AMERICAN BAR ASSOCIATION
SECTION OF LABOR AND EMPLOYMENT LAW
EMPLOYEE BENEFITS COMMITTEE

2009 MIDWINTER MEETING
FEBRUARY 18 – FEBRUARY 21, 2009
CHARLESTON, SOUTH CAROLINA

REPORT OF THE SUBCOMMITTEE ON MULTIEMPLOYER PLAN WITHDRAWAL LIABILITY

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DISCLAIMER

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CHAPTER 17

MULTIEMPLOYER PLAN WITHDRAWAL LIABILITY

II. Determination and Assessment of Withdrawal Liability

E. Notice of Withdrawal Liability

In *Chicago Truck Drivers Pension Plan v. El Paso CGP Co*., 525 F. 3d 591, 43 EBC 2741 (7th Cir. 2008), the court held that a Chapter 7 proof of claim for withdrawal liability is not constructive notice of the assessment to a non-bankrupt company that had previously been the parent of the bankrupt company (but had since sold its controlling interest), absent evidence of circumstances making it likely that the proof of claim would have reached the former parent.

In *Trustees of Sheet Metal Workers' Local Union No. 80 Pension Trust Fund v. W.G. Heating and Cooling*, 555 F. Supp. 2d 838, 44 EBC 1115 (E.D. Mich. 2008), the court held that a revised notice of assessment re-starts the time period for initiating arbitration.

III. Definition of Withdrawal

A. Complete Withdrawal

In *Lee Borntrager et al. v. Central States, Southeast and Southwest Areas Pension Fund*, 2008 WL 1820645, 44 EBC 1103 (N.D. Iowa Apr. 22, 2008), the court confirmed that, assuming appropriate authority is granted under the applicable trust agreement, trustees possess the power to determine the effective date of the involuntary termination of an employer's participation in a plan. In addition, the court found that an involuntary termination of an employer's participation will be reviewed under the "arbitrary and capricious" standard typically applied in disputes over benefits. Although the employers' complaint raised the question of whether termination triggered withdrawal liability, the court did not reach the question.

Pursuant to the trust agreement, the fund maintained an "adverse selection" policy, under which "the trustees are authorized to reject any collective bargaining agreement of an Employer (and all contributions from the Employer) whenever they determine either that the agreement is unlawful and/or inconsistent with any rule or requirement for participation by Employers in the Fund and/or that the Employer is engaged in one or more practices or arrangements that threaten to cause economic harm to, and/or impairment of the actuarial soundness of, the Fund…." *Id. at *10 (internal citation and emphasis in original omitted).* The fund expelled the employer because of its practice of replacing departing covered employees with independent contractors, on whose behalf no contributions could be made. *Id.*

The court affirmed the trustees' broad authority "to take appropriate action to ensure the financial integrity of the fund ... includ[ing] establishing the effective date of participants' termination." *Id*. at *8. (Internal citations omitted). The court concluded that the "Trustees in this case had not only the authority, but the fiduciary obligation, to take appropriate action to ensure the financial integrity of the fund." *Id*. In discharging these duties, the court concluded, trustees are bound by trust agreements, and not by provisions of subsequent labor agreements. *Id. (citing Sinai Hospital of Baltimore, Inc. v. National Benefit Fund for Hospital & Healthcare Employees*, 697 F.2d 562, 564, 568 (4th Cir. 1982)).

E. Corporate Transfers and Mergers

In *CenTra, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 585 F.Supp.2d 1017, 2008 WL 4878894 (N.D.Ill. 2008), the court vacated an arbitration award in favor of the employer that had significantly reduced the amount of withdrawal liability assessed based on contribution histories. The court found that the arbitrator misapplied § 4218 of ERISA.

CenTra was a trucking company that owned three subsidiaries—Central Cartage, Inc., Central Transport, Inc. and Detroit International Bridge Company ("DIBC") (and was in common control with another – U.S. Truck)—that all had operations covered by the plan. Prior to withdrawing, CenTra had undergone a three-step reorganization whereby it created new subsidiaries, merged two of the old subsidiaries (but not DIBC) into it, transferred all of the operations and some of the assets of the old subsidiaries into the new subsidiaries and finally sold the old subsidiaries to U.S. Truck. Ultimately, U.S. Truck liquidated all of its assets in bankruptcy.

DIBC, still owned by CenTra, incurred a complete withdrawal from the plan when it negotiated a new collective bargaining agreement that provided for participation in a different plan causing the Central States plan to terminate DIBC's participation in the Central States plan. CenTra was assessed withdrawal liability based on the contribution histories of DIBC and the old and new subsidiaries. The arbitrator held that CenTra was only responsible for DIBC's contribution history and that the contribution histories of the subsidiaries were passed to U.S. Truck based on the provisions of ERISA §§ 4218 and 4069. The arbitrator found that there was no withdrawal for any step of the transaction because ERISA §4069 (which is referenced by ERISA §4218) allows for division as a change in corporate structure that does not incur a withdrawal.

The court disagreed, finding that while the first step of the transaction—merging the old subsidiaries into the parent—was covered by ERISA §4218, the transfer of these assets and operations into the new subsidiaries was not. The court held that ERISA § 4218 did not apply to these transactions because the applicable statute requires the entity to cease to exist. In this case, after the transfer, CenTra continued to exist and could not avail itself of any of the protections of ERISA § 4218. Because the transfer could not meet the asset sale exception of ERISA § 4204, there was no basis for avoiding the full withdrawal liability.

G. Transactions to Evade or Avoid Liability

In *Chicago Truck Drivers Pension Plan v. El Paso CGP Co.*, 525 F. 3d 591, 43 EBC 2741 (7th Cir. 2008), the court held that the question of whether a parent sold its controlling interest in the contributing employer to evade or avoid withdrawal liability is a question reserved for arbitration. Thus, a parent that, after selling its controlling interest, receives actual notice of an assessment against its former subsidiary, must request review or initiate arbitration within 90 days if it wishes to preserve an argument that the sale was not an “evade or avoid” transaction. The parent companies in this case failed to do so, and when the pension plan later sued for collection, the court held that the companies had waived the defense.

In *Penske Logistics LLC v. Freight Driver and Helpers*, 2008 WL 4890142 (E.D.Pa. Nov. 5, 2008), the court denied the defendant plan’s motion to dismiss the employer’s request to the court to order the plan to make a determination under ERISA § 4212(c) of whether a principal purpose of the sale (that presumably created the withdrawal – the decision omits these facts) was to “evade or avoid liability” under ERISA’s “evade or avoid” transaction rule. In its decision, the court noted that the employer was not trying to challenge the merits of the plan’s decision. Rather, it was trying to force it to make a decision that would trigger the appropriate review and arbitration provisions of ERISA.

IV. Special Industry Provisions

A. Construction Industry

In *Central States, Southeast and Southwest Areas Pension Fund v. Warner and Sons, Inc.*, 2008 WL 4201014 (N.D. Ill. Sept. 9, 2008), the court granted summary judgment on the fund's action for payment of interim withdrawal liability pending arbitration. The court stated that the employer would only be relieved of its obligation to make interim withdrawal liability payments if the fund lacked a colorable claim because the employer "falls squarely within" the building and construction industry exemption. *Id*. at *3. The fund argued that driving to, from, and around construction sites does not constitute work in the building and construction industry. The court found this argument plausible because courts were split on the issue of how to define "building and construction industry." The court also noted that the employer did not establish definitively that "substantially all" of its covered employees were building construction employees. In particular, the employer failed to detail the specific work being performed by each covered employee, where the work was performed (on-site or off), when the work was performed, and how much time was spent performing each duty. The court awarded the fund the unpaid withdrawal liability payments with interest, attorneys' fees and costs, and liquidated damages in an amount equal to the greater of the interest or 20% of the unpaid amounts.

VI. Special Definitions and Relief Provisions

C. Transfers Following a Change in Certified Bargaining Representative

In *Hazel Park Racing Association v. Trustees of SEIU National Pension Fund*, 543 F.Supp. 2d 741, 43 EBC 1137 (E.D. Mich. 2008), plaintiff employers sought damages from the fund for the increase in withdrawal liability caused by the fund’s failure to transfer assets to the

Central States Fund, the fund in which the employers' employees participated after a change in the employees' representative. The court found that where an employer voluntarily recognizes a new representative and there is no certification of that change by the National Labor Relations Board, the old plan, in which the affected employees previously participated, is not obligated to transfer assets to the new plan in which they now participate. Section 4235(g)(2) of ERISA defines "certified change of collective bargaining representative" as "a change of collective bargaining representative certified under the Labor Management Relations Act, 1947, or the Railway Labor Act." ERISA Section 4235(g)(2). In this instance there had been no certification by either the NLRB or the Michigan Employment Relations Commission. *Hazel Park, 543 F.Supp. 2d* at 744.

VIII. Enforcement and Collection Disputes

A. Jurisdiction and Venue

In *GCIU-Employer Retirement Fund v. Goldfarb Corp*, 2008 WL 3286556 (C.D.Ill. Aug. 7, 2008), the court held that a control group relationship alone is insufficient to support personal jurisdiction for a withdrawal liability collection action against a foreign corporation which was in the control group of the contributing employer. Goldfarb Corporation, a Canadian corporation, owned Fleming Packaging Corporation, which in turn owned two subsidiaries that contributed to the fund. The complaint did not allege contacts to support general personal jurisdiction, and the specific activity of Goldfarb in the United States did not relate to the withdrawal liability cause of action, as required to support specific personal jurisdiction. The withdrawal was triggered by the repudiation of the collective bargaining agreements after Fleming filed for bankruptcy, but the court found that the withdrawal was not caused by Goldfarb. Accordingly, the court dismissed the case for lack of personal jurisdiction.

In *Central States, Southeast and Southwest Areas Pension Fund v. John R. Concrete & Supply Company*, 2008 WL 4066399 (N.D. Ill. Aug. 27, 2008), the court granted the employers' motion to transfer venue from the Northern District of Illinois to the Eastern District of Michigan. The court rejected the fund's argument that because the action was likely to be resolved on summary judgment, the inconvenience to the parties and witnesses should be less compelling, noting that it would not be appropriate to speculate on the merits of a summary judgment motion. The court further noted that although one of the employers contractually agreed to personal jurisdiction and venue in Illinois and that Illinois was the most convenient forum, such forum selection clauses were not always enforceable, and neither party had discussed the enforceability of that particular clause. The court concluded that because the employers and a substantial number of witnesses were located in Michigan, the inconvenience to the parties and witnesses outweighed any other considerations and favored granting the employers' motion to transfer.

C. Arbitration of Withdrawal Liability Claims

1. Issues Subject to Arbitration

In *Lee Borntrager et al v. Central States, Southeast and Southwest Areas Pension Fund*, 2008 WL 1820645, 44 EBC 1103 (N.D. Iowa Apr. 22, 2008), the court assessed the propriety of the trustees' termination of an employer's participation without addressing whether a complete withdrawal had occurred, or whether the propriety of termination was required to be arbitrated. Although the plaintiff employer sought a declaration that no withdrawal liability had been triggered, the court did not address the issue explicitly, reasoning that it need not address the question because of its finding that the termination was valid. *Id*. at *13.

In *Ludvik Electric Co. v Eighth District Electrical Pension Fund*, 2008 WL 4543687 (D.Colo. Oct. 10, 2008), the court held that a question of the impact upon withdrawal liability of settlement monies received by the plan was not an appropriate question for the court but rather is properly considered by an arbitrator as it is part of the calculation of withdrawal liability.

2. Initiation of Arbitration

In *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Loyal Casket Co.*, 2008 WL 938409, 44 EBC 1184 (N.D.Ill. Apr. 7, 2008), the court held that the fund's letter to a contributing employer containing an estimate of its withdrawal liability and a payment schedule was sufficient notice under ERISA Section 4219 to trigger the timetable for review and arbitration, and that the employer had waived its right to contest the withdrawal liability assessment by failing to request review within ninety days of the notice. The employer argued that, because the first letter contained only an estimate of its liability, and a subsequent letter recalculated the liability to a lower amount, the first letter did not meet the statute's notice requirement. However, the court cited a long line of cases recognizing that an estimate of withdrawal liability may serve to put the employer on notice, even where the notice does not state the actual amount of withdrawal liability.

E. Default

In *Central States, Southeast and Southwest Areas Pension Fund and Howard McDougall, Trustee v. O'Neill Brothers Transfer & Storage Company*, 553 F.Supp.2d 957, 44 EBC 1092 (N.D. Ill. 2008), the court found that a valid claim for default and accelerated payment prior to arbitration under ERISA Section 4219(c)(5) was stated by a complaint that alleged a withdrawing employer's imminent liquidation, where plan rules defined circumstances in which trustees could find that an employer likely will be unable to pay its withdrawal liability.

In *Trustees of Local 531 Pension Plan v. Corner Distributors*, 2008 WL 2687085 (E.D.N.Y. July 8, 2008), a Magistrate Report and Recommendation was affirmed, noting that service of a withdrawal liability complaint (stating that the employer has failed to make timely scheduled payments) satisfies the requirement that the plan provide notice of default and an opportunity to cure before accelerating. The Magistrate's Report and Recommendation rejected the fund's alternative argument that it also accelerated under 29 U.S.C. §1399(c)(5)(B), stating that the statute requires "failure to cure upon notice" as well as an event of default under a plan. The Magistrate indicated that there had been no notice of a plan-defined default event, only notice of failure to make timely payment.

F. Collection of Payments Pending Arbitration

In *Central States, Southeast and Southwest Areas Pension Fund and Howard McDougall, Trustee v. O'Neill Brothers Transfer & Storage Company*, 553 F.Supp.2d 957, 44 EBC 1092 (N.D. Ill. 2008), the court found that because ERISA Section 4219(c)(5)(B) defines "default" as "any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability," plans are free to accelerate payment and require payment in full, even pending arbitration, upon an occurrence found under a plan rule to indicate a "substantial likelihood" that the employer will be unable to pay its liability under the schedule.

Upon its withdrawal the employer informed the fund by letter that it was "preparing for its termination and liquidation." A plan rule provided that "[a] default occurs if...the Trustees, in their discretion, deem the Fund insecure as a result of... events," including "the Employer's insolvency." *Id*. at 962. The plan also provided that in the event of default the "outstanding amount of the withdrawal liability shall immediately become due and payable." *Id.* The fund issued no payment schedule, but demanded immediate payment of the entire liability in accordance with the Plan, and thereafter brought suit to enforce the employer's obligation. *Id*. at 960-961.

The employer moved to dismiss under FRCP 12(b)(6). It asserted that under ERISA section 4219(c)(2) only interim payments are available while arbitration is pending, and that the fund's failure to issue a payment schedule vitiated any payment obligation. *Id.* at 961. The court rejected the employer's argument, distinguishing between the "interim" payments available under section 4219(c)(2) and the "immediate and full payment of the outstanding amount in the event of a default," available in appropriate circumstances under Section 4219(c)(5). *Id*.

In so doing, the court sought to make clear that the relief available pending arbitration under section 4219(c)(5) does not undermine arbitration. It noted that the employer could still pursue arbitration after payment of the full amount claimed, because the fund "will be able to repay any withdrawal liability that a court or arbitrator ultimately determines they should not have collected," and that the fund, and not the employer, "should be the stakeholder in instances where there is a 'risk of non-payment.'" *Id. (quoting Trustees of Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Central Transport, Inc*., 935 F.2d 114, 116 (7th Cir. 1991)).

Consistent with Rule 12(b)(6), the Court did not rule on the validity of the trustees' finding, or ultimate entitlement to relief, nor did it suggest what standard might be applied to assess that finding. *Id*. at 962.

In *National Shopmen Pension Fund v. DISA*, 583 F.Supp.2d 95, 45 EBC 1221 (D.D.C. 2008), the court held that a plan cannot require an employer to pay an increased withdrawal liability annual payment when the employer has timely disputed such increase and has been making annual payments to the plan based on the original amounts required. The court held that the employer could use the "pay now, arbitrate later" provision of ERISA as a shield because it had been making the required interim payments for “an extended period of time.” In this case an extended period of time was six months.

The court contrasted cases where the employers had flatly refused to make any withdrawal payments, suggesting that in such instance a plan may appropriately demand an increased annual payment. The court also stated that ERISA provides no authority for plans to increase interim withdrawal payments ad hoc. The court indicated, however, that if the employer had sought a review of the initial determination of withdrawal liability, then ERISA may allow for the plan to change the amount of the interim payments.

G. Collection Actions, Enforcement of Award, Interest, Liquidated Damages, and Attorneys’ Fees

In *Chicago Truck Drivers Pension Plan v. El Paso CGP Co*., 525 F. 3d 591, 43 EBC 2741 (7th Cir. 2008), the court held that, where an employer made payments after the due date in the schedule, the United States Rule would presumptively apply to the attribution of payments received, so that the payments would be applied first to interest due on the late payments.

In *Board of Trustees, Sheet Metal Workers National Pension Fund v. DCI Signs & Awnings, Inc.* 2008 WL 640252, 43 EBC 1437 (E.D. Va. Mar. 5, 2008), the court considered whether to enforce an employer’s obligation to make an “exit contribution” upon its withdrawal from the plan where no withdrawal liability was owed. Under the terms of the trust agreement, the provisions of which the employer allegedly was required to abide by under the relevant labor agreement, “the Trustees may, in their sole and absolute discretion, impose an ‘Exit Contribution’... on any employer who has a ‘Triggering Event’.” A “triggering event” occurs when “the Employer ceases to have an obligation to contribute to the Fund on some or all of its Employees, but is not required to pay any withdrawal liability to the Fund under Title IV of ERISA as a result thereof.” *Id*. at *1 (internal citation omitted). After tendering a notice and demand for payment, the fund commenced a collection action pursuant to ERISA sections 515 and 502(g)(2).

The employer argued that the exit contribution was barred by ERISA. The court rejected the argument, reasoning that the MPPAA imposes “minimum, not maximum, rules governing employee benefit plans, and do[es] not preclude an employer from agreeing to pay a fee for withdrawal other than statutory withdrawal liability.” *Id.* at *3. The court noted that such obligations are consistent with MPPAA’s policy of strengthening plan funding. *Id.* at *4.

In *Board of Trustees, Sheet Metal Workers’ National Pension Fund v. DCI Signs & Awnings, Inc.*, 2008 WL 4329294 (E.D. Va. Sept. 15, 2008), the court denied both the employer's and the fund's motions for summary judgment on the fund's collection action for an "exit contribution," as well as interest, liquidated damages, attorneys' fees and costs. The parties signed a collective bargaining agreement, which included a provision attempting to incorporate by reference a trust agreement. The Trust Agreement provided that the fund had discretion to impose an "exit contribution" on any employer who had a "triggering event."

The court rejected the employer's arguments that summary judgment was proper because the trust agreement was not properly incorporated into the collective bargaining agreement, the doctrine of mistake relieves the employer of potential liability under the Trust Agreement, the exit contribution was an unenforceable penalty, and that the fund was not entitled to additional damages because the exit contribution is contractual in nature and independent of ERISA obligations. The court ultimately denied the employer's summary judgment motion because it found that there were two reasonable interpretations of the provision in the collective bargaining agreement relating to the Trust Agreement, which made summary judgment inappropriate. The court also rejected the employer's argument that it was not bound by the terms of the Trust Agreement because the only reference in the collective bargaining agreement to the Trust Agreement stated that the Trust Agreement was signed by the employer, which was false. The court found that this argument failed to establish that the employer cannot be obligated under the Trust Agreement because it did not take into account 29 U.S.C. § 1145, which essentially makes a multiemployer plan a third-party beneficiary of a collective bargaining agreement, and therefore entitled to enforce that collective bargaining agreement.

The court rejected the fund's argument in support of its motion that the employer's act of signing the collective bargaining agreement was a manifestation of its intent to be bound by the Trust Agreement because of its finding that there were two reasonable interpretations of the collective bargaining agreement provision relating to the Trust Agreement. The court also rejected the fund's argument that the doctrine of quasi-estoppel determined the employer's liability under the Trust Agreement. The court stated that it was doubtful whether the doctrine could be applied to the current action before it because ERISA preempts state laws that relate to employee benefit plans covered by the statute, and therefore found that summary judgment was not appropriate.

In *Trustees of Local 531 Pension Plan v. Corner Distributors*, 2008 WL 2687085 (E.D.N.Y. July 8, 2008), the court approved a Magistrate's Report and Recommendation to the effect that interest on each missed payment in the schedule would run from the date of missed payment, but that interest would not run on the accelerated amount until the date the complaint was served. The court indicated it felt bound to follow dicta in *Bowers v. Transportacion Maritima Mexicana*, 901 F. 2d 258 (2d Cir. 1990), despite the statutory default provision that a plan may require "accrued interest on total outstanding liability from the due date of the first payment which was not timely made."

In *New York State Teamsters Conference Pension and Retirement Fund v. Linden Motor Freight Co.*, 2008 WL 5341000 (N.D.N.Y. Dec. 19, 2008), the court approved the Magistrate's Report and Recommendation awarding the fund all outstanding withdrawal liability interim payments, plus 11% annual interest on each outstanding payment, and "double interest" liquidated damages under Section 502(g). The employer had failed to appear to contest the plaintiff's calculations.

In *Vacca v. Bridge Chrysler Jeep Dodge, Inc.*, 2008 WL 4426875 (E.D.N.Y. Sept. 4, 2008), the Magistrate recommended granting the fund's motion for summary judgment in its action to compel the employer to make withdrawal liability payments. The court stated that because the employer failed to initiate arbitration proceedings to dispute the assessed withdrawal liability, it waived its right to arbitration and to assert any defenses to that withdrawal liability in the current action. In addition, the amount of the assessed withdrawal liability became fixed.

The fund also sought interest, liquidated damages, attorneys' fees and costs. The court, however, recommended that the fund be required to provide information specifying the amount of interest and liquidated damages before these be awarded. The court also recommended that the fund be required to submit an attorney's sworn fee application specifying the amount of attorneys' fees and costs along with supporting documentation and required to demonstrate that the attorneys' fees incurred by the fund represent a "presumptively reasonable fee." *Id*. at *9.

In *Trustees of Building Laborers' Local 310 Pension Fund v Able Contracting Group, Inc.*, 2008 WL 3889997, 45 EBC 1788 (N.D. Ohio Aug. 19, 2008), the court held that based on the complaint, answer, counterclaim, and prior rulings that Able was liable for the unpaid withdrawal liability. Specifically, the court held that the three requirements for withdrawal liability had been met. First, that Able is an employer for purposes of withdrawal liability because Able had waived the argument that it was not an "employer" by not timely demanding arbitration. Second, that the fund complied with the statute (determined in an earlier proceeding). Third, that Able had failed to timely initiate arbitration. Although the court had determined timeliness in an earlier proceeding, the court specifically denied Able's argument that when the employer does not request review by the plan sponsor that there is an indefinite deadline for initiating arbitration.

In addition, the court held that an award of interest, liquidated damages, attorney's fees, and costs were mandatory where a plan prevails in compelling an employer to pay withdrawal liability. In reaching this conclusion, the court specifically adopted the majority view from sister circuits that "fees are mandatory in both delinquent contribution and withdrawal liability cases in which the plan sponsor prevails." *Id.* at *8-9.

In *New Orleans Employers-Int'l Longshoremen's Ass'n Pension Fund v. Walle*, 2008 WL 2224870 (E.D. La. May 27, 2008), the court held that an employer must make interim withdrawal liability payments while arbitration is pending and that arguments over whether withdrawal had occurred were required to be arbitrated. However, the court did note a court has the discretion to excuse an employer from making interim payments if the pension plan's claims are "frivolous or not colorable", but declined to excuse the employer in this case. *Id.* at *2 n. 6.

In *Trustees of Carpenters Pension Trust Fund--Detroit and Vicinity v. Cimarron Services, Inc.*, 2008 WL 126588, 43 EBC 1852 (E.D. Mich. Jan.14, 2008), Cimarron terminated its collective bargaining agreement and, therefore, ceased contributing to the fund. The fund assessed withdrawal liability and sent a demand letter to Cimarron's registered address by certified mail. The letter was accepted. Cimarron failed to demand, within 60 days of such notice, arbitration as the exclusive forum for challenging liability. Because Cimarron failed to timely demand arbitration, the court held that Cimarron was in default for the amount of the fund's claims and granted summary judgment. In so holding, the court rejected Cimarron's argument that notice was improper, explaining that Cimarron cited no authority that would support its argument that mailing notice to a business's registered address was inadequate notice under ERISA. The court also concluded that two corporations owned by Cimarron's principal stockholders were a common control group under ERISA and so were treated as a single employer with Cimarron that was jointly and severally liable for the withdrawal liability owed. The court denied the Trustees' motion for summary judgment as to their request for an award of costs and attorneys fees.

In *Grimm v. Central Landscaping, Inc.*, 2008 WL 3896270 (D. Minn. Aug. 19, 2008), the Trustees of the Minnesota Laborers Pension Fund sought $36,072.95 in expert witness, attorneys, and service and filing fees related to an action to collect withdrawal liability from the defendant. The court awarded only $11,085.17. The court denied recovery of the expert witness fees, finding that the Trustees had failed to base their claim for such fees on 28 U.S.C. §1821 or 28 U.S.C. §1920 as required. In addition, the court reduced the number of hours the Trustees used to calculate their request for attorneys fees because aggregate billing and inadequate task descriptions made it impossible for the court to determine if the amount claimed was based upon excessive hours and, therefore, unreasonable. The court did not adjust the amount claimed for service and filing fees as the defendant did not protest this amount.

I. Bankruptcy Issues

In *HNRC Dissolution Co.*, 396 B.R.461, 45 EBC 1656 (Bankr. 6th Cir. 2008), the court was asked to decide whether withdrawal liability was, in whole or in part, an administrative expense of the bankruptcy estate such that it would be entitled to a priority payment. In this case, the plan argued that at least the post-petition portion of withdrawal liability was an administrative expense. Since the withdrawal did not occur until nearly two years after the filing for bankruptcy, the plan argued that a certain portion of withdrawal liability attributable to post-petition years should be an administrative expense. The court disagreed and held that no portion of the withdrawal liability could be deemed an administrative expense.

In the Sixth Circuit, debts are entitled to be administrative expenses to the extent they "[(1)] arose from a transaction with the bankruptcy estate and (2) directly and substantially benefited the estate." *Id.* at 475. The court assumed that the withdrawal liability arose from a transaction with the bankruptcy estate but found that incurring this obligation did not directly and substantially benefit the estate. The court agreed that, while some of the liability was created as covered employees worked during the bankruptcy, many of the factors that determine withdrawal liability are not related to post-petition work. These factors are interest rate assumptions, stock prices, and incoming contributions. The impact of these outside influences are great and can be "far greater than potential loss (or gain) resulting solely from employees' continued work" during a bankruptcy.

IX. Co-Employer Liability

C. Shareholder, Director, or Officer Liability

In *Burke v. Hamilton Equipment Installers*, 528 F.3d 108 (2d Cir. 2008), the court held that a company owned by the son of a withdrawn employer was not liable for withdrawal liability under a corporate veil-piercing theory. Although the employer's daughter operated a company that was undercapitalized and was formed for the purpose of avoiding withdrawal liability and bargaining obligations, the son's company was founded long after the ERISA liability was incurred, and was not an alter ego by virtue of the familial relationship.

In *Local Union 1158 IBEW Pension Fund- PA v. H.H. Fluorescent Parts*, 2008 WL 2679169, 44 EBC 2244 (E.D. Pa. June 30, 2008), the court held that the fund failed to establish alter ego liability against individuals who owned the withdrawn corporation. The court noted that (1) capitalization was adequate, (2) the contributing corporation was not insolvent prior to the date of withdrawal, and (3) payments from the contributing corporation to the shareholders were made when the company was solvent and were not made to avoid withdrawal liability.

In *Central States v. Michigan Drum Renovating Company*, 2008 WL 4367379 (N.D. Ill. Mar. 27, 2008), the court considered whether a fund may collect a share of withdrawal liability from an heir of a corporate shareholder in a supplemental proceeding under FRCP 69(a) after entry of a default judgment against the defunct employer for unpaid withdrawal liability and distribution by the debtor employer of certain proceeds to the shareholder's estate.

The court found the FRCP 69(a) proceeding distinct from "an original action asserting withdrawal liability directly against a responsible officer, shareholder, partner, joint venture, or owner of the withdrawing business entity." *Id*. at *1. Without explicitly finding that ERISA did not preempt state law, the *Michigan Drum* court concluded that under Rule 69(a) the supplemental proceeding is governed by state law. *Id.* Accordingly, the court assessed the record in light of Michigan probate law. It determined preliminarily that the fund's claim was barred by the failure to assert a claim against the estate within four months, as required by Michigan law. *Id*. at *4.

D. Successor Employer Liability

In *Local Union 1158 I.B.E.W. Pension Fund-PA v. H.H. Fluorescent Parts, Inc*., 2008 WL 544675, 43 EBC 2349 (E.D.Pa. Feb. 27, 2008), the court entered summary judgment in favor of the fund in its suit to recover withdrawal liability from two companies that split off from the contributing employer after it received an estimate of its withdrawal liability and ceased making contributions. The court declined to enter summary judgment as to whether the individual owners could be held personally liable under an alter ego theory because the factual record was insufficient to apply the eight-factor "Third Circuit alter ego test."

X. Third-Party Claims

In *Trustees of Sheet Metal Workers' Local Union No. 80 Pension Trust Fund v. W.G. Heating and Cooling*, 555 F. Supp. 2d 838, 44 EBC 1115 (E.D. Mich. 2008), the court held that a counterclaim against the Fund's trustees must be dismissed for failure to state a claim, since an employer is not one of the enumerated parties to bring a breach of fiduciary duty claim under 29 U.S.C. 1132(a), and the Fund's trustees do not owe fiduciary duties to an employer in any event. 29 U.S.C. § 1451 creates a cause of action for an employer to sue regarding withdrawal liability, but this does not support a suit for breach of fiduciary duty. In addition, however, the court denied a motion to dismiss a third-party complaint against the union. The court found that an allegation that employer has a right to indemnity against a union for withdrawal liability based on fraud and misrepresentation states a claim, where the union is alleged to have represented that contributions would be required under the collective bargaining agreement, but said nothing about withdrawal liability. The LMRA may not confer subject matter jurisdiction for such a claim, but supplemental jurisdiction would exist, and such a state-law claim for fraud is not preempted.

In *Pneumatic Trucking, Inc. v. Local 164 Int'l Brotherhood of Teamsters*, 2008 WL 4850202 (E.D.Mich. Nov. 7, 2008), the court held that the union is not liable for an employer's withdrawal liability "as a matter of law." In this case, the employer sought to hold the union responsible for a portion of withdrawal liability that the employer claimed was attributable to additional employees vesting in the plan. The employer claimed that the union breached an oral agreement by refusing to sign the applicable collective bargaining agreement for over three years. The employer's argument was rejected by the court, which characterized this argument as merely one for indemnification for withdrawal liability. The court held that indemnification clauses for withdrawal liability are unenforceable and preempted by the MPPAA. (*citing Connolly v. PBGC*, 475 U.S. 211, 225.)

In *Einhorn v. J&S, Inc.*, 577 F. Supp. 2d 752 (D.N.J. 2008), J&S brought third-party claims against Eckerd alleging joint employer liability after the fund brought an action against J&S for collection of withdrawal liability. The court granted Eckerd's motion to dismiss J&S's joint employer claim arising from MPPAA, and granted Eckerd's motion to dismiss J&S's state law claims to the extent that Eckerd was seeking to compel arbitration of those claims.

The court held that J&S waived its right to contest the assessed withdrawal liability because it did not initiate arbitration during the prescribed statutory period. The court also held that J&S's failure to follow MPPAA procedures for contesting withdrawal liability precluded it from seeking a declaratory judgment regarding Eckerd's liability as a joint employer, since the appropriate time for an employer named by the union to assert that another party is the sole or joint employer is prior to the expiration of the prescribed statutory period to initiate arbitration. In addition, the court held that employers have no express or implied cause of action under ERISA or MPPAA to sue a third-party for contribution or indemnification on the theory that such party is properly the sole or joint employer for purposes of those statutes. Lastly, the court held that J&S's state law claims for breach of contract and promissory estoppel against Eckerd were not preempted by ERISA, since they arose out of a contractual agreement between the two parties. The court noted that although a portion of the damages sought by J&S was for the withdrawal liability incurred by J&S, J&S was seeking damages based on state law theories. The court held that these state law claims were subject to arbitration as provided in the parties' prior agreements.

XI. Welfare Plan Withdrawal Liability

In *Trustees of the Graphic Communications Int'l Union v. Bjorkedal*, 516 F.3d 719, 43 EBC 2129 (8th Cir. 2008), the court held that a husband and wife whose rental partnership leased space to a contributing employer wholly owned by the husband could not be held liable under an alter ego or breach of contract theory for contractual withdrawal liability to a multiemployer welfare fund. The court found that, although the husband was a common owner of both entities, the rental partnership was treated as separate from the corporation, and the husband and wife consistently reported their rental income on Schedule E of their individual tax returns. The court also denied recovery of delinquent contributions on a fiduciary breach theory, holding that the husband's decision to pay the lease instead of contributions to the fund was a corporate, and not a fiduciary decision subject to ERISA duties.

PBGC Regulation

The Pension Benefit Guaranty Corporation ("PBGC") issued a final regulation on December 30, 2008 (73 FR 79628) to implement provisions of the Pension Protection Act of 2006 ("PPA") that provide for changes in the allocation of unfunded vested benefits to withdrawing employers from a multiemployer pension plan and make certain adjustments in determining an employer's withdrawal liability when a plan is in critical status.

Fresh Start – Under section 4211(c)(5)(E) of ERISA, as added by the PPA, a plan using the presumptive withdrawal liability method in section 4211(b) of ERISA, including construction industry plans, may be amended to substitute a plan year that is designated in a plan amendment and for which the plan has no unfunded vested benefits, for the plan year ending before September 26, 1980. This is referred to in the regulation as the statutory "fresh start". The PBGC amended 29 CFR § 4211.12 to also allow for a regulatory "fresh start" option. For plans using the presumptive method of allocating unfunded vested benefits, the regulatory fresh start permits the plan to substitute a new plan year for the plan year ending before September 26, 1980, without regard to the amount of a plan's unfunded vested benefits at the end of that newly designated fresh start plan year. This regulatory fresh start option is not available for construction plans. This change is effective for withdrawals occurring on or after January 1, 2007.

Withdrawal Liability Computations for Plans in Critical Status – Under the PPA there are funding rules for plan in critical status. These rules allow for critical status plans to reduce adjustable benefits under their rehabilitation plan. In addition, an employer may be subject to contribution surcharges if certain conditions are met. The PBGC rule amends the definition of "non-forfeitable benefits" in section 4211.2 and the definition of "unfunded vested benefits" in section 4219.2, to include adjustable benefits that have been reduced by a plan sponsor pursuant to ERISA section 305(e)(8) or Code section 432(e)(8), to the extent such benefits would otherwise be non-forfeitable benefits. The PBGC rule also amends their regulation by adding a new section 4211.4 that excludes amounts attributable to the contribution surcharge under ERISA section 305(e)(7) and Code section 432(e)(7) from the contributions that are otherwise includable in the numerator and denominator of the allocation fraction. The PBGC rule provides an example that illustrates the exclusion of employer surcharge amounts from the allocation fraction. These changes are effective for withdrawals occurring on or after January 1, 2008.

Mass Withdrawal - The regulation also revises the reallocation of liability upon a mass withdrawal. Prior rules required that, in the event of a mass withdrawal, certain employers that had previously withdrawn from the plan before the mass withdrawal received a share of "reallocation liability" equal to the employer withdrawal liability over the withdrawal liability of all liable employers. The new regulation changes the allocation method to contribution base units. The new reallocation liability is the average of the employer's contribution base units over the combined average of all liable employers' contribution base units for the three plan years preceding each employer's withdrawal. The regulation makes clear that the denominator in this fraction is the sum of each employer's average contribution base units for the three plan years preceding each employer's withdrawal. These changes are effective for mass withdrawals that occur on or after January 29, 2009. This regulation was designed to address the problem that arises if the withdrawn employer had no initial liability. Without initial liability, the employer who is part of a mass withdrawal may end up with no share of the liabilities upon mass withdrawal. To address this anomalous situation, the regulation provides for the reallocation liability arising on a mass withdrawal to be apportioned based on contribution base units, rather than initial liability.