

Morgan, Lewis Tries to Fend Off Brobeck Fight

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Morgan, Lewis & Bockius tried hard Friday to torpedo an effort by former Brobeck, Phleger & Harrison employees to hold the firm responsible for providing severance pay after Brobeck collapsed.

Morgan, Lewis, which picked up one-third of Brobeck's partners and dozens of associates and staff, argued in U.S. District Court for the Northern District of California that it was not a successor to Brobeck nor responsible for the firm's liabilities.

"Plaintiffs are arguing this case as if a merger had gone forward, as if Morgan had assumed Brobeck's liabilities," said Thomas Reinert Jr., a partner in Morgan, Lewis' Washington, D.C., office. But "Morgan, Lewis neither purchased nor merged with Brobeck."

Former Brobeck employees filed suit against both Brobeck and Morgan, Lewis seeking 60 days' severance pay, claiming the firms violated the state Worker Adjustment and Retraining Notification and the California labor code by failing to provide employees 60 days' notice that the firm was to close or a mass layoff was to occur -- or 60 days' severance pay in lieu of notice.

Oakland federal court Judge Claudia Wilken, who heard the arguments Friday in *McCaffrey a/k/a Broke Beck v. Brobeck*, 03-2082, is considering the two defendants' motions to dismiss the case or, alternatively, to grant summary judgment.

Brobeck said it was not required to give employees 60 days' notice since it met two exceptions to WARN: The mass layoff was caused by unforeseeable business circumstances and the firm was actively seeking capital at the time of its dissolution.

Brobeck counsel Kathlene Lowe, a partner in Dorsey & Whitney's Irvine office, said it was unforeseen that the firm would fall apart at the end of January. She indicated that the collapse was triggered by the departure of partners in the Austin, Texas, office, particularly Steven Zager, who resigned Jan. 29, the day before firm leaders announced Brobeck was closing.

As late as December, she said, Zager sent e-mails to colleagues in the Dallas and Austin offices telling them "he was committed to the firm and excited about the merger and intended to stay."

The departure of partners from the Austin office "led Morgan, Lewis to advise Brobeck that it would not go through with the merger," Lowe said. Former Brobeck Chairman Richard Odom then believed the failed merger would lead a substantial number of other partners to leave, making it impossible to generate capital and remain a viable entity.

Prominent Reno labor attorney Mark Thierman, who is representing the Brobeck employees, dismissed the argument that partners were caught by surprise.

That's a "last-minute excuse," he said. "It leaves the door open so employers can say 'I didn't see it. I had a dream one night the business would fail.'"

As for Brobeck's pursuit of capital, Thierman said the firm had bolstered its finances prior to the firm's collapse -- partners deferred distributions to pay off a portion of the firm's bank debt -- and thus was not actively seeking capital when the firm dissolved.

Thierman spent most of his time arguing Brobeck's liability and only briefly addressed the employees' case

against Morgan, Lewis. While Morgan, Lewis did not acquire Brobeck, he said it had acquired so many attorneys, staff, equipment and client files as to be Brobeck's successor.

"They bought the business without buying the liability," Thierman said. The firm didn't buy the entire business, he added, but "cherry picked" enough people so that it could be considered Brobeck's successor on the West Coast.

In a brief to the court, plaintiffs also cite the lease Morgan, Lewis negotiated with Brobeck's former San Francisco landlord as evidence of the close ties between the two firms. The lease protects Brobeck partners from default liability on the former lease.

Reinert said the two firms had engaged in one transaction in which Morgan, Lewis paid \$2.1 million for Brobeck assets, primarily furniture.