NO. S-1510120
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,*

R.S.C. 1985, c. C-36, AS AMENDED

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT,*

S.B.C. 2002, c. 57, AS AMENDED

AND

IN THE MATTER OF THE PLAN OF COMPROMISE AND ARRANGEMENT
OF WALTER ENERGY CANADA HOLDINGS, INC., AND THE OTHER PETITIONERS
LISTED ON SCHEDULE "A" TO THE INITIAL ORDER

PETITIONERS

EXPERT REPORT OF JUDITH F. MAZO

Expert Report Filed by: United Mine Workers of America 1974 Pension Plan and Trust (the "**1974 Plan**")

1. My name is Judith F. Mazo, and my personal address is 7826 Orchid Street, NW, Washington DC 20012. I am an attorney admitted to practice in several U.S. state and federal jurisdictions.[1] Since 1975 I have specialized in the development, interpretation and application of the rules under the Employee Retirement Income Security Act of 1974 (ERISA), including the periodic amendments to that Act, with a special emphasis on multiemployer pension plans.

2. As my attached resume shows, for the past five years I have worked as a consultant to The Segal Company, and to individual multiemployer pension plans and their representatives. From July 1, 1980 to July 31, 2011, I was employed by The Segal Company as Director of Research, ultimately as Senior Vice President and director of compliance for retirement plan clients. Before joining Segal, I was employed by the Pension Benefit Guaranty Corporation (PBGC), and briefly for a private law firm.

My Background and Expertise

PBGC Service

3. I worked at PBGC from 1975 to 1979, as Executive Assistant to the General Counsel. ERISA had become law in September 1974 and, in those early years, the PBGC, the Department of Labor (DOL) and the Internal Revenue Service (IRS) were hammering out the details of the law's core concepts. Some of the agency leaders had worked with Congress and its staff to draft the bill that became ERISA – the PBGC General Counsel, for instance, had represented the Labor Department during the law's crucial legislative development stages, and the PBGC Executive Director had worked on it on behalf of the Commerce Department. Now they and their staff were designing the policies and rules to put it into effect. My job was to initiate or review PBGC rulings and other policy documents and, where appropriate, tee them up for the General Counsel's final review and approval.

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[1] I have not been engaged in the formal practice of law since 1980, and accordingly have taken inactive status in the bars of Louisiana and the District of Columbia, where I have been admitted, but have been an active speaker, writer and member of professional organizations, and so have continued to keep up with legal developments in my field.

Controlled group rules.

4. Among my assignments were direction of the successful litigation of the agency's first claim for employer liability against corporations and other businesses (trusts holding real estate). I also oversaw the drafting of the PBGC's controlled-group regulations.

Multiemployer plans.

5. When Congressional leaders were putting in place the statutory underpinnings of ERISA and its plan termination insurance program, it was not clear how that coverage would work for multiemployer pension plans. Because those plans are maintained by more than one employer pursuant to collective bargaining agreements, they do not terminate when any one employer leaves or goes out of business; in the mid-1970s the assumption was that lost employers would be replaced by new companies that the union organized and brought into the plan. Congress gave itself a 2-year extension for deciding what to do, by making multiemployer coverage discretionary with the PBGC until 1976.

6. It shortly became apparent that a different paradigm was needed for multiemployer plans. While indeed they did not terminate when individual employers left, so they shielded the PBGC from the shower of terminations that it experienced early-on, but a multiemployer plan could terminate, and with a bigger impact, if the whole industry supporting the plan failed.[2] The Administration launched a concerted effort, led by the PBGC in collaboration with IRS and DOL, to rethink how to protect pensions in multiemployer plans and come up with a legislative solution. On behalf of the PBGC's General Counsel, I was charged with directing the legislative drafting.

7. After two extensions of the deadline, Congress passed the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA),[3] in

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[2] Three multiemployer plans applied for coverage during the time PBGC had discretion to cover their benefits: two covering home-delivery milk drivers and one for cap-makers.

[3] References to MPPAA in the U.S. Code usually cite 29 U.S.C. §§ 1381 *et seq.* That is often enough for parties and courts to find what they need in individual cases, but technically it is not complete. MPPAA also made important changes to the Internal Revenue Code and Title I of ERISA, such as in the definition of "multiemployer plan", ERISA Section 3(37)(A), 29 U.S.C. § 1002(37)(A), and IRC Section 414(f), 26 U.S.C. §

substantially the same form and adopting substantially the same policies as we at PBGC had recommended.

Controlled group policy.

8. One of my early assignments was to handle the PBGC's first litigated claim for employer liability against members of the controlled group that included the company that had maintained the terminated pension plan, *PBGC v. Ouimet Corp.*, 630 F.2d 4 (1st Cir. 1980), *cert. denied,* 450 U.S. 914 (1981), *affirming, PBGC v. Ouimet Corp.,* 470 F. Supp. 945 (D. Mass. 1979). To prosecute that litigation, which began in bankruptcy court as *In re Avon Sole,* we had to decide what the agency's position was on the operation of controlled group liability. *See, Ouimet Corp.,* 470 F.Supp at 947. The PBGC determined that it reached not only the plan sponsor's parent corporation, which owned 100% of its stock, but also real estate trusts whose sole beneficiary was the sole shareholder of the parent company.[4] The court agreed with PBGC that they constituted a brother-sister group of trades or businesses with Avon Sole Company.

9. The federal First Circuit Court of Appeals upheld the PBGC's determination and held that ERISA termination liability as applied to controlled group members that had not employed the terminated plan's participants was constitutional. The U.S. Supreme Court denied the companies' request for review.

10. I also helped formalize the PBGC's controlled-group policy through another channel, overseeing the drafting of its controlled-group regulations.

Law Firm Service

11. I left the PBGC in 1979 and joined the law firm of Burns, Jackson, Miller, Summit & Washington, the Washington, DC branch of a New York

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414(f), and the plan funding [reorganization] rules in ERISA Sections 4242-4244A, 29 U.S.C. §§ 1422-1425, IRC Sections 418A-418D, 26 U.S.C. §§ 418A-418D (repealed in 2004).

[4] One of the trusts owned the facility in which the Ouimet Company was located, the other owned the Ouimet family's homes. The tenants paid rent to the trusts whose property they inhabited – which accumulated in the trusts for their eventual benefit.

City firm. Although I was only there for a year, two of my assignments during that time are pertinent here.

12. First, I was retained as a consultant to the Pension Task Force of the Labor and Education Committee of the U.S. House of Representatives, to work with the Committee's staff on MPPAA as it wended its way through Congress.

13. Second, the PBGC retained me to handle the appeal in its policy-setting case on the controlled group principle, *Ouimet Corp.*, 630 F.2d 4. [5]

Segal Company Service

14. The Segal Company – the employer from which I retired – is an international firm[6] that provides comprehensive consulting and actuarial services to its clients. In particular, it has long been the predominant consultant to US multiemployer pension plans, advising perhaps one-third of the plans, covering roughly 40% of multiemployer plan participants. One of its clients is the National Coordinating Committee for Multiemployer Plans (the NCCMP), the largest and most influential advocacy group for US multiemployer plans, working with the Washington agencies that regulate them and the members of Congress who enact the rules that the agencies carry out. The NCCMP was especially active in the development of MPPAA, keeping in daily touch with the PBGC and then the pertinent members of Congress and their staff. That relationship with policy makers has persisted, with consultations intensifying whenever multiemployer legislation is under consideration.[7]

15. The Segal Company has been the NCCMP's technical advisor since the organization's inception in 1974. From the day I joined Segal in 1980 until I retired in 2011, I was a key member of the Segal team working with the group. Given the broad reach of Segal's consulting relationships in the multiemployer community, we would identify problems the plans

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[5] This claim was for plan termination liability under the single employer guaranty program, but the relevant controlled-group rules – and the policies behind them – are the same for multiemployer withdrawal liability.

[6] Among Segal's 23 offices are facilities in Toronto and Edmonton.

[7] See, e.g., the organization's website, www.NCCMP.org, detailing its activities and listing submissions it has made to Congress and the Administration since 2001.

were encountering with laws and regulations – or problems they would face with proposed laws and regulations. My task was the development and detailed description of possible solutions, to be worked through with the NCCMP's other professionals and submitted to whatever part of the government that was positioned to help. Often we would then spend some time with the government staff, providing further explanation and helping them evaluate solutions.

16. In addition to working with the NCCMP in what was almost a continuation of my governmental policy-development role, I also advised my Segal colleagues and, often, the attorneys for our multiemployer pension clients on effective ways to meet the ever-changing laws and requirements. This often included the preparation of standardized forms and procedures that individual clients could adapt.

17. Obviously the enactment of MPPAA was a major event in the life of multiemployer pension plans and those advising them. For several years I commuted to Washington at least weekly, for meetings and consultations with NCCMP colleagues and government staff working on MPPAA implementation. Back in New York (where I then lived and worked) I would try to explain what was going on to staff working directly with multiemployer clients, prepare draft compliance materials that individual plans could adapt and work with individual clients and their attorneys, trying to devise workable compliance strategies. Predictably, the determination and collection of withdrawal liability was a key theme.

18. This is how my career at Segal played out, and how my expertise with multiemployer pension plans deepened, over 30-some years. The extent of my policy work for the NCCMP waxed and waned, depending on the issues on the regulatory or legislative agendas, but the compliance needs of – and questions from – multiemployer pension clients did not slow down.

19. Given the role that Segal played in the multiemployer community and that I played at Segal, I needed to be actively involved with the plans' lawyers and other professionals and the communities of ERISA actuarial and legal practitioners, to learn about and to explain legal and regulatory issues. In addition to NCCMP conferences and events, I spoke frequently at union and industry gatherings, as well as symposia sponsored by the

ERISA committees of the American Bar Association (ABA). I was active in the employee benefits committees of the ABA's Sections on Tax, Labor Law and Trusts and Estates, attending meetings, chairing subcommittees and contributing to government submissions. In 1999-2000 I chaired the ABA's Joint Committee on Employee Benefits (JCEB).

20. In 2000, I and several other lawyers who had been active with the JCEB established the American College of Employee Benefits Counsel (ACEBC).[8] I am a charter Fellow of the ACEBC, headed its Admissions Committee for several years and served a term as its vice president and two terms on its Board. One activity of the ACEBC was to provide training to IRS agents and other staff on how their rules and practices were working "in the real world". Through this arrangement, I provided training to the IRS on multiemployer plans for a number of years.

21. My CV lists other professional organizations and boards with which I have been involved.

"Retirement"

22. While the pace of my professional engagement has slowed since my retirement, I have continued consulting with The Segal Company and select individual clients on multiemployer regulatory and legislative matters. In particular, I still work closely with the NCCMP on legislation to update MPPAA (and subsequent amendments to it) and create new options for multiemployer groups to survive and thrive.

2. Questions to Be Addressed[9]

A. Controlled Group Liability.

23. The first question posed to me by Dentons, counsel for the UMWA 1974 Plan in this matter, is:

> How do ERISA's provisions on controlled group liability for withdrawal liability operate and what is their purpose?

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[8] Our first induction dinner was held in July 2000, at Windows on the World, the restaurant at the top of the World Trade Center in New York City.

[9] A list of the documents made available to me for the purpose of preparing my report is attached hereto as Appendix A. A list of the facts I have assumed to be true for the purpose of my report is attached hereto as Appendix B.

24. These multiemployer provisions are modeled after the single-employer plan termination liability provisions that were originally part of ERISA and were in force when MPPAA was passed. So, to answer this question, it is helpful first to explain those rules, and then see how they were adapted for the then-new multiemployer program.

Employer Liability under ERISA, In General

25. The spark that started the campaign for a pension reform law was the closure of the Studebaker Company's 100-year old manufacturing operations in South Bend, Indiana in 1963. This prompted the termination of the pension plan for the people working there, and the loss of just about all of the active employees' pensions.[10] The drama of so many people losing their retirement benefits after they had been paid reliably for more than a century led to calls in Congress and the media for pension plan termination insurance.

26. The policy analysts realized the government could not offer such insurance unless the law also required employers to take responsible steps to fund the plans, so minimum funding standards were added to the statutory design, and those managing the plan's assets were held accountable for their decisions, which led to the introduction of federal fiduciary standards. And having a responsibly financed and managed pension fund would not help the plan's beneficiaries unless the law set minimum standards to assure that workers would have a reasonable chance to earn and become vested in their pensions, so minimum standards for plan eligibility, accrual and vesting were added. All of these rules for on-going plans, which are interpreted and enforced by the IRS and the DOL, became the heart of ERISA.

27. Title IV of ERISA established the PBGC as a mandatory insurance program for private-sector pension plans. From the start, a fundamental principle has been that the United States does not stand behind the agency's guaranty obligations.[11] The United States – "the government" – does not underwrite the costs that PBGC must absorb when an underfunded pension plan terminates without a payment from the employer to cover the loss.

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[10] Studebaker's Hamilton Ontario plant continued in operation through 1966.
[11] ERISA Sections 4002(g)(2), 4061, 29 U.S.C. §§ 1301(g)(2), 1361(g)(2).

28. Instead, the PBGC relies on the private sector plans whose benefits it guarantees to come up with the funds to pay for those guarantees. The premiums the law imposes on on-going plans are the agency's primary funding source. Under the single employer program, the PBGC premiums are supplemented by the employer liability that the agency collects from sponsors of underfunded terminated plans (including the commonly-controlled corporate relatives of those employers) and earnings on the assets left in the terminated plans that the PBGC takes over. So, under the statutory design, employer liability serves both as a deterrent to employers' abandoning their pension obligations and as funding for the guarantees. A robust employer liability collection program can ease the burden of premiums that must be imposed on the remaining pension plans.

Withdrawal Liability under the MPPAA

29. MPPAA created a different sort of guaranty program for multiemployer plans, but retained the concept of employer liability that is shared with the whole commonly controlled group.

30. Under MPPAA, "plan termination" is not the critical event for PBGC involvement. Rather, the agency steps in and provides the funds needed to pay guaranteed benefits only when a plan is insolvent and no longer has enough cash to pay currently due benefits. Most terminated, insolvent plans continue operating rather than being taken over by the PBGC. They have two basic responsibilities: to keep paying benefits, albeit only at the reduced level that is guaranteed by the PBGC, and to continue to collect withdrawal liability from employers that have stopped contributing.

31. As passed in 1974, ERISA simply copied the single employer rules and made employers that were contributing to a multiemployer plan when it terminated liable to the PBGC for the underfunding. This was destabilizing for plans that were beginning to falter, as employers would try to get out as early as possible before the plan failed. To correct for that, MPPAA imposes withdrawal liability on every employer[12] that leaves

[12] However, under special rules for the entertainment and building and construction industries, there is no liability for employers that withdraw solely because their assets are sold or they go out of business. ERISA Section 4203(b), (c), 29 U.S.C. § 1383(b), (c).

an underfunded multiemployer plan, even if there is little likelihood of plan termination or insolvency at that time.

32. The strategy was to make the contributing employers – and by extension the covered workers whose pay could drop if the employer must spend more on the pension plan – responsible for guaranteeing the plans' funding, before there is any call on PBGC assets. Thus rather than increasing PBGC's multiemployer premiums so that it could afford to pay guaranteed benefits,[13] through withdrawal liability the law sought to reduce the likelihood that multiemployer plans would need to draw on the PBGC guaranty, by requiring each departing employer to pay for a share of the plan's underfunding even if it stops contributing. And, of course, withdrawal liability is payable directly to the multiemployer plan, where it can be put to work paying benefits, in contrast with employer liability under the single employer program.

33. For the UMWA 1974 Plan, the law calls for allocating a share of the plan's unfunded vested liabilities to a withdrawing employer based on its proportional share of contributions over the prior 5-year period, with no distinction based on when the liabilities arose[14] It also details the terms and conditions on which the liability is payable,[15] and prescribes an arbitration process for enforcement of the liability.[16]

The Controlled Group Concept in ERISA

34. All three major segments of ERISA – Title I (the fiduciary, reporting and related standards administered by the Labor Department), Title II (the funding, vesting and plan nondiscrimination standards in the Internal Revenue Code) and the Title IV benefit guaranty programs – use an expansive definition of employer. That is, for most substantive purposes they define "the employer" to include the company sponsoring

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[13] Although MPPAA did increase annual multiemployer premiums from $0.50 per participant to $2.60 per participant in gradual steps over a 9-year period, these amounts were based on the new law, including withdrawal liability, rather than the assumption that there was no other change in plan financing or the PBGC guaranty program.

[14] ERISA Section 4211(d), 29 U.S.C. § 1391(d). Other plans can use methods that to some extent insulate new employers from the pre-MPPAA underfunding, *see* ERISA Section 4211, 29 U.S.C. § 1391.

[15] ERISA Section 4219, 29 U.S.C. § 1399.

[16] ERISA Section 4221, 29 U.S.C. § 1401.

the plan and all members of its commonly controlled group of trades or businesses. "Common control" is determined by using mathematical formulas to measure the levels of mutual ownership among related companies.

35. In considering a claim against distant controlled group members based on a pension plan to which they did not contribute, it is helpful to step back and see where that liability fits in the design of the PBGC's pension guaranty program. It is easy to get lost in the technical maze of the controlled group rules[17], and breathe a sigh of relief and move on, once the algebra is solved. It is true that application of the mechanical tests is all that is needed to answer the statutory question whether given trades or businesses are under common control. But in analyzing the issues here it is also useful to address the underlying question: why do sometimes distant corporate relatives share employer liability under the statute?

36. As noted, the broader concept of "employer" applies for many of the on-going plan rules and standards of ERISA as well as the liability provisions of Title IV. This means, for instance, that an employee of one controlled group member will receive credit for service with another member to determine whether she has a vested right to her accrued benefits under the current company's pension plan.[18] It also means that the demographics of the whole group can be considered when the IRS is judging whether a pension plan is discriminatory under the Internal Revenue Code standards of IRC § 401(a)(4).[19] The controlled-group

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[17] E.g., to be a commonly controlled group there must be both concentration of ownership and common control, and the rules describe how to measure each of them, separately. They also address such issues as how options, treasury stock and stock held in trusts are counted in the mathematical tests, as well as the rules for attribution of stock ownership among family members.

[18] ERISA section 210(c), (d), 29 U.S.C. § 1060, IRC Section 414(b), (c).

[19] The Internal Revenue Code has long provided that the federal income tax benefits for "tax-qualified" pension plans (those that meet the standards of IRC Section 401(a), including the ERISA minimum standards) are not available to plans that "discriminate", i.e., that go too far in favoring shareholders, owners and highly paid employees. Many rules and regulations have been developed for applying the crucial nondiscrimination principle. See, e.g., the meticulously detailed regulations on measuring nondiscrimination in benefits, 26 C.F.R. §§. 1.401(a)-1 – 401(a)-13, 401(a)(5)-1 and nondiscrimination in plan coverage, 26 C.F.R. §§. 1.410(b) –1 – 1.410(b)-10.

concept is part of the ERISA and Internal Revenue Code definitions of "multiemployer plan," so that a collectively bargained plan maintained, for example, by a parent corporation would not inadvertently shift to multiemployer status if the plan were also adopted by a wholly owned subsidiary.[20]

37. In each of these applications, the same arithmetic rules apply to determine common control. If the ownership numbers add up, companies are under common control, whether or not there was any intent to evade statutory standards by dividing into separate companies or operationally related operations or shared corporate missions. The bright lines make it easy to know whether a pension plan is in compliance, while they may on occasion make it harder to apply.

Controlled Group Liability Under Title IV

The Law.

38. Given how interwoven the controlled-group concept is with the operation of on-going pension plans under ERISA, it should be no surprise that it would be included in the Title IV benefit guaranty programs as well.

39. Section 4001 of ERISA defines most of the terms that have a distinctive meaning for the plan benefit guaranty program of Title IV of ERISA. Subsection (b)(1) prescribes the controlled-group rule, in relevant part:

> For purposes of this title, under regulations prescribed by the [PBGC], all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades or businesses as a single employer. The regulations prescribed under the preceding

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The rules allowing companies to meet these standards separately for separate lines of businesses, ___, were added to the Code to mitigate problems caused by applying a strict "employer = controlled group" concept here.

[20] ERISA section 3(37)(B), IRC § 414(f)(2). The definition of "multiemployer plan" for the benefit guaranty program in Title IV of ERISA, section 4001(a)(3), does not include the controlled-group rule. That is because the special controlled-group definition of "employer" in section 4001(b)(1) of the law applies for all purposes under Title IV.

> sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of [the Internal Revenue Code].[21]

40. The implementing PBGC regulation that is relevant here is a brief paragraph stating simply that "The PBGC will determine that trades and businesses (whether or not incorporated) are under common control" if they meet the controlled group tests of IRC section 414(c).[22]

41. Section 414(c) of the Internal Revenue Code states briefly that the Treasury rules for determining common control when both incorporated and unincorporated businesses are involved "shall be based on principles similar to the principles which apply in the case of subsection (b)" of section 414 of the Code. Section 414(b), which applies for determining common control when the group is made up solely of corporations, adopts the rules in to IRC section 1563(a)[23]. Section 1563 and its implementing regulations provide the inspiration for the detailed rules, concepts and equations that govern the identification of a commonly controlled group of businesses under IRC sections 414(b) and (c) and ERISA section 4001(b)(1).[24]

42. The basic rules are fairly straightforward: businesses are under common control if they are part of a parent-subsidiary group, a brother-sister group, or a group that comprises both types of relationships.

43. As laid out in detail in the Treasury regulations under IRC Section 414(c), 26 C.F.R. §§ 1.414(c)-1 – 1.414(c)-5, companies are connected

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[21] 29 U.S.C. § 1301(b)(1).

[22] The most interesting thing about this regulation is the opening phrase, "PBGC will determine that ..." Washington DC regulars recognize that as a declaration that, PBGC will interpret and apply the controlled group rule when it is used under Title IV of ERISA, not the IRS, even though the IRS rules govern.

[23]However, section 414(b) excludes sections 1563(a)(4), relating to certain insurance companies, and 1563(e)(3)(C), relating to counting stock held by certain tax-qualified retirement plans. These exclusions are not relevant here.

[24] As this schematic demonstrates, the use of incorporation-by-reference in the drafting of U.S. tax and related laws has become a fine art. The governing ideas are so complex and detailed that drafters are wary of copying them when the same idea is used in different provisions, out of concern that something might be left out or they may make a formatting or other mistake that could change the meaning of the rule.

through a parent-subsidiary group if one owns at least 80% of the stock[25] of the other. There is a brother-sister group if the same five or fewer corporations, partnerships, trusts, or other businesses own at least 80% of each of them and has "effective control" of each of them through the same ownership proportions. A combined group is, of course, a group containing both as parent-subsidiary and brother-sister groups.

44. As discussed earlier, the employer liability imposed by ERISA helps to fund the benefit guarantees, albeit in a small way.[26] Applying it to the whole economic entity over which the group's assets are spread gives the controlling shareholders an incentive to keep their corporate relatives' plans funded or pay up on the claims of the PBGC, in a single-employer case, or the trustees, in the case of multiemployer plan withdrawal liability. Because the law uses mechanical tests and looks at highly concentrated levels of ownership, it does not matter whether the decision-makers actually exercised their control since they had the power to do so if they chose.

45. Withdrawal liability plays a broader and, frankly, more important role for multiemployer plans. Since it is owed to and collected by the plan itself, it is used exclusively for the payment of benefits, not for guaranteeing them at some future date if the plan fails. For that reason, safeguards like the controlled-group rules are essential to the withdrawal liability design.

Application to these facts.

46. For purposes of this discussion, I will assume the truth of the facts stated at the beginning of this Report. In sum, they show that Jim Walter Resources Inc. ("Walter Resources") was the company that had an

[25] Similar concepts, such as profits-interest or actuarial interest, are used for unincorporated businesses.

[26] According to the PBGC's annual report for its 2016 fiscal year, that year's settlements with employers for single-employer plan underfunding and unpaid contributions totaled $88 million. Because these are usually claims against bankrupt plan sponsors, it is often likely that the employer is delinquent on its plan contributions. That, of course, adds to the plan underfunding, so in the end it does not matter from a substantive point of view whether the recovery is charged against delinquent contributions or general plan underfunding. The total income of the single employer program for the fiscal year was $15 billion. PBGC FY 2016 Annual Report at 29. http://www.pbgc.gov/Documents/2016-Annual-Report.pdf.

obligation to contribute to the UMWA 1974 Plan. Walter Resources withdrew from that Plan in 2015. At the time of its withdrawal it was part of a commonly controlled group (as determined under the applicable U.S. regulations) that included the Walter Canada Group ("Walter Canada"). Walter Energy Co., the parent of both Walter Resources and Walter Canada, had purchased the Western Coal Co., through its wholly owned subsidiary, Walter Canada, in 2011.

47. That transaction was exactly what the controlled group rules were aimed at: the parent company put some of its assets into a separate corporation that, without the controlled group rule, would not be available to satisfy Walter Resources' obligations to the UMWA 1974 Plan. Under ERISA it is not material whether Walter Energy intended that result or even considered the impact on Walter Resources and the UMWA 1974 Plan when it made the purchase.

B. Liability of Non-U.S. Controlled Group Member

48. The next question put to me by Dentons was:

> In answer to the declaration of Marc Abrams, is a member of a controlled group that is outside of the United States exempt from withdrawal liability for that reason?

49. I believe the answer under U.S. law is no. My view is that the collection of withdrawal liability from any and all components of the controlled group that constitute the employer is a paramount goal of ERISA, as amended by MPPAA. Given the law's focus on withdrawal liability and plans' ability to collect it from the "employer", I do not believe that a U.S. court would allow that goal to be frustrated by the fact that one member of the controlled group is located outside of the United States.

50. The U.S. Supreme Court's framework for analyzing questions of extraterritoriality is outlined in two recent decisions, *RJR Nabisco Inc. v. European Community et al.* (2016) ___ US ___, 136 S.Ct. 2090 and *Morrison v. National Australia Bank Ltd.* (2010) 561 US 247, 130 S.Ct. 2869. That approach entails a two-part test, asking (a) whether the law gives a clear indication that it is intended to have extraterritorial effect and (b) whether the contest involves "a permissible *domestic* application of the

law" because its focus is on activities that took place in the United States, *RJR Nabisco*, 230 S.Ct., at 2100.

51. PBGC's Opinion Letter 97-1 (May 1997)[27], addresses a question very similar to the one before us. The agency's examination of the issues comports with the Supreme Court's analytical framework. Unlike Mr. Abrams, I find its reasoning persuasive. I believe a U.S. court would reach the same conclusion, particularly as the statement is from the expert agency charged by Congress with interpreting the law.

52. The ruling addresses a U.S. company's withdrawal from a multiemployer plan and the plan's resulting claim for withdrawal liability. The plan was not able to collect the full amount from the direct employer, which was in a bankruptcy proceeding, so it sought to recover the rest from other members of the contributing employer's controlled group, which were located in the United Kingdom (the "UK Companies").[28] The UK Companies urged the PBGC to declare that applying the controlled group rule to a non-U.S. company that had not been involved with the plan or the contributing employer would be an unacceptable extraterritorial application of ERISA.

53. The PBGC disagreed, and so do I. When, as here, an employer doing business in the United States contributes to an underfunded multiemployer pension plan located in the United States under a collective bargaining agreement entered into in the United States with the labor union that represents people working for that employer in the United States, and the employer terminates that contribution obligation pursuant to the authorization of a U.S. Bankruptcy Court, a U.S. statute – ERISA – makes the employer liable to the pension plan for a share of its underfunding. In addition, the U.S. law makes all of the contributing employers jointly and severally liable for that debt to the pension plan.

54. Clearly the focus of the law is the multiemployer plan's underfunding and the employer's withdrawal from the plan. In the case before the PBGC in Opinion Letter 97-1 and in the case at bar, all of the events involved in the creation, computation and assertion of the withdrawal liability have taken place within the United States. The fact

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[27] http://www.pbgc.gov/docs/97-1.pdf.

[28] The contributing employer and the UK Companies were both wholly owned subsidiaries of the same corporation.

that one of the related corporate entities that share the liability is located out of the U.S. does not make the law, the debt or the provisions for its collection "extraterritorial". The controlled-group liability is a collection tool that supports the law's main focus, which is the employer withdrawal. That took place in the U.S.[29]

55. Mr. Abrams reaches a different conclusion, apparently by taking a much narrower view of the focus of the statute. Rather than recognizing that the focus of MPPAA was on strengthening the financial status of multiemployer plans through, among other things, the imposition of withdrawal liability, he considers a peripheral feature of the withdrawal liability design – the controlled group concept – to be the focus of the law. see Abrams Report at p. 17. Here he posits that the addition of the Canadian operations to the Walters Energy controlled group was the central event on which ERISA's withdrawal liability collection scheme is focused. With respect, I disagree and I believe a U.S. court would do so as well, just as the PBGC did in Opinion Letter 97-1.

56. Mr. Abrams also errs when he brings in principles of personal jurisdiction to determine whether ERISA is being applied extraterritorially, see Abrams Report, 17 – 19. But that is not relevant to what is happening here. The UMWA 1974 Plan has come to a Canadian court to collect on the statutory debt of a Canadian company. Since is not asking a U.S. court to exercise jurisdiction over that Canadian collection action, there is no reason to consider the points Mr. Abrams raises regarding personal jurisdiction.

C. Penalty or Public Revenue Law

57. The final question that Dentons poses is:

> As a matter of United States law, does controlled group liability for withdrawal liability constitute a "penal, revenue or other public law" of the United States?

58. Again, my answer is no, and I believe a U.S. court would give the same answer.

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[29] Mr. Abrams suggests that the focus of the law was Walter Energy's creation of Walters Canada and its acquisition of the Western mines.

Is it a penalty?

59. Clearly, withdrawal liability is not a penal provision. It is automatically incurred when an employer withdraws from an underfunded multiemployer plan, regardless of the employer's good faith or its reasons for withdrawing. Indeed, multiemployer plan trustees are required to collect the liability when an employer withdraws, ERISA s. 4202. There is no allowance for subjective distinctions between "innocent" and "blameworthy" withdrawing employers.

60. Similarly, as emphasized repeatedly above, the controlled group concept applies without regard to the intent behind the creation of the group or its structure. It is true that a much-cited purpose of the controlled group rule is to prevent companies from devising corporate structures in ways that could complicate a pension plan's recovery of withdrawal liability, or make it difficult for rank and file employees to earn vested rights to their benefits. But that is a prophylactic, not a penal application of the law. By preventing actions that could defeat the purposes of the various laws in which the controlled group concept is brought to bear, that rule is actually the opposite of a penalty.

Is it a tax or revenue law?

61. The answer to that is easy and obvious: multiemployer withdrawal liability, as bolstered by the controlled-group rules, is calculated and collected by the multiemployer plans, not the PBGC. The law says that it must be paid, but not to the government and not for the benefit of the government – it is payable to the plans, for the benefit of their participants and beneficiaries. It is no more a tax than other payments to or for the benefit of private parties that are required by law, such as child support or automobile liability insurance.

62. Indeed, section 4068 ERISA gives PBGC a lien against the assets of an employer that owes the single employer plan termination liability to the agency, and subsection (c) of section 4068 gives that PBGC lien the status of a tax lien in bankruptcy or insolvency proceedings but the law provides no such enforcement status for a multiemployer plan's claim for withdrawal liability. So there is not even an indirect implication in ERISA that withdrawal liability is a tax or public revenue measure. The fact that

it runs against the controlled group members as well as the direct employer is immaterial to that question.

63. In sum, I believe that United States law does not treat controlled group liability for withdrawal liability as a penal, revenue or other public law of the United States, and I believe that the courts in the United States would so rule.

3. Conclusion

64. The concept that all trades or businesses under common control are treated as a single employer runs throughout the ERISA rules for on-going pension plans as well as terminating plans. When Congress passed the MPPAA it adopted the same controlled-group rule as a facet of multiemployer plan withdrawal liability, which holds employers that withdraw from a multiemployer pension plan liable to that plan for a share of its unfunded vested liability. Withdrawal liability aims to bolster plans' funding to improve the security of participants' benefits, even if contributing employers are pulling out. The controlled group rules aim at strengthening the plans' ability to collect the withdrawal liability.

65. There is no indication that Congress expected controlled group membership to be cut off at the borders of the United States. The focus of ERISA's withdrawal liability provisions, including the extension of that liability to controlled group members, is the collection of funds to assure the payment of benefits to multiemployer plan participants. As PBGC concluded in Advisory Opinion 97-1, ERISA's liability and collection rules are not considered extraterritorial under U.S. law just because one of the controlled group members that shares the joint-and-several liability is outside the United States.

66. Finally, withdrawal liability and its application to controlled group members is not a penalty, nor are they revenue measures under United States law.

4. Certification

Pursuant to Rule 11-2 of the Civil Rules of the Supreme Court of British Columbia, I hereby certify:

(a) I am aware of the duty of expert witnesses referred to in subrule (1) of Rule 11-2 that, in giving an opinion to the court, an expert appointed by one or more parties or by the court has a duty to assist the court an is not to be an advocate for any party;

(b) I have made this report in conformity with such duty, and

(c) I will, if called on to give oral or written testimony, give such testimony in conformity with such duty.

Judith F. Mazo

November 2016

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2011 – Present

Independent Consultant on ERISA-Covered Benefit Plans

Since her retirement from The Segal Company, Ms. Mazo has been engaged on a range of assignments taking advantage of her expertise in employee benefit plans and the Employee Retirement Income Security Act (ERISA) and Internal Revenue Code (IRC) rules that govern them. These have included:

- Expert witness on behalf of Petco Corp. in litigation regarding the rules and practices governing funded welfare plan benefits;

- Mediator to help resolve a deadlock between the union and employer trustees of a national multiemployer pension fund;

- Ongoing engagement as a principal technical resource to the National Coordinating Committee for Multiemployer Plans (NCCMP) in its legislative effort to revise and modernize the ERISA and IRC rules governing multiemployer pension plans, to better serve the employees and retirees they cover and their contributing employers.

- Ongoing, as-need consultant to The Segal Company on compliance issues for multiemployer retirement plan clients.

1980 – 2011

The Segal Company: Senior Vice President and Director of Research

Ms. Mazo's responsibilities as Senior Vice President and Director of Research for The Segal Company, generally included directing research and providing guidance on public policy, legislative and regulatory issues and other matters of interest to clients of this national actuarial, benefits and compensation consulting firm. She served on Segal's Senior Management Team and chaired its National Practice Council, a forum for the top leadership of the Company's professional and technical practices. She was twice elected by her fellow shareholders to the company's board of directors.

During this period Ms. Mazo, who spoke and wrote frequently on employee benefits matters, was, among other things, a member of the Harvard/Kennedy School Health Care Delivery Policy Project, the Pension Research Council of the Wharton School and the Editorial Advisory Board of the BNA Pension and Benefits Reporter. A Charter Fellow of the American College of Employee Benefits Counsel, Ms. Mazo served as its Vice President for the 2002-2003 term, and was a member of its Board from 2000 to 2007. Active in the American Bar Association, she was Chair of its Joint Committee on Employee Benefits for the 1999-2000 term. In April 2002, the President of the United States appointed her to the Advisory Committee of the Pension Benefit Guaranty Corporation. She was appointed by Secretary of Labor Alexis Herman to the U.S. Department of Labor's ERISA Advisory Council, and chaired its Working Groups on Cash Balance Plans and on Disclosures Regarding Health Care Quality, and reappointed to the Council by Secretary Elaine Chao. In May 1998, the National Law Journal listed her as one of the country's top employee benefits lawyers.

From 1980 until her retirement, Ms. Mazo served as The Segal Company's principal consultant providing technical advice to the NCCMP. The NCCMP is the primary organization in Washington advocating on behalf of labor-management pension, health and other employee benefit plans. As its technical advisor, Ms. Mazo was deeply involved in the development of virtually all of the legislation and regulations governing the design and administration of these union-negotiated multiemployer retirement funds for over 30 years, as well as many of the rules affecting multiemployer health and welfare funds. Ms. Mazo is widely recognized for her technical expertise on multiemployer funds and tax qualified retirement plans generally and, as noted, continues to work with the NCCMP on many of those same issues.

1979 - 1980

Law Firm Associate Specializing in ERISA Matters

Assignments included serving as special counsel to the U. S. Pension Benefit Guaranty Corporation (PBGC) and as a consultant to the Pension Task Force of the Committee on Education and Labor of the U.S. House of Representatives.

1975-1979

Pension Benefit Guaranty Corporation

She was senior attorney for the PBGC and executive assistant to its general counsel from 1975 to 1979. In these early years of ERISA and of the Agency's operations, she played a significant role in virtually every decision setting the basic rules for regulating defined benefit employee retirement plans. Among her responsibilities were:

- Directing the PBGC's position in PBGC v. Ouimet Corp., the first case establishing a parent corporation's statutory liability for its subsidiary's

terminated pension plan under the ERISA controlled-group rules and

- Directing the Administration task force that prepared and drafted its proposed overhaul of the ERISA rules for multiemployer retirement plans, which Congress ultimately enacted as the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA).

Education and Background

Ms. Mazo graduated with honors from Yale Law School and Wellesley College and has been admitted to the bar in the District of Columbia and the State of Louisiana.

APPENDIX A

The following documents were made available to me for the purpose of preparing my report:

A. Amended Notice of Claim filed by the United Mine Workers of America 1974 Pension Plan and Trust, on November 9, 2016;

B. Amended Response to Civil Claim of the United Mine Workers of America 1974 Pension Plan and Trust, filed by the Petitioners, the Walter Canada Group on November 15, 2016;

C. Second Amended Response to Civil Claim, filed by the United Steelworkers, Local 1-424 on November 16, 2016;

D. Reply to the Response to Civil Claim of the United Steelworkers, Local 1-424 filed by the United Mine Workers of America 1974 Pension Plan and Trust, on October 5, 2016; and

E. Expert report of Marc Abrams, attached as Tab 20 to the Walter Canada Group's Book of Evidence dated November 14, 2016.

APPENDIX B

I have assumed the following facts to be true for the purpose of my report:

i. The 1974 Plan claims against Walter Canada Holdings, Inc. ("Canada Holdings") and related entities (described collectively as the "Walter Canada Group" and listed in Schedule "A" hereto) in relation to the pension withdrawal liability of Jim Walter Resources Inc. ("Walter Resources") arising under the provisions of ERISA. The amount of the claim is in excess of US$900 million.

ii. Walter Energy Inc. ("Walter Energy") is a public company incorporated under the laws of Delaware and headquartered in Birmingham, Alabama.

iii. Walter Energy did business in West Virginia and Alabama.

iv. Walter Energy's board of directors and its management team operated out of Birmingham, Alabama.

v. Canada Holdings is incorporated under the laws of British Columbia and has its registered and records office in Vancouver, British Columbia.

vi. Canada Holdings is wholly owned by Walter Energy.

vii. Walter Resources is wholly owned by Walter Energy.

viii. Walter Resources is incorporated in Alabama and did business in Alabama.

ix. Walter Resources' management team operated out of Birmingham, Alabama.

x. The 1974 Plan is a pension plan and irrevocable trust established in accordance with section 302(c)(5) of the Labor Management Relations Act.

xi. The 1974 Plan is a multiemployer defined benefit pension plan under section 3(2), (3), (35), (37)(A) of ERISA.

xii. The 1974 Plan is resident in Washington, D.C.

xiii. The trustees of the 1974 Plan are resident in the United States.

xiv. All participating employers in the 1974 Plan are resident in the United States.

xv. Walter Resources, as a signatory to National Bituminous Coal Wage Agreements ("CBA"), has been a participating employer in the 1974 Plan.

xvi. Walter Resources in the only U.S. entity affiliated with Walter Energy that has been party to a collective bargaining agreement with the 1974 Plan.

xvii. No member of the Walter Canada Group is or ever has been a party to a collective bargaining agreement with the 1974 Plan.

xviii. The Walter Canada Group comprises all entities owned directly or indirectly by Walter Energy that are incorporated under the laws of Canada or its provinces.

xix. Walter Energy affiliates in the United States provided essential management services to the Walter Canada Group, including accounting, procurement, environmental management, tax support, treasury functions, and legal advice.

xx. William Harvey, of the City of Birmingham, Alabama, was the executive vice president and chief financial officer of Canada Holdings.

xxi. Mr. Harvey was also the chief financial officer and executive vice president of Walter Energy.

xxii. Mr. Harvey, and four other officers of various Walter Canada Group companies who were also employees of Walter Energy, resigned on January 20, 2016.

xxiii. Before 2011 Walter Energy did not have any operations or subsidiaries in Canada or the United Kingdom.

xxiv. On March 9, 2011 Walter Energy incorporated Canada Holdings.

xxv. Canada Holdings was incorporated specifically to hold the shares of Western Coal Corp. and its subsidiaries.

xxvi. On April 1, 2011, Canada Holdings acquired all outstanding common shares of Western Coal Corp.

xxvii. The acquisition was completed pursuant to a plan of arrangement approved by the Supreme Court of British Columbia.

xxviii. At that time the 1974 Plan had an unfunded liability of greater than US$4 billion.

xxix. Western Coal Corp. and its subsidiaries operated coal mines in British Columbia, the United Kingdom and the United States.

xxx. The operations of the Walter Canada Group principally included the Brule and Willow Creek coal mines, located near Chetwynd,

British Columbia, and the Wolverine coal mine, near Tumbler Ridge, British Columbia.

xxxi. The principal assets of the Walter Canada Group are the cash proceeds from the sale of the Brule, Willow Creek and Wolverine mines and a 50% interest in the Belcourt Saxon Coal Limited Partnership.

xxxii. The Walter Canada Group did not and does not have assets or carry on business in the United States.

xxxiii. The 1974 Plan is in financial distress and had unfunded vested benefits of approximately US$5.8 billion as of July 1, 2015.

xxxiv. On July 15, 2015 Walter Energy and related U.S. companies commenced proceedings under chapter 11 of title 11 of the United States Code.

xxxv. On December 28, 2015 the U.S. Bankruptcy Court entered an order authorizing Walter Energy and its U.S. affiliates to reject the CBA and declaring that Walter Resources had no further obligation to contribute to the 1974 Plan.