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**REPORT OF THE SUBCOMMITTEE ON
MULTIEMPLOYER PLAN WITHDRAWAL LIABILITY**

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DISCLAIMER

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

II. Determination and Assessment of Withdrawal Liability

B. Computation of Liability

In *Roofers No. 30 Combined Pension Fund v. D.A. Nolt, Inc.*, 2011 WL 2938104 (3d Cir. July 22, 2011), the plan challenged the district court's decision finding that the plan's recalculation of the unfunded vested benefits underlying Nolt's withdrawal liability was improper. The district court's decision was previously discussed in the Subcommittee Report for the 2011 Midwinter meeting. By way of background, the plan had initially assessed liability using \$2.7 million in unfunded vested benefit liability and four years later revised the assessment using \$12.8 million in unfunded vested benefit liability. Nolt challenged the re-assessment in arbitration, where the arbitrator found the reassessment was improper. The arbitrator's decision was affirmed by the district court, and the plan challenged that decision.

The plan argued that it did not improperly calculate the unfunded vested benefits liabilities by including early retirement and post retirement survivor benefits because these benefits did not include age and death entitlement conditions. Second, the plan argued that it should not be estopped from correcting the actuary's error, which would result in the retroactive calculation of withdrawal liability because ERISA and IRS rules required the correction. Third, it argued that the actuary's error was not significant, pointing out that the background and mechanics of the actuary's calculation were mostly undisputed and that the repayment schedule and the actuarial data and assumptions were correct. Finally, the plan argued that it was entitled to pre-demand interest. As to each of these issues on appeal, the Third Circuit simply affirmed the district court's decision in its entirety without adding any analysis or additional conclusions.

2. Actuarial Assumptions and Methods

In *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent Pension Fund) v. CPC Logistics, Inc.*, 2011 WL 3471087 (N.D. Ill. Aug. 8, 2011), the court rejected the fund's motion to vacate or modify the arbitrator's award. The arbitrator had found that the fund's calculation of withdrawal liability violated ERISA § 4213 because the calculation was not made on the basis of the interest rate assumption that represented the fund actuary's best estimate.

After the Supreme Court's decision in *Concrete Pipe and Products of Cal., Inc. v. Construction Laborers Trust for S. Cal.*, 508 U.S. 602 (1993), the fund adopted a resolution in 1996 requiring the fund's actuary to calculate the UVB liability with two different interest rate assumptions: the interest rate that represented the actuary's "best estimate" (*see* ERISA § 4213), *i.e.*, the blended rate developed by actuaries at the Segal Company ("Segal Blend"), and the plan's funding assumption rate. The Trustees' resolution required the use of the Segal Blend unless that rate resulted in a higher amount of withdrawal liability than use of the plan's funding assumption did.

The Trustees' resolution requiring this "lesser of the two" approach was repealed in 2004. The arbitrator found that the pool for the 2004 plan year was correctly calculated using the Segal Blend but was distorted by the change in the interest rate assumption from the prior year such

that the employer's allocated withdrawal liability for the entire period was greater than it would have been if the Trustees had simply used the Segal Blend method in all years.

The arbitrator had found that the capped UVB methodology required by the plan during 1996-2004 did not represent the actuary's best estimate and, therefore, violated ERISA § 4213. The court agreed with the arbitrator's interpretation of that section and further found that the arbitrator's award, which required the fund to recalculate the employer's withdrawal liability as if the fund had never adopted the capped UVB methodology, was within the arbitrator's authority.

E. Notice of Withdrawal Liability

In *Labarbera v. United Crane and Rigging Services, Inc.*, 2011 WL 1303146, 50 EBC 2238 (E.D. N.Y. Mar. 2, 2011), the court determined that the fund could collect withdrawal liability against a sole proprietor in common control with the withdrawing employer. The sole proprietor, Marian Smith, had objected to the liability, claiming that he never received notice of the assessment of liability. The court noted there was sufficient ambiguity regarding whether Mr. Smith had received any of the fund's notice letters. However, it was undisputed that Mr. Smith received a copy of the complaint to hold him liable as he answered the complaint. The court held that a complaint can serve as notice of withdrawal liability if it contains all the requisite elements: amount of withdrawal liability, schedule for payment and demand for payment. The court also held that it was irrelevant whether the payment schedule could actually be complied with because the dates specified had passed; it was sufficient that a schedule had been stated.

In *Retirement Plan of the National Retirement Fund v. Lackmann Culinary Services Inc.*, 2011 WL 3366354 (S.D.N.Y. July 29, 2011) the court found that the fund's initial notice of withdrawal to the employer, which contained an estimated amount of liability, was sufficient notice under Section 4219 of ERISA, and that the employer had waived its right to request arbitration over the adequacy of the notice or the amount of the assessment because it failed to request review by the employer within 90 days after the initial notice. The employer had argued that the initial notice from the fund did not constitute proper notice because it failed to identify the exact or actual amount of the withdrawal liability. However, the court held that a notice of withdrawal liability need not confirm to a particular form or template, and need not specify an exact amount, as long as it notifies the employer of the amount of liability assessed, the payment schedule, and the demand for payment. The court found that the notice with the estimated assessment substantially complied with ERISA's requirements.

III. Definition of Withdrawal

F. Sales of Assets

In *Central States, Southeast and Southwest Areas Pension Fund v. Georgia-Pacific LLC*, 639 F.3d 757, 51 EBC 1071 (7th Cir. 2011) the Seventh Circuit affirmed a decision holding that an employer did not trigger an obligation to pay withdrawal liability as a result of the sale of one

of its divisions. In this case, the employer originally contributed to the fund on behalf of employees working in two divisions: Pulp and Paper Transport and Building Products. In 1994, Georgia-Pacific outsourced the covered work performed by the Pulp and Paper Transport Division before closing that division entirely in 1995. Georgia-Pacific did not incur withdrawal liability as a result of either event. Between 1994 and 1997, Georgia-Pacific reduced contributions to the fund on behalf of employees in the Building Products Division, and the fund assessed withdrawal liability for a partial withdrawal.

In 2004, Georgia-Pacific sold the Building Products Division in a sale intended to comply with ERISA's § 4204 assets sale exemption from withdrawal liability. The fund's withdrawal liability demand asserted that Georgia-Pacific was nonetheless liable for withdrawal liability because the sale of assets was not the "sole" reason for the withdrawal, such that the requirements of § 4204 were not satisfied. In the assessment, the fund excluded the contribution history for employees whose contributions were assumed by the purchaser in the asset purchase agreement. Georgia-Pacific challenged the withdrawal liability assessment.

The arbitrator ruled in favor of Georgia-Pacific, finding that the sale of the Building Products Division was covered by § 4204, and that the employer did not owe withdrawal liability as a result of the sale. Specifically, the arbitrator found that the length of time between the events in 1994-1997 and the sale in 2004 supported treating the events as distinct, found that there was no common scheme or pattern among the different events, and found that the 2004 sale was motivated by identifiable business considerations. The district court enforced the arbitration decision.

On appeal, the Seventh Circuit focused on the question of whether, if the sale had not occurred, the employer would have incurred withdrawal liability. According to the court, this question separates out "the role of the sale from the role of everything else." In addition, the court considered the tax law step-transaction doctrine, finding no reason to overturn the arbitrator's conclusion that the earlier transactions were independent and should not be consolidated and treated as a single withdrawal. Ultimately, the court found that the protections of § 4204 applied because Georgia-Pacific's sale of the Building Products Division was not part of a plan to withdraw in stages and because the sale transferred an ongoing business to an entity willing and able to make pension contributions.

The district court's decision was previously discussed in the Subcommittee Report for the 2011 Midwinter meeting.

G. Transactions to Evade or Avoid Liability

In *Teamsters Joint Council No. 83 of the Virginia Pension Fund v. Empire Beef Co., Inc.*, 2011 WL 201492, 50 EBC 1824 (E.D. Va. Jan. 20, 2011), the court, on remand from the 4th Circuit, reviewed whether defendant's transfer of property to a creditor was a transaction for which a principal purpose was the evading or avoiding of withdrawal liability. The defendant, a single shareholder corporation, transferred its interest in a general partnership to one creditor in exchange for its cancellation of a \$1.3 million loan. The acknowledged purpose of the transfer

was to protect a party from unsecured creditors, including the pension plan to whom the defendant owed withdrawal liability.

The court held that a principal purpose of the transfer was not to evade or avoid withdrawal liability, but rather to protect against all creditors, some of whom were owed substantially more than the pension plan. The court held that to be a principal purpose it had to be one of the factors that weighed heavily in the employer's rationale. In this case the defendant's testimony convinced the court that avoiding withdrawal liability was not the actively contemplated purpose, but likely an incidental effect of the transfer.

In *LoPresti v. Pace Press, Inc., et al.*, 2011 WL 2150458 (S.D.N.Y. May 31, 2011), the court denied defendant DG3's motion to dismiss on the grounds that the plaintiff had stated a claim for withdrawal liability. The plan trustee sought to recover withdrawal liability from defendant-seller Pace Press and defendant-purchaser DG3. Although DG3 was aware of Pace Press' withdrawal liability, the defendants' asset purchase agreement did not address the liability. DG3 argued that an employer that is subject to withdrawal liability can only transfer such liability to a purchaser if the employer negotiates a transfer pursuant to 29 U.S.C. § 1384 (ERISA § 4204). Section 1384 permits a seller to avoid withdrawal liability by requiring the purchaser to contribute to the plan. The court held that although the parties' agreement did not satisfy Section 1384 requirements, Section 1384 did not bar the plan's claim. The court held the plaintiff adequately stated a claim against DG3 because the parties has structured the asset sale to evade withdrawal liability, DG3 was aware of Pace Press's withdrawal obligation and that DG3 was a party within reach of the action.

In *Operating Engineers & Pension Trust Fund v. Western Power & Equipment Corp.*, 2011 WL 2516775 (N.D. Cal. June 23, 2011), the fund sought to hold liable the purchaser of a withdrawn participating company, as well as one of its related entities, under a number of different theories, including that certain actions by the purchaser constituted a transaction to evade or avoid withdrawal liability. The court first reviewed the fund's argument that a related entity could be held liable as the parent of the purchaser, either on a theory of agency or on a "single employer" theory. The court refused to dismiss the agency theory, since the pleadings showed significant connection between the two, including a shared website, the negotiation of agreements and collective bargaining agreements by the officer of one entity on behalf of the other, and an admission by the company's counsel that the subsidiary was created solely to enter into the purchase agreement. The court did dismiss the single employer theory, however, finding that the theory, developed by the NLRB to prevent employers from avoiding their collective bargaining obligations by splitting into union and non-union companies, was applicable only in the limited context of labor relations, and not in the context of ERISA withdrawal liability.

The court next dismissed the fund's claim for breach of contract, which had been based on a side letter to the purchase agreement executed between the purchaser and the withdrawn employer. The fund could not maintain a third-party beneficiary claim for breach because it could not show that the side letter agreement was made exclusively for its benefit, as required under California state contract law. The agreement only recognized the employer's withdrawal liability obligations, but did not affirmatively convey them to the purchaser. The court similarly dismissed the fund's common law conversion claim based on the purchase agreement, since the agreement, which did contain a provision regarding the "holdback" of withdrawal liability,

nevertheless did not create the requisite ownership right necessary to maintain a conversion claim. The court distinguished the present case from ones where a guarantor bank's right to set-aside funds is established as a requirement for a surety agreement.

Finally, the court reviewed the fund's claim under ERISA § 4212(c) against both the purchaser and the withdrawn employer for engaging in a transaction to evade or avoid withdrawal liability. Although the fund did not claim the entire transaction was a sham, it did allege that the purchaser withheld information about the funds set aside for withdrawal liability claims as part of the transaction, and eventually used those funds to settle a separate judgment against the seller. The court held that, although the purchaser was not the employer, it could still be held liable under ERISA § 4212(c), which applies to any party whose actions adversely affect the fund. The court further held that, although the purpose of the side letter agreement may have been to protect the purchaser from the seller's potential withdrawal liability, this did not preclude a finding that the letter agreement also had a "principle purpose" to evade or avoid withdrawal liability. Consequently, it found the fund's allegations regarding the purchaser's actions sufficient to proceed with an "evade or avoid" claim.

In *Einhorn v. Twentieth Century Refuse Removal Company*, 2011 WL 6779760 (D.N.J. Dec. 22, 2011), a pension fund sought to recover withdrawal liability assessed against an employer that had sold substantially all of its assets to a third party, as well as against the defunct employer's principal owners. The pension fund sought recovery of withdrawal liability on several different theories. First, the pension fund alleged that the employer's owners were liable under an "evade or avoid" theory pursuant to ERISA § 4212(c). The district court agreed that the fund had pleaded facts sufficient to withstand a motion to dismiss. In reaching that decision, the district court rejected the owners' argument that ERISA does not permit recovery under section 4212(c) against non-employers. According to the district court, nothing in ERISA's text would appear to limit recovery to non-employers, and noted that ERISA's policy objective to ensure that pensions promised by employers would not be rendered illusory is best served by not restricting recovery to employers only. Second, the pension fund sought recovery against the employers' owners on a theory of breach of fiduciary duty. The district court determined that the claim failed because the assessed withdrawal liability did not constitute "plan assets" as a matter of law. Finally, the district court found that the pension fund had adequately pled the elements of a claim for equitable subrogation or constructive trust under section 502(a)(3) of ERISA. The district court concluded that the pension fund had alleged sufficiently that the particular assets sought against the defunct employer and its owners were identifiable and in the possession of these parties.

VI. Special Definitions and Relief Provisions

F. Free Look

In *EUSA-Allied Acquisition Corp v. Teamsters Pension Trust Fund Of Philadelphia & Vicinity*, 2011 WL 2457695, 51 EBC 2480 (D.N.J. June 16, 2011), a contributing employer sought to avoid paying withdrawal liability to the fund, based on its agreement with the fund and the union that it would not be subject to such withdrawal liability if it withdrew before the

expiration of a free look period. Although the employer understood the free look period to expire only after five full years of participation, the fund interpreted it in accordance with the statutory free look provision, and argued that the free look period expired when one of the employer's employees vested, having worked four years and 750 hours in the fifth year. The employer sought a restraining order to set aside the withdrawal liability and avoid arbitration under a theory that the free look agreement was a fraudulent inducement. However the court found the employer was unlikely to succeed on its fraudulent inducement claim, given that the free look agreement, which the employer itself had drafted, incorporated by reference the statutory free look provision, under which the free look period ends when the first employee becomes vested under the plan. The court further noted that the employer was compelled under ERISA § 4219(c) to make interim withdrawal liability payments pending arbitration, and declined to recognize an equitable exception to this requirement in the case of irreparable financial harm. Finally, the court declined to issue a temporary restraining order based on the employer's claim that it would suffer immediate and irreparable injury if required to begin making payments. The court noted that an upcoming hearing on the employer's motion for a preliminary injunction would occur before the employer would be in default under the statutory schedule, and given this timeline, there was no immediate harm.

After the court denied the employer's motion for a TRO in the decision discussed above, in *EUSA-Allied Corp. v. Teamsters Pension Trust Fund of Philadelphia & Vicinity*, 2011 WL 3651315 (D.N.J. Aug. 18, 2011), the court denied the employer's motion for a preliminary injunction to stay the interim payments and arbitration requirements. The court found that the employer had not shown a likelihood of success on the claim that the employer was fraudulently induced to sign the collective bargaining agreement (CBA) requiring contributions to the fund in reliance on a misstatement of the effect of the pension plan's free look provision.

The employer claimed to have understood at the time that it signed the collective bargaining agreement that the free look provision would enable it to contribute for five full calendar years without incurring withdrawal liability. When it withdrew four years and eleven months later and the fund assessed withdrawal liability, the employer sued seeking a preliminary injunction against the interim payment required. The fund argued that the plan's free look provision was intended as a succinct statement of the law and even referenced the statute and, therefore, had to be interpreted in light of the meaning of the statute. The statute does not say that the free look period is five years but rather says it is the number of years required for vesting under the plan. Likewise, the fund administrator testified that it was his understanding that the statute provided for the free look period to run out before any employee of the employer could vest in the fund. Because that could happen in less than five years under the plan, the free look period could be less than five years.

The court found there was no likelihood of success on the fraudulent inducement claim because the statements regarding the length of the free look period on which the employer allegedly relied to its detriment were made by the union and were not attributable to the fund. Further, the court found that there was no evidence that the union acted with an intent to mislead or that the employer's reliance on the union's interpretation was justified given the language of the statute.

VIII. Enforcement and Collection Disputes

A. Jurisdiction and Venue

In *Boland v. Fortis Construction Company, LLC*, 796 F.Supp.2d 80 (D.D.C. 2011), the defendant, doing business in Missouri, sought to dismiss the case for lack of subject matter and personal jurisdiction in the District of Columbia, where the fund was administered. The fund sought to hold the defendant liable for withdrawal liability as the alter ego of a withdrawn participating company that had entered bankruptcy. The defendant first contended that the court lacked subject matter jurisdiction over the alter ego issue, which was likely dispositive to the case, because it was not governed by federal law. The court disagreed, noting that the alter ego question was so entwined with the fund's federal ERISA claim for withdrawal liability as to form part of the same case or controversy, and found that it had subject matter jurisdiction over the entire claim.

The court next considered the defendant's claim that it did not have personal jurisdiction, because the defendant did not have the requisite minimum contacts with the District of Columbia. Again, the court disagreed, and relied on the special provision in ERISA § 4301(b) for nationwide service of process in holding that the relevant question was not minimum contacts with the District, but minimum contacts with the *United States* as a whole, which in this case was clearly satisfied. Congress' authorization of nationwide service of process under ERISA, the court held, meant that a federal court may exercise personal jurisdiction over any U.S. resident, without regard to whether a court in that state could exercise jurisdiction under minimum contacts principles. The court did not rule on the merits of the fund's alter ego claim, but found it had pleaded sufficient facts, without substantive rebuttal from the defendant, to establish a colorable claim under ERISA, and to provide a basis for the court's personal jurisdiction over the defendant. Finally, the court found venue was proper in the District of Columbia under ERISA § 4301(d), since the fund was administered there, and denied the defendant's motion for a transfer of venue to Missouri, giving particular weight to the fund's decision to litigate in the District of Columbia and its interest in litigating its various collection disputes in a central location.

In *Central States, Southeast and Southwest Areas Pension Fund v. Mills Investments, LLC*, 2011 WL 4901322 (N.D. Ill. Oct. 14, 2011), the court denied defendants' motion requesting transfer to another jurisdiction because only one of the eight factors to be considered in determining whether to transfer weighed in favor of the transfer and venue was proper in both jurisdictions. 28 U.S.C. § 1404(a) provides that a federal district court may transfer a civil litigation to any other district court where it may have been brought for the convenience of the parties and witnesses, and in the interest of justice. Courts have recognized that a transfer away from a fund's home forum increases costs, depletes fund assets and encourages the use of §1404(a) as a way of avoiding obligations. Courts have also held that the interest of justice is served when the costs to funds are kept to a minimum.

In deciding a motion to transfer, courts consider the following factors: the plaintiff's choice of forum, the location of material events, the relative ease and access to sources of proof, the convenience of the parties, the convenience of the witnesses, the speed in which the case goes to trial, the familiarity of applicable law and the relationship of the communities to the

litigation. Only the factor regarding speed to trial slightly favored transferring the case to defendants' jurisdiction based on federal court management statistics concerning average time to dispose of cases. As to the remaining factors, however, defendants failed to establish that transfer was favored. Specifically, defendants failed to establish that the parties, witnesses, or access to documents would be more convenient in their jurisdiction. Moreover, material events had occurred in both jurisdictions as defendants had failed to make payments in their jurisdiction, but the trustees issued the demand for payment and notice regarding withdrawal liability from their jurisdiction. Likewise, courts in both jurisdiction were found to be equally familiar with the applicable law. Accordingly, defendants' motion was denied.

C. Arbitration of Withdrawal Liability Claims

1. Issues Subject to Arbitration

In *PACE Industry Union-Management Pension Fund v. Troy Rubber Engraving Company*, 2011 WL 3321311 (M.D. Tenn. Aug. 2, 2011), the employer had submitted a request for review that the fund contended expressed only general disagreement with the fund's assessment and did not identify any specific inaccuracy. The fund provided some information requested by the employer but did not respond to the issues raised in the purported request for review. The employer then sought to arbitrate the dispute but did so incorrectly.

The court entered summary judgment for the fund finding that the issues of the sufficiency of the employer's request for review and the fund's response to same were topics that should have been posed to an arbitrator. The court stated that the statute provides a 180 day period from the request for review in which the employer may initiate arbitration even if the fund does not respond to the request for review. The court further found that the employer had not properly initiated arbitration (for reasons discussed in the next section) and had, therefore, waived defenses it might have raised there including a possible laches defense regarding the timing of the withdrawal liability notice, which was sent seven (7) years after the withdrawal.

In *Hancock v. Koplos Excavating, Inc.*, 2011 WL 4888895 (N.D. Ill. Oct. 12, 2011), the court denied an employer's motion to dismiss a complaint for payment of withdrawal liability. The employer argued that the action should be dismissed because the trustees failed to join an indispensable party. The complaint named the employer and "any other trade or business in a controlled group," but did not join any trade or business group. In response, the trustees argued that they only used that description of the employer in the complaint because of uncertainty as to whether the employer belonged to a controlled group. The trustees had since determined through discovery that the employer was not a member to a controlled group. The court, therefore, found this issue to be moot.

The court also denied the employer's argument that the trustees failed to comply with a condition precedent by not first seeking to resolve the dispute in arbitration before filing the lawsuit. 29 U.S.C. § 1401(b) provides that if no arbitration proceeding is initiated, the plan sponsor may bring a collection action in state or federal court. There is no requirement for the trustees to first arbitrate their claim.

2. Initiation of Arbitration

In *Operating Engineers' Pension Trust Fund v. Fife Rock Products Company*, 2011 WL 227665 (N.D. Cal. Jan 24, 2011), the court considered the requirements to timely initiate arbitration. Defendant had sent a letter to the fund requesting that arbitration be initiated in accordance with 29 C.F.R. § 4221.3(d) and that the fund should propose potential arbitrators. The fund argued that the defendant did not take the necessary steps to initiate arbitration under ERISA § 4221, but did not articulate any specific argument as to what was missing from the defendant's timely letter. Rather, the fund argued that defendant did not initiate arbitration in accordance with AAA rules.

The court disagreed with the fund, finding that arbitration was appropriately and timely initiated. The defendant complied with the requirements of the relevant regulation – 29 C.F.R. § 4221.3(d). The court rejected the fund's argument that compliance with AAA rules was necessary because there was no contractual requirement to use AAA rules to initiate arbitration and it did not matter that the employer later agreed to use the AAA rules in conducting the arbitration.

The plaintiff fund in *Teamsters-Employer's Local 945 Pension Fund v. Waste Management of New Jersey, Inc.*, 2011 WL 2173854 (D.N.J. June 2, 2011) alleged that the defendant employer missed the deadline for the initiation of arbitration because the parties' agreement to proceed under AAA rules required the employer to initiate arbitration according to AAA regulations. As such, the fund argued the employer's initiation of arbitration pursuant to the PBGC regulations was insufficient. Based on this allegedly late initiation, the fund asserted claims under ERISA and the Declaratory Judgment Act. The court granted the employer's motion to dismiss on the grounds that the employer's initiation of arbitration was timely pursuant to the PBGC regulations that had been explicitly adopted by the fund. Moreover, the parties' subsequent agreement to proceed according to AAA rules did not require the employer to initiate arbitration a second time pursuant to those rules.

In *PACE Industry Union-Management Pension Fund v. Troy Rubber Engraving Company*, 2011 WL 3321311 (M.D. Tenn. Aug. 2, 2011), the court found that the employer's having initiated arbitration with the New Jersey State Board of Mediation was inconsistent with the clear requirements of the PBGC regulations and the fund's trust agreement, which the court held were to be strictly construed. After the fund received notice of the request to the Board of Mediation, and the fund thereafter notified the employer that was not the correct forum for a withdrawal liability arbitration, the employer took no further action to correctly initiate arbitration. Accordingly, the court found that the employer had failed to timely initiate arbitration such that it waived all of the defenses it could have raised at an arbitration.

F. Collection of Payments Pending Arbitration

In *Nat'l Shopmen Pension Fund, et al. v. DISA Indus. Inc.*, 653 F.3d 573 (7th Cir. 2011), the Seventh Circuit overturned the district court's decision in favor of an employer and held that both the employer and the plan could seek arbitration of a revised notice of withdrawal liability, and the employer forfeits its opportunity to dispute a revised withdrawal liability calculation by

failing to do so. On appeal, the plan argued that the employer could not challenge its revised calculation of monthly withdrawal liability payments without first seeking arbitration, and that its interpretation of 29 U.S.C. § 1399(c)(1)(C)(i)(I) concerning the calculation of monthly payments was correct. The employer had initiated arbitration to dispute the plan's monthly withdrawal liability payment calculation. Pending arbitration, the plan increased the employer's monthly payment. The employer continued to make monthly payments at the original amount assessed, but refused to make the higher monthly payments on the basis that the plan's interpretation of § 1399(c)(1)(C)(i)(I) was incorrect.

The district court (in *Shopmen I*) referred the case to the arbitrator and ruled that the employer was not required to make the higher payments pending arbitration. After obtaining this ruling in its favor, the employer withdrew its demand for arbitration. Instead of suing or initiating arbitration, the plan issued the employer notice that since the arbitration was no longer pending, payments of the revised amounts were due immediately and that the employer's continued failure to pay the increased amount would constitute default. The employer still refused to pay the increased amount, and the plan sued again (*Shopmen II*) arguing that the employer was in default and had forfeited its right to challenge the plan's revised calculation by failing to exhaust its administrative remedies.

In *Shopmen II*, the district court dismissed the plan's complaint finding incorrectly that the employer's failure to seek arbitration did not preclude it from defending the merits of the case since the plan had also failed to exhaust its administrative remedies. The Seventh Circuit reversed this ruling. The Seventh Circuit held that a plan can reassess its calculation within a reasonable time period so long as the employer is not prejudiced. It further held that any dispute regarding that recalculation must be resolved through arbitration. When DISA withdrew its demand for arbitration, it forfeited its opportunity to dispute the recalculation. The Seventh Circuit also found that nothing had prevented DISA from filing a second request for arbitration after DISA received the notice regarding the increased payments, yet it failed to do so.

With respect to the statutory interpretation of § 1399(c)(1)(C)(i)(I), the Seventh Circuit did not reach this issue because it ruled that the employer forfeited its opportunity to dispute the plan's interpretation of this statute. Nevertheless, it stated in dicta (adopting the PBGC's position) that the correct interpretation for calculating monthly withdrawal liability payments for an employer that contributes to a plan for less than *three consecutive years* would be to factor in a zero for the years during which no contributions were made.

In *Central States, Southeast and Southwest Areas Pension Fund v. Murphy Brothers, Inc.*, 772 F.Supp.2d 918 (N.D. Ill. Feb. 15, 2011), the district court reviewed whether an employer could meet the exception to making interim withdrawal liability payments pending arbitration. The exception is that the employer must demonstrate that the fund's claim for interim payments is frivolous and the employer would suffer irreparable harm if it were forced to make payments. In this case the employer argued that it did not withdraw as it qualifies for the building and construction industry exemption. The covered employees were mainly involved in the delivering of supplies to and from job sites. The court stated that there is significant case law that holds that the delivery of materials to a jobsite is not building and construction work and

does not qualify for the exemption. Based on this body of case law, the court did not agree that the fund's claim for interim payments was frivolous.

In *Central States, Southeast and Southwest Areas Pension Fund v. St. Joseph Packaging, Inc.*, 2011 WL 3177244, 51 EBC 2477 (N.D.Ill. July 22, 2011), the court granted summary judgment to the fund and required the withdrawn employer to pay its interim withdrawal liability in a lump sum pending arbitration, as well as interest, liquidated damages, and attorneys' fees. The fund assessed withdrawal liability after the participating company and its control group ceased all operations under the collective bargaining agreement, and required the employer to pay its liability in a single lump sum under Section 4219(c)(5)(B) of ERISA after the fund determined that there was a substantial likelihood the employer, which had sold its assets and planned to dissolve, would be unable to pay the withdrawal liability. The employer initiated arbitration and agreed that it was obligated to pay interim withdrawal liability, but argued that it should be exempt from the usual "pay now, dispute later" rule and should be permitted to pay a reduced amount of withdrawal liability, or to pay in installments rather than a lump sum, pending the arbitrator's ruling. However, the court held that the requirement to pay interim withdrawal liability during arbitration does not permit an exception for financial hardship where the fund has an uncontested claim for substantial withdrawal liability, and the fund's claim is not frivolous. The possibility of reduced or installment payments were properly a question for the arbitrator. Finally, the court declined to review the arbitrator's preliminary ruling in favor of the fund, since it was not ripe for review. The arbitration proceedings were not yet complete under Section 4221(b)(1) since the arbitrator's ruling was only preliminary and did not provide for an award.

In *Teamsters Local 945 Pension Fund v. Omni Waste Service, Inc.*, 2011 WL 3329550 (D.N.J. Aug. 1, 2011), the court granted the fund's motion for a preliminary injunction compelling defendant employer to make interim withdrawal liability payments during arbitration, notwithstanding the employer's contention that (1) it had not withdrawn, and (2) the court should find an equitable exception to the requirement to pay interim withdrawal liability because such payments would cause irreparable harm to the employer. The court first held that under Section 4219(c) of ERISA, the fund need only show that it made a demand for interim payments under Section 4202, and that the payments were not made, to bring an action to compel the employer to make the interim withdrawal liability payments. The employer's contention that it had not withdrawn, but had only reached an impasse in its negotiations with the union, was, for this purpose, irrelevant. Second, the court declined to apply an equitable exception based on the employer's claim that the injunction would cause it irreparable financial injury. Although it recognized that such an exception might be available under case law in the Fifth and Seventh Circuits, the court held that under precedent in the Third Circuit, there are no exceptions to the requirement that an employer pay interim withdrawal liability pending arbitration, in accordance with the plain meaning of the statute.

In *EUSA-Allied Corp. v. Teamsters Pension Trust Fund of Philadelphia & Vicinity*, 2011 WL 3651315 (D.N.J. Aug. 18, 2011), the court denied the employer's request to stay the interim payments requirement. The court noted that the Third Circuit had not recognized the equitable exception to mandatory interim payments developed by the courts in *Trustees of Plumbers and Pipefitters National Pension Fund v. Mar-Len, Inc.*, 30 F.3d 621, 626 (5th Cir. 1994) and *Trustees of the Chicago Truck Drivers Pension Fund v. Rentar Industries*, 951 F.2d 152, 155 (7th

Cir. 1991). The court further stated that even under the equitable exception articulated in those cases, the court would limit the category of “frivolous” cases to which the exception would apply to cases where the fund’s assessment was in explicit conflict with the statute, which the court found was not the case here for the reasons discussed above in the sub-section on Free Look.

In *Trustees of the Suburban Teamsters of Northern Illinois Pension Fund v. Nagel Trucking & Materials, Inc.*, 2011 WL 6792767 (M.D. Ill. Dec. 22, 2011), the employer initiated arbitration but did not make interim payments because of a dispute over the date of withdrawal. Citing the *DISA* case decided by the Seventh Circuit, the court awarded interim payments pending arbitration.

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

In both *Reed v. Curry Concrete Construction Inc.*, 2011 WL 2037608 (D. Minn. Mar. 17, 2011), and *Reed v. Mesabi Bituminous, Inc.*, 2011 WL 1626564 (D. Minn. Mar. 17, 2011), the court held that the plaintiff fund set out sufficient facts to withstand a FRCP 12(b)(6) motion to dismiss where the complaint contained the requisite statements that: (1) the plaintiff was a multiemployer pension plan; (2) plaintiff demanded payments of withdrawal liability in a letter to the defendant; and (3) defendant did not pay the requested withdrawal liability payments.

In *Trustees of the Local 531 Pension Fund, v. Flexwrap Corp.*, 2011 WL 3348080 (E.D.N.Y., Aug. 2, 2011), the court granted summary judgment to the fund and awarded the outstanding withdrawal liability, interest, liquidated damages, attorneys fees and court costs after the employer, which had defaulted on its quarterly payments, failed to dispute the calculation of withdrawal liability or offer facts in opposition to plaintiff’s motion for summary judgment. The hourly rate of \$250 for partners and associates and \$125 for paralegals was deemed appropriate and in line with rates awarded to counsel with comparable experience, as was the total of 82 hours billed, in connection with an unopposed motion for summary judgment

In *Board of Trustees of the UFCW Local 174 Pension Fund v. Karl Ehmer Delicatessen*, 2011 WL 4382862 (E.D.N.Y. Aug. 8, 2011), there was a default judgment for the fund. Although the defendant did not appear, the magistrate judge reviewed the requested damages in detail and made specific corrections to them. She did not agree with the fund’s actuary that interest on unpaid withdrawal liability should be compounded so she recalculated simple interest herself. She also recommended a 40% reduction in attorney’s fees because the hourly rate charged was relatively high and was not justified on the basis of the attorney’s experience.

In *Central States, Southeast and Southwest Areas Pension Fund v. REW Corporation*, 2011 WL 3627383 (N.D. Ill. Aug. 17, 2011), the court entered summary judgment for the fund. The employer had submitted the first twelve monthly installments required under the withdrawal liability payment schedule but then had stopped making payments. The court found that the employer had defaulted on its payments such that the fund was entitled to the unpaid principal plus interest, liquidated damages and attorney’s fees.

In *Pension Trust Fund for Operating Eng'rs v. Hillsdale Rock Co.*, 2011 U.S. Dist LEXIS 103553 (N.D. Cal. Aug. 19, 2011), a Magistrate Judge recommended that default judgment be entered against the employer for the amount of withdrawal liability plus interest, liquidated damages, and attorneys' fees and costs. The fund and Trustees introduced evidence that Hillside Rock Company, Inc. ("HRC") was a participating employer in the pension trust, made a complete withdrawal from the trust by ceasing to make trust payments, and was provided notice regarding the withdrawal liability assessment and its right to challenge the assessment. The fund and Trustees also introduced evidence that HRC failed to initiate arbitration and did not make any payments, even after it was informed that payments were delinquent and would be accelerated and due in full immediately with interest and liquidated damages. Accordingly, the Magistrate recommended entry of default judgment against HRC for payment of the withdrawal liability, plus 10% interest and liquidated damages as provided by the Delinquency Collection Procedures adopted by the Trustees. The Magistrate also recommended a mandatory award of attorneys' fees and costs under 29 U.S.C. § 1132(g)(2)(D) at the lodestar amount (reasonable hours times reasonable hourly fee). In *Pension Trust Fund for Operating Eng'rs v. Hillsdale Rock Co.*, 2011 U.S. Dist LEXIS 103554 (N.D. Cal. Sept. 12, 2011), the district court subsequently entered judgment against HRC upon *de novo* review and acceptance in entirety of the Magistrate's recommendation.

In *Trucking Employees of North Jersey Welfare Fund, Inc. Pension Fund v. Uramix Concrete Corp.*, 2011 WL 3841361 (D.N.J. Aug. 25, 2011), the fund sued for an injunction requiring the employer to make timely interim withdrawal liability payments. The employer was not paying according to the schedule established by the fund but was instead waiting to receive a late payment notice from the fund and then submitting payments within 60 days thereafter. The court found that the employer could not be found to be in default unless and until it had not cured a late payment within 60 days after receiving a default notice such that the court concluded that the employer could continue the procedure it had used up to that point.

In *N. Cal. Glaziers Pension Trust Fund v. Hollis Glass, Inc.*, 2011 U.S. Dist. LEXIS 119565 (N.D. Cal. Oct. 13, 2011), a Magistrate Judge recommended that default judgment be entered against the employer for the amount of withdrawal liability plus interest, liquidated damages, and attorneys' fees and costs. The Magistrate also recommended that the employer be compelled to produce records required by ERISA § 4219(a) so the fund could evaluate issues of common control and whether any transactions had occurred to evade or avoid withdrawal liability.

In reaching the recommendation, the Magistrate considered the following six factors enumerated by the Ninth Circuit to determine whether an entry of default judgment is appropriate: (1) prejudice to the plaintiff; (2) merits of plaintiff's substantive claim; (3) reasonableness of the sum of money at stake; (4) possibility of dispute concerning material facts; (5) excusable neglect for default; and (6) policy favoring decision on the merits. *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). As to the first factor, the Magistrate determined that if the fund were unable to collect withdrawal liability from the employer, it would be greatly prejudiced and left without any other recourse to pay employees their pensions. With regard to the merits of the claim, the Magistrate found the fund's claim to be meritorious because the fund had provided the employer with proper notice of the withdrawal liability

assessment, but the employer failed to initiate arbitration. The Magistrate likewise found that the fund was entitled to a mandatory award and that the amount of the award was reasonable for several reasons, including the employer's delinquent payments at the time when the action was filed. The Magistrate also found that the fund met its burden of proving its damages where it introduced evidence of the calculations made by the trust administrator and the fund's actuary for withdrawal liability, liquidated damages, and interest.

As to the last three factors concerning disputed facts, excusable neglect for default and the policy favoring decisions on the merits, the Magistrate found that no dispute of material facts existed since the employer failed to challenge the Complaint, the employer's failure to do so did not result from excusable neglect, and the policy for deciding the case on the merits should not preclude an entry of default judgment in this case because the employer, despite receiving notice, had failed to participate in the process. Finally, the Magistrate also recommended an award of attorneys' fees and costs at the lodestar amount.

In *Graphic Arts Indus. Joint Pension Trust v. Hatcher Press, Inc.*, 2011 WL 5149124 (D.D.C. Oct. 28, 2011), the district court entered a default judgment in favor of a multiemployer fund that sought enforcement of withdrawal liability and payment of delinquent contributions from a withdrawn employer. The district court found that the fund was entitled to delinquent contributions, interest on those contributions and liquidated damages payable in accordance with the plan's delinquency policy. The district court found that, notwithstanding the fact that the employer was not signatory to the plan's trust agreement, the employer nonetheless was subject to the attendant delinquency policy because the employer had availed itself of the benefits of the fund. The district court also found the employer liable for the full amount of withdrawal liability because the fund had timely issued a withdrawal liability assessment and demand for payment, and the employer had failed to make any such payment or respond in any manner. The district court also awarded interest and liquidated damages in connection with the claim withdrawal liability award, and further awarded the fund attorneys' fees and costs in bringing the default judgment action.

In *Bakery and Confectionary Union and Indus. Pension Fund v. Mt. Rose Ravioli & Macaroni Co., Inc.*, 2011 WL 6130975 (E.D.N.Y. Nov. 10, 2011), the district court entered a default judgment in favor of a multiemployer fund that sought enforcement of a withdrawal liability assessment issued to a withdrawn employer from the fund. The district court found that the fund had issued a notice of the employer's withdrawal liability and a demand for payment in accordance with a payment schedule. The district court further found that the employer waived its right to contest its withdrawal liability when it failed to demand or initiate arbitration within the time period specified under section 4221 of ERISA. The district court calculated damages to include the amount of the withdrawal liability, as well as damages available under section 502(g) of ERISA, including interest at the rate provided under the plan, liquidated damages, costs and attorney's fees.

In *National Shopmen Pension Fund v. DISA Indus., Inc.*, No. 1:09-cv-06983 (N.D. Ill. Nov. 10, 2011), the court denied an employer's motion to proceed with its assertion of equitable defenses and counterclaims to the fund's withdrawal liability claim. In making that determination, the court interpreted the Seventh Circuit's decision on appeal, styled *Nat'l*

Shopmen Pension Fund. v. DISA Indus., 653 F.3d 573 (7th Cir. Aug. 8, 2011), as “rul[ing] definitively that DISA was in fact in default without recourse to additional proceedings.” According to the court, the Seventh Circuit had found that DISA had terminated arbitration proceedings against the fund and did not try to reinstate them. In the court’s view, the Seventh Circuit also had found that DISA’s failure to pay withdrawal liability after receiving notice and demand from the fund constituted default and a forfeiture of DISA’s opportunity to dispute its withdrawal liability. As a result, the court decided that the only matter remaining was the determination of the total amount of withdrawal liability, plus any interest, liquidated damages, and fees and costs.

In *Trustees of the Utah Carpenters’ and Cement Masons’ Pension Trust v. Industrial Power Contractors Plan Maint. Servs.*, 2011 WL 6130932 (D. Utah Dec. 8, 2011), the district court held that an employer and members of its controlled group were liable for mass withdrawal liability following a mass withdrawal. The district court issued this ruling despite the fact that the contributing employer was not signatory to a collective bargaining agreement obligating the employer to contribute to the fund on behalf of covered employees.

As described by the district court, effective April 2003, the employer stopped contributing to the fund. The fund did not issue a notice of regular withdrawal liability to the employer and demand for payment based on application of the de minimis rule under Title IV of ERISA. In July 2007, however, the fund issued an assessment notifying the employer that a mass withdrawal had occurred as of December 31, 2006 and explained that the de minimis rule no longer applied under mass withdrawal liability rules. After being assessed with mass withdrawal liability, the employer failed to submit a request for review of the fund’s assessment or initiate arbitration in accordance with section 4221 of ERISA.

In the subsequent collection action, the employer and members of its controlled group argued that ERISA’s arbitration requirement was inapplicable because the employer was not signatory to a collective bargaining agreement obligating the employer to contribute to the fund. In the alternative, the employer argued that the fund’s collection action was barred by the doctrine of laches and the statute of frauds. The district court ruled that ERISA’s arbitration requirement applies regardless of whether a collective bargaining agreement exists. In so ruling, the court construed the term “employer” under Title IV of ERISA to encompass all those who “act as an employer” with respect to a pension plan. According to the court, “[c]ontributing to the plan is the most fundamental way in which an entity acts as an employer.” It follows from this, the court reasoned, that since the employer “act[ed] as an employer” by contributing to the fund, the employer must comply with the review and arbitration procedures set forth in Title IV of ERISA. The court dismissed the laches argument advanced by the employer and its controlled group because the plan’s cause of action accrued at the time of the occurrence of a mass withdrawal, not at the later time of the employer’s regular withdrawal that had resulted in de minimis liability. Similarly, the court dismissed the statute of fraud argument as inapplicable because the employer and its controlled group’s liability arose by virtue of a federal statute, i.e. ERISA, not by contract.

In *Pension Trust Fund for Operating Engineers v. Joco Geospatial Companies*, 2011 WL 6303404 (N.D. Cal. Dec. 16, 2011), the court found both the associate hourly rate of \$195 per

hour and the paralegal rate of \$115 per hour to be reasonable based on a comparison of rates for other ERISA cases in the district. The court also found the 19.9 hours of associate time and 61.92 hours of paralegal time to be reasonable for this default judgment case.

H. Statute of Limitations

In *Pace Industry Union-Management Pension Fund v. Singer*, 2011 WL 841142, 50 EBC 2545 (E.D.N.Y. Mar. 8, 2011), the court addressed the issue of statute of limitations for withdrawal liability in a case where an initial payment schedule was issued and then the entire amount was accelerated upon default. The court held that ERISA's six-year statute of limitations runs to the missed payments on the date each payment is missed and that the acceleration of the entire amount due does not reset the limitations period.

I. Bankruptcy Issues

In *In re BFW Liquidation, LLC*, 459 B.R. 757 (Bankr. N.D. Ala. 2011), the district court held that a dispute over a proof of claim filed by a fund for the withdrawal liability incurred by an employer should be referred to arbitration pursuant to section 4221(a) of ERISA. The employer objected to the amount of the fund's assessment and claimed that the bankruptcy court should resolve the dispute. The unsecured creditors' committee and liquidating trustee joined the employer and argued that the bankruptcy court instead of an arbitrator should adjudicate the claim. In support of their argument, these parties insisted that the bankruptcy process, specifically section 502(b) of title 11 of the United States Code, abrogates the statutory mandate of section 4221(a) of ERISA.

The bankruptcy court found, nevertheless, that the dispute should be referred to arbitration for three main reasons. First, the court held that the goals of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") are best achieved by having technical withdrawal liability issues resolved by arbitrators with specialized expertise in this area. Second, the court found that the use of an arbitrator furthers MPPAA's objective to conserve judicial resources that otherwise would be expended in delving into arcane issues regarding the computation of withdrawal liability. Finally, the court found that arbitration achieved MPPAA's goal of providing pension funds with an economical and more expeditious alternative to the courts for adjudicating withdrawal liability claims. The court noted, moreover, that the exclusive jurisdiction granted to courts sitting in bankruptcy includes the discretion to utilize other forums for deciding highly technical issues. The court viewed this discretion as providing further justification for permitting the referral of the withdrawal liability dispute to arbitration.

In *Carpenters Pension Trust Fund for Northern California v. Moxley*, 2011 WL 1225572, 51 EBC 1311 (N.D. Cal. Mar. 31, 2011), the fund appealed the bankruptcy court's decision that the employer's withdrawal liability was a dischargeable debt. The plaintiff argued that the withdrawal liability was nondischargeable pursuant to section 523(a)(4) of the Bankruptcy Code. Section 523(a)(4) provides that the bankruptcy cannot discharge a debt of defalcation while acting in a fiduciary capacity. The plaintiff argued that the language of the trust agreement that provides that plan assets include contributions "to be made" to the fund. The plaintiff further argued that withdrawal liability is similarly a plan asset. The court declined to rule on whether withdrawal liability is a plan asset and instead held that plaintiff's argument failed because

Moxley was not a fiduciary of the plan. The plaintiff argued that Moxley was a fiduciary because he exercised control over the unpaid withdrawal liability, but the court held that such argument is not sufficient as any fiduciary duty under the specific provisions of 11 U.S.C. § 523(a)(4) must exist prior to and independent of the withdrawal liability.

In *In re Marcal Paper Mills, Inc.*, 650 F.3d 311, 51 EBC 1967 (3d Cir. 2011), the Third Circuit affirmed a district court's holding that a fund's withdrawal liability assessment against a debtor employer could be apportioned between the periods of time before and after the employer filed a petition for Chapter 11, and that the assessment of withdrawal liability for the post-petition period constituted an administrative expense entitled to priority over the claims of unsecured creditors under the Bankruptcy Code. The Bankruptcy Code defines "administrative expenses" as "the actual, necessary costs and expenses of preserving the estate including ... wages, salaries, and commission for services rendered after the [filing of the bankruptcy petition]." To establish priority, the fund had the burden of proving that any portion of the withdrawal liability owed to the fund was a post-petition expense provided in exchange for a service that was actual and necessary for the continued operation of the employer business. The court held that the employees performed post-petition work necessary to keep the employer's business in operation and thus conferred a benefit to the estate because withdrawal liability applies to defined benefit plans in which the benefits are provided to employees based on the *expected* resources of the plan upon retirement. The withdrawal liability is therefore consideration in exchange for the employees' post-petition work. The court further held that there was no reason why an assessment of the post-petition withdrawal liability could not be apportioned out, though this calculation was left to the Bankruptcy Court on remand.

In *In re BI-LO, LLC*, 2011 WL 4549150 (D.S.C. Sept. 30, 2011), the district court disagreed with the debtors' argument on appeal that the Bankruptcy Court had erred in determining that the fund's withdrawal liability claim against BI-LO as a controlled group member encompassed the plan's evade and avoid claim so as to defeat the argument that the latter claim had not been timely asserted prior to the expiration of the bar date deadline for filing proofs of claims against the debtors. Specifically, the debtors argued that the evade and avoid claim should be considered separately from controlled group issues for the purposes of a proof of claim. One of the debtors had argued that it was not liable for withdrawal liability because it was removed from the controlled group. The court found that this assertion unavoidably implicated the issue whether this transaction occurred for the purpose to evade and avoid withdrawal liability. The court further found that the fund claim was sufficient to put the debtors on notice of the withdrawal liability, including of the issues of evade and avoid, and was therefore not time-barred.

IX. Co-Employer Liability

A. Definition of "Employer"

In *Government Development Bank for Puerto Rico v. Holt Marine Terminal, Inc.*, 2011 WL 1135944, 50 EBC 2720 (E.D.Pa. Mar. 24, 2011), the plaintiff sought to recover payment of withdrawal liability made on behalf of a bankrupt shipping company, NPR, Inc. ("NPR"), from

NPR's corporate affiliates and those affiliates' individual owners. The plaintiff asserted two theories of liability: (1) the defendants were alter egos and (2) the corporate veil should be pierced to hold defendants individually liable.

In pressing its alter ego claim, the plaintiff made three arguments. First, it argued that a defendant was liable as an alter ego of a company in common control with NPR. Second, it argued that defendants were a single employer of which NPR was integrated. Third, it argued that NPR and a defendant company were alter egos using its second theory as a backdrop. The court rejected all three arguments.

The court held that under Third Circuit precedent, alter ego claims cannot be extended to those in common control with the withdrawing employer. As a matter of law, an alter ego of a company in common control with a withdrawing employer cannot be held responsible for the withdrawal liability of that employer.

The court then turned to the remaining two arguments which rested on a finding of either single employer or a federal common law alter ego claim, depending on which standard the court adopted as the appropriate test. The court determined that there was no prior precedent for either test and that it did not need to establish one as the plaintiffs' claims failed under either theory. Under the single employer theory, as established under the National Labor Relations Act, the test is whether two nominally separate entities are functioning as a single enterprise. Labor law has established four factors for review: (1) integration of operations; (2) centralized labor relations; (3) common management; and (4) common ownership. The court determined that plaintiffs failed to prove any of the four factors were present.

Moving to the federal common law alter ego test, the court stated such review is similar to a veil piercing test, and it must consider factors such as "gross undercapitalization, failure to observe corporate formalities, nonpayment of dividends, insolvency of debtor corporation, siphoning of funds from the debtor corporation by the dominant stockholder, nonfunctioning of officers and directors, absence of corporate records, and whether the corporation is merely a façade for the operations of the dominant shareholder." The court reviewed each of these factors and found that the plaintiffs had not proved a single one. Accordingly, the court rejected the alter ego claim.

Turning to the veil piercing claim, the court agreed that while such a claim is a valid ERISA theory of liability, based on the court's analysis of the federal alter ego claim, that plaintiffs could not establish a legitimate veil piercing claim in this case.

In *Central States, Southeast and Southwest Areas Pension Fund v. International Comfort Products, LLC*, 787 F.Supp.2d 696, 50 EBC 2889 (M.D. Tenn. Apr. 8, 2011), the district court addressed whether a federal court had jurisdiction to determine whether an employer has an obligation to contribute a multiemployer fund under applicable labor-management relations law or whether the NLRB has exclusive jurisdiction over such issues. The primary issue to be decided by the court was whether, pursuant to Section 301 of the NLRA, the defendant was bound to the collective bargaining agreement under a "joint employer" theory and thus, liable for contribution obligations. Because Section 301 explicitly provides jurisdiction to federal courts

and the issue did not involve questions of representation or unfair labor practices, the court held it had jurisdiction to determine whether ICP faced a duty under applicable labor management relations law to contribute to the pension fund. This finding was preliminary to a decision on the merits as to whether ICP had incurred withdrawal liability as an “employer.”

Upon the parties’ cross motions for summary judgment on the merits in the same case, then, in *Central States, Southeast and Southwest Areas Pension Fund v. International Comfort Products, LLC*, 2011 WL 3608553 (M.D. Tenn. Aug. 16, 2011), the court considered the issue of when a non-signatory company not under common control with the signatory employer could, nevertheless, be an “employer” subject to withdrawal liability. Here, ICP was a manufacturer that had a contract with Top to provide truck driving services to ICP. Top was signatory to the collective bargaining agreement requiring contributions to the fund, but ICP reimbursed Top for the wages and benefits paid to the drivers. ICP also exercised control and supervision over the drivers in several fairly significant ways.

Previously, the district court had granted ICP’s motion for summary judgment on the grounds that it was not an “employer” under MPPAA because it was not signatory to the collective bargaining agreement. The fund appealed the case to the Sixth Circuit, and that court held that an obligation to contribute to a plan may arise from a contract or from applicable labor-management relations law. The Sixth Circuit remanded the case for the district court to determine whether ICP had the latter type of obligation.

On remand, the district court, citing to *Metropolitan Detroit Bricklayers District Council v. J.E. Hoetger & Co.*, 672 F.2d 580 (6th Cir. 1982), noted that when two companies constitute a “single employer” with regard to the relevant employees, both companies will be bound by the collective bargaining agreement signed by one of the companies. In *J.E. Hoetger*, the court had set forth a four factor test for determining that two companies are a single employer: (1) the interrelation of operations between the companies, (2) common management, (3) centralized control of labor relations, and (4) common ownership.

The court clarified that, to determine whether ICP as an “employer” because it had “a duty under applicable labor-management relations law” to contribute to the fund, the court was required to examine whether ICP and Top constituted a “single employer” under the four-factor test in *J.E. Hoetger* and not the “joint employer” test recited in *NLRB v. Centra, Inc.*, 954 F.2d 366 (6th Cir. 1992) or *Carrier Corp. v. NLRB*, 768 F.2d 778 (6th Cir. 1985). The court said that those latter cases did not show that a non-signatory “joint employer” was liable for fund contributions and, thus, are irrelevant to withdrawal liability.

Applying the four-factor test from *J.E. Hoetger*, then, the court found that a reasonable juror could find that ICP’s supervision and control of the drivers was sufficient to create a single employer relationship between ICP and Top. The court also found, however, that a reasonable juror could also conclude that ICP and Top did not constitute a single employer because there was no common ownership or management between the two companies. The court emphasized that the determination of single employer status is essentially a factual one and found that it could not resolve the factual disputes, in the case at the summary judgment stage. Accordingly, the court denied both parties’ motions for summary judgment.

B. Controlled Group Liability

In *Holland v. Red River Trucking, LLC*, 2011 WL 2417129, 51 EBC 2420 (E.D. Ky. June 10, 2011), the court held that plaintiff had not set out sufficient factual allegations to “make it plausible” that the defendant was in common control with the withdrawing employer. The court held that common control factors are set out by tax regulations which set forth the standards of common control and that plaintiff failed to aver that any of the standards were present.

In *Central States, Southeast and Southwest Areas Pension Fund v. King Dodge, Inc.*, 2011 WL 2784118 (E.D.Mo. July 15, 2011), the court ordered the respective trustees of two trusts that collectively owned all the stock in the defendant withdrawn participating company to produce certain documents regarding the trusts to enable the plaintiff fund to determine whether any trade or business in common control with the participating company might be jointly and severally liable for its withdrawal liability. The plaintiffs had obtained a subpoena for each trust, requiring production of its trust document and amendments, documents governing the administration of the trust from the date of its establishment, and federal tax returns, schedules, and attachments, along with supporting documentation. Because the information requested was for the investigation of common control relationships, it clearly fell within the scope of Federal Rule of Civil Procedure 69(a)(2), which permits discovery in aid of a judgment from any person, including the debtor, and the court granted the fund’s motion to compel production of the documents. The court denied the fund’s request for attorneys’ fees and costs from each defendant because the fund failed to establish a legal or factual basis for the request.

In *Automotive Industries Pension Trust Fund v. Fitzpatrick Chevrolet Inc.*, 2011 WL 2446317 (N.D. Cal. July 17, 2011), the court denied the defendant company’s motion to dismiss where the plaintiff fund alleged that the company was under common control with a withdrawn participating company. The fund’s complaint alleged that the same group, two individuals and a trust, owned 100 percent of both the company and the withdrawn participating company, satisfying the 80% controlling interest requirement, and the same group of individuals and trusts held an 86 percent identical interest in the two entities, also satisfying the effective control requirement. The defendant argued that, for purposes of determining effective control under Section 414(c) of the Code and the corresponding regulations, the determination must take into account the actuarial interest of the trust beneficiaries where one or more owners is a trust, and that the fund had failed to allege sufficient facts to meet the effective control requirement under the IRS regulations. The court agreed that the fund must demonstrate the actuarial interest requirement is met with respect to the trust beneficiaries in order to show common control. However, the court found that the plaintiff’s complaint, which alleged 50.75 percent control by the trust of one entity and 64.34 percent control of the other on an actuarial basis, was sufficient to proceed to discovery. Finally, the court rejected the defendant’s argument that it was not subject to the requirement under ERISA to furnish information to the fund because it did not directly hire any employees, and thus was not an employer within the meaning of the statute. The court noted that withdrawal liability and the attendant requirements under ERISA do not depend on whether an entity independently hired employees, only whether it is treated as a single business entity.

In *Carpenters Pension Trust Fund for Northern California v. Lindquist*, 2011 WL 2884850 (N.D. Cal. July 19, 2011), another court faced the question whether the owner of a withdrawn employer can be held personally liable for withdrawal liability based on his leasing income. However, unlike the court in *Nagy* (discussed below), this court declined to adopt the *Groetzinger* test in the context of withdrawal liability under ERISA, and found the owner personally liable based on a broader definition of trade or business. The owner in this case leased a building to the employer, a packaging company of which he was the sole shareholder, up until the day before the employer's withdrawal from the fund. The owner argued that his ownership and leasing of the building to the employer were merely passive investments, and not a trade or business, because he had minimal involvement with the operation of the building, which was mostly handled by the company. However, the court declined to adopt the *Groetzinger* test, part of which distinguishes between active and passive investments, and instead found that the leasing activities did constitute a trade business, particularly because the withdrawing employer itself was the lessee. The fact that the company, rather than the owner, was primarily responsible for operation and maintenance of the building did not insulate the owner from being treated as operating a trade or business with respect to the lease. The court also rejected the owner's argument that his leasing activity could not constitute a trade or business under common control because it terminated the day before the withdrawal. Such a rule, the court reasoned, would allow employers to avoid joint and several withdrawal liability simply by terminating their leases the day before withdrawal, and would undermine the purpose of MPPAA.

In *Central States, Southeast and Southwest Areas Pension Fund v. Nagy Ready Mix, Inc.*, 2011 WL 3021524 (N.D.Ill. July 22, 2011), the court found that the principal owner of the withdrawn employer control group, related trucking and ready-mix concrete companies, could be held personally liable for the withdrawal liability, because his work as an independent contractor for an unrelated developer and golf course management company constituted a trade or business under common control with the withdrawn employer. In determining whether any of the owner's activities were a trade or business, the court first examined the owner's leasing of a building to the concrete company, and looked to the Supreme Court's decision in *Commission of Internal Revenue v. Groetzinger*, 480 U.S. 23, 35 (1987). Under that test, in order to be considered a trade or business, an entity must engage in the activity: (1) for the primary purpose of income or profit and (2) with continuity and regularity. Although the leasing activities were primarily for income or profit, meeting the first requirement for a "trade or business" under *Groetzinger*, the court found that the leasing activities were not sufficiently regular and continuous to warrant liability. Although the owner accepted significant rental income from the lease on the building and claimed a tax deduction for its depreciation, he had a limited role in its regular operation and maintenance, leading the court to view it as a passive investment rather than an active trade.

With respect to the managerial work the owner performed for the golf course development and management company, the court examined whether the owner acted as an independent contractor, and thus was operating a separate business, or as an employee of the developer. Applying the Seventh Circuit's five-factor employment test, the court found that the owner's ultimate control and lack of supervision over the means and ends of his work, his use of a Form 1099 and Schedule C in filing his tax returns, and the non-exclusive nature of his

employment all pointed toward his status as an independent contractor, rather than an employee. Consequently, the court found, his work for the developer constituted a trade or business under common control with the withdrawn employer, and the owner could be held personally liable for the withdrawal liability.

In *Central States, Southeast and Southwest Areas Pension v. Messina Trucking, Inc.*, 2011 WL 4496084 (N.D. Ill., Sept. 27, 2011), the court considered the issue of whether an individual can be personally liable as the owner of an unincorporated control group entity as a result of the individual's commercial real estate holdings. The fund sued various control group entities, and Stephen and Florence Messina as individuals, to collect withdrawal liability, which was not being paid while an arbitration was pending.

The defendants conceded that several entities were liable but challenged the liability of Auburn, Messina Products and Stephen and Florence Messina. With regard to Auburn, the court noted defendants' admission that Auburn had been an employer at one time and indicated that Auburn could dispute at the arbitration whether the assessment against it was correct. With regard to Messina Products and the individuals, the court applied the test for "trade or business" set forth in *Groetzinger*.

Applying this test, the court found that Messina Products was a business. With regard to the Messinas individually, the court distinguished between the activities of Messina Trucking, of which Stephen Messina was owner and president, and the Messinas' activities as landlord of the property from which Messina Trucking operated its business. The court found that the property insurance and utility bills were paid by Messina Trucking and that all repairs and maintenance on the property were done by Messina Trucking employees. Accordingly, the court concluded that Stephen and Florence Messina's commercial real estate holdings were passive investments not trades or businesses. Thus, the court concluded that they could not be held personally liable for withdrawal liability.

In *Central States, Southeast and Southwest Areas Pension Fund v. SCOFBP, LLC*, 2011 WL 6762860 (7th Cir. Dec. 27, 2011), the Seventh Circuit upheld the decision of the lower court that two solvent entities were "trades or businesses" under "common control" with an insolvent employer that participated in the Central States, Southeast and Southwest Areas Pension Fund, and therefore were liable for the employer's withdrawal liability. The appeals court found that the solvent entities were each a "trade or business" under the test established in *Commissioner v. Groetzinger*, 480 U.S. 23, 35 (1987). In doing so, the appeals court determined that no economic nexus between the withdrawn employer and the trades or businesses under common control is required. The appeals court also rejected the argument that the solvent entities were mere investment vehicles because the entities earned income, paid management fees, claimed business-related tax deductions, and applied for and were issued federal employer identification numbers. The appeals court further found that these solvent organizations were under common control with the insolvent, withdrawn employer based on a bankruptcy court's determination that the solvent entities would have been in the common control of the bankruptcy estate but for the fraudulent transfer of the interests in the entities. The appeals court dismissed the charge that the district court improperly relied on this "after-the-fact" decision of the bankruptcy court (that was later affirmed by the district court). According to the appeals court, an ERISA creditor is entitled to rely on a decision such as this one that pierced the fraudulent transactions. In the view of the

court, to hold otherwise would thwart the fundamental purposes of ERISA to protect promised retirement benefits to employees and to hold responsible employers seeking to avoid their responsibilities to provide such benefits.

D. Successor Employer Liability

In *RP Baking, LLC v. Bakery Drivers and Salesmen Local 194 and Industry Pension Fund*, 2011 WL 2912861 (D.N.J. July 18, 2011), the court held that the withdrawn employer, which had purchased assets from another contributing employer to the fund two years earlier and had assumed the employer's pension contribution obligations under the collective bargaining agreement, could be held liable as a successor after the seller employer failed to pay the portion of the withdrawal liability attributable to its former employees. While this case was pending, the Third Circuit ruled in *Einhorn v. M.L. Ruberton Constr. Co.*, 632 F.3d 89 (2011), that the purchaser of assets can be liable for the seller's liability to a fund where the purchaser had notice of the liability and there is sufficient evidence of continuity of operations between the buyer and the seller. Although *Einhorn* involved delinquent contributions and not withdrawal liability, the court pointed to *Upholsters' Internat'l Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323 (7th Cir.1990) as well as *Utah Carpenters' & Cement Masons' Pension Trust v. Daw, Inc.*, No. 2:07-CV-87 TC, 2009 WL 77856, at *3 (D.Utah Jan.7, 2009), which were cited with approval by the *Einhorn* court, in ruling that the *Einhorn* rule could be applied in the withdrawal liability context. Consequently, the court held that the employer could be held liable on a theory of successor liability for the seller's withdrawal liability. The court also held, however, that the defendant fund, which had included the claim for successor liability in its counterclaim against the employer, had not adequately pled its counterclaim, which it dismissed with leave to amend. Although the fund's counterclaim pled that the purchaser employer had knowledge of the seller's obligations under the collective bargaining agreement, it failed to tie those obligations specifically to the withdrawal liability to give the plaintiff employer fair notice of the support for the withdrawal liability claim.

X. Third Party Claims

In *CPC Logistics, Inc. v. International Paper Co.*, 2011 WL 4550192 (E.D. Mo. Sept. 30, 2011), the district court held that the plaintiff, a withdrawn employer from the Central States Southeast and Southwest Areas Pension Fund (the "fund"), had pled facts sufficient to withstand a motion to dismiss for lack of standing to sue. The withdrawn employer had entered into an employee driver lease agreement with the defendant to support the defendant's transportation operations. The terms of the agreement required the defendant to pay certain "direct charges," including "amounts paid pursuant to any applicable collective bargaining agreement." After paying a lump sum payment to satisfy its withdrawal liability obligation to the fund, the withdrawn employer sought reimbursement of the payment amount from the defendant. When that payment was not forthcoming, the employer instituted the action. The defendant moved to dismiss the action on the grounds that the employer had assigned the agreement to two of its subsidiaries, and, therefore, the employer no longer had standing to sue to enforce the terms of the agreement. The court denied the motion to dismiss and reasoned that if the assignment was valid, then the employer arguably incurred an injury prior to the assignment. The court further

reasoned that, even if the assignment proved to be invalid, then the employer would retain standing to pursue its claim for reimbursement. The court also noted that the two subsidiaries the agreement had been assigned to also potentially have standing as party plaintiffs if the assignment proves to be valid.