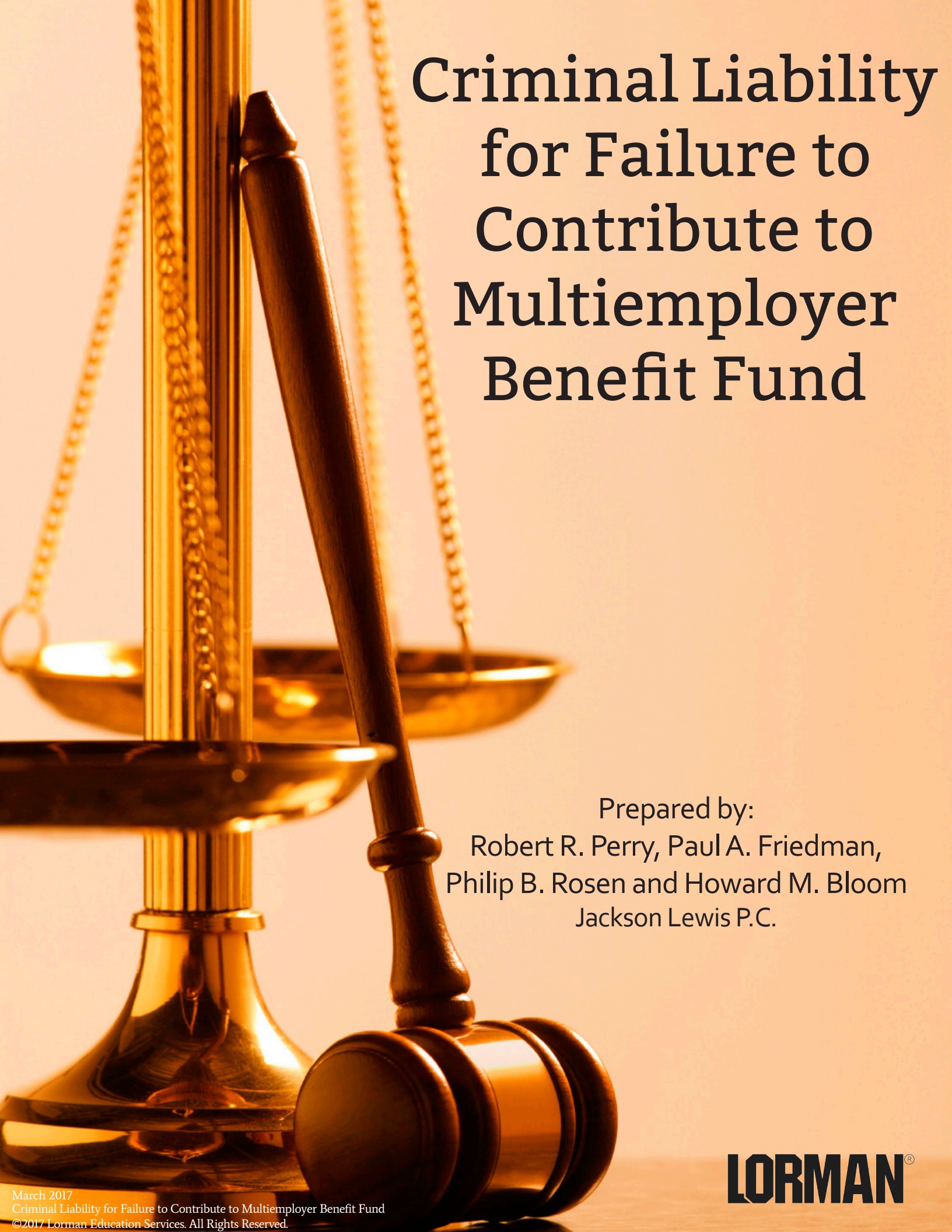

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Criminal Liability for Failure to Contribute to Multiemployer Benefit Fund?

By Robert R. Perry, Paul A. Friedman, Philip B. Rosen and Howard M. Bloom

The precarious financial status of some multiemployer benefit funds has led to criminal indictment against non-contributors. This troubling expansion of potential sanctions for failure to make required contributions to multiemployer benefit plans appears in a case from the U.S. District Court for the District of Massachusetts.

In *United States of America v. Thompson* (No. 1:16-cr-10014-1), the U.S. Attorney for the District of Massachusetts obtained criminal indictments against a husband and wife and the two asbestos abatement businesses they owned and operated. The U.S. Attorney alleged the following criminal violations:

- Mail Fraud (18 U.S.C. § 1341)
- Theft or embezzlement from Employee Benefit Plan (18 U.S.C. § 1027)
- False ERISA Statements (18 U.S.C. § 664)

In addition to these charges (which carry significant periods of incarceration), the indictments sought criminal forfeiture of real and personal property traceable to the commission of these alleged offenses under 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c).

Background

Christopher and Kimberly Thompson owned and operated Air Quality Experts, Inc. and AQE, Inc. Both entities' location, management, equipment, and workforce were the same. Air Quality was a non-union asbestos

abatement company incorporated in New Hampshire in 1987. AQE was an asbestos abatement company incorporated in New Hampshire in 2005 and, since its inception, bound by collective bargaining agreements. The CBAs obligated AQE to file monthly reports with several multiemployer welfare and pension benefit plans and to make contributions to such funds for hours worked by bargaining unit members.

Double-Breasted Operation

The indictments stemmed from the Thompsons' operation of a "double-breasted" asbestos abatement business. The basis for the charges was the defendants' alleged submission of false contribution reports to the funds (based on hours that bargaining unit members worked for the unionized entity) and the associated failure to pay the full value of benefit contributions to which the funds were entitled (because contributions were not made for the hours that bargaining unit members worked for the non-union shop).

"Double-breasting" generally refers to a unionized employer's acquisition, formation, or maintenance of a separate non-union company to perform the same type of work in the same geographic area as covered by its collective bargaining agreement. This may be done to get work not open to a unionized operation. The district court acknowledged such arrangements are "neither uncommon nor inherently unlawful." Sufficient separateness between the unionized and non-union companies is necessary to avoid being found a "single employer" or "alter egos" based on evidence of common ownership, common management, centralized control of labor relations, and interrelations of operations.

Alter Ego Found

The Thompsons argued that the indictments failed to state an claim because the remittance reports properly included only union members' work for AQE and not for Air Quality, because Air Quality and AQE were part of a lawful double-breasted operation.

The court, however, denied their motion to dismiss and found sufficient the government's allegations that Air Quality and AQE were "alter egos." It found the companies were actually a single business and Air Quality was bound by the CBAs that AQE signed. Therefore, the court held, the defendants fraudulently misrepresented that their business was a lawful double-breasted operation with two separate companies, one subject to the CBAs and the other not.

The court dismissed the defendants' argument that they should not face civil liability as an alter ego (and be held criminally liable) because the non-union shop (Air Quality) was created before AQE (the union shop), and case law requires the alleged alter ego entity be created to avoid labor obligations. The court, however, found the order of creation not determinative for purposes of alter ego liability and concluded the indictments stated the criminal offenses with sufficient adequacy.

Troubling Implications

The court noted that it "found no criminal cases that have relied on the alter ego theory, and no such case has been cited to this Court." *Thompson*, therefore, represents a troubling expansion of liability from civil to criminal. Further, imposition of criminal liability for something (double-breasted operations) described as "neither uncommon nor inherently unlawful" is similarly disturbing. Finally, also worrying is the determination of the

sufficiency of the sophisticated elements of a lawful double-breasted operation will be up to a jury in a criminal proceeding.

Companies that do business in a double-breasted structure, and the attorneys who counsel them, should pay close attention to multiemployer benefit plan contribution obligations, *Thompson,* and subsequent case law.

Please contact Jackson Lewis to discuss this case and what it may mean to your particular situation.