February 4, 2011

Third Circuit Says That Asset Purchaser May Have Successor Liability for Seller's Delinquent Contributions to Multi-Employer Plans

In a recent decision, *Einhorn* v. *M.L. Ruberton Construction Co.*,[1] the Third Circuit Court of Appeals held that an asset purchaser could be liable for a seller's delinquent multi-employer plan contributions. Adopting the Seventh Circuit's approach, the Third Circuit Court of Appeals departed from the traditional common law rule of successor liability and held that, under some circumstances and particularly in the ERISA context, a purchaser could be liable for the seller's delinquent ERISA fund contributions as a successor in interest to the seller of those assets.

Background

The successor liability issue arose in connection with the sale of the assets of Statewide Hi-Way Safety, Inc. ("Statewide"), a highway construction company. Under two collective bargaining agreements with the Teamsters (the "Union"), Statewide had to make contributions to two ERISA pension funds: the Teamsters Pension Trust Fund and the Welfare Fund of Philadelphia and Vicinity (the "ERISA Funds"). In a 2005 audit, the ERISA Funds discovered Statewide contribution delinquencies of almost $600,000, including liquidated damages. Statewide also faced other financial difficulties and possible disbarment from public contract work based on fraud allegations.

Ruberton Construction Co. ("Ruberton") began negotiating to purchase Statewide's assets. The Union, concerned that Ruberton would not become a party to its collective bargaining agreements, successfully sought a temporary restraining order enjoining the sale and subsequently participated in the sale negotiations. The parties discussed the contribution delinquencies at the negotiations, which resulted in two agreements: first, the Union agreed to dismiss the injunction suit and Statewide agreed to cooperate with the payroll audit and to remit timely future contributions to the ERISA Funds; and second, Ruberton agreed to comply with the existing collective bargaining agreements until the negotiation of new ones. Neither agreement addressed Ruberton's potential successor liability to the ERISA Funds for the delinquent contributions. Four days later, in October 2005, Statewide sold its assets to Ruberton.

In December 2005, the Administrator for the ERISA Funds ("Einhorn"), sued Statewide and Ruberton, as a successor in interest, and sought to recover the delinquent contributions. Statewide and Einhorn entered into a settlement agreement to pay the contributions in installments, but Statewide breached this agreement and Einhorn was unable to enforce the

[1] *Einhorn* v. *M.L. Ruberton Construction Co.*, Case No. 09-4204 (3d Cir. Jan. 21, 2011).

final judgment. Einhorn then filed a new suit against Ruberton, alleging Ruberton's liability for Statewide's delinquent contributions under a successor liability theory.

The Successor Liability Case

When the case came before the District Court, the Third Circuit had previously established that successors could be liable for ERISA fund contributions in the context of mergers in *Teamsters Pension Trust Fund of Phila. & Vicinity* v. *Littlejohn*,[2] but a question remained as to whether successor liability would apply in the context of an asset sale. Under traditional common law rules, successor liability would not attach to an asset sale unless (i) the purchaser explicitly or implicitly assumed the liability; (ii) the transaction constituted a *de facto* merger; (iii) the purchasing corporation was a mere continuation of the seller; or (iv) the transfer of assets was for the fraudulent purpose of escaping liability for unpaid debts. However, in *Artistic Furniture*,[3] the Seventh Circuit, relying the Supreme Court's decision in *Golden State Bottling Co.* v. *NLRB*,[4] had held that a purchaser of assets could be liable under successor liability for the seller's delinquent ERISA fund contributions if the purchaser had notice of the debt and sufficient evidence existed of "continuity of operations" between the buyer and seller. The District Court rejected the Seventh Circuit approach, construing *Littlejohn* as holding that traditional principles of corporate law supplied the federal common law rules of successor liability. As a result, the District Court granted Ruberton's motion for summary judgment in the absence of any of the common law exceptions creating successor liability.

The Third Circuit, however, concluded that the District Court failed to balance the equities properly between the successor, the public, and the affected employees in the labor context. Instead, the Third Circuit noted that courts following *Golden State* have developed a federal common law doctrine of imposing successor liability more expansive than the common law rule "when necessary to protect important employment-related policies." The Third Circuit identified three principal factors derived from *Golden State* that it had previously applied in the employment discrimination context to conclude that successor liability may be appropriate in *Einhorn*: (i) the successor must have notice of the potential liability; (ii) there must be a sufficient continuity of operations and workforce; and (iii) the predecessor entity must be unable to provide adequate relief to the victimized employees.

The Third Circuit also disagreed with the District Court's interpretation of *Littlejohn*, noting that *Littlejohn* provides a framework to determine successor liability under ERISA. Because ERISA does not provide guidance on successor liability, courts interpreting the statute must develop federal common law that comports with ERISA's policy goals. Adopting state

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[2] *Teamsters Pension Trust Fund of Phila. & Vicinity* v. *Littlejohn*, 155 F.3d 206 (3d Cir. 1998).

[3] *Upholsterers' Int'l Union Pension Fund* v. *Artistic Furniture of Pontiac*, 920 F.2d 1323 (7th Cir. 1990).

[4] *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168 (1973).

common law, the Third Circuit concluded, conflicted with ERISA's goals.[5] The Third Circuit dismissed an argument for characterizing the delinquent contributions as mere contractual debt subject to the common law rule, noting that Congress had provided ERISA funds with greater protections against delinquent contributors than existed under contract principles. It reasoned that ERISA had as a principal policy goal to "protect plan participants and their beneficiaries," and that Statewide's failure to pay contributions harms the plan beneficiaries—over fifty union workers and their families—without health insurance. If Ruberton could not be found liable, then other employers in the multiemployer pension plan would have to contribute additional amounts, which the Third Circuit reasoned would contravene congressional policy; such policy shifts the balance of considerations away from adopting the common law rule of successor liability in favor of a specialized federal standard.

As a result, the Third Circuit held that a purchaser of assets could be responsible for delinquent ERISA funds contributions under a theory of successor liability if the purchaser has notice of the liability before the sale and sufficient evidence of continuity of operations between the buyer and the seller exists. Factors taken into consideration under the substantial continuity test include continuity of workforce, management, equipment and location, completion of work orders begun by the predecessor, and the constancy of customers. The Third Circuit remanded the case to the District Court to determine whether the continuity of operations between Ruberton and Statewide sufficed to impose successor liability on Ruberton.

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This memorandum is not intended to provide legal advice with respect to any particular situation and no legal or business decision should be based solely on its content. Questions concerning issues addressed in this memorandum should be directed to any of the following:

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[5] The Third Circuit also noted that *Golden State*'s theory of successor liability does not necessarily expand the doctrine of successor liability. Although *Golden State*'s approach does not require commonality of ownership between the buyer and seller, it imposes an additional notice requirement before the debt can follow. For this reason, the *Golden State* approach does not discourage corporate transactions because the purchase price can take into account the liabilities or the purchaser could negotiate for an indemnification. The Third Circuit reasoned that because the purchaser can negotiate protection against the potential liability, the financial burden on the successor will not prevent the imposition of liability. Finally, the Third Circuit noted that other circuits and district courts have adopted the *Golden State* doctrine for delinquent ERISA payments in the context of an asset sale.

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