HUNTON & WILLIAMS

CLIENT ALERT

February 2011

Contacts

1445 Ross Avenue
Suite 3700
Dallas, Texas 75202-2799

L. Scott Austin
(214) 979-3002
saustin@hunton.com

Terrence G. Connor
(305) 810-2517
tconnor@hunton.com

Jennifer D. Ellis
(305) 536-2732
jellis@hunton.com

Patricia K. Epps
(804) 788-8249
pepps@hunton.com

Laura M. Franze
(213) 532-2131
lfranze@hunton.com

Fraser A. McAlpine
(415) 975-3726
fmcalpine@hunton.com

Kurt A. Powell
(404) 888-4015
kpowell@hunton.com

J.G. Ritter, II
(804) 788-8402
jritter@hunton.com

Richard L. Wyatt, Jr.
(202) 419-2162
rwyatt@hunton.com

Buyer Beware: Asset Purchaser Found Liable for Seller's Delinquent ERISA Benefit Plan Contributions

In corporate M&A transactions, the seller's employee benefit plans can create substantial potential liabilities, including liabilities for underfunded benefit obligations, as well as liabilities related to the seller's administration of its plans. Buyers often try to structure the transaction to avoid these liabilities. Generally, in an asset transaction the buyer does not assume any liabilities of the seller that it does not expressly assume in the transaction agreement. However, in *Einhorn v. M.L. Ruberton Construction Company*, No. 09-4204 (January 21, 2011), that general rule was put to the test, and the U.S. Court of Appeals for the Third Circuit found that a buyer of assets was liable for more than $600,000 of the seller's delinquent pension plan contributions.

In *Einhorn*, William J. Einhorn, representing certain employee benefit funds, brought suit to recover unpaid contributions from M.L. Ruberton Construction Company. According to Einhorn, Ruberton Construction was obligated to contribute to the benefit funds under two collective bargaining agreements as a successor to the original employer under the collective bargaining agreement, Statewide Highway Safety, Inc.

In 2005, Ruberton Construction entered into negotiations to purchase certain assets of Statewide. The union learned of the potential sale and sought injunctive relief, fearing that Ruberton Construction, a nonunion employer, would not become a party to Statewide's collective bargaining agreements. The district court entered a temporary restraining order, but negotiations continued, this time with the union's rights represented. Throughout the negotiations, the nearly $600,000 in delinquent pension contributions were discussed; however, Ruberton Construction never agreed to assume the pension obligations. Ultimately, Ruberton Construction and Statewide closed a transaction under which Ruberton Construction bought certain of Statewide's assets (without assuming the pension liability). After the sale, Statewide defaulted on the pension liability, and Einhorn sued Ruberton Construction.

The district court applied the traditional common law rule of successorship liability, where 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 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. Because it found that none of the exceptions existed, the district court held that Ruberton Construction was not liable for the delinquent contributions. Einhorn appealed.

It is well-settled common law that successor liability may be imposed for delinquent ERISA fund contributions in the context of a merger or stock sale. The transaction between Statewide and Ruberton Construction, however, was not a merger or stock sale; Ruberton Construction purchased only certain assets of Statewide and did not assume Statewide's liability for delinquent pension contributions. In analyzing the case, the Third Circuit relied upon what it characterized as an emerging federal common law successor doctrine, where liability has been imposed upon successors beyond the confines of the general rule when necessary to protect important employment-related policies (e.g., cases brought pursuant to the National Labor Relations Act and Title VII of the Civil Rights Act of 1964). Those cases emphasize the importance of providing protection for the affected employee who is otherwise left without a remedy against the now-defunct predecessor entity.

Drawing similarities to those cases, the court focused on what it considered to be ERISA's central policy goal — protecting plan participants and beneficiaries. Finding that this central policy must be protected even if it meant going beyond the general rules of successor liability, the court held that a buyer of assets may be liable for a seller's delinquent pension plan contributions where the buyer had notice of the liability prior to the sale and there exists sufficient evidence of continuity of operations between the buyer and seller.

This case highlights the importance of ERISA-related diligence in corporate transactions, even in the context of asset acquisitions. If purchasing the assets of a company that has existing benefit plans, the asset purchaser should ensure that it is well aware of the liabilities it is actually purchasing, and should consider building safeguards in the asset purchase agreement, such as negotiating a purchase price that reflects potential benefit liabilities, or including an appropriate indemnity provision with a sufficient escrow. Due diligence on these issues prior to any acquisition is critical. Buyer beware!