

# You AUTO KNOW®

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## HIDDEN LIABILITY IN ASSET PURCHASE AGREEMENTS

As you know, franchise valuations are, in most instances, at historic highs. For the seller it is a matter of obtaining their price and getting out "clean" without any type of continuing liability. For the buyer, it is generally obtaining a good opportunity and trying to eliminate as much, if not all, exposure from the seller's prior course in dealing in business. Any attorney well versed in handling asset purchase agreements knows that we have tried various strategies in order to avoid continuing liability or successor liability regarding unemployment compensation. The majority of strategies used to limit or eliminate workers' compensation unemployment compensation liability were generally successful. However, it now appears that those days are gone.

In Ohio, a case was recently decided on July 28, 2015, in the Tenth District Court of Appeals, entitled *Jeff Schmitt Chevrolet, Ltd. v. Director, Ohio Dept. of Job & Family Services*, No. 14 AP-917, which set a precedent relative to the continuing successor liability of a surviving and/or successor purchaser of a business. Jeff Schmitt Chevrolet (Schmitt) appealed a judgment from the Franklin County Court of Common Pleas wherein the Unemployment Compensation Review Commission (UCRC) found that Schmitt was in fact a successor-in-interest to the previous owner for the purpose of determining unemployment compensation rights. The transaction progressed as a typical automobile buy/sell. Schmitt, pursuant to the asset purchase agreement, purchased among other things "all other fixed capital and usable assets of any kind or nature whatsoever, owned by Seller." Including, "all non-accounting books and records historically maintained by Seller," and the new vehicle inventory. On the date of closing, the predecessor dealership terminated its GM franchise and Schmitt opened up a

later, the UCRC informed Schmitt that it had inherited the unemployment contribution rate of its predecessor and that it in fact was a successor-in-interest to the predecessor business. Approximately six months later, the UCRC Director affirmed the decision indicating that Schmitt was a successor-in-interest to the predecessor. The director stated that Schmitt had purchased the assets and had employed a large number of the predecessor's employees and specifically stated it was "immaterial whether these employees were discharged by the seller and hired by the buyer or if they were transferred directly." Schmitt immediately appealed the decision. During the UCRC appeal, UCRC argued that Schmitt was engaged in the same business as its predecessor, maintaining the same facility as its predecessor, hired the vast majority of the predecessor's work force and generally bought all the assets of the predecessor. It in fact "acquired everything needed to operate and continue the operations of" predecessor . . . "at that location." UCRC further stated that when the predecessor filed its Termination Disposition Business Form it stated that Schmitt had acquired 100 percent of the assets of the business. Schmitt argued that it did not purchase 100 percent of the assets in that it did not purchase the used vehicle inventory, cash or accounts receivable or purchase the GM franchise agreement. Ultimately, the decision was affirmed and Schmitt appealed the decision to the Court of Common Pleas. On October 6, 2014, the trial court issued a decision and entry affirming the UCRC decision, taking the position of the UCRC that Schmitt had acquired all the property necessary to continue its predecessor's business at the location, the vast majority of its employees and "its good will."

The Court determined that pursuant to Ohio Revised Code §4141.09, every employer makes contributions to its unemployment compensation and that §4141.24(F) states in pertinent part: "if an employer transfers all of its trade or business to another employer or person, the acquiring employer or person shall be the successor-in-interest to the transferring employer and shall assume the resources and liabilities of such transferring employers account, and continue the payment of all contributions, or payments in lieu of contributions under this chapter." Based upon the evidence presented at the hearings, it was determined that Schmitt was a successor-in-interest by operation of law since all of the successor trade or business was transferred at the time of sale. The transfer of the business was and included all "real, personal and intangible property integral to the operation of the trade or business." Although Schmitt did not purchase the used car inventory or the cash or accounts receivable, it did state that this was a minor portion of the transaction and said assets were not normally part of an asset purchase agreement.

Based upon this case, it will be incumbent upon you as a buyer to determine the unemployment contribution rates paid to the State of Ohio to determine whether or not this added liability should be taken into consideration when determining the value of the business to be purchased. As always, the State of Ohio is attempting to get as much revenue as it possibly can and is looking for new avenues and alternatives in order to obtain same.



As always, these are highlights of the law and are not to be construed as containing the entire law. This is not to be construed or relied upon as a legal opinion. If you are presented with this problem, contact your legal counsel for advice.

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Having been a Chevrolet dealer, Robert A. Poklar's business background and experience in the automotive industry aid him in his representation of numerous Ohio automotive dealerships. He also represents after-market service companies, trade organizations, dealers, advertising associations and corporations. Pursuant to certain ethical standards, this may be construed as advertising.