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

2013 MIDWINTER MEETING
FEBRUARY 20 – FEBRUARY 23, 2013
CHARLESTON, SOUTH CAROLINA

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 *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. CPC Logistics, Inc.*, 2012 WL 3554446 (7th Cir. 2012), the Seventh Circuit held that the fund's withdrawal liability assessment to CPC violated ERISA because it was not based on the actuary's best estimate. In doing so, the court upheld an arbitrator's conclusion that the fund's calculation resulted in an over assessment of more than $1 million.

Although the actuary confirmed that use of the Segal Blend as the interest assumption in the calculation of withdrawal liability was the actuary's best estimate, between 1996 and 2003 the fund trustees directed the actuary to use the funding rate interest assumption rather than the Segal Blend whenever the funding rate resulted in lower unfunded vested benefits. This directive resulted in withdrawal liability pools that were lower than they would have been if they had been calculated based on the Segal Blend for all but one of the years when the trustees' directive was in place. In 2004, the trustees removed their directive to use the "lesser of" interest rate and returned to the Segal Blend. When CPC withdrew from the fund and was assessed withdrawal liability, several of the pools were based on funding rate rather than the Segal Blend. CPC argued this violated ERISA. In addition, CPC also challenged the 2004 pool, arguing that the shift in interest rate created an unusually large pool at a time when CPC's contributions and resulting share of the pool were at their highest.

Because the withdrawal liability was based in part on pools calculated using the funding rate rather than the Segal Blend, the Seventh Circuit found that the arbitrator sensibly concluded that the withdrawal liability had not been calculated on the basis of actuarial assumptions that reflect the actuary's best estimate. The court also rejected the fund's argument that ERISA § 4213(b)(1) created a safe harbor whenever the funding interest rate is used in a withdrawal liability assessment, noting that the funding rate could be appropriate but was not under the circumstances of this case. The court concluded that ERISA requires that withdrawal liability be calculated on the basis of the actuary's best estimate and upheld the arbitrator's authority to reduce CPC assessment to that level.

In *Burke v. Eaton Assocs., Inc.*, 2012 WL 267982 (W.D.N.Y. Jan. 30, 2012), the court granted summary judgment in favor of the plaintiffs, trustees and sponsors of a multiemployer pension fund. Defendant, a contributing employer, moved for cross summary judgment, alleging that it owed nothing to the pension fund under a settlement agreement terminating the fund.

Specifically, the employer argued that because the amount of the withdrawal payment was to be calculated based on the "average yearly contributions paid" for three prior consecutive years, the employer could not owe anything since it had failed to make any payments in the years preceding the agreement. The court dismissed this argument, instead interpreting the contract to require a minimum contribution, which relevant section would be rendered superfluous if the employer was required to pay nothing. The district court also found support in section 4224 of ERISA, which allows a multiemployer plan to adopt alternative payment rules for satisfying employers' withdrawal liability, such as the ones set forth in the agreement with settling employers, "*if such rules are consistent with this chapter [of Title IV of ERISA]*" (emphasis added). The court reasoned that these operative words are consistent with the terms and structure of the underlying settlement agreement if the burden of withdrawal liability among employers has been allocated in an equitable fashion. The court therefore granted summary judgment in favor of the plaintiffs, finding that the employer owed the fund for the years in which it made no payments, but deferred on the question of the amount of such payments.

Subsequently, both parties again filed cross motions for summary judgment, seeking the court's approval of their respective methods of calculating the employer's liability. In *Burke v. Eaton Assocs., Inc.*, 2012 WL 3991268 (Sept. 11, 2012), the court denied the fund's request for damages in the amount of the full withdrawal liability that the employer otherwise would have operated under ERISA. Instead, the court granted damages only as to those years that the employer had failed to make payments pursuant to the settlement agreement with the fund.

III. Definition of Withdrawal

A. Complete Withdrawal

In *Central States, Southeast and Southwest Areas Pension Fund v. Waste Management of Michigan, Inc.*, 674 F.3d 630, 52 EBC 2109 (7th Cir. 2012), the Seventh Circuit held that the district court did not err in granting the fund's motion for summary judgment in an action against Waste Management. The fund sought Waste Management's contributions to the fund, as required pursuant to a CBA, which was set to expire on January 31, 2009. Six weeks prior to the termination of the CBA, on December 14, 2008, Waste Management and the union agreed to a new CBA, under which Waste Management was no longer required to make contributions to the fund. Likely seeking to minimize its withdrawal liability, Waste Management argued for the use of the December 14, 2008 date as the date the CBA ended.

Waste Management argued that both the Participation Agreement and the original CBA were ambiguous. Although the Participation Agreement stated that any agreement "that purports to prospectively reduce the contribution rate" payable to the fund by a participating employer would be invalid, Waste Management argued that the word "prospectively" was ambiguous because it could reasonably be interpreted to allow for immediate action. In other words, the new CBA did not eliminate the duty to contribute prospectively; it did so immediately. This, the Seventh Circuit ruled, was not a reasonable interpretation of the Participation Agreement.

Waste Management also argued that an opt-out provision in the original CBA permitted either party to unilaterally cancel the agreement at any time during the four-year period of the agreement, so long as 60 days' notice was provided. The Seventh Circuit rejected this reading as well. The opt-out provision unambiguously applied to a provision allowing for automatic renewal of the agreement and not to the contributions terms of the CBA. Therefore, the Seventh Circuit affirmed the district court's ruling which obligated Waste Management to continue contribution to the fund through the expiration of the original CBA, which was January 31, 2009.

F. Sales of Assets

In *Hop Energy, L.L.C. v. Local 553 Pension Fund*, 678 F.3d 158, 53 EBC 1129 (2d Cir. 2012), the Second Circuit addressed the sale of assets exemption to the assessment of withdrawal liability. Specifically, the Second Circuit affirmed the district court's holding that a contributing employer is not exempt from withdrawal liability when the purchaser lacks the obligation to contribute "substantially the same number of contribution base units" to the fund as the contributing employer contributed before the sale.

Hop Energy entered into an asset purchase agreement that gave the purchaser the right to amend, revise, or terminate any collective bargaining agreements, to layoff employees or otherwise reduce the total number of hours for which it was required to make contributions to the fund. The fund's Trustees assessed $1,204,007 in withdrawal liability against Hop Energy, maintaining that this provision of the asset purchase agreement stripped the transaction of 4204 protection. Section 4204 provides an exception to withdrawal liability where the purchaser retains an obligation to contribute to the plan for "substantially the same number of contribution base units" for which the seller was obligated to contribute. The arbitrator and the district court agreed with the Trustees' assessment of withdrawal liability. The Second Circuit affirmed, reasoning that although the purchaser was subject to the same contribution rate to the fund, it was not obligated to contribute for the same contribution base units (*i.e.*, hours of pay) and consequently did not qualify for the ERISA Section 4204 exemption from withdrawal liability.

G. Transactions to Evade or Avoid Liability

In *New Jersey Regional Council of Carpenters v. RAC Atlantic City Holdings, LLC*, 2012 WL 482161, 53 EBC 1500 (D.N.J., Feb. 14, 2012), various multiemployer funds associated with two unions filed separate complaints against the defendants alleging that they had breached the CBA by failing to make required contributions. One of the pension funds also sued the employer for withdrawal liability. Defendant RAC moved to dismiss the complaint on the grounds that it had terminated its legal existence prior to the suit having been filed. The fund argued that the cancellation of RAC's existence as a limited liability company was a transaction to evade or avoid withdrawal liability under ERISA § 4212(c) such that the cancellation should be disregarded and a judgment for withdrawal liability imposed. RAC responded that the fund had not asserted an ERISA § 4212(c) violation in their complaint nor alleged any facts there to support such an allegation. The court agreed that the complaint was deficient in this manner. The court granted the motion to dismiss the complaint but gave the fund leave to amend the complaint to make the necessary allegations.

In *Trustees of Utah Carpenters' and Cement Masons' Pension Trust v. Loveridge*, 2012 WL 252296 (D. Utah June 28, 2012), the court granted summary judgment for the fund to enforce an arbitrator's decision that the employers had withdrawn from the fund. The facts begin with the 2002 Winter Olympic Games in Salt Lake City. The additional construction required by the games brought a large but temporary upswing in participants enrolled in the fund. Coupled with weak investment returns, the fund's unfunded vested benefit liability "skyrocketed." In response, a number of employers sought to switch to a different multiemployer pension plan. The union agreed to the change.

Although these employers began contributions to a separate multiemployer plan, to avoid a withdrawal, the employers continued to contribute at the rate of $.10 per hour to the fund. Two years later the amount was increased to $.52 as it was thought that the amount of $.10 would cause the employers to incur withdrawal liability under the evade or avoid provision of MPPAA. The fund was amended to allow employers to contribute $.52 to the fund to reduce the fund's unfunded vested benefits, but would not accrue benefits for employees.

Ultimately the fund retained new counsel that determined this arrangement resulted in the withdrawal of all the employers contributing at the minimum amount but not accruing benefits for their employees. The employers contested the withdrawal in arbitration and lost. The fund then filed suit to enforce the arbitrator's decision.

The employers argued that a bargaining agreement is not "any transaction" within the meaning of the evade or avoid provision in 29 U.S.C. §1392. The court disagreed, finding that the plain language means any type of transaction, including entering into a collective bargaining agreement. The court also agreed with the arbitrator that the employer's explicit statements that the $.52 contributions were paid to avoid incurring a withdrawal is clear evidence that the employers had a principal purpose of evading withdrawal liability.

In *Lopresti v. Pace Press, Inc.*, 2012 WL 2263499 (S.D.N.Y. June 18, 2012), the court ruled that the defendants had not engaged in a transaction designed to evade or avoid withdrawal liability. The fund had sought to hold the withdrawing employer and its purchaser liable for withdrawal liability.

The defendant Pace Press purchased a printing press with money borrowed from Merrill Lynch. At the same time Pace began suffering a significant decline in sales. Pace then began to seriously consider bankruptcy. Ultimately a competitor stepped in to purchase the assets of Pace. Pace then settled with Merrill Lynch and its other creditors using the proceeds from the sale. At the time it reached agreement with these creditors, Pace had not yet withdrawn from the fund.

The fund sought payment of the withdrawal liability from both Pace and the purchaser of its assets, DG3 North America, Inc., under the theory that the sale transaction was done to evade or avoid withdrawal liability. The court disagreed, holding that while Pace was aware of the withdrawal liability, the sale was structured to avoid bankruptcy. The mere awareness of withdrawal liability did not rise to the level of intent and was not a principal purpose of the transaction. In addition, the court held that the purchasers retention of the owners of Pace was not a transaction to evade or avoid where the owners were paid appropriately for their level of management and that they were necessary to be retained in order to preserve certain accounts. The court also held that just because a transaction is structured as an asset sale rather than a stock sale is not evidence of intent to evade or avoid. Rather, there are many business reasons to purchase assets and not stock, especially where there are unpaid creditors of the company.

In *CIC–TOC Pension Plan v. Weyerhaeuser Co.*, 2012 WL 5879525 (D. Ore. Nov. 20, 2012), the district court vacated an arbitrator's award in favor of the pension fund. The court first noted that, although an arbitrator's findings of fact are presumed correct, the case was decided on stipulated facts, and the arbitrator's conclusions of law are reviewed *de novo*. The court then disagreed with the arbitrator's conclusion that the timing of the company's closure of a trucking facility in Albany, Oregon permitted the fund to assess withdrawal liability pursuant to ERISA § 4212(c).

It was undisputed that the company had a legitimate business reason for closing the trucking facility. The company did so, however, on an accelerated basis after it learned that the fund would have unfunded vested benefit liability for the first time. The fund argued that the company's decision to effectuate the closing two days before the end of the last plan year for which no withdrawal liability had to be assessed so as to avoid the imposition of withdrawal liability should be disregarded pursuant to ERISA §4212(c). Accordingly, the fund had assessed liability as if the closing had occurred in the following plan year, as the company had originally planned. The arbitrator had agreed with the fund's view.

The court disagreed with the pension fund and the arbitrator for several reasons. First, after examining a number of dictionary definitions, the court held that the company's unilateral act of closing the Albany facility was not a "transaction" to which ERISA § 4212(c) could apply. The court found that "transaction connotes (1) conducting, not ceasing, business and (2) an event involving more than one party as opposed to a unilateral action.

More significantly, after reviewing the legislative history of MPPAA and prior case law in the Ninth Circuit, the court held that ERISA § 4212(c) was not intended to impose liability on *bona fide* cessations of operations regardless of the timing of those cessations. The court noted that, while ERISA § 4212(c) is aimed at sham transactions, "employers may time *bona fide* business transactions to minimize withdrawal liability without fear of triggering ERISA §4212(c)."

IV. Special Industry Provisions

A. Construction Industry

In *Trustees of Laborers District Council and Contractors Pension Fund v. Excel Contracting*, 2012 WL 4322572 (S.D. Ohio Sept. 20, 2012), the fund brought an action against two contractors for withdrawal liability allegedly owed arising from these defendants' withdrawal from the fund. After filing an answer to the fund's complaint, the contractors moved for leave to amend their answer to include an affirmative defense that the contractors were exempt from withdrawal liability under the building and construction industry exemption set forth under section 4203(b) of Title IV of ERISA.

Plaintiffs opposed the motion to amend as futile, arguing that the contractors had waived any defense under section 4203(b) of ERISA by not timely instituting arbitration as required under section 4221 of the statute. The contractors argued that they were excepted from ERISA's arbitration requirement because (1) they are permitted to bypass arbitration in order to determine whether each is an "employer" within the meaning of ERISA, and (2) arbitration would have been premature because the contractors did not "cease doing business" under the building and construction rules until after the time period to commence arbitration had lapsed.

The court held that a determination as to whether the criteria under section 4203(b) of the statute have been satisfied requires resolution by arbitration. In reaching that determination, the court rejected the contractor's argument that section 4203(b) of ERISA turns on whether a party is an "employer." Rather, the court found, the material question under that statutory provision is whether an employer continues to perform work in the jurisdiction for which contributions were previously required, or resumes work in the jurisdiction within a particular time period. Accordingly, the court denied the contractors' motion to dismiss.

VI. Special Definitions and Relief Provisions

F. Free Look

EUSA-Allied Acquisition Corp. v. Teamsters Pension Trust Fund of Phila., 2012 WL 1033012, 53 EBC 2532 (D. N.J. Mar. 26, 2012), is a case involving the free look provision of ERISA § 4210. This case appeared in last year's Subcommittee Report. The court had considered an employer that had withdrawn approximately four years and eleven months after beginning contributions. Under the fund's plan, an employee could be considered vested after having worked for four years plus 750 hours in Covered Employment. Therefore, the pension fund had concluded that the free look period had expired several months prior to the employer's withdrawal, and the fund assessed withdrawal liability. On the employer's motion for a preliminary injunction, the court held that the employer did not have a substantial likelihood of success on the claim that "the number of years required for vesting" necessarily meant five full years such that there was no basis for the court to decide the issue as opposed to deferring to statutorily required arbitration.

EUSA-Allied Acquisition had claimed that the local union had fraudulently induced the employer to sign the collective bargaining agreement on the representation that the employer could withdraw at any time for 60 months after it commenced contributions to the fund without being subject to withdrawal liability. In a March 26, 2012 decision (2012 WL 1033012), the court considered a motion for summary judgment filed by the local union. The local union argued that it was entitled to be dismissed from the case because there was no factual basis to hold the local union liable on any of the counts asserted against the local union in the employer's complaint. The court declined to resolve the dispute until the employer and the fund had completed the withdrawal liability arbitration because the contract claim at issue was intertwined with the issue of whether the fund had properly assessed withdrawal liability against the employer.

VIII. Enforcement and Collection Disputes

A. Jurisdiction and Venue

In *Central States, Southeast and Southwest Areas Pension Fund v. Ehlers Dist., Inc.*, 2012 WL 581246 (N.D. Ill. Feb. 22, 2012), the court denied the defendants motion to transfer the case to the Northern District of Iowa. The court noted that in ERISA collection cases, the plaintiff's choice of venue is given substantial deference and the case will not be moved unless this deference is outweighed by other factors. Weighing all the factors, the court held that while the situs of material events weighed slightly in favor of a transfer, all of the other factors were either neutral or weighed in the favor of fund. Accordingly, the defendants did not demonstrate that the fund's choice of forum should be ignored.

C. Arbitration of Withdrawal Liability Claims

1. Issues Subject to Arbitration

In *Alongi v. Moores Crane Rental Corp.*, 2012 WL 6589702 (D. Mass. Dec. 17, 2012), a withdrawn employer failed to initiate arbitration regarding the fund's notice and demand for withdrawal liability. The fund thereafter filed an action seeking to recover the withdrawal liability allegedly owed. The employer counterclaimed, alleging that the fund would be unjustly enriched by imposition of the fund's assessment of $149,578 in withdrawal liability. In support of its counterclaim, the employer argued that the fund's lawyer initially informed the employer that its withdrawal liability only would be $48,000, and that liability eventually would "go away." The court found, nonetheless, that the employer had failed to request arbitration regarding the fund's "initial" or "revised" withdrawal liability assessment. Because the employer had failed to timely request arbitration, the court found that the employer's arguments in support of its unjust enrichment counterclaim had been waived.

The employer next argued that the fund negligently or intentionally misrepresented that the employer could "try out" participation in the fund for a few years without facing withdrawal liability. The court that the employer's argument did not concern the "fact or amount" of withdrawal liability, and that such issues of fraud and misrepresentation are not subject to arbitration under the MPPAA. Therefore, the court allowed the employer's intentional and negligent misrepresentation counterclaims to proceed.

In *RP Baking LLC v. Bakery Drivers and Salesmen Local 194 and Industry Pension Fund*, 2012 WL 1079633 (D.N.J., Mar. 30, 2012) (discussed in detail in Successor Liability section), the court also denied a motion to dismiss a claim that the employer did not timely initiate arbitration. The issue was whether the 60-day period for initiating arbitration commenced with the date the fund's letter was sent or the date the letter was received by the employer. The statute refers to the "date of notification to the employer" and is thus arguably ambiguous on this point. The court reviewed the authority presented and found it inconclusive. Accordingly, the court found that the employer had not met its burden to show that controlling authority precluded the fund's legal theory.

In *666 Drug, Inc. v. Trustees of the 1199 SEIU Health Care Employees Pension Fund*, 2012 WL 1142464 (S.D.N.Y., Apr. 4, 2012), the court ordered the Defendant pension fund to show cause why the court should not resolve certain disputes about the Plaintiff employer's withdrawal liability. After a hearing on the order to show cause, the Court ordered the parties to arbitrate their dispute.

Plaintiff was a longstanding contributing employer to a pension fund. In 1999, the CBA that required contributions to the fund expired and was not renegotiated, but the employer continued to make contributions to the fund until November 2010. After the employer notified the fund that the employer was going to be acquired by a larger company and requested a withdrawal liability estimate, the fund considered the acquisition a withdrawal and assessed withdrawal liability. Plaintiff filed a lawsuit seeking a declaratory judgment that it was not liable for withdrawal liability due either to the statute of limitations or a laches defense and that it was not obliged to arbitrate the dispute.

The court noted that there is a narrow exception to the arbitration requirement that allows a federal court to decide disputes about per se employer status which concern whether a party was ever actually an employer under MPPAA. Here, the court found, however, that it was undisputed that the Plaintiff had been an employer under MPPAA and held that an arbitrator must decide disputes about continued employer status which concern when an employer ceased being an employer under MPPAA. The court further found that there were factual issues at the root of Plaintiff's dispute about whether the fund assessed liability timely. Accordingly, the court held that the timeliness of the assessment had to be decided by an arbitrator.

F. Collection of Payments Pending Arbitration

In *Board of Trustees of Local 50 Pension Fund v. Zucker and Co., Inc.*, 2012 WL 2335351 (E.D. N.Y. June 19, 2012), the court granted summary judgment for the fund and held that the defendant, Zucker and Co., was liable for payment of interim withdrawal liability payments while the defendant pursued arbitration of the withdrawal assessment. In a footnote the court assessed the defendant's remark during oral argument that payment of the interim withdrawal liability would bankrupt the employer. The court noted that, assuming that it could reduce the amount of interim payment based on financial circumstances, the defendant produced no evidence on the stated impact.

In *Automobile Mechanics Local No. 701 Union and Industry Pension Fund v. Krumpholz*, 2012 WL 1245661 (N.D.Ill. April 13, 2012), the court granted judgment on the pleadings against one defendant in the plaintiff fund's suit to collect interim withdrawal liability during arbitration, after the defendant failed to oppose the fund's motion to strike all of its affirmative defenses. One of the defenses, which the court easily rejected, was that the Supreme Court's decision in the then-pending case involving the individual mandate under the Affordable Care Act could invalidate Congress's commerce clause power to require the payment of withdrawal liability by employers in a controlled group under the MPPAA. As to the other defendant, which denied that it was in a controlled group with the withdrawn employer, the court ordered further briefing on whether it should be required to pay interim withdrawal liability pending arbitration of its controlled group status, specifically whether the fund lacked a colorable claim and whether the defendant would suffer severe financial hardship if compelled to make interim payments.

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

In *Trustees of the Local 138 Pension Trust Fund v. F.W. Honerkamp Co*., 2012 WL 3538267, 53 EBC 2761 (2d Cir. August 17, 2012), the Second Circuit rejected the fund's argument that the Pension Protection Act of 2006 (the "PPA") prohibits an employer from withdrawing from a multiemployer plan after the fund has entered critical status. In this case, the fund announced in March, 2008 that it was in critical funding status and developed an appropriate rehabilitation plan. Even so, the Trustees determined that the fund was unlikely to emerge from critical status within the ten-year period.

Shortly after the CBAs requiring Honerkamp to contribute to the fund expired, Honerkamp negotiated successor CBAs that provided for its withdrawal from the fund. The Trustees of the fund sued Honerkamp, arguing that the PPA prohibited Honerkamp from withdrawing after the fund entered critical status and sought to compel Honerkamp to make retroactive and prospective contributions to the fund. Honerkamp countered that withdrawal was permissible and that it would be liable only to pay withdrawal liability as calculated under the MPPAA. The district court agreed with Honerkamp that the PPA did not prevent its withdrawal from the fund or require it to make retroactive or ongoing contributions to the fund.

In an issue of first impression, the Second Circuit held that, although the PPA does not explicitly address this issue, it does not prevent an employer from withdrawing from a critically underfunded plan. The Court noted that there were several provisions of the PPA that altered withdrawal liability calculations in other situations involving funds in critical status. The Court also observed that the PPA amended portions of ERISA addressing withdrawal liability "without the slightest indication that it intended to abrogate" an employer's right to withdraw, even after a fund has entered critical status. Additionally, the Second Circuit noted that the PBGC also recognizes an employer's ability to withdraw from a fund in critical status. The Second Circuit concluded that Congress' goal in enacting the PPA was not to forbid employers from withdrawing from underfunded plans. Rather, the PPA aims to protect beneficiaries of multiemployer plans by keeping these plans adequately funded.

In *Resilient Floor Covering Pension Fund v. M & M Installation, Inc.*, 2012 WL 1813395 (N.D.Cal. May 17, 2012) the court declined to award attorney's fees to the defendant contributing employer after entering summary judgment rejecting the pension fund's claim for withdrawal liability based on piercing the corporate veil. Reviewing some of the factors governing the award of attorney's fees in the Ninth Circuit under *Hummell v. S.E. Rykoff*, 634 F.2d 446, 453, the court found that the fund's corporate veil-piercing claim was not made in bad faith, since the defendant company's undercapitalization would have supported the piercing of a corporate veil; that the fund, which had been certified in critical status under Section 305 of ERISA, might not be able to satisfy the award; and that the fund's claim was for the benefit of all its participants, which argued against the award of fees. Furthermore, the court pointed out the defendant was not a prevailing party within the meaning of Section 4301 of ERISA, since the plaintiffs prevailed in their ultimate goal of compelling the payment of withdrawal liability. On the plaintiffs' motion for mandatory attorney's fees under Sections 4301 and 502(g) of ERISA, the court found the hourly rate of $250 for attorneys reasonable, but reduced the rate for paralegals from $150 to $125. The court also excluded from the calculation hours spent by plaintiffs' counsel during the pre-appeal phase of the case, since the plaintiffs had previously requested such fees and been denied for failing to comply with local rules. The court declined to reduce the remaining hours total based on defendant's contention that some of the legal research was redundant, but did reduce the total by ten percent after noting that 204 hours spent on a summary judgment motion seemed somewhat excessive.

In *Local 807 Labor–Management Pension Fund v. Maritime Fish Products, Inc.*, 2012 WL 2609321 (E.D.N.Y. May 31, 2012), the magistrate recommended the court decline to vacate a previously-entered default judgment against the withdrawn employer after it failed to make its first two monthly withdrawal liability payments or respond or appear after the fund filed suit. The employer claimed that it had no record of receiving service through the Secretary of State, and that it was not obligated to make contributions, or by extension, withdrawal liability payments, to the fund because the pension fund was not specifically mentioned in one section of the collective bargaining agreement. The magistrate rejected the first argument, noting that service on the Secretary of State was properly made under Rules 4(e)(1) and 4(h)(1)(a) of the Federal Rules of Civil Procedure, and the employer presented no evidence that the Secretary of State failed to provide the notice. The magistrate also rejected the argument that the CBA did not require pension contributions, noting that, although the CBA did not explicitly refer to the pension fund in the section on contributions, it did include references to enforcement actions by the pension fund, and the employer had been making pension contributions for twenty-four years prior to the withdrawal. Finally, in addition to withdrawal liability, the court awarded the plaintiff fund interest, liquidated damages, attorney's fees and costs. However, the magistrate reduced the stated attorney's fees, finding that a blended hourly rate of $400, predominantly for work by a junior associate, was not reasonable in the Eastern District of New York, and recommending instead hourly rates of $400 for partners and $325 for associates.

In *Eighth District Electrical Pension Fund and IBEW Local 354 v. Wasatch Front Electric and Construction,* 2012 WL 2090061 (D.Utah June 8, 2012), the court held that the plaintiff multiemployer pension fund's claim against a withdrawn employer for delinquent contributions and withdrawal liability was precluded under claim preclusion, or *res judicata*, where a previous suit by the local union to enforce the collective bargaining agreement resulted in a settlement under which the CBA was terminated and the employer withdrew from the fund. Weighing the three elements required for claim preclusion—a final judgment on the merits, privity of the parties in each suit, and identity of the cause of action—the court held (1) that the prior settlement clearly stipulated that the suit was dismissed on the merits with prejudice; (2) that the local union that initiated the prior suit and the multiemployer pension fund covering its members were in privity, since both the local union and the pension fund had sued for the benefit of the same union members, a labor trustee of the pension fund had been involved in the earlier suit as business manager of the union, and permitting suit by the fund after the union's suit was settled could create the potential for abusive litigation; and (3) that the causes of action in both suits arise from same transaction, since both involve the same CBA. The court rejected the fund's argument that the current suit, including the claim for withdrawal liability, was a separate and distinct cause of action because it arose from statute and not the CBA. The court reasoned that the withdrawal liability claim could and should have been brought in the union's earlier suit, and was therefore precluded when brought by the fund. In doing so, the court took the unusual step of vacating an earlier entry of partial summary judgment in favor of the fund, after the employer conceded it owed withdrawal liability. Finally, the court held that claims against the company's owner or a related company under an alter ego theory of liability were similarly precluded, since those claims also could have been brought under the previous suit by the union.

In *Board of Trustees of the UFCW Local 174 Pension Fund v. Jerry WWHS Co., Inc.*, 2012 WL 729261 (E.D.N.Y. March 5, 2012), a pension fund assessed withdrawal liability against an employer. When the employer did not pay, the fund obtained a default judgment against the employer. The parties then entered into a settlement agreement providing a payment schedule but the employer defaulted on payments. The employer then made an assignment of all its assets and liabilities for the benefit of its creditors, which is akin to a state court bankruptcy proceeding. After the assignment, the fund sued the employer under the terms of the settlement agreement. The defendant assignee moved to dismiss the complaint on two grounds. The defendant argued that the fund had failed to properly effect service of the complaint and that the lawsuit should be dismissed because all claims against the employer were required to be pursued in the pending Assignment Proceeding.

The court found that New York law permitted service on a corporation through the Secretary of State, which is what was done here. The court also found that, although there are public policy reasons to favor addressing all liabilities in the Assignment proceeding, there was no automatic stay of other proceedings in a state assignment proceeding as there is in a federal bankruptcy case. The court determined that it had discretion to permit the withdrawal liability collection action to proceed and noted that entering a default judgment against the employer would not allow the pension fund to circumvent the assignment matter because the fund would have to present any final judgment to the Assignee.

In *Pension Plan for Pension Trust, Fund for Operating Engineers, F.G. v. Dynamic Consultants, Inc.*, 2012 WL 3629046 (N.D.Cal. August 21, 2012), the fund alleged that Dynamic Consultants stopped contributing to the fund in April 2009 and made a complete withdrawal. The fund alleged the amount of the withdrawal liability to be $1,094,355, and sought interest, liquidated damages and costs, including attorneys' fees. The fund filed its complaint on January 31, 2012. On June 13, 2012, the fund moved for entry of default. Default entered on June 18, 2012.

Under Federal Rules of Civil Procedure 55(b)(2), in determining whether a default judgment is appropriate, the following factors are considered: (1) the possibility of prejudice to the plaintiff; (2) the merits of plaintiff's substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was sue to excusable neglect; and (7) the strong policy favoring decisions on the merits.

Following the entry of default, the fund demanded payment of the outstanding amount of withdrawal liability on three occasions. The defendant failed to make any payments. The court found the fund's complaint sufficiently stated a meritorious claim, but found the amount requested by the fund to be too large to be awarded on a motion for default judgment without a sworn record that justifies the sum in detail. The court stated that default judgment is generally disfavored where large sums of money are involved. Therefore, the court ultimately denied the fund's motion for default judgment without prejudice.

In *Pension Plan for Pension Trust, Fund for Operating Engineers, F.G. v. Dynamic Consultants, Inc.*, 2012 WL 4857803 (N.D.Cal. October 11, 2012), the fund again sought an entry of default judgment against Dynamic Consultants for failure to pay withdrawal liability.

The fund's new motion again alleges the amount of the withdrawal liability to be $1,094,355, plus accrued interest, liquidated damages and costs including attorneys' fees. In addition to an actuarial declaration submitted with the fund's first motion for default judgment, the fund has submitted with this motion the report on employer withdrawal liability used in the actuary's calculations and the actuary's letter to the fund regarding Dynamic Consultants withdrawal liability. In this second motion for default judgment, the fund specifically sought: (1) $1,094,335 in unpaid contributions; (2) $218,871 in liquidated damages; (3) $128,023.14 in interest; (4) $3,539.84 in costs; and (5) $6,471 in attorneys' fees.

In finding in favor of the fund, the court held that an award of the unpaid contributions, interest, liquidated damages, and reasonable attorneys' fees and costs is mandatory pursuant to Section 1132(g)(2) where, as here, (1) a judgment has been entered in favor of the fund, (2) unpaid contributions exist as the time of the suit, and (3) the plan provides for such an award. However, the court did deny the fund $2,920 in investigative costs. Therefore, the final judgment for the fund equaled $1,448,339.98.

In *IBT Local 868 Pension Fund v. Country Ford Ltd.*, 2012 WL 4788404 (E.D.N.Y October 6, 2012), a district court in New York ruled on the issue of permissible substitution of a deceased defendant compelled to pay withdrawal liability. Prior to this case, the district court had entered a default judgment against defendant Vincent Caruso, with the amount of damages to be determined. However, within a year of the default judgment, defendant Vincent Caruso died. The fund immediately indicated its intent to look to the defendant's estate to satisfy the judgment.

The fund filed a motion to substitute the defendant's wife and children as distributees of the estate or, in the alternative, the defendant's son, individually and as executor of the estate. The district court focused on the issue of whether the fund proposed a proper party for substitution. Proper parties for substitution would include either (1) a successor of the deceased party-- a distributee of an estate if the estate of the deceased has been distributed at the time the motion for substitution is made, or (2) a representative of the deceased party -- a person lawfully designated by state authority to represent the deceased's estate.

The district court relied on New York law in determining whether a person is a proper successor or representative of a deceased defendant. Pursuant to Section 4-1.1 and 4-1.2 of the New York Estate Powers and Trust Law, the district court found clear evidence that Michael Caruso, the defendant's son, was a proper party for substitution, as he was named executor of the defendant's estate in his will. New York law defines a personal representative as a person who has received letters to administer the estate of a decedent. *See* N.Y.E.P.T.L. Section 1-2.13. The district court found that the fund provided the court with sufficient evidence to establish Michael Caruso as the executor of the decedent's estate.

However, the decedent's will also listed his wife and children as distributees of the estate. Although the court stated in a previous order that a distributee of an estate would be a proper successor or representative, the order specified that the estate of the deceased must be fully distributed at the time the motion for substitution is made. Because the estate of the defendant was not fully distributed at the time the fund filed its motion for substitution, the court found that the defendant's spouse and children were not proper parties for substitution as distributees.

In *Trustees of the Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Sheiman Provision Co.*, 2012 WL 3104402 (E.D. PA July 30, 2012), the court determined that $300 per hour was reasonable in an award of attorney’s fees under ERISA. The court also determined that the 24.6 hours spent on behalf of the relevant summary judgment motion was also reasonable.

In *Vetrone v. Holt Cos., Inc.*, 2012 WL 2861611 (N.D.N.Y. July 11, 2012), a fund asserted claims against a withdrawn employer for withdrawal liability and costs. The fund in the matter had sent the employer a written notice and demand for withdrawal liability. However, the employer had failed to remit any funds toward payment of the assessed withdrawal liability, nor make any timely demand for arbitration pursuant to section 4221(a) of ERISA.

The court granted the fund’s motion for summary judgment, finding that the fund had met the procedural requirements for assessment of withdrawal liability, and finding further that the employer had failed to exhaust its available administrative remedies. The court rejected the employer’s argument that the fund’s initial notice of withdrawal liability was deficient for lack of an adequate explanation of the method used to calculate the withdrawal liability, finding that the statute imposes no such requirement as part of an initial demand. The court also rejected the employer’s argument that the fund’s notice and demand for payment of withdrawal liability was over a year late, reasoning that any such challenge had to have been made by the employer in requesting review or timely instituting arbitration.

In *Vetrone v. Holt Cos., Inc.*, 2012 WL 4006327 (N.D.N.Y. Sept. 12, 2012), the court granted the fund’s claim for attorneys’ fees, interest, and costs in connection with the court’s prior granting of the plaintiff’s claim for summary judgment (2012 WL 2861611). Defendant raised no objection to plaintiff’s calculation of interest or costs, and the court chided the fund for asserting in its brief that a 6% rate applied. The court instead applied the published interest rates set out in 29 C.F.R. § 4219.32(b), which are calculated quarterly, and awarded the fund $41,577.25 in interest on the unpaid principal of $314,833.54. The court then accepted the fund’s suggested award of attorneys’ fees at $21,940, rejecting arguments made by the employer that time entries, such as two-tenths of an hour for “leaving messages or calendaring activities,” was excessive. The court noted in that instance such time entries “could have been accompanied by a review of the file” before completing the activity and could not be said to be patently unreasonable.

In *Central States, Se. & Sw. Areas Pension Fund v. E & L Dev., Inc.*, 2012 WL 3434867 (N.D. Ill. Aug. 15, 2012), an employer that had withdrawn from the fund did not contest the principal amount it owed in withdrawal liability, or the fund’s right to interest, attorneys’ fees and costs. Rather, the employer contested the fund’s contention that it should be awarded liquidated damages under section 502(g) of ERISA based on twenty percent of the entire withdrawal liability owed, not just the sum of the periodic payment amounts that the employer must pay if the employer does not pre-pay. The court found that the liquidated damages should be calculated as a percentage of the *total accelerated* withdrawal liability so long as the fund met the statute's procedural requirements for accelerating that amount due in the event of a default under section 4219(c)(5) of the statute. Because the fund satisfied the statutory requirements to accelerate the total amount due, the court found that the employer would be liable for twenty percent of the total accelerated withdrawal liability.

In *Empire State Carpenters Welfare, Pension, Annuity, Apprenticeship, Charitable Trust v. Mazzco Enters., Inc.*, 2012 WL 4511436 (E.D.N.Y. Aug. 2, 2012), the magistrate judge, in its report and recommendation, relied upon the Supreme Court's opinion in *Perdue v. Kenny A. ex rel Winn*, ----- U.S. -----, 130 S.Ct. 1662 (2010) endorsing the lodestar method in calculating an award of attorneys' fees and costs in connection with a judgment for unpaid contributions. The magistrate judge recognized that whether described as the lodestar or presumptively reasonable approach, a court must "take into account case-specific factors to help determine the reasonableness of the hourly rates and the number of hours expended." The magistrate found that the proposed hourly attorney rate and number of hours expended by attorneys to be reasonable, but reduced the hourly rate for paralegal time. The magistrate also recommended a default judgment be entered against the employer, and recommended an award to the plan for unpaid contributions, interest, liquidated damages, and audit fees.

In *Resilient Floor Covering Pension Fund v. Michael's Floor Covering, Inc.*, 2012 WL 3062294 (N.D. Cal. July 26, 2012), the magistrate judge granted in part and denied in part a motion for protective order filed by a pension fund and its Board to claw back allegedly privileged materials and information in the hands of an alleged successor to a contributing employer of the fund. The pension fund alleged that the alleged successor either should have to pay withdrawal liability or continue to contribute to the fund. In connection with that withdrawal liability dispute, the alleged successor served the fund with a Rule 30(b)(6) notice and listed as proposed topics many issues relating to matters typically subject to attorney client privilege or attorney work product. The fund objected to the proposed documents on the grounds of privilege, to which defendants argued that the fund had waived privilege by disseminating a particular email to third-party Union officials.

The magistrate found that the email was protected under the attorney-client privilege and the work product doctrine. However, the magistrate found that the attorney-client privilege had been waived by virtue of forwarding the email to officials at the Union without a common legal interest a joint litigation effort. The magistrate further found that attorney work product had been waived for the same reason. While the magistrate noted that the fund and the Union have a common financial interest in collecting contributions from participating employers, the fact that the email left the sphere of common interest resulted in a waiver of that protection. The magistrate held that the fund had not relied on the email for any claim or defense or to gain a tactical advantage. As a result, the magistrate found that there was no subject matter waiver and prohibited the employer from discovering additional opinion work product beyond the email itself.

In *Dillner v. Sheesley Supply Co., Inc.*, 2012 WL 5818315 (W.D. Pa. Nov. 15, 2012), the court granted the fund's motion for summary judgment as to liability but required further information from the fund as to the amount of damages. The fund had issued two partial withdrawal assessments. The employer had requested review but had not initiated arbitration. The employer made some payments but then stopped.

When the fund filed a collection lawsuit, the employer filed an answer. When the fund then filed a motion for summary judgment, however, the employer did not file an opposition. As the motion was unopposed, the court indicated that it was bound to grant the fund's motion as to liability. The court noted, however, that, even if the employer had opposed the motion for summary judgment, the employer would have been unable to challenge the assessments in court because it had failed to initiate arbitration.

The court then examined the fund's claimed damages. The court indicated that it found it unclear whether the withdrawal liability amount owed as referred to by the fund consisted of principal only or of a combination of principal and interest that was built in through the mechanism of the amortization schedule. Further, given that lack of clarity about the amount of principal owed, the court also found it unclear whether the 20% liquidated damages amount had been determined as 20% of principal or 20% of principal and interest.

Finally, the court indicated that the fund's trust agreement provided for attorney's fees in collection actions in the amount of 20% of the delinquent principal. The court said the fund had not shown why that amount was a unreasonable percentage or why the court should deviate from its normal method of determining attorney's fees.

I. Bankruptcy Issues

In *In re Nevin/Caryl Liber*, 2012 WL 1835164 (Bkrtcy.N.D.Ohio May 18, 2012), the bankruptcy court held, in the context of an individual's bankruptcy proceeding, that a pension fund's right to the proceeds of the sale of real estate owned by the debtor's company was superior to the rights of the estate trustee. The pension fund's claim arose from the withdrawal by a contributing employer that the fund claimed was under common control with a limited liability company of which the debtor was a member. Explaining that the estate trustee takes the debtor's property subject to any restrictions that would apply to the debtor himself, and noting that, under Ohio law, a member of an LLC may have rights to distributions of assets but no specific interest in the property of the LLC, the court concluded that the fund, as a creditor to the LLC, took priority over the trustee's right to the proceeds of the sale of property owned by LLC, which could be distributed to members only after claims against the LLC had been satisfied. The trustee argued that the fund had not established the common control element of its claim for withdrawal liability against the LLC and that common control was lacking because the debtor never held more than 50% control of the company. But, the court held that as a matter of *res judicata*, it would not consider those claims since default judgment had previously been entered in favor of the fund against the LLC, the fund had established its prima facie case in that proceeding, and the estate trustee did not intervene in the case even though it had notice of the proceeding.

In *In re M & M Fishing Corp.*, 468 B.R. 461 (Bankr. D. Mass. 2012), the court overruled the debtor's objection to a proof of claim filed by the pension fund. The employer ceased doing business and sold its assets. The pension fund assessed withdrawal liability and commenced a collection action in district court. Prior to a hearing on the merits of the district court action, the Debtor filed a Chapter 7 petition in the bankruptcy court. The fund filed a proof of claim for the withdrawal liability.

The Debtor objected to the proof of claim on the grounds that the fund did not have unfunded vested benefit liability at the time of the Debtor's withdrawal. Alternatively, the Debtor objected that, if it had liability, the liability should be capped, pursuant to ERISA § 4225 because all of Debtor's assets were sold to an unrelated entity. The fund responded that the Debtor had failed to seek arbitration in the time proscribed by statute and had, therefore, waived its objections with regard to the amount of liability. The court agreed with the fund that the Debtor had waived its right to argue that there should be no withdrawal liability by failing to request review and pursue arbitration. The court further found that the Debtor's failure to timely initiate arbitration resulted in a waiver of its argument that the "insolvency cap" limited its liability to thirty percent of the proceeds of the sale of assets to an unrelated party.

IX. Co-Employer Liability

A. Definition of "Employer"

In *Resilient Floor Covering Pension Fund v. M & M Installation, Inc.*, 2012 WL 669765 (N.D.Cal. February 29, 2012), the court granted summary judgment to the plaintiff pension fund on its claim that the defendant company was an alter ego of the withdrawn contributing employer. After deciding that both the alter ego and corporate veil-piercing doctrines were available to plaintiffs in actions under ERISA to enforce withdrawal liability claims, and that Section 4212(c), regarding transactions to evade or avoid liability, does not provide the exclusive remedy in such actions, the court found that the two companies were alter egos, where each had common ownership, and the operation and work history of each company demonstrated that one was formed to operate under union contracts while avoiding withdrawal liability. The court declined, however, to pierce the corporate veil and hold individual shareholders liable, where there was no evidence that shareholders' personal assets were commingled with those of the company. The court rejected a claim by the fund based on successor liability, where one company had wound up its affairs and there was insufficient continuity of operation. Finally, the court did not find evidence of a transaction to evade or avoid liability under Section 4212(c), reasoning that the employer could not have had the intent required by the statute before the fund provided notice of withdrawal.

B. Controlled Group Liability

In *Sun Capital Partners III, L.P. v. New England Teamsters and Trucking Industry Pension Fund*, 2012 WL 5197117 (D. Mass October 18, 2012), the court specifically rejected a 2007 PBGC opinion that private equity funds can be a "trade or business" potentially subject to joint and several liability for a portfolio company's unfunded pension liabilities. In 2007, the

PBGC issued an opinion that held that a private equity fund is a "trade or business" for purposes of the controlled group rules of ERISA because it has a stated purpose of creating a profit and providing investment services. In its opinion, the PBGC states that this activity is regular and continuous because of the size of the private equity fund and its profits and, as a result, the fund and the portfolio company are members of a controlled group. This is the first case to reject a multiemployer plan's attempt to rely on PBGC precedent to assess a private equity fund with a portfolio company's unfunded pension liabilities.

In this case, several private equity funds sought a declaratory judgment that they were not liable to the fund for payment of withdrawal liability originating from the bankruptcy of Scott Brass, Inc., one of the companies in their investment portfolio. The fund contended that the private equity funds were not purely passive investments, but rather qualified as a trade or business, since they played an active role in managing Scott Brass, Inc. by taking over the majority of the board of director positions, injecting themselves into the daily operations of the company, and receiving reimbursements and other non-investment income. The district court disagreed with the fund, reasoning that the private equity funds do not have employees, own any office space or make or sell any goods. Furthermore, the tax returns for each private equity fund list only investment income in the form of dividends and capital gains. The district court determined that the one-time investment of capital by a private equity fund into a portfolio company is a passive investment and does not result in the private equity fund engaging in a trade or business.

The court in *Sun Capital Partners* expressly considered and declined to rely on the 2007 PBGC opinion. Importantly, the court held that the 2007 PBGC opinion had misapplied the theory of agency and incorrectly imputed the management companies' or general partners' actions to the private equity funds.

In *Central States, Se. and Sw. Areas Pension Fund v. CLP Venture, LLC*, 2012 WL 6680302, at *1 (N.D. Ill. Dec. 21, 2012), the court granted the fund's motion for summary judgment, finding the defendant entities joint and severally liable for the withdrawal liability of a contributing employer to the fund. The fund had assessed withdrawal liability of over $1.2 million against the contributing employer when it permanently ceased covered operations under the fund. In a separate action, the fund secured a consent judgment in the amount of roughly $1.7 million for the withdrawal liability. The consent judgment stated that certain of the defendants constituted a "single employer" under Title IV of ERISA by virtue of being part of a group of trade or businesses under common control. The fund instituted the present action seeking to hold all the named defendants jointly and severally liable for the consent judgment.

The central question turned on whether a non-defendant, George J. Cibula ("Cibula"), directly or indirectly owned at least 80% of the ownership interest in each of the named defendants. The defendants argued that Cibula did not own 80% of the voting shares of Geobeo, Inc., and therefore a brother-sister group comprised of the other defendants and Geobeo did not exist as of the date of withdrawal. In support of this contention, defendants contend that Cibula's ownership interest in Geobeo never exceeded 73% because Geobeo failed to make several payments under a stock redemption agreement, resulting in a default that kept more than 20% of Geobeo stock in escrow. However, the court found that the shares that stayed in escrow ceased to be "shares entitled to vote" and therefore Cibula owned 100% of the outstanding stock from the date of default. In addition, the court determined that interest in Geobeo stock had been assigned to Cibula, including the rights to the stock held in escrow. Therefore, the court found that the fund had established that Cibula had at least 80% ownership of Geobeo's shares.

The defendants next argued that they are not part of a group of trades or businesses that would be required to hold them jointly and severally liable for the withdrawal liability. Citing Seventh Circuit precedent, the court pointed out that "[f]or an activity to be a trade or business..., a person must engage in the activity: (1) for the primary purpose of income or profit; and (2) with continuity and regularity." *Id.* at * 5 (citation omitted). The court further quoted the Seventh Circuit as having recognized the high unlikelihood that "a formal for-profit business organization would not qualify as a 'trade or business' under" the statute." *Id.* Despite that defendants' characterization of their businesses as passive investment vehicles, the court determined that each defendant constituted a "trade or business" based on several factors, including that each was an active, formally recognized business that applied for and received federal employer identification numbers, paid management fees, contracted with outside professionals to conduct business operations, filed tax returns and reported rental revenue. *Id.* at *5–8. The court further determined that an affidavit submitted by Cibula averring that he spent less than 10 hours per year on each business failed to establish a genuine issue of material fact on the issue.

In *Local 138 Pension Fund v. Tax Trucking Co.*, 2012 WL 1886787 (E.D.N.Y. April 17, 2012), the magistrate judge recommended denying each party's motion for summary judgment where a material issue of fact existed as to whether the wife of the deceased former owner of the defendant employer could be treated as an owner and held liable, personally or as sole owner of a real estate company in the same controlled group, for the employer's withdrawal liability obligations. The deceased husband had been sole owner of the unincorporated employer, and the wife was owner of a real estate holding company that leased office space to the husband's company. Considering the spousal attribution rule under Code Section 414(c), which provides that an individual is considered to own an interest owned by her spouse, the magistrate explained that the wife clearly would be considered an owner if the husband had been alive at the time of the withdrawal in 2009. However, since the husband had died four years prior to the withdrawal, the determination was more difficult. The fund argued that the wife was an owner as of 2009, based on evidence that the husband's trucking company continued to pay the taxes, mortgage, and utilities of the wife's real estate company and that the wife signed legal documents as owner of the trucking company. Although this evidence was enough to create a genuine issue of fact, the magistrate could not conclude as a matter of law that the wife was an owner at the time of withdrawal, where the fund had presented no evidence of the wife's direct involvement in the operation of the company.

In *Central States, Southeast and Southwest Areas Pension Fund, v. Ray C. Hughes, Inc.*, 2012 WL 1520721 (N.D.Ill. April 30, 2012), the court found that a corporation that primarily held securities and notes and rented an office building was a trade or business under common control with the defendant corporation, and therefore could be held jointly and severally liable for the defendant's withdrawal liability obligations. The court found that common control was established where the beneficiary of a family trust had effective control of both the corporation and the withdrawn employer. The court further found that the corporation constituted a trade or business within the meaning of Code Section 414(c), since even its passive real estate investment activity indicated it was operated for income or profit, and the business activities of the corporation, including tax filings and work performed by contractors on the corporation's rental property, showed continuous and regular activity.

In *Central States, Southeast and Southwest Areas Pension Fund v. King Auto Fin., et al.,* 2012 WL 4364310 (N.D. Ill. Sept. 19, 2012), a former contributing employer stopped making its periodic withdrawal liability payments to a pension fund. The fund subsequently obtained a judgment against the employer for the full amount of withdrawal liability owed by the defaulting employer. Unable to collect on the judgment, the fund brought five claims against several businesses and trusts related to the employer. The named defendants moved to dismiss all the claims.

The fund's core allegation was that several of the defendant businesses and trusts were a group of trades or businesses under common control and thus were jointly and severally liable to the fund. The court found that the fund adequately had pled such claims against the former owner of the contributing employer and the revocable trust established in that owner's name, and also as against two other related businesses. The court also allowed the fund to proceed with its claims against these defendants under "alter ego" and "evade or avoid" legal theories, and under a state fraudulent transfer statute.

In *Board of Trustees of Auto. Mechanics' Local No. 701 Union & Indus. Pension Fund v. Moroni,* 2012 WL 5305093 (N.D. Ill. Oct. 25, 2012), the fund had previously received a default judgment against a withdrawn employer ("ELM") for approximately $1 million in withdrawal liability. The fund then sued a sole proprietorship and its owner and another corporation alleging that the sole proprietorship and the second corporation were trades or business under common control with the employer or that they were liable under common law successor liability or alter ego theories. The fund also sued the employer's owners under the Illinois Business Corporation Act. Defendants filed a motion to dismiss the complaint, which was granted in part and denied in part.

The court first rejected the defendants' argument that the present lawsuit was barred by *res judicata*. The court noted that where the employer was found liable in the prior lawsuit, *res judicata* would prevent relitigation of the control group's liability but would not prevent the fund from suing additional control group members to enforce that liability in a subsequent lawsuit. The court also noted that such a new suit would not be precluded because it would involve a different issue, namely whether the new defendants were trades or businesses under common control with the employer against whom liability had already been established.

On the issue of whether the new defendants were trades or businesses under common control with the employer in this case, the fund had alleged that the individual defendants, Moroni and his spouse were beneficial owners of 100% of a trust and that the trust owned 90 percent of ELM. The court explained that under the common control regulations, interests owned by a trust are considered owned by the beneficiaries who have an actuarial interest of five percent or more in the organization interest, to the extent of such actuarial interest. 26 C.F.R. §

1.414(c)–4(b)(3). Thus Moroni and his spouse were alleged to own 90 percent of ELM and 100 percent of the sole proprietorship and the other corporation such that the fund had acceptably pled that the three entities were under common control.

The court dismissed the fund's state law claim under the Illinois Business Corporation Act against the directors of ELM for improper distributions of ELM's assets. The state statute refers to corporate directors and the fund merely alleged that the individual defendants were officers and shareholders.

The court denied the motion to dismiss the fund's successor liability and alter ego claims. With regard to successor liability, the court found that the fund had sufficiently pled facts to support the allegation that there was notice and substantial continuity of business operations, including use of the same assets, customer lists, customers, equipment and employees.

With regard to alter ego liability, the court found that the fund had alleged several unity of interest factors related to the diversion of assets from ELM to the Moroni entities, that Moroni failed to respect corporate formalities, that the new companies were established to permit ELM to escape its obligations to the fund and that recognizing the new corporation as a separate entity would result in an injustice and fraud. The court held that these allegations were sufficient to survive a motion to dismiss and that the more specific standard of pleading required for fraud did not apply.

C. Shareholder, Director, or Officer Liability

In *Central States, Southeast and Southwest Areas Pension Fund v. National Lumber Company*, 2012 WL 2863478 (N.D. Ill. July 11, 2012), the court granted in part and denied in part a motion to issue a protective order precluding the fund from obtaining privileged documents. National Lumber had executed a trust mortgage with a third-party to wind down its business. Subsequently, the court entered a default judgment against National Lumber for the full amount of withdrawal liability. The fund then sought payment of the withdrawal liability in a separate suit against former members of National Lumber's Board of Directors. With that case proceeding in discovery, the fund served a post-judgment request for production of privileged documents on National Lumber and the former Board Members intervened to seek to stop such production.

The court held that the trustee of National Lumber and not the intervenors retained all management powers. Accordingly, whether National Lumber would waive the privilege and provide the requested documents was to be determined by the trustee and not the intervenors. To the extent, however, the fund is seeking attorney work product, those materials can be protected by privilege appropriately asserted by the attorney that prepared the materials.

D. Successor Employer Liability

RP Baking LLC v. Bakery Drivers and Salesmen Local 194 and Industry Pension Fund, 2012 WL 1079649, 53 EBC 2554, (D.N.J.) involved a claim of successor liability. Pechter's

Baking Group had been a contributing employer to the pension fund. It entered into an asset purchase agreement (APA) with RP Baking LLC in June 2006 and also ceased operations at that time. Although it appears that the APA was not drafted to comport with ERISA § 4204, it did require RP Baking to assume Pechter's CBA requiring contributions to the fund. In 2007, the fund sent a demand for withdrawal liability to Pechter's. In 2010, the fund sent a demand to RP Baking as Pechter's successor. The fund also sent a withdrawal liability demand to RP Baking for its own withdrawal liability. RP Baking initiated arbitration but also filed a lawsuit seeking a declaration that it was not liable as Pechter's successor. The fund counterclaimed for the withdrawal liability owed on the grounds that RP Baking had not timely initiated arbitration.

This case appeared in last year's Subcommittee Report. We there indicated that the court had held, in response to a motion to dismiss the fund's counterclaims, that the Third Circuit's decision in *Einhorn v. M.L. Ruberton Constr. Co.*, 632 F.3d 89 (2011) (recognizing successor liability in the context of delinquent contributions) would logically extend to withdrawal liability. On March 30, 2012, the court issued two further decisions in the case. In the first decision, the court denied the employer's motion to dismiss the fund's amended counterclaims. In the second decision, the court denied the parties' cross motions for summary judgment finding that there were genuine disputes of material fact as to the two elements required to establish successor liability.

In the 2011 decision on the initial motion to dismiss the fund's counterclaims, the court held that the fund could state a claim for relief on a successor liability theory but had not adequately pled sufficient facts to support its contention that RP had notice of Pechter's withdrawal liability. In its March 30, 2012 decision (2012 WL 1079633) on the employer's motion to dismiss the fund's amended counterclaims, the court found that the fund had cured the earlier deficiency by indicating that RP had notice of Pechter's withdrawal liability because it assumed Pechter's CBA under the APA, because its attorney requested language in the APA disclaiming any assumption of Pechter's withdrawal liability and because RP decided not to request an estimate of those debts but rather sought to use contractual provisions to avoid liability. The court had found in its 2011 decision that the second element for a claim of successor liability – a substantial continuity of business operations – had been adequately pled. The court referenced that decision in its 2012 decision denying the employer's motion to dismiss the amended counterclaims.

In the court's second decision on March 30, 2012 (2012 WL 1079649), the court denied cross motions for summary judgment on the issue of successor liability. With regard to the notice element, the court said that the critical question was whether RP had sufficient notice of Pechter's withdrawal liability debts prior to the asset sale such that RP could negotiate the amount of those debts into the purchase price. The court found that the record was unclear as to when Pechter's withdrew from the fund and whether the withdrawal was prior to the asset sale. The court seems to suggest without deciding that if Pechter's withdrawal liability did not exist before the asset sale because Pechter's only withdrew as a result of (i.e., after the asset sale), then the fund would not be able to provide notice sufficient to support successor liability. This will be an issue to look for in any final decision on the merits in this case.

With regard to the substantial continuity of business relations element, the court looked at the record with regard to a number of specific factors (continuity of workforce, management, equipment and location; completion of work orders begun by predecessor; continuity of ownership (which the court described as not necessary but relevant to the analysis) and changes to product lines). The court found that some of these factors favored the fund and some favored the employer. Evaluating the factors in their totality, the court held that neither cross-movant had satisfied its burden on summary judgment to show that there was no genuine issue of material fact as to whether there was or was not a substantial continuity of business operations.

In *Automotive Industries Pension Trust Fund v. South City Ford, Inc.*, 2012 WL 1232109, 53 EBC 2745 (N.D. Cal., Apr. 12, 2012), the court denied a motion to dismiss finding that the plaintiff pension fund had stated a claim for successor liability against the moving defendant. The court cited to Ninth Circuit authority that had held a successor liable for predecessor's delinquent contributions under ERISA (*Hawaii Carpenters Trust Funds v. Waiola Carpenter Shop, Inc.*, 823 F.2d 289 (1987)) and to Seventh Circuit authority extending that doctrine to withdrawal liability (*Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48, 49 (1995)).

The court further found that the fund had alleged sufficient facts in support of a claim of successor liability to withstand a motion to dismiss. Defendant SCF had sold its assets to SCM, the movant. Plaintiffs alleged in the complaint that, after the sale, Defendant SCM substantially continued SCF's business operations. Specifically, Plaintiffs alleged that SCM continued to use the same business name, provided the same services, used the same facilities, machinery and equipment, employed the same employees, served the same customers and completed work that had been in process at the time of the sale. Plaintiffs also alleged that Defendant SCM had both actual and constructive knowledge of Defendant SCF's potential liability for unfunded vested benefits. Although Defendant SCM denied this allegation, the court said it had to presume Plaintiff's allegations to be true in ruling on a motion to dismiss.

During the case of *Indiana Electrical Workers Pension Benefit Fund v. Tiernan & Hoover, Inc.*, 2012 WL 4470218 (S.D.Ind. September 27, 2012), Enterprise Electric & Mechanical moved to dismiss the complaint. Seeking to collect damages resulting from Tiernan & Hoover's withdrawal from the fund in the 2009-2010 plan year, the fund sought to hold Manweb Services and Enterprise Electric & Mechanical jointly and severally liable for the unpaid withdrawal liability, pursuant to the successor liability doctrine. However, Enterprise Electric & Mechanical asserted, in its motion to dismiss, that the fund's second amended complaint failed to state a plausible claim for relief against it because the complaint does not contain allegations that specifically connect Enterprise Electric & Mechanical to the alleged wrongful conduct. Rather, Enterprise Electric & Mechanical claims that the fund simply collapsed two distinct entities (Manweb Services and Enterprise Electric & Mechanical) into one in its second amended complaint and failed to allege any independent facts against Enterprise Electric & Mechanical.

In reaching its conclusion, the district court relied on the legal relationship established by the fund between Manweb Services and Enterprise Electric & Mechanical. The court found that the fund must allege "at least a few facts" to support their assertion that Manweb Services was doing business as Enterprise Electric & Mechanical at the time it purchased the assets of Tiernan & Hoover. The district court ultimately concluded that the fund failed to allege any facts to support this legal relationship and dismissed Enterprise Electric & Mechanical from the suit without prejudice.

In *Central States, Southeast and Southwest Areas Pension Fund v. Ehlers Dist., Inc.*, 2012 WL 2726759 (N.D. Ill. July 9, 2012), the court granted summary judgment for the fund and held that the defendant, Ehlers Dist., Inc., was liable for withdrawal liability as a successor of The Dairy Trust Co.

Dairy Trust was wholly owned by two individuals – Kevin and Terry Ehlers. In 2008 Dairy Trust withdrew from the fund and was assessed withdrawal liability. In 2010 the fund obtained a judgment against Dairy Trust for unpaid withdrawal liability and interest. While the fund was pursuing its collection action against Dairy Trust, the Ehlers formed a new company, Ehlers Dist., and caused Dairy Trust to transfer substantially all of its assets to this new company. The fund then sued Ehlers Dist. under theories of successor liability and entering into a transaction to evade or avoid withdrawal liability.

The court noted that successor liability was an appropriate recovery mechanism in the Seventh Circuit against purchasers where: (1) the purchaser has notice of the claim for withdrawal liability prior to the purchase; and (2) there is a substantial continuity in the operation of the business after the sale. It was undisputed that Ehlers Dist. had notice of the funds claim against Dairy Trust for unpaid withdrawal liability. It was also undisputed that Ehlers Dist. conducted the same business as Dairy Trust, from the same location, using the same trucks and employees, serving the same customers and having the same suppliers. Because Ehlers Dist. had notice of the claim and carried on the same business operation, it was liable for the unpaid withdrawal liability of Dairy Trust.

The court also determined that it did not matter whether Ehlers Dist. was an employer for purposes of MPPAA because remedies created by 29 U.S.C. §1932 also apply to entities liable as successors. The court did not decide the issue of whether the actions of the Ehlers were taken to evade or avoid withdrawal liability.

In *Automotive Indus. Pension Trust Fund v. Ali*, 2012 WL 2911431 (N.D. Cal. July 16, 2012), a pension fund brought claims for withdrawal liability accrued by a seller and former owner of a car dealership against the current owner of the dealership, a limited liability company ("LLC"), and individually against the managing member of the purchasing LLC. The fund had previously brought a state action against the dealership's prior owner (the employer who had accrued the withdrawal liability), which was settled out of court for only a partial amount of the total withdrawal liability. As part of that action, the prior owner produced the dealership purchase agreement to the fund. That purchase agreement contained provisions indicating that the parties had determined that the purchaser would bear sole responsibility for the amount of any unfunded pension liabilities of the seller, including withdrawal liability.

In its complaint, the pension fund alleged a theory of successor liability in support of a claim that defendants were liable for the withdrawal liability of the seller. The fund also alleged a breach of contract claim, alleging that the fund itself had recourse under the dealership purchase agreement under a third-party beneficiary theory. On a motion to dismiss, the court held that the fund had not adequately pled claims against the individual managing member of the LLC, and dismissed all claims against him with leave to amend. The court then held that the fund had adequately alleged that the LLC was a bona fide successor to the seller entity, and therefore that a successor liability claim against the LLC could proceed. In doing so, the court admonished the parties for treating "successor liability" as an independent cause of action, rather than a simple breach of contract claim whose necessary predicate is a showing of an underlying ERISA violation. In that vein, the court found that the fund had stated a viable claim as a third-party beneficiary to the dealership purchase agreement, since the relevant provisions in the sales agreement were intended to benefit the fund.

After the court's initial dismissal of the claims against the individual LLC member, the fund amended its third party beneficiary claim alleging that the individual member was personally liable for the withdrawal liability. On a subsequent motion to dismiss, the defendant argued that (1) the individual member properly assigned any withdrawal liability to the LLC, (2) the fund had received money in a settlement from the dealership's prior owner that extinguished defendants' liability, and (3) the fund's claim for breach of contract was preempted by ERISA. The court held that the dealership purchase agreement granted the individual LLC member the right to assign any withdrawal liability. 2012 WL 4837427 (N.D. Cal. Oct. 12, 2012). The court found also that the fund's consent was not necessary in order to release the member from personal liability, finding that California state law did not require the consent of third-party beneficiaries for such a transfer of liabilities. Accordingly, the court dismissed all claims against the individual LLC member, leaving only the claims against the LLC entity and current owner of the dealership. Importantly, the court declined to rule on an issue raised as part of the motion as to whether ERISA preempted the breach of contract claim. While the court faulted the defendants for failing to bring this argument up in initial briefing, the court did indicate that the preemption issue could be taken up at the summary judgment stage.

X. Third Party Claims

In *Shelter Distrib., Inc. v. General Drivers, Warehousemen & Helpers Local Union No. 89*, 2012 WL 3062294, 52 EBC 2217 (6th Cir. Mar. 16, 2012), the court, on an issue of first impression, held that an indemnification clause found in a collective bargaining agreement requiring the union to reimburse an employer for any contingent withdrawal liability did not violate public policy under ERISA. The employer withdrew from the plan due to the termination of the collective bargaining process. After the plan assessed the employer with withdrawal liability, the employer demanded indemnification for this amount from the union pursuant to the collective bargaining agreement, which provided, in relevant part, that "[t]he Union shall indemnify [the employer] for any contingent liability which may be imposed under the Multi-Employer Pension Plan Amendments Act of 1980."

Affirming the district court's decision, the Sixth Circuit held that the indemnification provision did not violate public policy under ERISA and was enforceable. In reaching this conclusion, the court relied upon its decision in *Pfahler v. National Latex Prods. Co.*, 517 F.3d 816 (6th Cir. 2007). In *Pfahler*, the Sixth Circuit held that the prohibition under section 410(a) of ERISA against "an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation or duty under this part" did not also disallow a fiduciary's indemnification agreement with a third party. The appeals court analogized from *Pfahler* that "[t]here is no logical difference between contracting with an insurance company under section [410(b)] and negotiating an indemnification provision like the provision in [the employer's] contract with the Union." According to the Court, because a fiduciary is permitted to enter into an indemnification agreement pursuant to section 410(b) of the statute, it follows that an employer may be indemnified by a third party, *i.e.*, the union, for conduct that the employer otherwise would be responsible for under Title IV of ERISA.