

PURCHASER OF ASSETS MAY BE LIABLE AS SUCCESSOR FOR SELLER'S UNPAID BENEFIT FUND CONTRIBUTIONS

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Under the traditional common law rule of successorship liability, it is well established that, absent a specific agreement to the contrary, an entity that purchases the assets of another entity does not assume the seller's liabilities unless one of the following exceptions applies: the transaction is a merger or is deemed to be a merger; the purchasing entity is a mere continuation of the seller; or the transfer of assets is for the fraudulent purpose of escaping liability for unpaid debts.

In a decision filed on January 21, 2011, *Einhorn v. M.L. Ruberton Constr. Co.*, No. 09-4204, the U.S. Court of Appeals for the 3rd Circuit (which covers Pennsylvania, New Jersey, and Delaware) held that, notwithstanding the traditional common law rule, a purchaser of assets may be liable for a seller's delinquent ERISA fund contributions where: (a) the buyer had notice of the liability prior to the sale; and (b) there exists sufficient evidence and continuity of operations between the buyer and seller.

The court noted that ERISA does not provide explicit instructions with respect to successorship issues. Accordingly, it was up to the courts to "fill in the gaps by developing, in light of reason, experience, and common sense, a federal common law of rights and obligations imposed by the statute." The court explained that its holding was based upon the balancing of the equities, and concluded that Congress's policy of protecting ERISA fund participants and beneficiaries is greater than that afforded by the common law of contracts, especially since the successor

is in the best position to remedy the violation, and because notice of the delinquency is required, the potential liability can be reflected in the purchase price, or in an indemnity clause in the agreement of sale.

The court pointed out that its decision was consistent with that of every other court of appeals that has ruled on this issue, as well as a 1973 ruling by the U.S. Supreme Court in connection with unfair labor practices under the National Labor Relations Act, and a host of other court of appeals' decisions involving a myriad of other employment laws, including Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Fair Labor Standards Act.

Finally, with respect to the portion of its holding relating to continuity of operations, the court stated that the following factors should be examined: continuity of the workforce, management, equipment, and location; completion of work orders begun by the predecessor; and constancy of customers.

In light of this ruling, the prudent, potential purchaser will conduct due diligence regarding not only existing and potential employment discrimination, wage and hour, and NLRA claims, but also claims relating to ERISA benefits, and procure appropriate representations and warranties, indemnification provisions, and perhaps a corresponding adjustment to the purchase price.