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SUCCESSOR LIABILITY FOR BENEFIT PLAN CONTRIBUTIONS IN ASSET PURCHASES - - TWO JANUARY 2011 COURT CASES

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As the economy slowly improves and we see more merger and acquisition activity, those involved in such transactions should be aware of recent shifts in the traditional common law rule of successor liability. There once was a time when the buyer of a seller's assets (not stock) could choose not to assume the seller's ERISA plans and safely exclude liability for contributions and benefits under such plans in the purchase agreement. However, courts have begun to carve exceptions to the rule that liabilities are not transferred in an asset sale unless the buyer is merely a continuation of the seller. The common law rule has been expanded based on a series of federal cases that imposed successor liability when necessary to protect important employment-related policies (beginning with the U.S. Supreme Court's ruling in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168). As discussed below, two recent cases in the 3rd and 7th Circuits illustrate application of this expanded rule, but come to different conclusions due to the facts presented.

Einhorn v. M.L. Ruberton Construction Co. (3rd Circuit, 1/21/11)

This case involved a multiemployer defined benefit plan and a multiemployer health and welfare plan (the "plans'). The Third Circuit followed a 1990 7th Circuit case that found a purchaser of assets could be held liable under ERISA for the seller's delinquent contributions to a multiemployer fund provided that (i) there is sufficient evidence of continuity of operations and (ii) the purchaser had knowledge of the liability of the seller (*Upholsterers' International Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2nd 1323).

William J. Einhorn was the plans' administrator. Statewide Hi-Way Safety, Inc. ("Statewide") was required under two collective bargaining agreements with the Teamsters to make contributions to the plans. By the time Statewide sold its assets to M.L. Ruberton Construction Co. ("Ruberton") in late 2005, Statewide had incurred about $600,000 in delinquent plan contributions and liquidated damages. Ruberton knew of the delinquencies and on March 16, 2006 a settlement agreement was reached whereby Ruberton agreed to the collective bargaining agreements and Statewide agreed to pay the delinquent contributions in a series of installments. Statewide subsequently breached the agreement and Einhorn filed suit against Ruberton, as Statewide's successor in interest, in June 2006.

The court reasoned that "a central policy goal underlying ERISA's enactment "was to protect plan participants and their beneficiaries." Statewide's failure to pay contributions caused harm to plan beneficiaries

and changed the nature of the employment relationship. Fifty-three union workers, and in some cases their families, were left without health insurance. Other precedents in the 3rd Circuit have recognized that because ERISA and the Multiemployer Pension Plan Amendments Act of 1980 are remedial statutes, they "should be liberally construed in favor of protecting the participants in employee benefit plans." In sum, the court held that "a purchaser of assets may be liable for a seller's delinquent ERISA fund contributions to vindicate important federal statutory policy," such as protecting plan participants and beneficiaries.

The court found that Ruberton could be liable for Statewide's delinquent contributions if it: (i) had knowledge of the debt before the asset sale (regardless of whether or not it knew that the plans intended to seek recovery); (ii) substantially continued Statewide's operations; and (iii) can provide adequate relief. The case was remanded back to the District Court to make a factual determination on the business continuity issue based on the following factors: (1) continuity of the workforce, management, equipment and location; (2) completion of the work orders begun by the predecessor; and (3) constancy of customers.

Feinberg v. RM Acquisition, LLC (7th Circuit, 1/6/11)

This case involved an unfunded non-qualified "top hat" plan for senior executives of Rand McNally. Rand McNally filed for bankruptcy in 2003 and the proceedings did not modify or discharge the debt related to the plan. In 2007, Rand McNally sold all of its assets to an acquisition company that did not assume liability for the plan. The former executives, led by Feinberg, sued the buyer to recover benefits under the top hat plan, since neither the plan nor Rand McNally had any assets.

The acquisition company was Rand McNally's successor in the sense of having become the owner of Rand McNally's assets, but the court noted that the purchase of a company's assets, even all of them, does not in itself make the purchaser the "owner" of the seller's liabilities. The acquisition company did not appear to be a mere continuation of Rand McNally under another name and did not "connive" with Rand McNally to deprive plan participants of their benefits. The court explained that a buyer's declination to assume liabilities will be valid unless the transaction is a fraud against creditors, or the buyer and seller are not meaningfully separate companies, as in a corporate reorganization. As Feinberg did not make a case for successor liability, the court held for the defendant.

It should be noted that the court also rejected Feinberg's claim that the acquisition company was liable under ERISA Section 510. ERISA Section 510 provides that it is unlawful "to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary" for exercising his rights under the terms of an ERISA plan or for the purpose of interfering with the attainment of any right to which he may become entitled under an ERISA plan. The court decided that the acquisition company didn't interfere with any rights that the plaintiffs may have had under the top hat plan; the acquisition company had nothing to do with the plan.

These two cases bring to light the importance of employee benefits diligence in asset purchases. King & Spalding's Employee Benefits and Executive Compensation team has extensive experience representing clients in mergers and acquisitions. We would be glad to assist you with respect to employee benefit plan liability issues that may arise in such transactions.

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