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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

C. Duty of Employer to Provide Information

In *Central Pennsylvania Teamsters Pension Fund v. Bear Distributing Company, Inc.,* 2009 WL 812224, 47 EBC 1037 (E.D. Pa. Mar. 26, 2009), on summary judgment the court found enforceable against the defendant company the obligation to provide information upon the request of a pension fund under ERISA section 4219(a), 29 USC section 1399(a), although it neglected to specify the relief provided to enforce the obligation.

E. Notice of Withdrawal Liability

In *Board of Trustees, National Shopmen Pension Fund v. Northern Steel Corp*. 2009 WL 3069674 (D.D.C. Sept. 28, 2009) the defendant claimed it did not receive notice of withdrawal liability. The court found that even if the employer did not receive the initial notice, it received notice through service of the complaint, but the employer's failure to initiate arbitration within 90 days after service of the complaint constituted a waiver of its right to arbitrate. The court also found that two other companies were alter egos of the employer and therefore jointly and severally liable. The court denied summary judgment against the individual defendants on a veil-piercing theory owing to insufficient facts.

In *Amalgamated Lithographers of America v. Unz & Co. Inc.,* 2009 WL 4016482 (S.D.N.Y. Nov. 3, 2009), an employer ("Scott") had ceased operations in 2003. The pension fund sent a withdrawal liability demand letter to Scott in 2005, but it was not received and was returned to the fund as undeliverable. The court found that the 2005 letter to Scott was not adequate notice to the employer. In May 2008, however, the plan sent an information request letter to an entity ("Unz") it had reason to believe was a trade or business under common control with Scott. The fund enclosed with that letter the 2005 demand letter to Scott. The court found that the two entities were under common control and explained that notice to one member of the control group is considered notice to all members. The court further found that the 2008 information request letter with the 2005 demand letter enclosed did constitute sufficient notice to both Unz and Scott of the withdrawal liability demand. The court noted that MPPAA's notice provisions are liberally construed to protect pension plan participants; that no particular form of notice is required; and that the notice must simply include the amount of liability and the schedule for payment and must demand payment.

The court further noted that if Unz wanted to contest the adequacy of the notice it received, it should have done so in arbitration. But Unz did not request review from the plan sponsor within 90 days from the date of the notice, which the court noted was a prerequisite to Unz's ability to initiate arbitration unilaterally. The court found that, having failed to timely request review, Unz forfeited its right to initiate arbitration, and therefore forfeited its right to contest the amount owed or the adequacy of the notice. The court found that there was no basis to apply equitable tolling to extend the time for Unz to seek review because there was no fraudulent or other conduct designed to conceal the existence of a claim and because Unz had not acted reasonably to discover the facts and protect its rights.

The court further responded to Unz's claim that the pension fund's claim should be barred by the doctrine of laches. The court indicated that a laches defense can apply in a withdrawal liability case if a pension fund has unreasonably delayed notifying an employer of its liability. But the court held that a laches defense must be arbitrated, and Unz had waived this defense by failing to arbitrate.

In *Penske Logistics LLC v. Freight Drivers and Helpers*, 47 EBC 1687, 2009 WL 1383298 (E.D. Pa. May 14, 2009), the court held that there is no requirement that a pension fund must determine that a principal purpose of an employer's transaction was to evade or avoid withdrawal liability for purposes of triggering the notice and arbitration provisions under MPPAA. The court held that the notice of withdrawal and assessment of liability was sufficient to trigger the arbitration timeline requirements under ERISA section 4221.

In *Unite National Retirement Fund v. Rosal Sportswear, Inc.*, 2009 WL 331430 (M.D. Pa. Feb. 9, 2009**)** the court rejected the request of individual defendants to take discovery relating to changes in the amount of withdrawal liability where the individuals claimed that they had not received notice of liability, and thus had no opportunity to arbitrate issues relating to the amount of liability. *Id.*, *5.

Quoting the Third Circuit's decision in *IUE AFL CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 128 (3d Cir. 1986), the court found that "[a] fund can only be expected to provide notice to the corporation that is the ostensible employer of the fund's participants." *Unite National Retirement Fund v. Rosal Sportswear, Inc*, at *5, *quoting Barker & Williamson*, 788 F.2d at 128. Thus, the employer's shareholder had notice of the demand, and "declined the opportunity to challenge this amount through the procedures established by statute." *Id.*

III. Definition of Withdrawal

A. Complete Withdrawal

In *Borntrager v. Central States Southeast and Southwest Areas Pension Fund*, 577 F.3d 913, 47 EBC 1705 (8th Cir. 2009), the court affirmed the district court decision that was discussed in the Committee's report last year. The pension fund had expelled the employer for violating the plan's rule against adverse selection. Under that rule, an employer was prohibited from restricting pension coverage to only those employees likely to receive a benefit (and excluding those employees less likely to receive a benefit) because such practices had the potential to adversely affect the actuarial soundness of the fund. The fund's authority to terminate the employer's participation was challenged by the employer and affected participants in an action for declaratory and injunctive relief. Among other grounds, the employer and participants argued that the expulsion was contrary to MPPAA, whereby Congress had established withdrawal liability as a fund's specific remedy for declining employee participation, and the fund should not be permitted to substitute its judgment for Congress's. The court rejected this argument, finding that the fund had expulsion authority pursuant to the trust agreement and that there is no provision of ERISA or MPPAA that constrained the fund's authority under the trust agreement to expel an employer. The court noted that, after the fund trustees expelled the employer from participation, the fund assessed liability for a complete withdrawal against the employer, but the court made no findings about whether a complete withdrawal had occurred or whether the assessment was correct.

In *Gastronomical Workers Union Local 610 v. La Mallorquina, Inc.*, 597 F.Supp.2d 265, 46 EBC 1337 (D. P.R. 2009), the court held that a non-voluntary withdrawal does not exempt the employer from withdrawal liability. The court also dismissed the employer's counterclaim that the Fund was demanding money based on a situation the Fund created.

After a number of years of contributing to the Fund, the employer and union agreed upon a collective bargaining agreement that no longer required the employer to make contributions. The Fund subsequently assessed withdrawal liability. The employer argued that withdrawal liability did not apply because the decision to withdraw was jointly made by the union and employees. The court concluded, however, that withdrawal liability is imposed without regard to whether an employer voluntarily withdraws from the Fund. *Id.* at 269. The purpose of withdrawal liability is to protect the vested pension interests of the employees, not to punish an employer for malice or willfulness. *Id.*

The court also dismissed the employer's counterclaim, finding that the dispute concerned a determination of withdrawal liability that had to be arbitrated. The fact that the complaint was filed against the union, a third party, did not excuse the employer from this requirement. *Id.* at 271.

In *Gerhardson v. Gopher News Co.* 2009 WL 3242024, 47 EBC 2582 (D. Minn. Sept. 30, 2009), senior employees sued their employer under ERISA alleging that the employees were adversely affected by the employer's complete withdrawal resulting from having been expelled from the pension fund for violating the rule against adverse selection. The court granted the employer's motion to dismiss for failure to state a claim. The court found that 29 USC section 1451 (ERISA section 4301) provides a party standing to sue but still requires a plaintiff to show that he was adversely affected by some violation of a substantive provision of Subtitle E of Title IV of ERISA. The plaintiffs here could not make such a showing because the court found that in a complete withdrawal, a withdrawing employer can be liable only to a pension fund and not to its employees.

E. Corporate Transfers and Mergers

CenTra, Inc. v. Central States, Southeast and Southwest Areas Pension Fund, 578 F. 3d 592, 47 EBC 1713 (7th Cir. 2009), addressed the safe harbor for reorganizations: no withdrawal occurs solely because an employer ceases to exist by reason of a "merger, consolidation, or division," and the "successor corporation(s)" shall be considered the original employer. In particular, the Seventh Circuit interpreted the terms "division" and "successor" and discussed the process by which contribution history is allocated after a reorganization.

In a series of transactions, CenTra (1) merged two contributing union subsidiaries into itself; (2) created two new subsidiaries; (3) transferred the CBA obligations of the former subsidiaries to the new subsidiaries, along with some assets; and (4) sold the stock of the new subsidiaries to a different control group. CenTra also had a third contributing union subsidiary that it did not sell, but which permanently ceased to have an obligation to contribute some time after the sale of the two new subsidiaries, thus triggering a complete withdrawal for CenTra. In the subsequent assessment, most of the liability resulted from the contribution history of the two subsidiaries which were merged into CenTra.

Rejecting the employer's argument that a series of related transactions should be treated as a whole, the court held that CenTra was the "successor" after the merger transaction, and thus inherited the contribution history of the two merged subsidiaries. The court held that the transfer of the CBA obligations to the two new subsidiaries was not a "merger, consolidation, or division" under ERISA section 4069(b), 29 U.S.C. section 1369(b), and thus the two new subsidiaries could not inherit the contribution history as "successors" within the meaning of ERISA section 4218, 29 U.S.C. section 1398. Thus, at the time of its complete withdrawal, CenTra still had the contribution history of the old subsidiaries.

G. Transactions to Evade or Avoid Liability

In *UNITE National Retirement Fund v. Rosal Sportswear, Inc.* 2009 WL 3241660 (M.D. Pa. Oct. 1, 2009), the pension fund assessed withdrawal liability after the employer ceased covered operations and went out of business. The employer did not initiate arbitration and failed to pay. The pension fund sued the sole shareholder and asked the court to pierce the corporate veil to hold her personally liable. The court discussed the Third Circuit's test for whether the corporate veil should be pierced because a corporation is simply an alter ego of its shareholders or officers (*citing Pearson v. Component Tech. Corp.*, 247 F.3d 471, 484 (3rd Cir. 2001)) and noted that the Third Circuit had held that, for purposes of MPPAA, there is a federal interest in disregarding the corporate form where appropriate to prevent parties from fraudulent evasion of withdrawal liability (*citing Board of Trustees of Teamsters L. 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164, 169 (3rd Cir. 2002)). Here, the court determined that there were facts suggesting that Rosal was a sham corporation (loans made to shareholder written off) but that there were also facts suggesting that the principle of limited liability should be respected (corporation was solvent and well-capitalized, and there was no evidence of commingling of funds). Accordingly, the court found that there was a genuine dispute of material fact and denied both sides' motions for summary judgment.

In *Rosal Sportswear*, the fund also sued members of the sole shareholder's family to whom company payments had been made on the theory that these were transactions to evade or avoid withdrawal liability. The court noted that the Second Circuit had held that, when a transaction is undertaken with a principal purpose to evade or avoid withdrawal liability, the federal courts are empowered to reach the party to whom the assets have been transferred (*citing IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1056 (2d Cir. 1993)). The court found there was evidence to suggest that payments to the sole shareholder and her relatives were made to avoid having to pay those monies to the pension fund, but the court also found evidence supporting the opposing view. Accordingly, the court denied both sides' motion for summary judgment.

IV. Special Industry Provisions

F. Special Rules for Other Industries

In City of *Warwick v. Laborers' International Union of North America National*, 2009 WL 46260, 46 EBC 1258 (D.R.I. Feb. 23, 2009), the court dismissed a declaratory judgment action brought by the City seeking determination that the City fell within the governmental exception to MPPAA. The City had agreed to make pension fund contributions for its crossing guards. When the City terminated its crossing guards and contracted for such services, it discontinued contributions to the Fund. The Fund subsequently assessed withdrawal liability. The City responded by claiming that it had established a governmental pension plan and was exempt from MPPAA. The court disagreed and held that the governmental exception did not apply because the City had not alleged that the Fund only served governmental employers, a requirement for the governmental exception to apply. *Id.* at 5. Also, the City had not established or maintained the Fund; it simply made contributions. *Id.*

VIII. Enforcement and Collection Disputes

A. Jurisdiction and Venue

GCIU-Employer Retirement Fund v. Goldfarb Corporation, 565 F. 3d 1018 (7th Cir. 2009) explored the limits of personal jurisdiction for withdrawal liability claims against a foreign citizen. The Goldfarb Corporation was a Canadian company that owned 80% of Fleming Packaging Corporation, a company that contributed to the GCIU Fund. Thus Goldfarb was in the controlled group liable for the withdrawal, but the Seventh Circuit pointed out that liability must be distinguished from jurisdiction. For personal jurisdiction, a court must find either sufficient general contacts with the United States, or that the withdrawal liability cause of action arose out of specific contacts by the foreign corporation with the United States.

The GCIU Fund did not assert sufficient general contacts, so the court focused on the facts that gave rise to the withdrawal liability. The defendant had substantial involvement with Fleming, but the court pointed out that the withdrawal resulted from the sale of the assets of Fleming, and that at the behest of Fleming's lenders, Goldfarb had issued a proxy and relinquished its control several months prior to the sale. Thus, Goldfarb did not have any involvement in the two key facts that were determinative of the occurrence of a withdrawal: the structure of the sale (asset vs. stock) and whether the sale would comply with ERISA section 4204, 29 USC section 1384.

In *Fynn v. Berich*, 603 F.Supp.2d 49 (D.D.C. 2009), the court granted defendant's motion to transfer the case to the District of Colorado, finding that Colorado was the more convenient venue. The Fund brought suit in Washington, D.C. against a bankrupt employer's controlling owner, its principal officer, and a Colorado corporation also owned by the employer's controlling owner, claiming that the defendants had engaged in transactions to evade the participating employer's withdrawal liability. The court granted defendants' motion to transfer the case to the District of Colorado, finding that it was the more appropriate venue: the defendants, participating employer, and the union were all located in Colorado, and the alleged improper transactions occurred in Colorado. *Id.* at 51. The Fund had filed a claim in the participating employer's bankruptcy in Colorado, such that it would not be unduly burdensome for the Fund to litigate this action in Colorado as well. *Id.*

In *UNITE-HERE Nat'l Retirement Fund v. Village Resorts*, 2009 WL 255860 (S.D.N.Y. Feb. 3, 2009), the court determined that jurisdiction and venue were proper pursuant to 29 USC section 1132(e) in a district where a plan is "partially administered."

Illinois-based Plaintiff HERE Pension Fund demanded withdrawal liability from the Illinois-based defendant employer in February 2007, but received no response. After the employer failed to make its first payment, the Fund demanded payment and declared a default, but again the employer failed to respond. *Id.*, *1.

In September 2007, the HERE Fund merged with the UNITE-HERE National Pension Fund, which was administered in both New York and Rhode Island. The merged Plaintiff Fund filed suit in the Southern District of New York seeking payment of the withdrawal liability, liquidated damages, and attorney's fees, basing jurisdiction and venue upon 29 USC section 1132(e) (and evidently not invoking the Title IV equivalent, ERISA section 4301(d)), which states that an action may be brought "in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found..." The complaint alleged that "the Fund is administered in part in the Southern District of New York." *Id. at *2.*

Defendant objected to jurisdiction on statutory grounds only, asserting that "partial" administration does not satisfy the statute's requirements. *Id. at *3 (*remaining citations omitted). In rejecting the employer's argument, the court relied upon an affidavit from the Fund manager outlining the extent of Fund business performed in New York—administrative offices, regular meetings of trustees and committees, location of legal counsel—concluding that the Fund was administered in New York within the meaning of the statute. In so finding, the court looked "at the extent of managerial decisions made regarding the plan in [the relevant] district....," and concluded that "a plan can be administered in multiple districts." *Id.* *3-*4 (internal citations omitted). However, the court granted the defendant's motion to transfer to the Northern District of Illinois, which it found to be the more convenient forum for the parties. *Id. *4-*5.*

B. Review Procedures

In *GCIU-Employer Retirement Fund v. Toledo Printing Company*, 2009 WL 1046792 (N.D. Ohio Apr. 17, 2009), the court held that the Fund was entitled to summary judgment on its withdrawal liability claim when, upon notice from the employer that the employer had closed its doors, the Fund sent a notice to the employer assessing withdrawal liability, proposed a payment installment schedule, and issued a demand for payment. *Id.* at 3. When the employer failed to arbitrate or otherwise communicate with the Fund regarding the calculation of liability or the employer's ability to comply with the payment schedule, the Fund was entitled to summary judgment. *Id.*

C. Arbitration of Withdrawal Liability Claims

In *Trustees of the Soft Drink Industry – Local Union No. 744 Pension Fund v. Royal Crown Bottling Company*, 2009 WL 310896, 46 EBC 1010 (N.D. Ill. Feb. 9, 2009), the court refused to create a new equitable tolling exception to the arbitration statute of limitations based on the employer's contention that the Fund made misrepresentations.

The Fund assessed withdrawal liability in September 2005. The employer timely requested a review of the assessment, which the Fund denied. However, the Fund also requested additional information, and the employer provided it. On November 6, 2006, the Fund again informed the employer that it would not reduce the assessment. On January 4, 2007, the employer submitted a request for arbitration. In response, the Fund filed for a declaratory judgment action alleging that the employer's arbitration request was untimely. The employer, however, argued that the court should toll the statutory deadline, alleging that it had relied on the Fund's misrepresentations that it would reduce the assessment. In finding in favor of the Fund, the court noted that based on the Seventh Circuit's decision in *Central States, Southeast and Southwest Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1372 (7th Cir. 1992), equitable tolling exceptions only apply in situations where the employer has filed a legitimate defense in federal court. *Id.* at 3. Although other circuits have created broader exceptions, district courts within the Seventh Circuit must interpret the exception narrowly. *Id.* The court noted that although the result seemed harsh, the employer cannot claim it was unaware of the ramifications of it failure to comply with the statute's requirements. *Id.*

In *Trustees of the Utah Carpenters' and Cement Masons' Pension Trust v. New Star/CULP L.C.*, 2009 WL 321573, 46 EBC 1147 (D. Utah Feb. 9, 2009), the court held that the question of whether an employer actually withdrew from a Fund must be arbitrated. Upon receiving a withdrawal liability assessment, the employer did not request a review, and it did not initiate arbitration to challenge its withdrawal liability. When the Fund brought suit to recover the amounts due, the employer argued that it was covered by the MPPAA building and construction industry exception and, as a result, did not withdraw from the Fund as a matter of law. However, the court held that whether an employer actually withdrew is a central issue in the withdrawal liability determination and it must be arbitrated. *Id.* at 3.

In *Trucking Employees of North Jersey Welfare Fund, Inc. - Pension Fund vs. Parsippany Construction Co. Inc.*, 2009 WL 1076201 (D.N.J. Apr. 21, 2009), the court confirmed that an employer must arbitrate the issue of whether it has withdrawn.

In response to the Fund's motion for summary judgment, the employer acknowledged its failure to demand arbitration, arguing only that arbitration was not required in all circumstances and that the failure to arbitrate does not deprive the court of jurisdiction under *Crown Cork and Seal Co. v. Central States S.E. and S.W. Areas Pension Fund*, 881 F.2d 11 (3d Cir. 1989). The employer sought to dispute its liability under the definition of complete withdrawal applicable to construction industry plans. *Id.* at *3.

The court observed that the question of whether a complete withdrawal has occurred "is precisely the type of question arbitration is meant to address in the first instance." *Id.* Thus, while the court acknowledged that *Crown Cork* provides for certain limited exceptions to the arbitration requirement, it made clear the rarity of such exceptions. Here, the employer offered no justification for the failure to arbitrate, and summary judgment was granted the Fund, providing the relief available under ERISA section 502(g)(2), 29 USC section 1132 (g)(2). *Id.* *3-*5.

By contrast, in *Operating Engineers' Pension Trust Fund vs. Clark's Welding and Machine,* 2009 WL 1324049 (N.D. Cal. May 8, 2009), on a motion to dismiss, the court found no obligation to arbitrate an employer's defense based on a settlement agreement that purportedly extinguished the Fund's right to collect withdrawal liability.

In May 2003, the Plaintiff Fund sued the employer for delinquent contributions. In May 2004, the parties filed a stipulation of dismissal in the delinquency action, stating that the employer had ceased operations as of July 2003, and setting forth a payment schedule "to satisfy delinquent and unreported contributions to the pension funds." *Id.*, *1.

In June 2008 the Fund demanded withdrawal liability based on the July 2003 cessation of operations. The employer did not request review or arbitration. When the Fund filed suit to collect allegedly late withdrawal liability payments, the employer moved to dismiss, arguing that the 2003 stipulation of dismissal extinguished any withdrawal liability. The Plaintiff Fund countered in part that the employer was required to raise the stipulation of dismissal in arbitration. *Id. at *3.*

The court ruled that MPPAA does not require arbitration of the effect of a settlement agreement, observing that employers must arbitrate only those issues "which go to the merits of the liability assessment itself...," in particular, "establishment, computation, and collection of withdrawal liability." *Id. at *3 -*4* (internal citation omitted). The court relied heavily on the Third Circuit's similar finding in *Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc. Pension Fund v. CenTra,* 983 F2d 495, 506-07 (3d Cir. 1992), and distinguished *ILGWU National Retirement Fund v. W. Helena-Helena Sportswear, Inc.*, No. 96-1007 1996 US Dist. Lexis 206 35 (S.D.N.Y. July 25, 1996), noting that the court in *Helena* had not considered *CenTra*, and that, unlike *Helena*, the matter before it did not involve employer delay. *Id.* at *4. Finding the stipulation of dismissal ambiguous, the court refused to grant the employer's Rule 12(b)(6) motion.

In *Unite National Retirement Fund v. Rosal Sportswear, Inc.*, 2009 WL 331430 (M.D. Pa. Feb. 9, 2009), the court confined discovery to corporate veil piercing and other collection-related matters, granting the Plaintiff Fund's motion to bar discovery relating to changes in the amount of withdrawal liability where the defendant employer failed to demand arbitration regarding that liability.

After finding the withdrawn employer insolvent, the Plaintiff Fund initiated litigation to pierce the corporate veil against the employer's sole shareholder, and against relatives of the shareholder, seeking return of payments alleged to have been made to evade or avoid liability. *Id.*, *1-*3.

Defendants sought to explore changes in the employer's liability set forth in a series of letters that culminated in the liability demand. Defendants asserted entitlement to explore the varying liability amounts because the Fund identified the letters as a basis for its "evade or avoid" claim. *Id.*, *3. In response, the Fund argued in part that the defendants were seeking to avoid their obligation to arbitrate issues concerning the amount of liability. *Id.*

The district court barred the requested discovery, finding that the changes in the withdrawal liability amounts were not relevant to the Fund's claims currently at issue. *Id.*, *4. The letters containing estimates were relevant not for the substance of the estimates, but because they "suggest that [employer] was aware that it was likely to incur withdrawal liability if the company ceased operations or otherwise withdrew from the Fund." *Id.* Accordingly, the evade or avoid claim only "requires a determination of whether payments made to [relatives of the owner] were motivated by the knowledge of, and intent to evade or avoid, already-assessed or potential withdrawal liability." *Id.* The bases of the liability calculation were similarly irrelevant to the Fund's other claims. *Id.* Summing up, the court stated that it "will not ignore [MPPAA's arbitration provisions] and now allow challenges to the trustees' calculation simply because the Fund alleges that [the sole stockholder] tried to avoid liability by transferring [assets to family]. *Id.*, *5.

E. Default

In *Central States, Southeast and Southwest Areas Pension Fund v. O'Neill Bros. Transfer and Storage Co*., 2009 WL 1470011 (N.D. Ill. May 27, 2009), the court held, in its review of competing motions for reconsideration, that it correctly granted summary judgment to the Fund that O'Neill was in default based on the entirety of the record before it. The court found that the Fund had presented O'Neill with a demand for payment along with a payment schedule and that O'Neill rejected that demand and payment schedule.

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

In *Central States, Southeast and Southwest Areas Pension Fund v. O'Neill Bros. Transfer and Storage Co.*, 2009 WL 901142 (N.D. Ill. Apr. 1, 2009), the court held that when a company ceased all operations and liquidated its assets, there was an immediate and compelling need for the employer to provide a lump sum payment of its withdrawal liability to the Fund. While the employer admitted that it had ceased doing business and liquidated its assets, it denied that it had informed the Fund that it was preparing for its termination and liquidation. Nonetheless, the court determined that circumstances created an immediate and compelling need for a lump sum payment to protect Fund assets. *Id.* at 2.

In *Building Laborers Local 310 Pension Fund v. Able Contracting Group, Inc.*, 2009 WL 792472 (N.D. Ohio Mar. 23, 2009), the court awarded attorneys' fees based on the Sixth Circuit's lodestar approach. The lodestar approach looks at numerous factors, including determining a reasonable hourly rate.

The Fund had negotiated a rate of $200 per hour with the attorneys. In requesting an award of attorneys' fees, however, the Fund argued that a rate of $300 per hour was reasonable under the lodestar approach used in *Building Serv. Local 47 Cleaning Contr. Pension Plan v. Grandview Raceway*, 46 F.3d 1392, 1400 (6th Cir. 1995). The court found that $250 was the appropriate rate because it was the average of the requested rate and the negotiated rate, and recent case law from courts in the same district typically award fees between $200 and $300 per hours. *Id.* The Fund had not provided information as to the experience of the attorneys involved that would justify an upward adjustment.

The court also determined that the factors enumerated in *Reed v. Rhodes*, 179 F.3d. 453, 471 (6th Cir. 1999) did not warrant an adjustment to the lodestar figure. Specifically, the court found that no adjustment was needed to the time the Fund's lawyers claimed they spent on the case. The time was appropriately documented: each line was dated, described the specific tasks undertaken and included (in fractions) the hours for each time entry, and the hours expended (163.25) were reasonable given that withdrawal liability "involves a labyrinth of statutes and associated case law. " *Id.* at 4.

In *Teamsters Joint Council No. 83 of Va. Pension Fund v. Empire Beef Co., Inc.,* 2009 WL 2872498 (E.D. Va. Sept. 3, 2009), the court denied a motion for attorneys' fees. The court had found after a bench trial that an entity called Weidner was not under common control with the withdrawn employer, Empire Beef. As the prevailing party, Weidner moved for attorneys fees from the pension fund pursuant to ERISA sections 502(g)(1) and 4301(e). The court noted that an award of attorneys' fees under these sections is in the district court's discretion and cited the Fourth Circuit's five-factor test set forth in *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1029 (1993) and *MidAtlantic Medical Services, LLC v. Sereboff*, 407 F.3d 212, 221 (2005). The five factors are

> (1) degree of opposing parties' culpability or bad faith;
> (2) ability of opposing parties to satisfy an award of attorneys' fees;
> (3) whether an award of attorneys' fees against the opposing parties would deter other persons acting under similar circumstances;
> (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and
> (5) the relative merits of the parties' positions.

In applying the five factors, the court found that the pension fund had not acted in bad faith in light of its fiduciary obligation to actively pursue withdrawal liability claims against control group members and in light of Fourth Circuit authority stating that mere negligence or error does not constitute bad faith. Accordingly, the court denied the motion for attorney's fees.

In *Central Pennsylvania Teamsters Pension Fund v. Bear Distributing Company, Inc.*, 2009 WL 812224, 47 EBC 1037 (E.D. Pa. Mar. 26, 2009,), on summary judgment the court found that a sponsoring Union's purported settlement of all claims arising from the closing of a facility did not act as a bar to a Fund's withdrawal liability claim. The court noted that the grievance that resulted in the settlement did not involve withdrawal liability, and rejected the defendant company's assumption that the Union and the Pension Fund were a single entity. *Id.*, at *6. Where, as here, an employer fails to file a request for review, the assessed liability is "due and owing," the court concluded. *Id.*, *7. The parties evidently did not raise, nor did the court address, the question of whether the effect of the purported settlement should have been arbitrated.

In *Unite National Retirement Fund v. Rosal Sportswear, Inc.*, 2009 WL 331430 (M.D. Pa. Feb. 9, 2009), the court confined discovery to corporate veil-piercing and other collection-related matters, granting the Plaintiff Fund's motion to bar discovery relating to changes in the amount of withdrawal liability where the defendant employer failed to demand arbitration regarding that liability.

In *Gastronomical Workers Union Local 610 et al v. La Mallorquina, Inc*, 2009 WL 1362033 (D.P.R. May 12, 2009) the court found mandatory an award of attorney's fees and costs in a successful action to collect delinquent withdrawal liability payments under section 502(g)(2) of ERISA, 29 USC section 1132(g)(2). In so doing, however, it reviewed the claimed award for reasonableness and, as the court put it, to "winnow out excessive hours, time spent tilting at windmills, and the like." *Id.* at *2 (internal citation omitted). Respecting an attorney's appropriate billing rates, the court stated that it would "use 'the prevailing market rates in the relevant community' as the starting point, thereby considering the rates in the community for similar services provided by attorneys of reasonably comparable skill, experience and reputation." *Id*. (Internal citation omitted). Because some of the fees sought were billed at rates higher than it found to be reasonable in the District of Puerto Rico, the court reduced those charges, and similarly reduced certain fees as excessive for litigation of relatively short duration. *Id.* at *3.

I. Bankruptcy Issues

In *In re Local 722 I.B.T., Debtor*, 414 B.R. 443 (Bankr. N.D. Ill. 2009), the debtor was a local union that filed a Chapter 11 petition for bankruptcy relief after being sued by its former president. The Court analyzed whether the bankruptcy was really a two-party dispute such that it should be dismissed for cause. The debtor's schedules included a contingent claim of the pension plan for withdrawal liability. The Court noted that filing for Chapter 11 bankruptcy protection does not amount to a repudiation of the obligation to contribute or a cessation of operations so as to trigger withdrawal liability. Accordingly, the Court was disinclined to include the fund's claim, and without that claim, a single creditor – the former local union president – held over two-thirds of claims. Accordingly, the court granted the creditor's motion to dismiss the bankruptcy case.

In *Trucking Employees of N. Jersey Welfare Fund, Inc. – Pension Fund v. Marcal Paper Mills, Inc*., 2009 WL 3681897 (D.N.J. Nov. 2, 2009), the district court considered a case on appeal from the bankruptcy court. The bankruptcy court had concluded that no portion of the pension fund's withdrawal liability claim was entitled to administrative expense status and reclassified the claim as a general unsecured non-priority claim. The district court on appeal found that the withdrawal liability claim could be apportioned between pre- and post-petition accrual of pension credit permitting administrative expense status to the post-petition portion. The district court remanded the action to the bankruptcy court to review the pension fund's proposed apportionment of withdrawal liability between vested benefits accrued before the employer filed for bankruptcy and those that accrued afterwards.

In *In re Moxley, Debtor,* 2009 WL 4017298 (Bankr. N.D. Cal. Nov. 18, 2009), the individual debtor owned a sole proprietorship that was obligated to a pension fund for withdrawal liability. After the debtor filed a voluntary Chapter 7 petition, the fund filed an adversary proceeding alleging that its claim for withdrawal liability was nondischargeable pursuant to Bankruptcy Code section 523(a)(4). That provision bars discharge of an individual debtor from any debt "for fraud or defalcation while acting in a fiduciary capacity." The Court discussed the meaning of "fiduciary capacity" under this provision, noting that it requires an express or technical trust relationship which must exist prior to and without reference to the act of wrongdoing (*i.e.,* not a constructive or implied trust relationship). The Court then considered the pension fund's argument that the debtor was a fiduciary with regard to the fund because he had controlled plan assets by failing to make withdrawal liability payments owed to the fund. The Court rejected this argument pursuant to several decisions in which the Ninth Circuit had held that contributions owed to an employee benefits plan do not become plan assets until they are paid to the plan. The court also noted that Bankruptcy Code § 523(a)(4)'s requirement that the fiduciary relationship arise prior to the alleged wrongdoing meant that the requisite fiduciary relationship could not be found to exist solely as a result of the failure to pay amounts owed to the fund. The court further found that there was no "defalcation" here because no funds had been entrusted to a fiduciary which the fiduciary had then failed to account for or pay back. Rather, the debtor simply failed to use his personal assets to pay his debt to the fund. Accordingly, the court held that Bankruptcy Code section 523(a)(4) did not bar the discharge of withdrawal liability in the Chapter 7 case.

IX. Co-Employer Liability

A. Definition of "Employer"

In *Central States, Southeast and Southwest Areas Pension Fund v. International Comfort Products, LLC,* 585 F. 3d 281, 47 EBC 2768 (6th Cir., 2009), the Sixth Circuit reversed the district court's grant of summary judgment on the employer's claim that it was not an "employer" against whom withdrawal liability could be assessed because it was not contractually obligated to contribute to the pension fund. The court first found, consistent with its sister circuits, that the word employer is not defined in MPPAA such that the Title I definition of employer—"any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan"—should be applied. It further found that the relevant "relation" for purposes of withdrawal liability was whether the employer was obligated to contribute to the fund. In further construing the definition of employer, however, the court countered decisions of the Seventh, Eighth and Ninth Circuits in which those courts had suggested—apparently without a careful examination of the merits of the position—that the definition required that the employer be contractually obligated to contribute to the pension fund. Rather, the Sixth Circuit noted that the term "obligation to contribute" is defined in MPPAA to mean either an obligation arising under a CBA or as a result of a duty under applicable labor-management relations law. As the district court had only considered whether the employer had a contractual obligation to contribute to the fund, and not whether it had an obligation under applicable labor management relations law, the court of Appeals reversed the district court's decision and remanded the case to that court for further proceedings.

B. Controlled Group Liability

In *Teamsters Joint Council No. 83 of Virginia Pension Fund v. Empire Beef Co., Inc.*, 47 EBC 1162, 2009 WL 1764554 (E.D.Va. June 18, 2009), the Fund argued that the partners' capital account summary should be used to determine ownership in a partnership for determining common control issues. If the capital account summary was used, the partnership would be in common control with the withdrawing employer as one partner only had a 50% interest in partnership under the pertinent partnership agreement but the same partner's capital account was effectively greater than 80%. The court disagreed with the Fund, holding that a partner's fluctuating capital account does not increase or decrease the partner's interest in the partnership from year to year.

In *Bakery and Confectionery Union and Industry International Pension Fund v. Wilson,* 2009 WL 1258592, 47 EBC 1418 (N.D. Cal. May 5, 2009), the court denied a motion to dismiss under Rule 12(b)(6), finding a cause of action where two related corporations were alleged to be a controlled group as defined in ERISA sections 4001(b)(1) and 4201(a), and where the controlling shares of each corporation were alleged to be held in each of two living trusts. In so doing, the court rejected the Trusts' arguments that "no common control exists where the living trust passively holds shares in" the two businesses and that one controlled group member could not be held liable because it "did not contract separately with the Pension Fund." *Id. at *2.*

The court disposed of the first argument by noting that "'ERISA does not distinguish between active and passive investments,'" *quoting*, *Bd of Trustees W Conference Teamsters Pension Trust Fund v. Lafrenz*, 837 F.2d 892, 895 (9^{th} Cir. 1988). *Id.*

Similarly, the court concluded that where a controlled group is found, no direct contractual relationship between the relevant union and each corporation under common control is required, citing ERISA section 4001(b)(1), 29 USC section 1301(b)(1). *Id.*

In *Plumbers and Steamfitters Local 150 Pension Fund v. Custom Mech. CSRA, LLC*, 2009 WL 3294793 (S.D. Ga. Oct. 13, 2009), the pension fund assessed withdrawal liability against a withdrawn employer, Custom Mechanical Partnership. The owners of that entity had formed Custom Mechanical LLC to do the same type of work without union labor. Custom Mechanical Partnership was then dissolved; Custom Mechanical LLC thereafter performed non-union work in the jurisdiction of the collective bargaining agreement of the same type for which Custom Mechanical Partnership was previously obligated to contribute to the fund. The court found that Custom Mechanical Partnership and Custom Mechanical LLC were trades or businesses under common control because they were both exclusively owned and controlled by the same three people. Accordingly, the court stated that the two entities are to be treated as a single employer and held jointly and severally liable for withdrawal liability. The court further found that Custom Mechanical LLC received proper notice of the withdrawal liability and failed to timely initiate arbitration proceedings to dispute the assessment such that the total withdrawal liability was due and owing to the fund.

In *Central States, Southwest and Southwest Areas Pension Fund v. GWT 2005, Inc.,* 2009 WL 3255246 (N.D. Ill. Oct. 6, 2009), the magistrate judge addressed a motion to quash a subpoena for post-judgment discovery from a non-party. The subpoena commanded a former officer of the judgment debtor to produce his income tax returns and documents relating to certain other businesses. The court found the subpoena, although nominally directed to parties against whom the fund did not have a judgment, did not exceed the scope of post-judgment discovery because the withdrawal liability of the judgment debtor would extend to these other persons if the discovery established that they were trades or businesses under common control with the judgment debtor.

C. Shareholder, Director, of Officer Liability

In *Unite National Retirement Fund v. Rosal Sportswear, Inc.*, 2009 WL 331430 (M.D. Pa. Feb. 9, 2009)**,** an action brought by the plaintiff fund to collect liability from the withdrawn employer's sole shareholder and her relations, the court confined discovery to corporate veil-piercing and other collection-related matters, granting the Plaintiff Fund's motion to bar discovery relating to changes in the amount of withdrawal liability where the defendant employer failed to demand arbitration regarding the that liability.

After finding the withdrawn employer insolvent, the Plaintiff Fund initiated litigation to pierce the corporate veil against the sole shareholder and against the shareholder's relatives, seeking return of payments alleged to have been made to evade or avoid liability. *Id.,* *1-*3.

Defendants sought to explore changes in the employer's liability set forth in a series of letters and culminating in the liability demand. Defendants asserted entitlement to explore the varying liability amounts set forth in the letters and demand because the Fund identified them as a basis for its "evade or avoid" claim. *Id.*, *3. In response the Fund argued in part that the defendants were seeking to avoid their obligation to arbitrate issues concerning the amount of liability. *Id.*

The district court barred the requested discovery, finding that the changes in the withdrawal liability amounts were not relevant to the Fund's claims currently at issue. *Id.*, *4. The letters containing estimates were relevant not for the substance of the estimates, but because they "suggest that [employer] was aware that it was likely to incur withdrawal liability if the company ceased operations or otherwise withdrew from the Fund." *Id.* Accordingly, the evade or avoid claim only "requires a determination of whether payments made to [relations of the owner] were motivated by the knowledge of, and intent to evade or avoid, already-assessed or potential withdrawal liability." *Id.* The bases of the liability calculation were similarly irrelevant to the Fund's other claims. *Id.* The court also rejected the individual defendants' argument that they had received insufficient notice of liability, and should be permitted to explore the basis of the liability calculation. *Id., *5* Summing up, the court stated that it "will not ignore [MPPAA's arbitration and notice provisions] and now allow challenges to the trustees' calculation simply because the Fund alleges that [the sole stockholder] tried to avoid liability by transferring [assets to family]. *Id*.

In *Bakery and Confectionery Union and Industry International Pension Fund v. Wilson*, 2009 WL 1258592 (N.D. Cal. May 5, 2009), the court declined to dismiss claims against the individual beneficiaries of living trusts holding interests in a controlled group, because of the individuals' status as sole proprietors. *Id.*, *3.

In *Resilient Floor Covering Pension Fund v. M&M Installation, Inc.*, 2009 WL 2566721 (N.D. Cal. Aug. 18, 2009), the Fund sought to hold Simas Floor liable for M & M's withdrawal liability under alter ego, successor, and sham transaction theories. Simas floor countered that it could not be responsible for withdrawal liability as it was not an "employer" under MPPAA because it was neither under common control with M&M, nor the alter ego or successor of M&M. Although Simas did not dispute that the there were sufficient factors – common ownership, common management, interrelationship of operations and centralized control of labor relations – between the two companies to meet the alter ego commonality requirement, Simas argued that it was not an alter ego of M&M because the Fund had to prove that Simas was created for the purpose of avoiding the M&M's existing collective bargaining obligations.

The court disagreed, holding that because this was not a question of whether Simas Floor had any labor obligations, the second half of the alter ego doctrine created under labor law does not apply to claims for payments to a pension fund. Rather, the issue is whether keeping the two employers separate undermines the purpose of MPPAA. Holding that Simas was the alter ego of M&M, the court did not review the other theories of liability.

In *Board of Trustees, Sheet Metal Workers' National Pension Fund v. Redbird Heating & Cooling Enterprises*, 2009 WL 1608751 (E.D.Va. June 1, 2009), the court, in an uncontested matter, held that the federal common law and labor law standard of alter ego applied to the claim of withdrawal liability and not the corporate law alter ego standard.

D. Successor Employer Liability

In *CenTra, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 578 F.3d 592 (7th Cir. 2009), the court affirmed the district court decision that was discussed in the Committee's report last year. The Seventh Circuit interpreted ERISA § 4218's provision that a successor corporation shall be considered the original employer for purposes of withdrawal liability. There, two subsidiaries had merged into CenTra and ceased to exist as such leaving CenTra as the surviving corporation. CenTra then contributed certain assets and assigned certain liabilities to new subsidiaries, which new companies were in turn sold to a separate company, U.S. Truck. The issue in the case was whether the assessment against CenTra properly included the contribution histories of the old subsidiaries or, alternatively, whether those contribution histories were "inherited" by U.S. Truck.

The court found that CenTra inherited the contribution histories of the old subsidiaries under ERISA section 4218 as a consequence of the merger. It further found, however, that the "drop down" of assets and liabilities from CenTra to the new subsidiaries was not a "division," which the court explained generally means a sale of a subsidiary's stock rather than a transfer of only certain assets and liabilities. If there had been a division, then the successor entity, U.S. Truck, would have "inherited" the contribution histories of the old subsidiaries under ERISA section 4218. However, because the court found there was no division, the contribution histories of the old subsidiaries stayed with CenTra and were properly included in determining the amount of CenTra's withdrawal liability.

In *Central Pennsylvania Teamsters Pension Fund v. Bear Distributing Company, Inc.*, 2009 WL 812224, 47 EBC 1037 (E.D. Pa. Mar. 26, 2009), on summary judgment the court employed general principles of successorship liability under the National Labor Relations Act, Title VII of the Civil Rights Act of 1964, and the Age Discrimination In Employment Act. *Id.*, *8-*11. The court applied a familiar facts and circumstances approach, weighing such factors as whether the purported successor employs the same workforce, the same location, equipment, customers, ownership and management, *Id.*, *8. Noting also that the alleged successor must have notice of the claims of the predecessor, id., the court found that defendant Sheffer Beer was a successor of defendant Bear Distributing because of overlapping or identical ownership, management, equipment, business operations and workforces. *Id.*, *9-*10.

Similarly, in *Trustees of the Utah Carpenters' And Cement Masons' Pension Trust v. Daw, Inc., n/k/a Daw Construction Group, LLC*, 2009 WL 77856, 45 EBC 2703 (D. Utah Jan. 7, 2009**)** the court applied a National Labor Relations Act successor analysis to determine that the purchaser of a contributing employer's assets was liable as a successor for the employer's withdrawal liability.

Defendant Daw, Inc. was a Utah construction company whose employees participated in the Utah Carpenters' and Cement Masons' Pension Trust ("Plan"). After Daw's February 2004 sale of its assets, the purchaser formed Daw Construction Group, LLC ("DGC"), to which it assigned all Daw assets. DGC also assumed Daw's collective bargaining agreement with the Southwest Regional Council of Carpenters, which provided for contributions to the Plan. *Id.*, *1.

In July 2006 the Plan demanded withdrawal liability of $893,000 based on a January 2004 withdrawal, and in August 2006 asserted DGC's liability for Daw's obligation. *Id.*, *2. DGC did not demand arbitration, and the Plan filed suit seeking to collect Daw's withdrawal liability from DGC.

The court granted the Trustees' summary judgment motion, holding that DGC was responsible for Daw's withdrawal liability. Citing *National Labor Relations Bd. v. Tricolor Prods., Inc.*, 633 F.2d 266 (10^{th} Cir. 1980), the court considered the continuity of Daw's business following the asset purchase. The court noted that DGC had continued Daw's business, retained Daw's employees, made use of Daw's license, retained Daw's former principals, operated from Daw's previous location and continued to make payments to the Plan from a Daw account. *Id.*,*3.

The court did not consider whether, given DGC's continuing contributions to the Plan and the successorship finding, no withdrawal had occurred, or whether the requirements of ERISA section 4204 might have been met.

In *Resilient Floor Covering Pension Fund v. M&M Installation, Inc.*, 2009 WL 2566721 (N.D. Cal. Aug. 18, 2009), defendant M&M was created by one of the owners of Simas Floor to serve as a union signatory flooring contractor to allow non-union Simas Floor to bid on union jobs by subcontracting the work to M&M. After M&M ceased to contribute to the pension fund and was assessed withdrawal liability, it shut down operations and wound up its business, selling its only assets to Simas Floor. It was undisputed that there was sufficient commonality to find Simas Floor to be the alter ego of M&M. Nevertheless, defendants insisted that for Simas Floor to be liable for M&M's withdrawal liability the fund was required to prove that M&M was created for the purpose of evading the union employer's existing collective bargaining operations. The magistrate judge disagreed that was the correct question to ask and instead found that recognizing the separateness of the two employers would undermine the purposes of ERISA as amended by MPPAA.

X. Third Party Claims

In *Pittsburgh Mack Sales & Service, Inc. v. International Union of Operating Eng'rs, Local Union No. 66,* 580 F.3d 185, 47 EBC 2237 (3d Cir. 2009), the court rejected the argument that a contractual provision requiring the union to indemnify the employer in the event of withdrawal liability was unenforceable as against public policy. The parties' CBA provided for hourly contributions to a multiemployer pension fund and stated that the union would hold the employer harmless for any liability to the fund over and above the hourly contribution amount. After the employer ceased to have an obligation to contribute to the fund, the fund assessed withdrawal liability against the employer. The employer then sought to hold the union responsible for the withdrawal liability under the CBA's "hold harmless" provision. When the union refused to indemnify the employer, the employer filed a declaratory judgment action asking the court to declare that the CBA required the union to indemnify the employer. The union moved to dismiss the complaint on several grounds. The district court granted the union's motion to dismiss on the ground that the CBA's "hold harmless" provision was unenforceable as against public policy.

The Third Circuit vacated the district court's decision and remanded the case to the district court for further proceedings on the merits. Because it was deciding an appeal of a district court's grant of a motion to dismiss, it did not make factual determinations but rather accepted the facts as alleged in the employer's complaint as true. In particular, the court accepted the employer's contention that the CBA provision at issue constituted an agreement by the union to indemnify or hold the employer harmless from withdrawal liability, although the union apparently did not agree that was the intent of that provision.

The Third Circuit held that,

> [t]he purposes behind ERISA and the MPPAA—ensuring the pension funds will be adequately funded even when employers withdraw from them, and that the employees who are relying on those funds will be protected—will be served even if indemnification agreements between employers and third parties are permitted, so long as the employer remains primarily liable for the funding.

Slip op. at 14. In reaching its conclusion, the court stated that it was immaterial whether the "third party" bound by the indemnification provision was the union which would use employee dues to pay the indemnity. The court found that the employer had admitted in briefing and argument before the court that it would always remain primarily liable to the pension fund. Therefore, the court found that the employer's efforts to enforce a private contractual provision which may obligate the union to indemnify the employer for that statutory liability would not necessarily defeat the purposes of ERISA or MPPAA.

Eckerd Corp. v. J&S, Inc. 2009 WL 2596502 (D.N.J. Aug. 25, 2009) arose out of the settlement of a prior case, *Einhorn v. J&S, Inc.*, 577 F. Supp. 2d 752 (D.N.J. 2008). In *Einhorn*, the pension fund sought withdrawal liability from J&S, and J&S brought a third-party complaint against Eckerd Corp. alleging that Eckerd was liable as a joint employer. The court in *Einhorn* had granted Eckerd's motion to dismiss because there had been no exhaustion of MPPAA's required review procedures as to Eckerd. After the court dismissed Eckerd from *Einhorn*, the fund and J&S settled that case pursuant to an agreement that required J&S to pay the entire principal plus an additional amount that partially covered the interest, liquidated damages and attorneys' fees sought by the fund. The settlement agreement purported to assign to J&S the fund's rights, obligations and duties under MPPAA to pursue collection of the withdrawal liability assessment from Eckerd. It also specifically assigned to J&S the right to seek reimbursement from Eckerd for the settlement amount and the balance of the amounts sought in the *Einhorn* complaint in excess of the settlement amount. Eckerd then sued J&S for a declaratory judgment that these provisions were unenforceable as against public policy.

The court held that allowing a plan to assign its rights to recover withdrawal liability to a party that has already been assessed as an employer would undermine the intricate statutory framework designed to provide for the quick and informal resolution of withdrawal liability disputes. The court indicated that J&S could seek indemnification against Eckerd under common law. The court further invalidated the settlement agreement's provisions on the grounds that, to the extent that the fund could assign to J&S a right to act as its agent to collect from Eckerd, it could only assign the right to collect that amount that the fund had not already received from J&S, namely the balance of the amount assessed in *Einhorn* over the settlement amount that J&S paid to the fund.