

'Double-Breasted' Operations Face Criminal Risk

By **Benjamin Wish**

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Many individuals in the construction industry, and in other industries, form and operate both union and nonunion companies in order to pursue business opportunities relating to union and nonunion work.

In many instances, the union and nonunion companies share ownership, equipment, facilities or other features. Such an arrangement is known as a “double-breasted” operation, and, until recently, could potentially expose a business to civil liability but not the risk of criminal prosecution.

Now, however, in the wake of prosecution by the U.S. Attorney’s Office for the District of Massachusetts of the owners of a double-breasted operation, it is apparent that an individual’s choice to operate a double-breasted business may present substantial criminal risk.

The potential civil liability for improper double-breasting has been well-established for some time. Such potential liability, and the concomitant risk of litigation, exists despite courts’ recognition that double-breasted operations in general are “neither uncommon nor inherently unlawful.”[1] Indeed, it is not per se unlawful for union and nonunion companies to be “joined at the hip,” including common ownership, common business purpose, and other similarities.[2]

Under certain circumstances, a non-union company may be found civilly liable for the obligations of a union business under a collective bargaining agreement with a union, including union pension fund contributions. In particular, where the nonunion company is operated as an “alter ego[.]” for the fraudulent purpose of shifting union work to a non-union and thereby engaging in a sham to avoid [the union employer’s] collective bargaining obligations” courts may bind that company to the at-issue CBA.[3]

In addition, where the National Labor Relations Board finds that employees of the nonunion and union companies comprise a “single appropriate bargaining unit,” the nonunion company may potentially be found liable for CBA obligations under a so-called “single employer” theory.[4]

Typically, a dispute over whether the nonunion company within a double-breasted operation is liable for CBA obligations is joined through a civil breach-of-contract suit brought by union pension funds. The



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pension funds allege the extent to which the union and nonunion companies are intertwined, assert that the nonunion company is a “sham,” and pursue as their remedy the pension fund contributions allegedly owed by the nonunion company.

Such litigations are often complex, as the fact-finder must analyze the business operations of both the nonunion and union company to assess whether the nonunion company is a “sham” alter ego.

Beginning with an indictment of the owners of companies in a double-breasted operation, and the companies themselves, in early 2016, however, the Massachusetts U.S. attorney communicated that it views double-breasted operations as potentially criminal enterprises.[5] In that matter, prosecutors indicted a husband and wife (the Thompsons), as well as the union and nonunion companies that they allegedly operated as a double-breasted operation, for mail fraud, theft or embezzlement from an employee benefit plan, false Employee Retirement Income Security Act statements, aiding and abetting, and criminal forfeiture.

The gravamen of the indictment of the Thompsons was that the nonunion and union companies allegedly defrauded union pension funds because the nonunion company allegedly failed to make pension fund contributions but overlapped in myriad respects — including ownership, business purpose, equipment and otherwise — with the union company.

Notably, the indictment of the Thompsons did not allege that any union work was ever shifted away from the union company to the nonunion company. Rather, the prosecutors consistently explained that their theory of the case was that the nonunion and union companies were in fact “the same business,” meaning that the obligations of the union company were allegedly the obligations of the nonunion company. They alleged that the union company had obligations under the CBA to make pension fund contributions, such that when the non-union company allegedly failed to make pension fund contributions it allegedly defrauded the union pension funds.

As Chief U.S. District Judge Patti Saris, who presided over the matter, remarked, this case was the first time any criminal prosecution had been based on a “double-breasted” theory: “I’ve never seen a case like this, and I couldn’t find any cases exactly like this, or even analogous, criminally.” Nevertheless, the indictment survived a motion to dismiss, which defendants brought based upon the argument that the indictment failed to allege that the nonunion company was used to take union work from the union company.

The matter concluded in the spring of 2017, including with the dismissal of all criminal charges against the individual defendants. Remarks by both the court and prosecutors at the conclusion of the matter give some insight into the U.S. attorney’s office’s view of double-breasted operations.

Judge Saris remarked that “[d]ouble-breasting is completely legal under the laws of this circuit so long as there is no fraud, and ... if there are gray areas, it should be the matter of collective bargaining and not something fought out through a federal criminal case.”

The U.S. attorney’s office disagreed and stated: “[I]t’s the government’s position that under certain circumstances they are, and that if a company engages in certain conduct while operating a double-breasted shop, they are subject to prosecution.”

The extent to which the Massachusetts U.S. attorney’s office is currently investigating double-breasted businesses for alleged criminal activity or is intending to seek to indict such businesses is, of course,

unknown. It is, however, clear the government's view is that double-breasted operations are subject to criminal prosecution, including where the government has not developed evidence that union work has been fraudulently shifted away from the union company and to the nonunion company.

In other words, the risk of operating a double-breasted operation is no longer solely potential liability for pension fund contributions but also criminal prosecution and imprisonment. Of course, an indictment alone is devastating to a business, regardless of the eventual outcome at any trial. More than ever, it is critical for owners of companies within double-breasted operations to carefully set up and operate the union and nonunion companies so as to minimize the risk of liability.

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DISCLOSURE: Benjamin Wish represented Christopher Thompson and Air Quality Experts Inc. in United States v. Thompson, et al., 1:16-cr-10014-PBS (D. Mass.).

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[1] Massachusetts Carpenters Cent. Collection Agency v. A.A. Bldg. Erectors, Inc., 343 F.3d 18, 22 (1st Cir. 2003).

[2] *Id.*

[3] S. California Painters & Allied Trades, Dist. Council No. 36 v. Rodin & Co., 558 F.3d 1028, 1032 (9th Cir. 2009).

[4] S. Prairie Const. Co. v. Local No. 627, Int'l Union of Operating Engineers, AFL-CIO, 425 U.S. 800, 803–04 (1976).

[5] See United States v. Thompson, et al., 1:16-cr-10014-PBS (D. Mass.).