

## **Multiemployer Pension Plan Withdrawal: An In-Depth Examination**

Strategies for Minimizing Liability and Challenging Assessments

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WEDNESDAY, MARCH 18, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

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# **Multiemployer Pension Plan Withdrawal: An In-Depth Examination Strategies for Minimizing Liability and Challenging Assessments**

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# Outline

- ✦ Overview of Multiemployer Pension Plans
- ✦ Partial and Complete Withdrawals
- ✦ Controlled Group and Successor Liability
- ✦ Developing Issues Under MPRA
- ✦ Collecting Bargaining Issues
- ✦ Two Pool Plan Design Changes
- ✦ Arbitration and Settlement Strategies
- ✦ More Pension Reform?

# Introduction

- ✦ MPPAA enacted in 1980
- ✦ Withdrawal liability created, so that an employer who ceased to contribute could be required to pay its proportionate share of the Plan's unfunded vested liabilities, even if the employer had fully paid the contributions required by the CBA
- ✦ Since 1980, unions and defined benefit pension plans have fallen out of favor
- ✦ There are approximately 1,500 Taft-Hartley DB plans in the U.S.; almost all of them are not fully funded for withdrawal liability purposes

# Withdrawal Liability

- ✦ Withdrawal liability is payable only upon the occurrence of a withdrawal, as defined by ERISA.
- ✦ A withdrawing employer is liable to the pension plan for employer's share of plan's unfunded vested benefits ("UVBs"), if any; determination of UVBs depends on actuarial assumptions and methodologies.
- ✦ Title IV of ERISA specifies two types of employer withdrawals that can trigger payment of liability:
  - Complete withdrawals; and
  - Partial withdrawals
- ✦ Special rules in certain industries

# Complete Withdrawal

- ✦ “Complete Withdrawal” is defined under ERISA as:
  - A permanent cessation of the employer’s obligation to contribute under the plan; or
  - A permanent cessation of the employer’s covered operations under the plan.
- ✦ Permanent cessation of employer’s obligation to contribute
  - Upon expiration and non-renewal of collective bargaining agreement (“CBA”) that obligated employer to contribute to the plan (unless employer has an ongoing duty under the NLRA to continue to contribute under the terms of the expired CBA)
  - Where a fund terminates an employer’s participation in the fund. See e.g. *Borntrager v. Central States, SE & SW Areas Pension Fund*, 2008 WL 1800645 (N.D. Iowa, 4/22/08)
  - Where the employees decertify the union

# Complete Withdrawal (cont'd)

- ✦ Permanent cessation of employer's "covered operations"
  - Refers to those business activities for which the employer is required to contribute to the plan
  - May be triggered by layoffs, plant closures or sale of the business
- ✦ What is "permanent cessation"?
  - Permanence is something less than eternal;
  - An employer's expressed intent to resume operations must be corroborated by extrinsic evidence;
  - Liquidation or total shutdown of the employer is not necessary so long as the employer has ceased conducting business activity that gives rise to the contribution

# Partial Withdrawal

- ✦ ERISA § 4205(a) defines a partial withdrawal as follows:
  - 70% decline in employer contributions over three plan years, or
  - A cessation of contribution obligation under one, but not all bargaining agreements, and continuation of work in CBA jurisdiction of the type for which contributions were previously required, or a transfer of such work to another location or another entity owned or controlled by employer, or
  - A cessation of contribution obligation at one but not all facilities, and continuation of work at the facility of type for which contributions previously required.

# Defining the Employer: Background on the Controlled Group

- ✦ For purposes of withdrawal liability, all corporations, “trades or businesses” under common control are treated as a single “employer” and are jointly and severally liable.
- ✦ Section 4001(b)(1) of ERISA: “Under regulations prescribed by [PBGC], all employees of trades or business (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. [Such] regulations . . . shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under Section 414(c) of the [tax code].”
- ✦ If multiple members of a controlled group contribute to the same multiemployer plan, when one member stops contributing, there may be no withdrawal, or at most a partial withdrawal.

# Controlled Group of Corporations

- ✦ Must be both “commonly held” and a “trade or business” at time of the withdrawal.
  - Trade or business need not have economic nexus
- ✦ Generally, in determining whether an activity is a “trade or business,” courts consider (a) whether for primary purpose of income or profit and (b) engaged in with continuity and regularity.
- ✦ Generally limited to business entity, unless pierce corporate veil.
  - One of the members of controlled group is unincorporated
  - Leasing property by individuals
  - Partnerships
  - Sole proprietorships

# ***Sun Capital* and Controlled Group Issues**

- ✦ A 2007 PBGC Opinion Letter opined that a private equity fund was a trade or business.
- ✦ *Bd. of Trs., Sheetmetal Workers' Nat'l Pension Fund v. Palladium Equity Partners, LLC*, 722 F.Supp.2d 854, 869 (E.D. Mich. 2010).
  - Reliance on PBGC “investment plus” approach
  - Denial of summary judgment based on fact dispute
  - Case resolved prior to further adjudication
- ✦ *Sun Capital Partners III, LP v. New Eng. Teamsters & Trucking Industry Pension Fund*, 724 F.3d 129 (1st Cir. 2013).
  - Adopted investment plus approach and held fund was trade or business
  - Partial remand

# *Sun Capital* and Controlled Group Issues

- ✦ *Sun Capital Partners III, LP v. New Eng. Teamsters & Trucking Indus. Pension Fund*, 2016 WL 1239918 (D. Mass. March 28, 2016).
  - Held that Sun Fund III was a trade or business
  - Held that Sun Funds III (30%) and IV (70%) were aggregated to clear 80% ownership threshold under partnership-in-fact theory
- ✦ Overturned on appeal in 2019
  - *Sun Capital Partners III, LP v. New England Teamsters & Trucking Industry Pension Fund*, 943 F.3d 49 (1st Cir. 2019)
  - Held that the multi-factored partnership test under relevant federal tax law had not been satisfied
  - “[W]e are reluctant to impose withdrawal liability on these private investors because we lack a firm indication of congressional intent to do so and any further formal guidance from PBGC”

# Corporate Transactions and Successor Issues

- ✦ Stock sale generally does not cause a withdrawal.
- ✦ Asset sale does cause seller to withdraw unless parties comply with ERISA §4204
- ✦ Business reorganizations (mergers, spin-off, or change in structure) are not a withdrawal if no interruption in contributions and the obligation to contribute continues. ERISA 4218; *see Central States v. Sherwin-Williams*, 71 F.3d 1338 (7th Cir. 1995); *Teamsters Pension Trust Fund of Philadelphia v. Central Michigan Trucking, Inc.* 857 F.2d 1107 (6th Cir. 1988); PBGC Opinion Letters 82-4 (Feb. 10, 1982), 84-7 (Dec. 20, 1984).

# Expansion of Successor Doctrine

- *Tsareff v. ManWeb Services*, 794 F.3d 841 (7th Cir. 2015).
  - Broadening of knowledge concept articulated in *Tasemkin* and *Artistic Furniture*.
  - Reference to liability “loophole,” and reversed and remand.
- *But see, Heavenly Hana LLC v. Hotel Union & Hotel Indus. of Haw. Pension Plan*, 2016 U.S. Dist. LEXIS 16466 (N.D. Cal. Feb. 10, 2016).
- ✦ *Resilient Floor Covering Fund v. Michael’s Floor Covering, Inc.*, 801 F.3d 1079 (9th Cir., 2015).
  - Arguable expansion of Seventh and Third Circuit standards.
  - Construction industry application.
  - No direct sale of any assets (30% at public auction).
  - Petition for certiorari denied.

# Successor Doctrine Construction Industry

- ✦ *Ceco Concrete Constr. LLC v. Centennial State Carpenters Pension Trust*, 821 F.3d 1250 (10th Cir. 2016)
  - After employer's obligation to contribute ended, its parent company acquired a non-union construction company, which performed work for which contributions were previously required
  - Court held control group status is determined as of date control group triggers withdrawal

# Strategies in Corporate Transactions

- ✦ Successor liability
  - Make sure indemnification provisions cover risk
  - Credit risk may dictate further security needs (covenants, escrow, offset, etc)
  - Distressed sales
- ✦ Controlled Group
  - Avoiding ownership threshold
  - Asset protection strategies

# Developing issues under MPRA

## ✦ Multiemployer Pension Reform Act of 2014

- Passed at the end of 2014
- Extended Pension Protection Act of 2006 Red/Green/Yellow Framework
- Made subtle changes to withdrawal liability

## ✦ Allocation of withdrawal liability

- Additional contributions required as part of a funding or rehabilitation plan not counted in allocation fraction

## ✦ Calculation of 4219(c) payment schedule

- Surcharges not included in calculating highest contribution rate
- PBGC's Proposed Regulations re FIP and RIP contributions counting

## ✦ Treatment of pre-MPRA contributions

# Collective Bargaining: Preparing for Withdrawal

- ✦ Information Available from Fund:
  - Current plan document including any amendments and latest summary plan description
  - Current trust agreement including any amendments
  - Upon request by the employer, that employer's participation agreement that relates to the current or any of the five immediately preceding plan years
  - Annual Report (Form 5500) and Plan funding notice
  - Periodic actuarial reports
  - Financial reports from investment manager or advisor
  - Audited financial statements
  - Application for amortization extension (if applicable)
  - Latest Funding Improvement or Rehabilitation Plan (if applicable) and the contribution schedules applicable with respect to such Funding Improvement or Rehabilitation Plan
  - MPRA specifies that these documents do not have to be provided if they have been in the administrator's possession for six years or more.
- ✦ Reasonable copying/ mailing costs may be imposed

# Collective Bargaining and Withdrawal Liability

- ✦ 4219(c) limits withdrawal liability payments for “capped” liabilities.
  - Annual Payment Cap
  - 20-Year Cap
- ✦ Presents Strategic Challenges in Collective Bargaining When Dealing with Underfunded Plans
- ✦ MPRA Insulates Contributing Employer from Additional Exposure from FIP and RIP Contribution Increases
  - See Proposed PBGC regulations.  
<https://www.pbgc.gov/prac/pg/other/guidance/pending-proposed-rules>

# Two Pool Plan Design Changes

- ✦ General rule is that there are four statutory methods for allocating unfunded vested benefits, and 4211(c) permits a Fund to use an alternate method, with PBGC approval.
- ✦ The “Two Pool” method creates two separate withdrawal liability pools:
  - “New Pool” of UVBs relating to future liabilities of “New Employers”
  - “Old Pool” of UVBs relating to past and future liabilities of “Existing Employers”
- ✦ Separate pools are only for withdrawal liability purposes; a Fund still has a single funding standard account.
- ✦ “Existing Employers” can become “New Employers” by paying their “Old Pool” liability, with varying rules for timing of payment.

# Defending Withdrawal Liability Claims

- ✦ Know when a withdrawal may occur
  - Triggers for complete and partial
  - Controlled group issues
  - Sale of business
- ✦ Obtain information from the Fund
  - Withdrawal liability estimate and payment schedule
  - Can also request actuarial funding information and information on plan performance
- ✦ Statement of Business Affairs
  - Most funds sent out this information request to employer after learning of possible withdrawal
  - Important to make sure information is accurate

# Notice and Demand Received: Next Steps

- ✦ Review determination of whether a withdrawal occurred
  - Did a withdrawal occur?
  - Date of withdrawal correct?
  - Is a partial withdrawal determination valid?
- ✦ Is the Fund attempting to accelerate?
  - Basis for acceleration
  - Can course be changed by sharing information about company status?
- ✦ Do any of the industry exemptions apply?
  - Construction industry (need to make sure plan is construction industry fund)
  - May require relatively significant factual investigation
  - Review statements made by employer in SBA or communications with Fund

# Notice and Demand Received: Next Steps (Con't)

- ✦ Application of 20-year and annual payment caps
  - Understand impact on claim by calculating present value of payments
- ✦ Application of other employer relief provisions (sale of assets, etc)
- ✦ Perform review of contribution history
  - Although difficult to challenge actuarial assumptions and applications of statutory formulas, contribution history susceptible to factual error
  - Can significantly affect calculation of withdrawal liability and annual payment cap
- ✦ Request necessary information from the Fund
  - Information related to calculation of annual payment
  - Plan funding information
  - Contribution history information

# Submitting a Request for Review

- ✦ Determine whether settlement discussion or informal discussion short of RFR is warranted.
- ✦ Can extend time to request review.
- ✦ The Request
  - Review fund procedures.
  - RFR in letter format directed to Board of Trustees.
  - May contain affidavits and other factual documentation.
  - Will be used as an exhibit in arbitration.
  - Detailed and persuasive.
  - Include all possible disputed issues to avoid waiver.

# Decision on Request for Review

- ✦ Fund may issue a decision on request for review.
- ✦ Typically decided at Board of Trustee level and approved at Board of Trustee meetings.
- ✦ May not issue decision prior to 180 day timeframe.
- ✦ Presents new opportunities for further discussion with Fund on settlement prior to initiating arbitration.

# Arbitration

Conducted in accordance with PBGC regulations.

- ✦ Most MPPAA arbitrations are conducted pursuant to AAA Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability. Those rules are available at [www.adr.org](http://www.adr.org).
- ✦ Approved by PBGC as alternative procedure
- ✦ Since early 1980s, AAA and International Foundation of Benefit Plans have maintained rules and list of MPPAA arbitrators.
- ✦ Recent approval of new AAA rules:
  - Dramatically reduced fee schedule at the suggestion of the PBGC.
  - Maximum \$5000.00 filing fee.
  - Filing fee can be partially reimbursed.
  - District Court procedure for arbitrator appointment.

# Arbitration

- ✦ Review fund procedures or arbitration provisions
  - Some funds have specific rules for how notice of arbitration is sent
  - Specific rules that alter arbitration procedure
  - Venue selection
- ✦ Cannot alter certain basic rules:
  - Time limits for initiation of arbitration
  - Arbitrator selected after initiation of arbitration
  - Opportunity to engage in discovery
  - Arbitrator's award must be made available upon request to the PBGC and contributing employers to the plan

# Arbitration

- ✦ MPPAA arbitrations include broad discovery by PBGC regulation, similar to judicial proceedings
  - Very few decisions addressing discovery
- ✦ AAA rules include right to a hearing unless waived by the parties
  - Many MPPAA arbitrations do not involved hearings
  - Decision on stipulated record
- ✦ Rules of Evidence do not apply
  - Relaxed admission of evidence
  - Can consider affidavits
- ✦ Use of experts

# Review

- ✦ Arbitrator standard
  - Legal issues *de novo*.
  - Factual issues are presumed correct. Employer bears burden of persuasion. *Concrete Pipe & Products of Ca., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993).
  - Actuarial methods must be shown “would not have been acceptable to a reasonable actuary.” *Id.*
- ✦ Appeal of arbitration decision in U.S. District Court
  - *De novo* review of legal issues.
  - Deference to factual findings of arbitrator.

# Settlement Strategies

- ✦ Capped liabilities
  - Settlement value a function of PV of payment schedule
  - More Funds negotiating discount rate in lower interest rate environment
- ✦ Non-capped liabilities
  - Lump sum discounts
  - Credit-worthiness
- ✦ True Defenses
  - Funds can often approach settlement differently
  - Interim payment conundrum and fee exposure
  - Lump sum leverage

# More Pension Reform?

- ✦ The JSC failed to deliver on its mandate
- ✦ The House Passed the “The Rehabilitation for Multiemployer Pensions Act”
  - Legislation would establish a loan program for failing MEPPs
  - Bonds would issue to finance loans; eligible plans could apply for a loan in an amount needed to fund the plan’s obligations for the benefits of participants and beneficiaries in pay status
  - If an employer withdraws during the term of the loan, withdrawal liability would be determined under the mass withdrawal rules
- ✦ The “Multiemployer Pension Recapitalization and Reform Plan”
  - Higher PBGC Premiums and PBGC minimum benefits
  - Composite or “hybrid” plan structure
  - Greater PBGC Partition authority

# Patrick W. Spangler

Patrick W. Spangler is a Shareholder in Vedder Price's labor and employment and benefits groups. He has defended sponsors, contributing employers and fiduciaries in a wide variety of ERISA-related disputes, including breach of fiduciary, cutback claims, retiree health and withdrawal liability litigation. Mr. Spangler also provides advice on benefits issues in the M&A context and is frequently called upon to advise businesses with exposure to multiemployer funds. Mr. Spangler has published many articles on employment and benefits issues, and has been recognized as an *Illinois Emerging Lawyer*, *Illinois Super Lawyer*, and was individually recognized as "highly regarded" by *Legal 500*.

He has served as chapter editor and author of the leading ERISA treatises *Employee Benefits Law* and *ERISA Litigation* (Bloomberg BNA), and has contributed articles to a number of other publications. He was also recently profiled by Bloomberg BNA as part of its *Video Insights* series on ERISA law, which is used by inside and outside counsel as an educational resources in the employee benefits field. Mr. Spangler is a former management chair of the withdrawal liability subcommittee of the American Bar Association's ("ABA") Employee Benefits Committee and is a member of the National Institute Faculty for the ERISA Litigation and ERISA Basics programs.

# Michael G. Congiu

Michael G. Congiu is a Shareholder with Littler Mendelson, P.C. While based in Minneapolis and Chicago, his international practice focuses, among other items, on advising U.S. employers on multiemployer pension plan issues. His practice involves the litigation of cutting-edge issues in the multiemployer pension plan space, but also focuses on providing proactive and strategic counsel on understanding and mitigating exposure to multiemployer pension plans both in and beyond the transactional context.

In a past life, Mr. Congiu was co-captain of the UW-Madison Men's Soccer Team and represented the United States on Youth National Soccer Teams. He lives in St. Paul, Minnesota with his wife and two daughters.