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Third Circuit Finds that Asset Purchaser May Have Successor Liability for Delinquent Multiemployer Plan Contributions

In *Einhorn v. M.L. Ruberton Construction Co.*, No. 09-4204, 2011 U.S. App. LEXIS 1171 (3d Cir. 2011), the U.S. Court of Appeals for the Third Circuit reversed a lower court ruling and held that a purchaser of the assets of an employer obligated to contribute to a multiemployer benefit plan may, under certain circumstances, be held liable for the seller's delinquent contributions to that plan. In reaching this conclusion, the Third Circuit followed the reasoning in *Upholsterers' International Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323 (7th Cir. 1990). *Einhorn* creates legal uncertainty for a purchaser who does not want to assume a seller's pension plan obligations as part of an asset sale.

Einhorn, the Administrator of the Teamsters Pension Trust Fund of Philadelphia & Vicinity and the Teamsters Health and Welfare Trust Fund of Philadelphia & Vicinity (the "Funds"), who had brought suit against M.L. Ruberton Construction Co. ("Ruberton") in the U.S. District Court for the District of New Jersey to recover unpaid contributions to the Funds. The Administrator alleged that M.L. Ruberton was liable as a successor to Statewide HiWay Safety, Inc. ("Statewide"), the original signatory to two collective bargaining agreements under which Statewide was obligated to contribute to the Funds.

In 2005, Statewide, a highway construction company, encountered financial difficulties. Ruberton entered into negotiations with Statewide to purchase its assets. Union members' rights were represented in the negotiations, and the parties reached agreements on the sale of Statewide's assets to Ruberton, but those agreements did not address the issue of successor liability to the Funds for Statewide's delinquent contributions. Following the agreements, Ruberton began making contributions to the Funds, leased and subsequently purchased facilities from Statewide, hired more than half of Statewide's employees (including a vice president and thirty-three percent shareholder), and took over several of Statewide's projects. Eventually, Statewide ceased all operations. *Id*. at *5-6.

The District Court applied a traditional common law rule of successor liability under which "an entity that purchases the assets of another does not assume the seller's liabilities unless one of the following exceptions applies: the purchaser expressly or impliedly assumed the liability; the transaction amounted to a de facto merger; the purchasing corporation is a mere continuation of the seller; or the transfer of assets was for the fraudulent purpose of escaping liability for unpaid debts." *Id*. at *9-10. Because the district court found that none of these exceptions were met, the court granted summary judgment to Ruberton.

On appeal, the Third Circuit held that the District Court had applied the wrong standard for determine whether successor liability attaches. The appropriate standard to apply under ERISA in the context of an asset sale, the Court of Appeals explained, is that a purchaser of assets may be held liable "where the buyer had notice of the liability prior to the sale and there exists sufficient evidence of continuity between the buyer and the seller." *Id*. at *27.

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In reaching this decision, the Court began its analysis by noting that, since decisions that pre-date ERISA, the federal courts have "developed a federal common law successorship doctrine imposing liability upon successors beyond the confines of the common law rule when necessary to protect important employment-related policies." *Id*. at *11 (citing *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973)), in which the Supreme Court held that a successor employer could be held liable for remedying the unfair labor practices of its predecessor). The line of cases following *Golden State Bottling* recognize that the successor employer is most often in the best situation to remedy the problem, and the cases have been extended to the employment discrimination context. *Id*. at *12-15.

In light of these policy considerations, the Third Circuit in *Einhorn* extended the availability of successor liability to multiemployer plan contributions in the context of assets sales, noting that it need not "reinvent the wheel" but could simply follow the approach taken by the Seventh Circuit in *Upholsterers' International Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323 (7th Cir. 1990). There the Seventh Circuit concluded liability could be imposed after an asset sale where there was sufficient continuity of operations, and the successor employer had notice of the liability. The Third Circuit further noted that the First, Second, and Ninth Circuits had reached a similar conclusion, along with a number of district courts. *Id*. at *24-26.

The Court further explained that this approach differed slightly but was not inconsistent with its earlier decision in *Teamsters Pension Trust Fund of Philadelphia & Vicinity v. Littlejohn*, 155 F.3d 206 (3d Cir. 1998), in which the Court applied the common law rule permitting imposition of successor liability in the case of a corporate merger, even where the successor did not have notice of the liability. The Court explained that, contrary to the context of a merger, a successor in the context of an asset sale "would have an incentive to inquire about the seller's previous liabilities to negotiate for a lower purchase price." *Id*. at *22. In the situation of an asset sale, the Court concluded, the equities would be best balanced by imposing successor liability, but only where the successor had notice of the liability.

Upon establishing the appropriate standard, the Court of Appeals set forth the following factors to consider, among others, when conducting the continuity analysis: "continuity of the workforce, management, equipment and location; completion of work orders begun by the predecessor; and constancy of customers." *Id*. at *27 (citing *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987)). Additionally, the Court noted that "commonality of ownership is not required." *Id*. at *28. Recognizing that the determination regarding whether a successor substantially continued a predecessor's operations is a factual matter (and noting that the parties had agreed that Ruberton had notice of the liability), the Court of Appeals remanded the case to the District Court to make this determination.

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