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REPORT OF THE SUBCOMMITTEE ON MULTIEMPLOYER PLAN WITHDRAWAL LIABILITY

Prepared By:

Tim Eicher
Angie Hubbell
Dinah Leventhal
James O'Connell
Greg Ossi
Bruce Perlin
Robert Schwartz
Barry Slevin

DISCLAIMER

The opinions of Mr. Perlin are his alone and do not reflect the views of the PBGC

CHAPTER 17

MULTIEMPLOYER PLAN WITHDRAWAL LIABILITY

II. Determination and Assessment of Withdrawal Liability

B. Computation of Liability

In *Roofers Local No. 30 Combined Pension Fund v. D.A. Nolt, Inc.,* 719 F.Supp. 2d 530 (E.D.Pa. 2010), the court held that the fund improperly calculated the unfunded vested benefits liabilities. The fund had included the early retirement benefits of participants who had not satisfied the age and service requirements for such benefits at the time of the withdrawal. The court held that such benefits were not "nonforfeitable" within the meaning of ERISA section 4213(c). In its holding, the court relied on precedent in the Third Circuit, and rejected a contrary opinion from the Ninth Circuit, regarding the treatment of lump sum death benefits as nonforfeitable benefits when death had not yet occurred. The court also held that the fund was not permitted to increase the employer's withdrawal liability assessment retroactively based on a revised calculation of UVBs, and was estopped from modifying the employer's date of withdrawal when the fund had already assessed withdrawal liability based on an earlier date. Finally, the court ruled that the fund could not charge the employer pre-demand interest in its withdrawal liability assessment beyond the "gap year" between the date of withdrawal and the first day of the plan year following withdrawal.

4. Pension Protection Act Adjustments

Internal Revenue Code § 432(e)(9), added by the Pension Protection Act of 2006, provides that any reductions to adjustable benefits made as part of a rehabilitation plan for a plan in critical status must be disregarded in determining a plan's unfunded vested benefits ("UVBs") for purposes of determining an employer's withdrawal liability. Code § 432(e)(9)(C) directs the PBGC to provide guidance on simplified methods for the application of this statutory requirement and on July 15, 2010, the PBGC issued Technical Update 10-3. See, http://www.pbgc.gov/practitioners/law-regulations-informal-guidance/content/tu17263.html.

The initial change in the UVBs due to the reduction of adjustable benefits ("RAB pool") is amortized over 15 years and allocated to employers pro-rata based on contributions over the 5 years preceding the year of withdrawal. The adjustment procedure works as follows. First, the value of the RAB pool is determined as of the end of the year the adjustment was adopted and is written down at the valuation interest rate in effect that year. A withdrawn employer is charged an allocable share of the RAB pool as of the end of the plan year preceding its withdrawal which is added to the withdrawn employer's allocable share of UVBs determined under ERISA § 4211.

The guidance provides an example of how this calculation would be performed. The guidance indicates that the PBGC may supersede this guidance with regulations. It further indicates that the guidance is not binding on the public and states that if a plan sponsor wants to

use an alternative approach that satisfies the requirements of the applicable statutes and regulations, it may do so.

III. Definition of Withdrawal

E. Corporate Transfers and Mergers

In *Waldner v. Carr*, 618 F.3d838 (8th Cir. 2010), the Eighth Circuit considered the withdrawal liability implications arising out of a failed business acquisition. Waldner developed a business strategy to consolidate numerous struggling trucking companies, believing that a single consolidated entity would receive preferential treatment from the union and benefit from additional customer revenue. H & W Motor Express, Inc. was among the trucking companies that he sought to acquire in furtherance of his business strategy.

During the negotiation of a stock purchase, Waldner became aware of H & W's potential withdrawal liability to the Central States, Southeast and Southwest Areas Pension Fund. Nonetheless, Waldner moved forward. He signed numerous agreements in January of 2001, including a Memorandum of Understanding (HWK Memorandum) that outlined the transaction in which he would acquire H & W. Following the signing of documents, several shareholders of H & W stock ("HWK defendants") transferred their shares to Waldner. Waldner then began managing H & W. He also appointed a new board, became CEO of H & W and assumed full control over H & W's financials.

Waldner's business plan and several of the trucking companies he acquired failed. He transferred approximately $1.8 million in H & W's assets to other corporations with which he had substantial relationships and authorized H & W to file for bankruptcy in June of 2002. The HWK defendants demanded the return of the H & W stock that had been transferred to Waldner, but Waldner refused.

Subsequently, Central States filed suit against one of the related business entities owned and controlled by Waldner, claiming that the entity was liable for the withdrawal liability of H & K. Waldner then filed suit against the HNK defendants and others, making various claims relating to the HWK Memorandum and seeking declaratory and other relief. He specifically alleged an unjust enrichment claim relating to the withdrawal liability. Ultimately, the district court granted summary judgment to the defendants and dismissed each of Waldner's claims. The Court specifically found that it was not unjust for Waldner to be subject to H & K's withdrawal liability in light of the HWK Defendants' demand for return of their stock and Waldner's refusal to return the stock.

On appeal, the Eighth Circuit affirmed in all respects. In its discussion of the unjust enrichment claim, the court discussed the elements of the claim under applicable state law and concluded that the district court was correct in finding that the defendants had not been unjustly enriched because Waldner willingly placed himself in the position to be liable for H & W's withdrawal liability by denying the return of stock to the HWK defendants and retraining control over the management of H & W. The court held that Waldner could not now, when H & W was bankrupt, escape liability by simply returning the stock.

F. Sales of Assets

In *HOP Energy, LLC v, Local 553 Pension Fund*, 2010 WL 3398475, 49 EBC 2244 (S.D.N.Y. Aug. 26, 2010), the issue before the court was whether the parties to an asset sale complied with ERISA section 4204's requirement that the purchaser have an appropriate obligation to continue to contribute to the plan. The court found that on its face the purchase agreement did not comply with this requirement and that the appropriate time for determining whether the section 4204 requirements are met is at the time of sale and not dependent on the action of the parties thereafter. Although the purchase agreement required the purchaser to "make contributions to the [Pension Fund] for substantially the same number of contribution base units for which the Seller had an obligation to contribute," the following section negated any obligation created by the requirement. The next section of the purchase agreement stated that nothing in the relevant sections would impair the purchaser's right to terminate employees or the right to amend or terminate the collective bargaining agreement which could then reduce the number of contribution base units for which the purchaser was obliged to contribute.

In *Central States, Southeast and Southwest Areas Pension Fund v. King Chrysler Jeep*, 2010 WL 1197368 (N.D.Ill. Mar. 19, 2010), a sale of the assets of King Chrysler occurred, but the parties did not comply with the safe-harbor requirements of ERISA section 4204, thus triggering withdrawal liability. After receiving the Fund's notice of liability, King Chrysler failed to demand arbitration, and thus waived its defenses. The court also rejected its argument that the buyer's liability as a successor employer could constitute a defense to the liability of the seller.

In *Central States, Southeast and Southwest Areas Pension Fund v. Georgia-Pacific LLC,* 2010 WL 431674, 48 EBC 1997 (N.D. Ill., Feb. 2, 2010), the employer originally contributed to the fund on behalf of its employees working in its Pulp and Paper Transport Division and its Building Products Division. In 1994, it outsourced the covered work in the Pulp and Paper Transport Division and then closed that division entirely in 1995. Neither of those events gave rise to withdrawal liability. From 1994 to 1997, the employer reduced its contributions to the fund on behalf of employees in the Building Products Division and was assessed liability for a partial withdrawal. In 2004, the employer sold the Building Products Division in a sale that was intended to comply with ERISA § 4204's sale of assets exemption from withdrawal liability. The fund sent the employer a withdrawal liability assessment contending that the employer was still liable for withdrawal liability as a result of the sale because, based on the employer's reduced contributions prior to the sale, the asset sale was not the "sole" reason for the withdrawal as required by ERISA § 4204. In assessing liability, the fund excluded the contribution history for the employees whose contribution responsibilities were assumed by the purchaser in the asset purchase.

The arbitrator ruled in favor of the employer that the sale of the division was covered by the ERISA § 4204 exemption, and the arbitrator's decision was enforced by the district court. The arbitrator relied on the PBGC's analysis in PBGC Op. Ltr. 92-1 (Mar. 30, 1992), which the court then treated as persuasive authority. The arbitrator noted the following factors from that analysis: (1) the arbitrator found that the length of time between the earlier events, which occurred during 1994-1997 and the 2004 asset sale supported treating the events as distinct; and (2) the arbitrator found that there was no common scheme or pattern among the different events

and that the 2004 sale was motivated by distinct business considerations. The court found that the arbitrator's rulings on those issues were not clearly erroneous.

The fund further argued to the court that but for the earlier reductions in contributions, the sale of assets would not have constituted a complete withdrawal. The court noted that the "word 'cause' does not include every single occurrence without which a final event could not take place" such that but-for causation "often falls short of the meaning of cause in ordinary usage." Rather, the court stated that the "sole" cause within the meaning of ERISA § 4204 is the only cause that from a legal standpoint produces the withdrawal. The court held that the PBGC analysis was a sensible one for determining what was the sole cause so construed. The court concluded that the arbitrator's interpretation was more consistent than the fund's with congressional intent to encourage asset sales.

In *HOP Energy LLC v. Local 553 Pension Fund,* 2010 WL 3398475, 49 EBC 2244 (S.D.N.Y. Aug. 26, 2010), the employer, HOP Energy LLC ("HOP"), sold the assets of its Madison Oil Division to Approved Oil Co. ("Approved"). Prior to the sale of assets, HOP and Approved were both obligated to contribute to the fund. HOP and Approved entered into an Asset Purchase Agreement that was intended to provide an exemption from withdrawal liability for the seller under ERISA § 4204. Indeed, the fund stipulated that the parties to the sale had met the requirements of ERISA §§ 4204(a)(1)(B) and 4204(a)(1)(C). What was at issue in the case was solely whether the parties had met the requirements of ERISA § 4204(a)(1)(A). That paragraph requires that

> the purchaser has an obligation to contribute to the plan with respect to the operations for substantially the same number of contribution base units for which the seller had an obligation to contribute to the plan.

ERISA § 4204(a)(1)(A).

The arbitrator found that the parties to the sale of assets had not met that requirement. He reached that finding due to language in the Asset Purchase Agreement that he found negated that very obligation. Specifically, although the Asset Purchase Agreement first stated that "[t]he Purchaser shall make contributions to the Local 553 Pension Fund (the "Teamsters Fund") for substantially the same number of contributions base units for which Seller had an obligation to contribute with respect to the operations covered by the Teamsters Fund," the next sentence of the Agreement stated as follows:

> Notwithstanding the previous sentence and except as otherwise provided in Section 12.1, nothing in this Section shall impair or limit the Purchaser's right to discharge, layoff or hire employees or otherwise to manage the operations of the Business, including the right to amend, revise or terminate any collective bargaining agreement currently in effect and, as a consequence, reduce to any extent the number of contribution base units with respect to which the Purchaser has an obligation to contribute to any plan.

The Arbitrator found that this second sentence was a "negation" of the "otherwise clear promise" contained in the first sentence to contribute to the Fund for substantially the same number of contribution base units, as required by ERISA § 4204(a)(1)(A). Accordingly, the Arbitrator concluded that the sale of assets did not meet the requirements of ERISA § 4204(a)(1)(A) and, therefore, upheld the fund's assessment of withdrawal liability against the seller. The district court agreed with the arbitrator and confirmed the arbitration award.

VIII. Enforcement and Collection Disputes

A. Jurisdiction and Venue

In *Gastronomical Workers Union Local 610 v. Dorado Beach Hotel Corp.,* 617 F.3d 54, 49 EBC 2099 (1st Cir. 2010) the fund's actuaries determined for the 2005 plan year that the contributions to the fund would not be adequate to allow the fund to satisfy ERISA's minimum funding standard. The trustees notified the contributing employers that increased contributions were necessary as determined by the actuary, but the employers did not comply with that request. During calendar 2006, one contributing employer, Dorado Beach Hotel Corp. ("DBHC") withdrew from the fund and was assessed withdrawal liability. For that plan year and the next, however, DBHC agreed to make payments of $1,900,000 per year in accelerated withdrawal liability payments so as to enable the fund to avoid a funding deficiency. DBHC's scheduled withdrawal liability payments were adjusted to reflect the accelerated payments.

The trustees of the fund sued the contributing employers alleging that the employers failed to make sufficient payments to keep the fund in compliance with the minimum funding requirement of ERISA § 302(a). The district court granted the trustees' motion for summary judgment to the extent that it sought enforcement of the minimum funding requirements for plan year 2005. The court entered a judgment against each employer for a dollar amount representing the employer's pro rata share of the accumulated funding deficiency that had been reported at the end of the 2005 plan year. The employers appealed.

Among other arguments, the employers argued that the trustees caused the accumulated funding deficiency by mismanaging the fund's investments, but the court stated that ERISA's rules regarding whether a funding deficiency exists do not include investigations into the fund's management, which is an issue that could be raised in a suit for breach of fiduciary duty.

The employers also argued that when the district court entered judgment against them, the accumulated funding deficiency no longer existed. The Court of Appeals stated that if the employers' assertion that the accumulated funding deficiency had vanished was correct, then the district court judgment would enable the fund to, in effect, collect the same deficiency twice, which would be improper. Additionally, the Court of Appeals said that the dollar specific judgment was a legal remedy that may have exceeded the equitable relief available under ERISA § 502(a)(3). The Court noted that DBHC had made large payments during 2007 and 2008, after withdrawal liability had been assessed against it. Although the fund argued that these were withdrawal liability payments, which were distinct from contributions to cure a funding deficiency, the Court said that an accumulated funding deficiency is cured through infusions of cash into the plan regardless of whether that cash is paid as a result of that deficiency or as

withdrawal liability. For these reasons, the Court of Appeals vacated the judgment and remanded the case to the district court for further findings.

The trustees filed a post-judgment motion with the district court for attorneys' fees and costs, which the district court denied without comment. The trustees appealed. The Court of Appeals remanded this issue to the district court to reconsider in view of the Supreme Court's intervening decision in *Hardt v. Reliance Standard Life Ins. Co.,* 130 S. Ct. 2149, 2158 (2010), in which the Court indicated that a fees claimant under 29 U.S.C. § 1132(g)(1) must show "some degree of success on the merits," which cannot be a mere "trivial success on the merits" or a "purely procedural victory," but can fairly be called some success on the merits (presumably even if not total success as fees may be awarded to either side not just to the "prevailing" party). The First Circuit instructed the district court to determine in view of *Hardt* whether the trustees had achieved some degree of success on the merits.

In *Central States, Southeast and Southwest Areas Pension Fund v. St. Joseph Packaging, Inc.*, 2010 WL 4627654 (N.D. Ill. Nov. 4, 2010) the court granted the fund's motion for protective order and required defendants to seek their discovery and raise related defenses in the pending withdrawal liability arbitration, and not in the court action brought by the fund to recover interim payments.

Following St. Joseph Packaging, Inc's withdrawal from the fund, the fund determined that defendants were responsible for approximately $7.8 million in withdrawal liability. Defendants requested review, contending the liability should only be about half that amount, and ultimately initiated arbitration. Because defendants failed to make any interim payments required under MPPAA, the fund sued in federal court while the arbitration was pending.

In the court action, defendants sought extensive discovery from the fund concerning its assessment of withdrawal liability – ostensibly to support defendants' arguments in the court action that the withdrawal liability assessment was frivolous or that requiring interim payments would cause irreparable harm. The court granted the fund's request for a protective order, holding that the discovery requests did not relate to the issues before the court – whether the payments were due, and the frivolous/irreparable harm defenses – but instead related directly to issues that were being litigated in the arbitration and should be appropriately dealt with in that proceeding.

In *Central States Southeast & Southwest Areas Pension Fund v. Temp Excel Properties, LLC.*, 2010 WL 4735828 (N.D. Ill. Nov. 15, 2010) the court partially granted the fund's motion seeking certain documents that defendant claimed were protected under the attorney work-product doctrine. The defendant argued that it had notice that withdrawal liability potentially existed at the time of the asset purchase transaction that ultimately resulted in withdrawal liability, and that the documents at issue would not have been created "but for" the anticipation of litigation over withdrawal liability. However, the district court found no objective facts showing that defendant was resolved to litigate this matter prior to the date the fund issued a payment demand, and ordered defendant to produce relevant documents generated before such date.

In *Burke v. Lash Work Environments, Inc.* 2010 WL 1186336*,* 48 EBC 2534 (W.D.N.Y. Mar. 24, 2010), the employer ceased contributions to the pension fund in 1995, and the fund assessed withdrawal liability in 2001. The employer requested review and then initiated arbitration. Before completion of the arbitration proceeding, the parties entered into a September 2004 settlement agreement which purported to resolve their dispute over the withdrawal liability assessment. After the employer had made some but not all of the payments that were due under the settlement agreement, the employer notified the fund that it would be terminating its business operations and would not continue to make payments due under the settlement agreement. The fund sued the employer and another company that was owned by the son of the owner of the employer. The defendants moved to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1).

The court found that, once the parties entered into a settlement agreement that resolved their dispute over withdrawal liability, the nature of the payments changed from withdrawal liability payments owed under federal law to payments owed under a settlement agreement, which is a contract. The court further found that enforcement of the settlement agreement would not require adjudication of any substantive federal law issue. Accordingly, the court found that there was no federal subject matter jurisdiction and dismissed the case.

C. Arbitration of Withdrawal Liability Claims

1. Issues Subject to Arbitration

In *Asbestos Workers Local 24 Pension Fund v. NLG Insulation, Inc.*, 2010 WL 5464162, 50 EBC 1535 (D. Md. Dec. 29, 2010) the court held that the defendant employer could challenge the fund's withdrawal liability assessment in court despite foregoing arbitration because employer's argument was that it was *never* an employer for purposes of MPPAA and withdrawal liability, an issue properly determined by the court rather than an arbitrator. However, on summary judgment, the court ruled that the defendant was an employer covered by MPPAA and upheld the fund's calculation and assessment of withdrawal liability.

In *Hancock v. Cook County Waste and Recycling*, 2010 WL 1416978, 48 EBC 2823 (N.D.Ill. Apr. 5, 2010), the court granted summary judgment for the plan, holding that disputes of fact over whether a withdrawal occurred are irrelevant to judgment in district court, where the plan need only show that 1) the plaintiff is a multiemployer plan and the defendant was an employer under MPPAA; 2) the plan notified the defendant of its liability, and 3) the defendant failed to timely initiate arbitration.

2. Initiation of Arbitration

In *Penske Logistics, LLC v. Freight Drivers and Helpers Local 557 Pension Fund*, 377 Fed. Appx. 147, 49 EBC 1947 (3rd Cir. 2010) the Third Circuit affirmed a stay pending the outcome of arbitration entered by the district court. Penske had filed a declaratory judgment action seeking declaratory and injunctive relief as well as damages, claiming that the 557 Fund and its Trustees had failed to make a "determination" that Penske partially withdrew from the Fund as required by 29 U.S.C. §§ 1382 and 1399(b)(2).

The 557 Fund had sent a letter dated March 6, 2006 notifying Penske of its assessment of partial withdrawal liability in the amount of roughly $3.9 million. The assessment was based on a decline in contributions by Leaseway Motorcar Transport Company, an entity that had been in common control with Penske between 1996 until March of 2004. The letter set forth a payment schedule and demanded payment. Penske requested review and asserted that it was not liable for the withdrawal liability. After review, the Trustees declined to withdrawal the assessment, and Penske filed for arbitration.

During the pendency of arbitration, Penske filed suit in district court and subsequently filed a motion for summary judgment. The court denied the motion, finding that the letter notifying Penske of the withdrawal liability assessment and demanding payment was sufficient to trigger the arbitration provisions of MPPAA, and staying the case pending the outcome of arbitration. On appeal, the Third Circuit affirmed, finding that Penske had an adequate remedy because it could challenge its liability for the assessment in arbitration, the arbitrator's decision was reviewable in district court, and if Penske were to succeed, it could recover the interim payments plus interest from the 557 Fund.

In *Central States, Southeast and Southwest Areas Pension Fund v. C. & V. Leasing, Inc.*, 2010 WL 3024923, 49 EBC 1886 (N.D.Ill. July 30, 2010), the court held that Central States "promptly" objected to the timeliness of the employer's notice of arbitration by providing such objection seven days after receiving the notice of arbitration. In addition, the court held that Central States did not waive its objection to the timeliness of arbitration when it participated in the selection of an arbitrator with a statement that it was doing do without waiving its objection to the timeliness of the employer's demand.

In *Hancock v. Cook County Waste and Recycling*, 2010 WL 1416978, 48 EBC 2823 (N.D.Ill. Apr. 5, 2010), the court held that the employer's letter to the union asking about the status of the CBA did not qualify as a letter initiating arbitration.

In *Einhorn v. Kaleck Brothers*, 713 F.Supp. 2d 417, 49 EBC 1225 (D.N.J. 2010), the court held that a conversation between a fund trustee and one of the employer's owners did not justify equitable tolling of the deadline for the employer to demand arbitration with respect to an assessment of a complete withdrawal. The employer asserted that a fund trustee said that if it hired a union employee, it would not have to worry about withdrawal liability. The court found this insufficient to show that the fund misled the employer, since the fund sent the employer's attorney a letter, prior to the expiration of the deadline to demand arbitration, advising that the fund intended to pursue the assessment despite any issue concerning the hiring of a union employee. Because the employer failed to demand arbitration within the required period, the court granted summary judgment for the fund. The employer also argued that MPPAA was unconstitutional because it allowed an arbitrator to interpret the statutory definition of complete withdrawal, but the Court found it unnecessary to address the question since no arbitrator decision would take place in the case, due to the employer's failure to timely demand arbitration.

In *Operating Engineers' Pension Trust Fund v. Fife Rock Products Company*, 2010 WL 2635782 (N.D.Cal. June 30, 2010), the court held that the employer had initiated arbitration under ERISA section 4221(b)(1), and consequently the employer had not waived its defenses to

the withdrawal liability assessment. The court based its conclusion on the language in a letter from the withdrawing employer to the fund requesting arbitration and the course of conduct by the employer and fund during subsequent settlement discussions. The court distinguished another case where an employer's conditional request for arbitration, upon the eventual failure of pre-arbitration settlement negotiations, was held not to be an initiation of arbitration under ERISA.

E. Default

In *Central States v. O'Neill Bros. Transfer & Storage Co.*, 620 F.3d 766, 49 EBC 2282 (7th Cir. 2010), the Seventh Circuit distinguished between a non-payment default and an insecurity defaults, concluding that MPPAA contains no restrictions on the ability of a pension fund to declare a default based on insecurity during a pending arbitration.

The court found no indication that default payments should be treated differently from any other withdrawal liability payments, which must be made before an arbitration decision on the accuracy of the liability itself is made. The PBGC, as the agency charged with interpreting the statute, had been provided the opportunity to file a brief in this matter. In its brief, the PBGC distinguished the rules applicable to the two different types of default, indicating that the non-payment default provision contains language that prevents a finding of default for non-payment during arbitration. Specifically, the non-payment default provision indicates that a default for non-payment cannot be determined until a payment is not made "when due." Because the arbitration process determines when a payment is due, a payment cannot be late until that date is determined in the arbitral process. In contrast, the insecurity default provision contains no such requirement. Because the language is absent, the statute does not restrict a plan's ability to declare a default. The PBGC indicated that this was an important distinction that permitted a plan to protect itself by declaring a default at any time. Finding this interpretation reasonable, the Seventh Circuit deferred to the PBGC.

In *Central States v. Telegraph Paving Company,* 2010 WL 3516169, 49 EBC 2359 (N.D. Ill. Aug. 31, 2010), the fund simultaneously assessed withdrawal liability and determined that there was a substantial likelihood that Telegraph would be unable to pay the assessment. The Fund's determination was based on Telegraph's expressed intent to cease operations and Telegraph's previous failure to pay withdrawal liability until the Fund obtained judgment against it. The Fund required Telegraph to pay the entire withdrawal liability in a lump sum rather than providing a schedule of payments. Telegraph requested review, which the Trustees considered and denied. Telegraph timely initiated arbitration, but it had not paid any withdrawal liability during the arbitration.

Ordinarily, an employer pays interim withdrawal liability payments according to a schedule provided by the Trustees. The MPPAA statute provides mechanisms for the Fund to accelerate the payment scheduled based on either of two events labeled as "defaults." The first is a default based on the failure to make a payment when due, if the failure to make payment is not cured within 60 days of Notice of such failure. The second is any other event defined in rules adopted by the Fund which indicate a substantial likelihood that an employer will be unable to pay.

The Fund did not provide a payment schedule. Instead, it determined that the second type of default occurred before sending the notice and demand for payment. Telegraph did not challenge the notice and demand as void for lack of a payment schedule. Rather, it argued that the Fund cannot require it to pay accelerated interim payments because it has demanded arbitration. Telegraph relies on regulations that indicate that a default cannot occur until the arbitration has concluded and points out that the Seventh Circuit, in interpreting this regulation, has previously concluded that the Fund cannot accelerate payments, though the employer must still pay interim payments according to the payment schedule.

The court found Telegraph's argument inapplicable because the Fund had not relied upon the statutory provision affected by the regulation Telegraph cited when deciding to accelerate the payment. The Fund instead relied on 29 U.S.C. §1399(c)(5)(B) which permits acceleration due to "any event defined in rules adopted by the plan which indicate a substantial likelihood that an employer will be unable to pay." The court then considered whether the Fund was entitled to accelerate under §1399(c)(5)(B). The Fund had established criteria for determining when an employer is unable to pay withdrawal liability. Among the criteria were an employer's insolvency, bankruptcy, failure to pay debts when due, and "any other event or circumstance which in the judgment of the Trustees materially impairs the employer's creditworthiness or the employer's ability to pay the withdrawal liability." Based on these criteria, the Fund determined that the employer was substantially likely to be unable to pay.

After reviewing the Fund's rules and the rationale the Fund used in concluding that Telegraph was substantially unlikely to be able to pay, the court concluded that the Fund had made an appropriate determination, could lawfully accelerate payment, and that Telegraph was required to pay interim withdrawal liability to the Fund in the full amount of the assessment. The court also noted that the failure to pay interim withdrawal liability is treated as a failure to make delinquent contributions and that Telegraph was also required to pay interest, liquidated damages, and reasonable attorneys' fees and costs.

F. Collection of Payments Pending Arbitration

In *Central States, Southeast and Southwest Areas Pension Fund v. Heineman Distributing, Inc.*, 2010 WL 3404970 (N.D.Ill. Aug. 26, 2010), the court denied the employer’s motion to dismiss for lack of subject matter jurisdiction based on its argument that a multiemployer plan must arbitrate before it can file a claim for action of payment in a withdrawal liability case. The court also dismissed the employer’s motion to dismiss for failure to state a claim upon which relief can be granted that argued the plan cannot seek interim withdrawal liability payments.

In *Hancock v. Cook County Waste and Recycling*, 2010 WL 1416978, 48 EBC 2823 (N.D.Ill., Apr. 5, 2010), the court held that the defendants did not establish the requirements for being excused from interim payments – severe financial hardship and lack of a colorable claim by the plan.

In *National Shopmen Pension Fund v. DISA Industries*, 2010 WL 1251446 (N.D.Ill. Mar. 24, 2010), an Illinois district court addressed the formula for determining interim payments, and *res judicata* as a defense to an interim payments suit. ERISA §4219(c)(1)(C)(i) requires the annual interim payment to be calculated on the basis of the "average number of contribution base units for the period of 3 consecutive plan years …" in the last 10 "in which the number of contribution base units for which the employer had an obligation to contribute under the plan is the highest." The employer had only participated in the plan for 2 years before it withdrew, but the plan used a 3 year period in calculating the interim payments, which reduced the amount of each payment. The employer began making interim payments, and demanded arbitration. The plan then discovered its mistake, recalculated interim payments based on a 2-year period, and sued for the higher amount (in the District of Columbia). The D.C. court dismissed, saying the amount of interim payments could be adjusted by the arbitrator. The employer dismissed its arbitration, without objection by the plan. Then the plan sued in Chicago, for the higher interim payment amount.

Interpreting ERISA §4219(c)(1)(C)(i), the court held that the statute required the plan to use a three-year average, even if the employer had only participated in the plan for two years. On the *res judicata* issue, the court ruled in the fund's favor, finding that the D.C. court's statements on the appropriate formula were dicta.

The case is on appeal to the 7th Circuit. After oral argument, the panel invited the PBGC to file an amicus brief which the PBGC has since filed. In their brief, the PBGC argued that by failing to arbitrate, DISA waived its right to contest the annual payment schedule established by the fund. The PBGC also argued that the fund incorrectly calculated DISA's annual payment of withdrawal liability because it ignored ERISA's requirement to use three consecutive plan years in its formula for determining the highest annual number of contribution base units.

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

In *Operating Engineers' Pension Trust v. Clark's Welding*, 688 F. Supp. 2d 902, (N.D. Cal. 2010), the employer raised a variety of defenses in response to the withdrawal liability assessment including laches, a prior settlement agreement concerning a delinquency action, the doctrine of unclean hands, and estoppel. The court found that the laches defense was waived by the failure to initiate arbitration. With respect to the prior settlement agreement, the court found that this was not waived as an affirmative defense by the failure to initiate arbitration, but nonetheless found the settlement did not release defendants from liability. Having found that the prior release was not effective as a release of withdrawal liability, the court found that unclean hands was not a defense. Last, the defendant argued that the fund had misrepresented the availability of arbitration and was therefore estopped from seeking the claim. The court disagreed finding that the fund's letter did not misrepresent the availability of arbitration.

In *Board of Trustees, Sheet Metal Workers' National Pensions Fund v. Steinbruner Heating and Cooling*, 2010 WL 2105161 (E.D.Va. May 25, 2010), the court rejected the employer's argument that a prior finding of liability for delinquent contributions should operate

as a bar to the collection of withdrawal liability. The court reasoned that withdrawal liability is a separate cause of action from liability for delinquent contributions.

In *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Transworld Port and Distribution Services*, 2010 WL 1706186 (D.N.J. Apr. 26, 2010), the court applied the *Iqbal* standard to a complaint for interim payments, and held that all that is required is an allegation of a demand for interim payments and a failure to pay.

In *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. El Paso CGP Co.,* 2010 WL 310044, 48 EBC 2686 (N.D. Ill. Jan. 20, 2010), the employer withdrew from the fund in 1998 and filed bankruptcy in 1999. The fund filed a proof of claim in the bankruptcy case including a payment schedule but no first payment due date. The fund did not receive a response or any payments. The defendants' attorney discovered the claim in 2001 but did not respond to it. In November 2004, the fund sent defendants a notice and demand letter with a payment schedule providing that the first payment was due on December 1, 2004. When no payment was made on that date, the fund filed a collection action in December 2004. In February 2005, the employer requested review and in August 2005, the employer initiated arbitration.

The district court initially found for the fund on liability, and the case was appealed to the Seventh Circuit. The Seventh Circuit found that the defendants had actual notice of the proof of claim not later than January 1, 2002 after their attorney found the claim in late 2001. The court further found that the defendants' actual notice at that time triggered the duty to arbitrate such that the defendants' August 2005 arbitration demand was untimely and the defendants had waived any defenses to liability. The Seventh Circuit remanded the case to the district court on the issue of damages.

In order to determine damages on remand, the district court had to determine the due date of the first payment. Although the payment schedule that was submitted as a proof of claim did not contain a first payment due date, the district court found that the first payment due date was not later than 60 days after the notice and demand were received per MPPAA's default payment rule set forth in 29 U.S.C. § 1399(c)(2). Accordingly, the court found that the defendants had received the proof of claim not later than January 1, 2002, and the first payment was due not more than 60 days thereafter or on or before March 2, 2002. The district court rejected the defense of judicial estoppel, explaining that it did not fit well with the facts of this case because the fund had only changed its position on the initial payment due date because it was directed to do so by the court.

Because the defendants made interim payments during the course of the litigation, the district court had to determine how much money was still owed. The Seventh Circuit had noted that the federal common law "United States Rule," which instructs that payments should be applied first to accrued interest and then to principal, applied in this case. Accordingly, the district court determined that the interim payments paid were to be applied first to accrued interest on principal from the March 2, 2002 due date, and from that determined the remaining principal and interest owed by the defendants.

I. Bankruptcy Issues

In *Sheet Metal Workers Local 22 Funds v. Valenti,* 2010 WL 2326249 (D.N.J. June 7, 2010), multiemployer plans were owed withdrawal liability payments and delinquent contributions. The court found that the employer's grant of a mortgage on certain property by the employer to the employer's law firm was not a fraudulent conveyance under New Jersey law that was intended to conceal assets from the creditor multiemployer benefits funds. The plaintiff funds presented insufficient evidence of the employer's intent to defraud, where the amount of the mortgage was equal to and in lieu of the amount owed by the employer to the firm in legal fees, there was no evidence that the employer concealed the transaction, and attorneys were generally not considered "insiders" under New Jersey fraudulent conveyance law.

IX. Co-Employer Liability

In *Operating Engineers' Pension Trust Fund v. Clark's Welding and Machine*, 2010 WL 1729475 (N.D.Cal. Apr. 27, 2010), the court held that generally partners are personally liable for obligations of the partnership, so where the contributing employer was a partnership, withdrawal liability would be a liability of the individual partners. The court also awarded attorney's fees, determining the lodestar amount (reasonable hours x reasonable hourly fee), and rejected defendant's argument for a significant reduction of that amount.

A. Definition of "Employer"

In *Resilient Floor Covering Pension Fund v, M & M Installation*, ___ F.3d ___, 2010 WL 5175008 (9th Cir. Dec. 22, 2010), the 9th Circuit considered whether a non-union company may be liable for the withdrawal liability incurred by a union company on an alter-ego theory. Resilient Floor Covering Pension Fund filed suit against Simas Floor Co. Inc., a non-union employer, and M&M Installation Inc., a union employer Simas Floor created to handle union flooring work. The Fund sought to collect withdrawal liability from M&M and Simas Floor after M&M closed its business operations and stopped making contributions to the fund.

The district court granted summary judgment to the Fund, ruling that Simas Floor was M&M's alter ego because the two companies had sufficient commonality and because treating the two entities as separate entities would undermine the purposes of MPPAA. It also ruled that the Fund was not entitled to accelerate the liability because no default had occurred under 29 U.S.C. § 1399(c)(5), a ruling which the court of appeals affirmed based on the plain language of the statute.

Neither party challenged the availability of the alter ego doctrine under the MPPAA, and the district court did not consider whether the application of the alter ego was consistent with evade or avoid provisions of MPPAA. As a result, the court of appeals assumed, for purposes of this appeal, that the alter ego doctrine is available under MPPAA to hold a non-union entity liable for the withdrawal liability of a union employer. It pointed out the applicable alter ego standard in the 9th Circuit is the two-part alter ego test from the case *UA Local 343 v. Nor-Cal*

Plumbing, which requires proof: (1) that the two entities have common ownership, operations, management, and labor relations, and (2) that the non-union entity is a sham and used to avoid collective bargaining obligations.

Simas Floor conceded that the commonality element of the test was met. But, the 9th Circuit found that the district court ignored the second element of *Nor-Cal* and improperly focused on the more narrow question of whether recognizing the separateness of the two employers would undermine the purposes of the MPPAA. The 9th Circuit noted that there was evidence that M&M and Simas Floor used Simas Floor to avoid M&M's withdrawal liability, including the facts that M&M received all of its contracts and income from Simas Floor, and M&M passed profits through to Simas Floor rather than itself taking a profit.

Because the district court applied a standard differing from that set forth in *Nor-Cal*, as modified for the withdrawal liability context, the 9th Circuit remanded that aspect of the case. It directed the district court to determine whether the alter ego doctrine is applicable in the withdrawal liability context, and if it determines that it is applicable, to consider the evidence in light of the appropriate *Nor-Cal* standard in the first instance.

In *Ret. Plan of UNITE HERE Nat. Ret. Fund v. Kombassan Holdings A.S.*, ___ F.3d ___, 2010 WL 5157156 (2d Cir. Dec. 21, 2010) the court affirmed the district court decision holding defendant responsible for withdrawal liability under alter ego theory. Defendant, in order to circumvent prohibitions on foreign investments under Turkish law, purchased company but assigned control of company stock to four related entities. Nonetheless, defendant retained actual, if not legal, control of company—company board was entirely composed of defendant personnel; defendant, company, and four related entities shared the same chairperson; defendant directly and indirectly held 100% of company stock; and defendant controlled company board at company's bankruptcy proceeding. Notwithstanding these commonalities, defendant argued that the alter ego doctrine was inapplicable because four related entities were not successor entities but rather existed simultaneously, assignment of company stock to related entities was not executed in order to avoid collective bargaining agreement obligations, and facts did not demonstrate that defendant held any anti-union animus. The court rejected these arguments, and stated that it was employing a flexible, facts and circumstances alter ego test to further the public policy of binding a non-signatory to a collective bargaining agreement where necessary to prevent the evasion of labor law obligations by sham transactions or technical changes in operation.

B. Controlled Group Liability

In *Teamsters Joint Council No. 83 of the Virginia Pension Fund v. Weidner Realty Associates*, 377 Fed. Appx. 339, 48 EBC 2929 (4th Cir. 2010), the fund and its trustees appealed a district court order granting judgment in favor of Weidner in an action seeking to hold Weidner and Empire Beef Co. Inc. jointly and severally liable for unpaid withdrawal liability that Empire incurred when it closed operations in Virginia.

Weidner is a general partnership, originally formed to purchase a parcel of land in Rochester, New York. The parcel subsequently became a slaughterhouse, which Empire was

formed to operate. In 1993, the partners to Weidner formalized their arrangement by entering into a partnership agreement. The partners were Empire, Empire's sole shareholder, Steven Levine ("son"), and his father, Sidney Levine ("father").

In 2002, Empire expanded its operations into Richmond, Virginia and became a party to a collective bargaining agreement requiring contributions into the Fund. Empire closed its operations in Richmond in 2005, incurring approximately $500,000 in withdrawal liability to the fund. Empire made interim payments until it filed a Chapter 11 bankruptcy in September of 2007. On January 5, 2008, while the bankruptcy proceedings were still pending, son entered into an agreement where he transferred all of Empire's assets other than accounts receivable to father, in exchange of release of $1.4 million of secured debt that Empire owed father (Composition Agreement). Shortly thereafter, the bankruptcy court dismissed Empire's proceeding without discharging Empire's debts.

The fund then notified Weidner that it was jointly and severally liable for the remaining unpaid withdrawal liability on the grounds that Weidner was a member of Empire's control group. When Weidner refused to pay, the fund filed suit against Empire and Weidner to recover the remaining withdrawal liability. Empire did not contest its liability, but Weidner disputed liability, asserting that it was not a trade or business and that it was not under common control with Empire.

The fund argued that the Composition Agreement should be set aside because it was designed to evade or evade withdrawal liability, and that Empire and Weidner should be found in common control. The district court ultimately agreed with Weidner, declining to address the validity of the Compositions Agreement on the grounds that it could not consider an agreement entered into after Empire had withdrawn from the fund, and found that the fund had failed to prove that Weidner and Empire were under common control.

The Fourth Circuit reviewed the underlying statutory language, and pointed out that the determination of whether and entity is a trade or business under common control with the withdrawing employer is a determination that is to be made at the time of the withdrawal. The withdrawal occurred on September 30, 2005, at which time son was the sole shareholder of Empire and therefore had a controlling interest and effective control of Empire. Thus, the remaining question was whether son also had a controlling interest and effective control of Weidner.

Under applicable regulations, a controlling interest in a partnership is ownership of 80 percent or more of the capital interests or profits interest of the partnership. In the partnership context, effective control is ownership in the aggregate of more than 50 percent of the capital interests or profits interest of the partnership. A capital interest in a partnership is "an interest in the assets that is distributable to the owner of the interest" on liquidation. Son is imputed the ownership of Empire under ERISA, and as a result, both son and father own a 50% interest in Weidner. Because son did not own more than 50% of Weidner's capital interests, he did not have effective control over Weidner, and Weidner was not part of Empire's control group.

The fund argued that language in the partnership agreement addressing "Capital Accounts" should be found to supersede the IRS definition of capital interest and that each partners' capital account rather than their percentage interest should be used in determining effective control. Both the district court and the Fourth Circuit rejected this argument, finding that the partnership agreement addressed the amounts to be paid to each partner upon liquidation in a specific section of the agreement and that that section was controlling.

Lastly, the Fourth Circuit found that the district court failed to properly consider whether the principle purpose of the Composition Agreement was to evade or avoid withdrawal liability and remanded to the district court for further proceeding. Specifically, the court noted that while the determination of who is an employer should be made based on the facts at the time of the withdrawal, it would thwart MPPAA remedial purposes for find that the evade or avoid provisions apply only to pre-withdrawal transfers rather than transfers made subsequent to the liability.

In *Board of Trustees, Sheet Metal Workers' National Pension Fund v. Palladium Equity Partners, LLC*, 722 F.Supp. 2d 845, 2010 WL 2787436 (E.D. Mich. 2010), the Fund argued for summary judgment that three limited partnerships and a private equity firm should be liable for a bankrupt company's withdrawal liability as owners of the bankrupt company. Although the entities together owned more than 80% of the total combined voting power and value of outstanding stock no single entity owned over 80% of the shares. Rather, the Fund argued that that these entities were liable as either (1) partners or joint venturers; or (2) alter egos. The court held that there were sufficient facts in dispute that summary judgment was not warranted on either claim.

In *Central States v. SCOFBP, LLP*, 2010 WL 3613977, 49 EBC 2431 (N.D. Ill. Sept. 8, 2010), the fund filed suit against a corporation and two limited liability companies, claiming controlled group liability. The case turned on application of the common control test. Although there was a complicated tangle of ownership interests, the court concluded the defendants were part of the same controlled group. Specifically, under the applicable regulations, there was 100 percent actuarial interest in family trusts and nothing in the trust documents limited discretion to use trust assets for the individual's benefit. Among the trust assets were controlling interests in the defendant limited liability companies.

In *Board of Trustees Of Plumbers, Pipe Fitters & Mechanical Equipment Service, Local Union 392 Pension Fund v. Airstream Mechanical*, 2010 WL 3656036 (S.D. Ohio Aug. 11, 2010), the court held that to survive a motion to dismiss a claim that defendants are liable for withdrawal liability as members of a controlled group, the plan must allege some facts that support this theory. The court dismissed the claim because the plaintiff plan's complaint only contained a naked allegation that the defendant corporations were in common control with the withdrawing employer.

In *Sheet Metal Workers Local 22 Pension, Welfare, Annuity, Education, Training and Industry Funds v. Valenti*, 2010 WL 3515580 (D.N.J. Aug. 30, 2010), the court held that a husband and wife that owned and leased property to the withdrawn employer were partners in a trade or business that was in common control with the employer. The court also found that the

husband was personally liable under a veil-piercing theory because of the entity's gross undercapitalization, failure to observe corporate formalities, insolvency and the personal siphoning of corporate funds. The court, however, rejected the plan's argument that the wife should also be personally liable because she owned no stock in the entity. The court held that the plan could not make the requisite showing of control where an individual owns no stock in an entity.

In *Harrell v. Eller Maritime Company*, 2010 WL 3835150 (M.D. Fla. Sept. 30, 2010) the Fund filed suit against two entities that were in common control with Eller & Company, a withdrawing employer that did not pay its withdrawal liability, alleging that they were liable for withdrawal liability, plus pre-judgment and post-judgment interest, liquidated damages, and attorneys' fees and costs. The Fund voluntarily dismissed the claim against Eller Maritime Company, but moved for summary judgment on its claim against Continental Stevedoring & Terminals, Inc. The Fund established that it had provided notification to Eller and all the trades and businesses under common control with Eller that Eller had completed withdrawn from the Fund and that they were liability for the withdrawal liability. Neither Eller nor any of the businesses under common control with it initiated arbitration.

Continental challenged summary judgment on the grounds that the Fund failed to establish ERISA subchapter III applied to Continental and that the issue of whether Continental was a "trade or business" was not an issue that could be resolved on summary judgment. Continental did not produce any evidence in support of its challenge to the applicability of subchapter III. The Fund submitted a favorable determination letter as a qualified retirement plan, which the court found as sufficient to determine that subchapter III applied.

The Fund argued that Continental waived its right to litigate its status as a trade or business by failing to initiate arbitration. The court rejected this position, finding that the issue of whether an entity is a trade or business such that it is an "employer" within the meaning of MPPAA cannot be an issue within the exclusive purview of arbitration. The court then considered the merits of Continental's position and found that Continental had taken actions beyond the role of a passive shareholder. As such, the court found that Continental was a trade or business and therefore an employer for purposes of MPPAA. It also noted that its ruling was in keeping with MPPAA's purpose of preventing entities from escaping liability by simply compartmentalizing their operations into multiple operations.

Continental did not challenge whether it was under common control with Eller, and the finding that Continental was engaged in activities for profit on a continuous basis was sufficient to determine that it was an employer within the meaning of MPPAA. As a result, the court found Continental liable for the full amount of withdrawal liability and instructed the Fund to file an updated calculation of interest and statutory penalties.

In *Trucking Employees of North Jersey Welfare Fund v. Caliber Auto Transfer, Inc.,* 2010 WL 2521091 (D.N.J. June 11, 2010), the court declined to dismiss plaintiff pension and welfare funds' ERISA claims, including withdrawal liability claims, based on a control group theory of liability. The court found plaintiffs' allegation that some combination of a group of seven individuals held all stock of the related corporations sufficient to pass Rule 12(b)(6)

scrutiny, even though the allegations did not contain specific facts regarding the individual defendants' voting rights. The court also declined to dismiss the case based on claim preclusion, where the funds had previously sued the corporation and were now suing additional parties in the alleged controlled group on the same claims. It reasoned that controlled group withdrawal liability is analogous to joint and several liability, and thus escapes claim preclusion.

D. Successor Employer Liability

In *Central States v. King Dodge, Inc.*, 2010 WL 2990117 (N.D. Ill. July 27, 2010), the withdrawn employer contested its continuing liability for making withdrawal liability payments in accordance with the payment schedule provided by Central States because a successor employer should be liable. The court disagreed, holding that even if a successor employer is liable for withdrawal liability of its predecessor, such liability does not excuse the original employer from liability. Rather, a liable successor employer is only secondarily responsible for payment.

In *Board of Trustees of UNITE HERE Local 25 and Hotel Ass'n of Wash. D.C. Pension Fund v. MR Watergate LLC,* 677 F. Supp. 2d 229, 48 EBC 2368 (D.D.C. 2010), the employer obtained a loan from PB Capital to purchase the Watergate Hotel in 2004 and entered into a collective bargaining agreement that required contributions to the fund. In 2007, the employer closed the hotel and ceased contributing. PB Capital thereafter foreclosed on the building. The fund then assessed withdrawal liability against the employer and against PB Capital as a successor in interest. PB Capital filed a motion to dismiss for failure to state a claim under Rule 12(b)(6).

The court recited the general common law rule that a corporation that purchases another corporation's assets does not succeed to its liabilities, but the court noted the exception to that rule in the labor context known as successor liability. The court then set forth the elements of the successor liability doctrine in the D.C. Circuit but noted that the D.C. Circuit has not yet had occasion to apply the doctrine of successor liability in the context of withdrawal liability. The court noted that, in other courts, the determinative factor in the test for successor liability is whether there was substantial continuity of business operations between the seller and purchaser corporations.

The court granted the motion to dismiss because it found the allegations in the complaint were mere "threadbare recitals" of the elements of a cause of action for successor liability with no facts alleged to support those elements. Moreover, the court noted that the facts alleged in the complaint did not support the elements of the cause of action in that the employer had closed down the hotel, and PB Capital was a lender that had foreclosed on the property but had not resumed hotel operations. Because the successor had not resumed operating the hotel, the court found that it could not be said that there was substantial continuity of business operations as between the predecessor and successor companies.