VANCOUVER
JUL 27 2017
COURT OF APPEAL
REGISTRY

Court of Appeal File No CA44448

COURT OF APPEAL

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 A PLAN OF COMPROMISE AND ARRANGEMENT OF NEW WALTER ENERGY CANADA HOLDINGS, INC., NEW WALTER CANADIAN COAL CORP., NEW BRULE COAL CORP., NEW WILLOW CREE COAL CORP., NEW WOLVERINE COAL CORP., AND CAMBRIAN ENERGYBUILD HOLDINGS ULC

PETITIONERS
(RESPONDENTS)

AND:

UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN AND TRUST

APPELLANT

RESPONDENTS' APPEAL BOOK

United Mine Workers of America
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TAB 1

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. c. 2002, c. 57, AS AMENDED

AND

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

PETITIONERS

EXPERT REPORT OF MARC ABRAMS

Expert Report Filed by: Petitioners (the "Walter Canada Group")

I. INTRODUCTION

a. Personal Background

My name is Marc Abrams, and my home address is 1 Clark Smith Drive, Old Tappan, New Jersey 07675. I am a partner at Willkie Farr & Gallagher LLP and I am Co-Chair of the Firm's Business Reorganization and Restructuring Department. My curriculum vitae is attached hereto as Exhibit A.

I have been practicing law for over 38 years, and am admitted to practice before multiple state, federal and appellate courts. During this time, I have been engaged in numerous complex restructurings, both in and out of court, representing companies, creditors' committees and ad hoc groups, and other parties in interest. I also have substantial cross-border insolvency experience involving foreign insolvency regimes and related cases under the U.S. Bankruptcy Code. Many of these engagements have had significant pensions-related components, including a number of cases where I represented the administrators of pension plans or other statutory bodies in respect of pension plans, such as Nortel Networks, Inc., Reader's Digest Association, Inc., AMF Bowling and Sea Containers Services, Ltd. A number of my company-side representations have also involved significant claims asserted by multiemployer and single employer pension plans, including Petrie Retail, Inc., LTV Steel Corp., Delphi Corp., Journal Register Co. and Woodward & Lothrop Holdings, Inc.

Among other honors, I am a member of the Board of Directors and a Fellow of the American College of Bankruptcy. I have published numerous articles related to bankruptcy law and cross-border insolvency issues. I have also lectured at numerous conferences, including speaking engagements related to cross-border insolvency issues and pensions issues.

b. Instructions Provided To Expert In Relation to Proceedings

I have been retained by the law firm Osler, Hoskin & Harcourt LLP ("Osler"), who are counsel for Walter Energy Canada Holdings, Inc. ("Walter Energy Canada"), its direct and indirect subsidiaries and affiliates listed on Schedule "A" (collectively with Walter Energy Canada, the "Petitioners") and the partnerships listed on Schedule "C" to the Order of this Honourable Court made on December 7, 2015 (the "Initial Order") (collectively with the Petitioners, the "Walter Canada Group"), as an independent expert in connection with Walter Energy Canada's insolvency proceedings under the *Companies' Creditors Arrangement Act* ("CCAA").[1] In particular, I was asked to opine on the following question of U.S. law:

> If the claim of the United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Plan") against the Walter Canada Group is governed by United States substantive law (including ERISA), as a matter of United States law does controlled group liability for withdrawal liability related to a multiemployer pension plan under ERISA extend extraterritorially?[2]

As set forth in more detail below, it is my opinion that a U.S. court should conclude that the "controlled group" liability provisions of the U.S. Employee Retirement Income Security Act of 1974 ("ERISA") do not have extraterritorial application.

c. Overview of The Report

This report begins by providing an overview of the provisions of ERISA governing withdrawal liability in the context of a multiemployer pension plan, such as the 1974 Plan, as well as the statute's "controlled group" liability provisions. Assuming, without opining, that the 1974 Plan could establish that the Walter Canada Group are within Walter Resource's

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[1] Prior to this retention, I was retained by KPMG LLP, in its capacity as monitor of Walter Canada in Walter Canada's CCAA proceedings, with respect to issues relating to ERISA and U.S. employee benefits and bankruptcy laws.

[2] A copy of the instructions I received from Osler is attached hereto as Exhibit B.

"controlled group," the report proceeds to analyze, in the same manner a U.S. federal court would, whether ERISA's "controlled group" provisions apply extraterritorially with respect to a claim for withdrawal liability. The report also addresses certain jurisdictional considerations under U.S. law that may impact application of ERISA's liability provisions to a non-U.S. entity.

II. FACTUAL BACKGROUND

In connection with my assignment, I have reviewed, among other materials, pleadings filed in the 1974 Plan's civil claim against Walter Canada Group arising under ERISA as well as Walter Canada Group's Statement of Uncontested Facts. A list of the materials I have reviewed in connection with this opinion is attached hereto as Exhibit C.[3]

Based on my review of those materials, I understand the following facts to be relevant to this opinion:

- The 1974 Plan seeks to hold the Walter Canada Group jointly and severally liable for the claimed pension withdrawal liability of Jim Walter Resources Inc. ("Walter Resources").
- The Walter Canada Group and Walter Resources are direct or indirect wholly owned subsidiaries of Walter Energy Inc. ("Walter Energy"), a public corporation incorporated under the laws of the State of Delaware.
- On April 1, 2011, Walter Energy, through a Canadian holding company, acquired all of the outstanding shares of Western Coal Corp. (the "Western Acquisition").
- Prior to the Western Acquisition, Walter Energy did not have any operations or subsidiaries in Canada or the United Kingdom.

[3] I understand the parties may submit additional evidence prior to the hearing in this matter. I reserve the right to address such evidence in a reply submission.

- The Western Acquisition was completed pursuant to a plan of arrangement approved by the British Columbia Supreme Court.
- At the time of the Western Acquisition, the 1974 Plan had an existing unfunded liability of greater than US$4 billion.
- After the completion of the Western Acquisition, Walter Energy engaged in a series of internal restructurings to rationalize operations and to organize the corporate group into geographic business segments – *i.e.*, U.S., Canadian and U.K. I understand that in connection with the internal reorganization, U.S.-based assets or operations owned by Western Coal Corp. and acquired in the Western Acquisition were transferred to the group's U.S. business segment, but no assets or operations were transferred to the Canadian business segment.
- The Walter Canada Group does not have any assets or carry on any business in the U.S.
- The Walter Canada Group did not employ any persons who were members of the 1974 Plan and were not contributing employers to the 1974 Plan.
- Pursuant to certain management and other intercompany agreements, Walter Energy and its subsidiaries, based in the U.S., provided essential management services to the Walter Canada Group, including accounting, procurement, environmental management, tax support, treasury functions and legal advice.
- After the Western Acquisition, the Executive Vice President and Chief Financial Officer of Walter Canada resided in and worked out of Birmingham, Alabama.
- On July 15, 2015, Walter Energy and certain of its affiliates, including Walter Resources, commenced proceedings under Chapter 11 of Title 11 of the United States Code in the U.S. Bankruptcy Court for the Northern District of Alabama ("U.S. Bankruptcy Court").

- On December 28, 2015, the U.S. Bankruptcy Court issued an order authorizing, among other things, Walter Resources to discontinue any further contributions to, and effect a withdrawal from, the 1974 Plan.

III. RELEVANT PROVISIONS UNDER ERISA

a. Withdraw Liability Under ERISA

The 1974 Plan is a multiemployer defined benefit pension plan under Section 3(37)(A) of ERISA.[4] A multiemployer plan is a collectively bargained pension plan maintained and funded by more than one unrelated employer, typically within the same or related industries.[5] If one of the contributing employers withdraws from a multiemployer plan, either partially or completely, ERISA requires the employer to pay to the plan its share of any unfunded vested benefits, generally determined as of the end of the plan year preceding the plan year in which the withdrawal occurs.[6] The withdrawing employer's liability is referred to as "withdrawal liability."

Withdrawal liability is measured in terms of the plan's unfunded vested benefits allocated to the employer at the time of withdrawal.[7] The plan has a statutory duty to calculate and collect the withdrawal liability from the withdrawing employer.[8] If the withdrawing employer defaults in paying the withdrawal liability, the entire amount of the withdrawal liability becomes subject to collection.[9]

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4 Amended Notice of Civil Claim ("1974 Plan Claim") ¶ 22.

5 29 U.S.C. § 1301(a)(3).

6 29 U.S.C. § 1401; 29 U.S.C. § 1386.

7 29 U.S.C. §§ 1391(a), (b); 29 U.S.C. §§ 1391(a), (b).

8 29 U.S.C. § 1382.

9 29 U.S.C. § 1399(c)(5).

b. "Controlled Group" Liability

Under ERISA, withdrawal liability is the joint and several obligation of not only the withdrawing employer (as a contributing employer) but also each member of the employer's "controlled group."[10] A contributing sponsor's "controlled group" consists of the contributing employer and any other entity that conducts a "trade or business" and is under "common control" with the employer.[11] Courts have described the operation of ERISA's "controlled group" liability provisions as a "veil-piercing" statute that disregards formal business structures in order to impose liability on related businesses.[12]

For purposes of ERISA, the three principal types of "controlled groups" are: (i) Parent-Subsidiary Controlled Groups; (ii) Brother-Sister Controlled Groups; and (iii) Combined Groups.[13] Here, the 1974 Plan asserts that Walter Canada is part of Walter Resources's Parent-Subsidiary Controlled Group.[14] Under ERISA, a Parent-Subsidiary Controlled Group is a group consisting of entities connected through a controlling interest with a common parent where stock with at least 80% of the voting power or value (other than the parent) is owned by one or more corporations and the common parent corporation owns stock with at least 80% of the voting power of at least one of the corporations.[15]

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[10] 29 U.S.C. § 1301(a)(2); 29 U.S.C. §§ 1381(a), (b).

[11] 29 U.S.C. §§ 1301(a)(14)(A), (B); 29 U.S.C. § 1002(40)(B); *see also* 29 C.F.R. § 4001.2.

[12] *See, e.g., Sun Cap. Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund*, 724 F.3d 129, 138 (1st Cir. 2013) (ERISA's "broad definition of 'employer' extends beyond the business entity withdrawing from the pension fund, thus imposing liability on related entities within the definition, which, in effect, pierces the corporate veil and disregards formal business structures."); *Cent. States, S.E. & S.W. Areas Pension Fund v. Messina Prods., LLC*, 706 F.3d 874, 877 (7th Cir. 2013) ("When an employer participates in a multiemployer pension plan and then withdraws from the plan with unpaid liabilities, federal law can pierce corporate veils and impose liability on owners and related businesses.").

[13] 26 C.F.R. § 1.1563-1(a)(1)(i).

[14] 1974 Plan Claim ¶¶ 26-27, 33, 37-39.

[15] 29 U.S.C. § 1301(b)(1); 26 U.S.C. § 1563(a)(1).

As the U.S. Supreme Court has recognized, in place of the "subjective, case-by-case analysis that had previously prevailed," Congress purposefully adopted an "objective test" for determining whether a controlled group exists, based on a "mechanical formula" that establishes "a sharp dividing line that is crossed by incremental changes in ownership."[16] Thus, the applicable regulations for withdrawal liability of "controlled groups" establish a "brightline test based purely on stock ownership," and affiliates are not required to have actually exercised control over the employer (or vice versa) or engaged in any wrongdoing or misconduct in order to be liable as a member of the "controlled group."[17]

For purposes of this report, I assume that the 1974 Plan can establish that the Walter Canada Group meets the numerical tests for stock ownership or voting control with respect to a "controlled group" under ERISA. Therefore, I will next address, as a matter of U.S. law, whether ERISA's "controlled group" liability provisions apply extraterritorially.

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16 *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 34 (1982).

17 *See Bd. of Trustees of Trucking Employees of N.J. Welfare Fund, Inc.–Pension Fund v. Gotham Fuel Corp.*, 860 F. Supp. 1044, 1051 (D.N.J. 1993) ("Controlled group members are statutorily determined to be 'single entities,' without the necessity of a finding of improper motive or wrongdoing."); *PBGC v. Smith-Morris Corp.*, C.A. No. 94-cv-60042-AA, 1995 U.S. Dist. LEXIS 22510, at *8 (E.D. Mich. Sept. 13, 1995) (ERISA's concern is not "whether a stockholder who has controlling share actually exercised control over corporate affairs" but simply whether it had "the ability to control," as evidenced through stock ownership). Nevertheless, some courts have considered a controlled group member's actual control or involvement with the employer in imposing controlled group liability. *See, e.g., Asbestos Workers Local 24 Pension Fund v. NLG Insulation, Inc.*, 760 F. Supp. 2d 529, 541-42 (D. Md. 2010) (noting additional facts supporting court's conclusion that two companies were under "common control": overlapping officers, common ownership and clients, and shared offices and employees).

IV. EXTRATERRITORIAL APPLICATION OF ERISA'S "CONTROLLED GROUP" LIABILITY

I am not aware of any U.S. court that has directly addressed the question of whether ERISA's "controlled group" liability provisions have extraterritorial application. I will therefore analyze the question in the same manner as would a U.S. federal court presented with the issue.

a. Presumption Against Extraterritorial Application

As the U.S. Supreme Court recently reaffirmed, "[i]t is a basic premise of our legal system that, in general, United States law governs domestically but does not rule the world."[18] "This principle finds expression in a canon of statutory construction known as the presumption against extraterritoriality: Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application."[19] The U.S. Supreme Court directs courts to "assume that Congress legislates against the backdrop of the presumption against extraterritoriality,"[20] and, therefore, the relevant inquiry is "whether Congress has affirmatively and unmistakably instructed that the statute will" apply to foreign conduct.[21] "When a statute gives no clear indication of an extraterritorial application, it has none."[22]

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[18] *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2100 (2016); *see also Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010) ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'") (quoting *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)).

[19] *RJR Nabisco,* 136 S. Ct. at 2100.

[20] *Arabian Am. Oil Co.*, 499 U.S. at 248.

[21] *RJR Nabisco,* 136 S. Ct. at 2100.

[22] *Id.* (quotations omitted).

In determining whether the presumption against extraterritoriality applies in a particular case, courts consider two factors.[23] First, a court determines "whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially."[24] If the statute does not reflect a clear Congressional intent, "then at the second step [courts] determine whether the case involves a domestic application of the statute . . . ."[25] Courts do this by looking at the statute's "focus."[26] As the U.S. Supreme Court has explained with respect to this step of the analysis:

> If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.[27]

b. Determining Congressional Intent

Courts determine whether Congress intended a statute to apply extraterritorially by looking at the statutory text and the "context" of the statute.[28]

On their face, the "controlled group" liability provisions of ERISA are silent as to any Congressional intent of extraterritorial application. The statutory language relating to each of the three types of "controlled groups" referenced above merely describes the types of entities that may form part of a "controlled group" and the requisite stock ownership or voting control among related entities that would satisfy the tests.

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23 *RJR Nabisco,* 136 S. Ct. at 2100.

24 *Id. at* 2101.

25 *Id.*

26 *Id.*

27 *Id.*

28 *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665-66 (2013).

Notwithstanding the absence of express statutory language supporting extraterritorial application, the U.S. Pension Benefit Guaranty Corporation ("PBGC"), a federal agency created under ERISA and tasked with administering and enforcing certain ERISA provisions, took the position, in a 1997 advisory opinion, that ERISA liability applies to "controlled group" members located outside of the U.S.[29]

Specifically, the PBGC based its argument on Section 4001(b)(1) of ERISA, which directs the PBGC to develop "controlled group" regulations that are "consistent and coextensive" with the Department of Treasury regulations related to Section 414(c) of the Internal Revenue Code (the "IRC").[30] Section 414(c) of the IRC, in turn, authorizes the Secretary of the Treasury to prescribe regulations based on "principles similar to the principles which apply" to Section 414(b) of the IRC.[31] The Department of Treasury regulations under Section 414(b), with regard to the meaning of "members of a controlled group" under that section, do not incorporate another IRC provision that specifically ***excludes***, among other things, foreign corporations from the meaning of a "controlled group."[32] Thus, the PBGC argued that the failure to incorporate the foreign corporation exclusion, coupled with the mandate under ERISA that the PBGC promulgate regulations "consistent and coextensive" with Treasury

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[29] *See* PBGC Office of General Counsel, Opinion 97-1, dated May 5, 1997 ("PBGC Advisory Opinion"), at *5-6.

[30] *Id.* at *6-7.

[31] *Id.* at *7-8. Section 414(c) of the IRC provides that, for purposes of certain sections of the IRC, "all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer." Section 414(b) of the IRC provides that, for purposes of certain sections of the IRC, "all employees of all corporations which are members of a controlled group of corporations (within the meaning of section 1563(a), determined without regard to section 1563(a)(4) and (e)(3)(C)) shall be treated as employed by a single employer." 26 U.S.C. § 414(b).

[32] PBGC Advisory Opinion 97-1, at *8.

regulations, means that foreign corporations are included within a "controlled group" under ERISA.[33]

As further support for its position, the PBGC observed that Congress had visited and expanded the concept of "controlled group" liability on several occasions since ERISA was initially enacted, but at no time did these legislative acts "indicate[] any Congressional intent that controlled group liability be limited to domestic entities"[34] – even though Congress was fully capable of, and had, excluded or specified particular treatment for foreign corporations in other contexts.[35]

I do not believe a U.S. court would find this analysis persuasive in demonstrating the "clear indication" from Congress that is required to overcome the strong presumption against extraterritorial application of federal laws.[36] It would be unusual for Congress to express its intention that ERISA's "controlled group" liability applies extraterritorially solely by means of a passing reference to an entirely different statutory scheme pertaining to the U.S. tax laws that is silent on whether it applies extraterritorially.[37]

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33 *Id.* at *8-10.

34 *Id.* at *7.

35 *Id.* at *9.

36 In seeking to determine congressional intent, U.S. courts often defer to interpretations of specialized federal agencies tasked with implementing and enforcing the statute where the agency's interpretation is a permissible construction of the statute. *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-44 (1984). Courts have applied this form of "*Chevron*" deference to the PBGC with respect to ERISA. *See, e.g., Davis v. PBGC*, 596 F. Supp. 2d 1, 2 (D.D.C. 2008), *aff'd sub nom., Davis v. PBGC*, 571 F.3d 1288 (D.C. Cir. 2009) ("PBGC's interpretations of ERISA . . . are customarily entitled to *Chevron* deference."). Such deference may be limited, however, where, as here, the agency's interpretation was "not the result of public notice and comment." *Sun Capital Partners*, 724 F.3d at 140 (informal adjudication by PBGC resolving a dispute between a pension fund and third party was entitled to "no more deference than the power to persuade"). Further, at least one federal appellate court recently declined to afford *Chevron* deference to an IRS interpretation giving extraterritorial application to the U.S. tax code on the grounds of, among other things, the presumption against extraterritoriality. *See Validus Reinsurance, Ltd. v. United States*, 786 F.3d 1039 (D.C. Cir. May 26, 2015).

37 *See Arabian Am. Oil Co.*, 499 U.S. at 253 ("If we were to permit possible, or even plausible, interpretations of language such as that involved here to override the presumption against extraterritorial application, there would be little left of the presumption.").

Indeed, the PBGC's reasoning relies on language in the Treasury regulations under ***Section 414(b)*** of the IRC, set forth in 26 C.F.R. § 1.414(b)-1. However, Section 4001(b) of ERISA references the Treasury regulations under ***Section 414(c)*** of the IRC, not Section 414(b) (in contrast, Section 4001(a)(14) of ERISA, which relates to "controlled group" liability for *single*-employer plans, expressly references the Treasury regulations for both Sections 414(b) and (c) of the IRC). The regulations related to Section 414(c), which are set forth in 26 C.F.R. §§ 1.414(c)-1 and 1.414(c)-2, do not contain the exclusion in 26 C.F.R. § 1.414(b)-1 that the PBGC relies upon as supposed evidence of Congress intent to apply the statute extraterritorially. Rather, 26 C.F.R. §§ 1.414(c)-1 and 1.414(c)-2 do not reflect any indication, much less clear and unmistakable intent, that they be applied extraterritorially.

Further, the statutory language on which the PBGC relies stands in stark contrast to the text of other statutes reflecting a clear Congressional intent to provide for extraterritorial application. *See, e.g.*, Export Administration Act of 1979, 50 U.S.C. App. § 2415(2) (defining "United States person" to include "any domestic concern (including any permanent domestic establishment of any foreign concern) and any foreign subsidiary or affiliate (including any permanent foreign establishment) of any domestic concern which is controlled in fact by such domestic concern, as determined under regulations of the President"); the Logan Act, 18 U.S.C. § 953 (applying the Act to "[a]ny citizen . . . wherever he may be . . . ."); Section 30 of the Securities Exchange Act, 15 U.S.C. §§ 78dd(a),(b) (proscribing the "use of the mails or of any means or instrumentality of interstate commerce for the purpose of effecting on an exchange not within or subject to the jurisdiction of the United States, any transaction in any security . . . in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate . . . .").

Nor do I believe a court will find persuasive the PBGC's argument that Congress's failure to expressly limit the "controlled group" provisions to domestic entities in prior ERISA amendments evidences its intent to permit extraterritorial application. That assertion effectively reverses the judicial presumption against extraterritoriality. By virtue of the presumption, Congress need not express an intent that its laws be limited to domestic entities. As the U.S. Supreme Court held, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[38]

Further, other provisions of Title IV of ERISA undermine the notion that Congress intended for ERISA's "controlled group" liability provisions to apply extraterritorially. For example, ERISA contemplates that pension plans or sponsoring employers will file their lawsuits relating to Title IV of the statute in federal or state courts in the U.S., not foreign jurisdictions.[39] In particular, ERISA provides that U.S. federal courts have exclusive jurisdiction over lawsuits, including those asserting claims for withdrawal liability, by a "plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining."[40] These provisions undercut the inference that Congress intended for ERISA to apply outside of the U.S.

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[38] *Morrison*, 561 U.S. at 255.

[39] *See, e.g.*, 29 U.S.C. § 1401(b)(1) (collection proceeding by plan sponsor may be brought in "a State or Federal court of competent jurisdiction").

[40] 29 U.S.C. § 1451(a)(1); *see also* 29 U.S.C. § 1370(c) (similar jurisdictional provision in respect of single-employer pension plans).

When faced with two plausible but competing interpretations of a statute—one supporting an extraterritorial application and the other not—the presumption against extraterritoriality obviates the need for a court to choose one over the other. As the U.S. Supreme Court counseled in *Arabian Oil*, "[w]e need not choose between these competing interpretations as we would be required to do in the absence of the presumption against extraterritorial application . . . . Each is plausible, but no more persuasive than that."[41]

In short, ERISA's "controlled group" liability provisions do not reflect a "clearly expressed congressional intent" that "affirmatively and unmistakably" authorizes extraterritorial application.

c. Courts Addressing The Extraterritorial Effect Of Other ERISA Provisions

My conclusion that Congress did not intend for ERISA's "controlled group" liability provisions to apply extraterritorially is consistent with court decisions reaching the same conclusion with respect to other ERISA provisions. In *Chong v. InFocus Corp.*,[42] a Singaporean citizen working in Singapore for the Singaporean subsidiary of a U.S. company commenced a suit in a U.S. court asserting that he was entitled to benefits under a severance plan established by the U.S. company under ERISA. The district court granted summary judgment against the plaintiff on his ERISA claims on the grounds that absent clear Congressional intent to extend the reach of ERISA extraterritorially, the statute would not apply to a foreign employee providing services outside of the U.S. for a foreign subsidiary even if the applicable plan was administered by a U.S. company in the U.S. and the decision to deny the employee benefits was made in the U.S.[43]

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[41] *Arabian Am. Oil Co.*, 499 U.S. at 250.

[42] No. CV-08-500-ST, 2008 WL 5205968 (D. Ore. Oct. 24, 2008).

[43] *Id.* at *5-6.

In *Maurais v. Snyder*,[44] a Canadian doctor who performed medical services on a U.S. citizen in Canada sought compensation for his services from the patient and the patient's U.S. insurance company. The doctor sued in U.S. court and asserted claims under Pennsylvania state law. In response, the insurance company argued that the Canadian doctor's state law claims should be dismissed because they were preempted by ERISA as claims related to an employee benefit plan.[45] In considering this defense, the court concluded that the plaintiff's claims could be preempted by ERISA only if the statute applied extraterritorially, *i.e.*, to the medical procedures performed by the Canadian doctor in Canada.[46] Relying on the presumption that federal laws do not apply extraterritorially and the U.S. Supreme Court's precedent in *Arabian Oil*,[47] the court concluded that there was no language in ERISA evidencing clear congressional intent to legislate extraterritorially and preemption was therefore inapplicable.[48]

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Based on the foregoing, I find no evidence of congressional intent in the statutory text of ERISA's "controlled group" provisions that would overcome the strong presumption that the laws of the U.S. do not apply extraterritorially.

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[44] No. C.A. 00-2133, 2000 WL 1368024 (E.D. Pa. Sept. 14, 2000).

[45] *Id.* at *2.

[46] *Id.*

[47] 499 U.S. 244 (1991).

[48] *Maurais,* 2000 WL 1368024, at *2-3.

d. Domestic Application of ERISA to Foreign Entities

Where, as here, the presumption against extraterritoriality is not rebutted, a court would then proceed to the second step to determine "whether the case involves a domestic application of the statute . . . ."[49] Put another way, a court looks to "whether the factual circumstances at issue require an extraterritorial application of the relevant statutory provision,"[50] or whether it is being applied to domestic activity. This is done by looking to the statute's "focus" or purpose and determining whether the conduct relevant to that focus primarily occurred in the U.S.[51]

"[I]f the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory."[52] Importantly, more than just *some* of the relevant conduct must occur in the U.S. Rather, that conduct must touch the U.S. "with sufficient force to displace the presumption against extraterritorial application."[53] As the U.S. Supreme Court noted in *Morrison*, "it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States."[54] For that reason, the Court cautioned that "the presumption

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49 *RJR Nabisco, Inc.*, 136 S. Ct. at 2101; *see also Kiobel*, 133 S. Ct. at 1670; *Morrison*, 561 U.S. at 265-270. In its 1997 Advisory Opinion, the PBGC opined that the facts before it did not implicate an extraterritorial application of ERISA because the events that triggered liability occurred in the U.S. and involved the cessation of pension contributions of U.S. entities. PBGC Office of General Counsel, Opinion 97-1, dated May 5, 1997, at *5. As noted above, that interpretation has never been adopted by any U.S. court. Moreover, I do not find this reasoning persuasive because it only examines facts related to the triggering of the withdrawal liability, rather than facts related to the extension of such liability to members of the "controlled group." If the PBGC were correct, every application of "controlled group" liability to foreign affiliates would be domestic for purposes of the extraterritoriality analysis.

50 *Sec. Investor Protection Corp. v. Bernard L. Madoff Investment Sec. LLC*, 513 B.R. 222, 226 (S.D.N.Y. 2014).

51 *RJR Nabisco, Inc.*, 136 S. Ct. at 2101.

52 *Id.*

53 *Kiobel*, 133 S. Ct. at 1669.

54 *Morrison*, 561 U.S. at 266 (emphasis in original).

against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case."[55]

The "focus" of ERISA's "controlled group" liability provisions is to "prevent businesses from shirking their ERISA obligations by fractioning operations into many separate entities."[56] While I am unaware of any case that has analyzed the conduct or transactions that may be relevant to this statutory "focus" in the context of a claim against a foreign member of the contributing employer's "controlled group," numerous courts have considered that issue in a related context – whether a foreign "controlled group" member has sufficient minimum contacts with the U.S. to subject them to personal jurisdiction of the U.S. courts in a lawsuit alleging liability under ERISA.

Before addressing those cases, I will briefly summarize applicable principles of U.S. law relating to personal jurisdiction. Under federal law, courts recognize two types of personal jurisdiction over a defendant: (i) general, or all-purpose jurisdiction; and (ii) specific, or case-related jurisdiction. A court exercising general jurisdiction over a defendant can hear any and all claims against that defendant. A court may assert general jurisdiction over a foreign

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[55] *Morrison*, 561 U.S. at 266 (emphasis in original); *see also Bernard L. Madoff Investment Sec. LLC*, 513 B.R. at 227 ("[A] mere connection to a U.S. debtor, be it tangential or remote, is insufficient on its own to make every application of the Bankruptcy Code domestic.").

[56] *Messina Prods.*, 706 F.3d at 878; *Tamko Asphalt Prods., Inc. of Kan. v. Comm'r of Internal Revenue*, 658 F.2d 735, 740 (10th Cir. 1981); *NYSA-ILA Pension Trust Fund v. Lykes Bros., Inc.*, No. 96 civ. 5616 (DLC), 1997 WL 458777, at *6 (S.D.N.Y. Aug. 11, 1997) (same); *Robbins v. Pepsi-Cola Metropolitan Bottling Co.*, 636 F. Supp. 641, 648 (N.D. Ill. 1986) (same); *cf. Vogel Fertilizer*, 455 U.S. at 26-27 ("Through the controlled-group test, Congress intended to curb the abuse of multiple incorporation – large corporations subdividing into smaller corporations and receiving unintended tax benefits . . . ."); *Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. El Paso CGP Co.*, 525 F.3d 591, 595-96 (7th Cir. 2008) (affirming ERISA liability against U.S. members of withdrawing employer's "controlled group" and stating that "the controlled group provision allows a plan to deal exclusively with the defaulting employer known to the fund, while at the same time assuring itself that legal remedies can be maintained against all related entities in the controlled group") (internal quotations omitted).

defendant where the foreign defendant's "affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State."[57]

In contrast, to exercise specific jurisdiction over a foreign defendant, the plaintiff must demonstrate that the defendant has purposeful "minimum contacts" with the forum state such that the exercise of jurisdiction does not "offend traditional notions of fair play and substantial justice."[58] The defendant's contacts with the forum must be extensive enough that he could "reasonably anticipate being haled into court there."[59] Importantly, the defendant's contacts with the forum state must be related to and give rise to the plaintiff's claim against the defendant.[60]

Virtually all of the U.S. courts that have addressed this issue in the context of ERISA claims have found that they could not exercise personal jurisdiction over a foreign defendant alleged to be in a "controlled group" for purposes of joint and several pension liability under Title IV of ERISA. For example, in *GCIU-Employer Retirement Fund v. Goldfarb Corp.*,[61] the court affirmed dismissal of a claim for withdrawal liability against a Canadian indirect parent of a U.S. subsidiary for lack of personal jurisdiction. There, the plaintiff alleged that the Canadian parent had significant contact with the U.S. employer's lenders—including negotiating a loan agreement, and amendments thereto, with a U.S. based forum-selection clause—and engaged in conduct that ultimately resulted in the employer's withdrawal from the plan.[62] But the court there found that the foreign defendant's interactions with the lenders "were

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57 *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014) (internal citations omitted).

58 *Id.* (internal citations and quotation marks omitted).

59 *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

60 *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984).

61 565 F.3d 1018 (7th Cir. 2009).

62 *Id.* at 1020-22.

too attenuated" and "do not 'directly' relate" to the subsidiary's withdrawal to provide specific jurisdiction over the plaintiff's claims.[63]

Similarly, in *Central States, Southeast & Southwest Areas Pension Fund v. Reimer Express World Corp.*,[64] the plaintiff pension plan alleged that the U.S. employer's Canadian affiliates were liable under ERISA based on their stock ownership in or corporate affiliation with the U.S. entity and the provision of certain payroll services by one of the affiliates to the U.S. entity.[65] The U.S. Court of Appeals for the Seventh Circuit affirmed the district court's dismissal of the lawsuit, holding that "stock ownership in or affiliation with a corporation, without more, is not a sufficient minimum contact" upon which a U.S. court can exercise personal jurisdiction over foreign entities.[66]

More recently in *GCIU Employer Retirement Fund v. Coleridge Fine Arts*,[67] a U.S. district court held that it could not exercise personal jurisdiction over two Irish companies that the plaintiff, a retirement fund, alleged were subject to the withdrawal liability of their wholly-owned U.S. subsidiary.[68] The court concluded that it could not exercise personal jurisdiction over the Irish defendants because: (i) the defendants did not employ individuals in the U.S.; (ii) the defendants and the American subsidiary did not conduct business on behalf of one another; and (iii) the defendants and the American subsidiary maintained separate budgets, payroll, and business records.[69]

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63 *Id.* at 1025.

64 230 F.3d 934 (7th Cir. 2000).

65 *Id.* at 943-45.

66 *Id.* at 943.

67 154 F. Supp. 3d 1190 (D. Kan. 2015).

68 *Id.* at 1192-93.

69 *Id.* at 1201.

In contrast, personal jurisdiction was established against a foreign affiliate in *PBGC v. Asahi Tec Corp.*[70] That case involved a claim under Title IV of ERISA against a Japanese parent company, Asahi Tec Corp. ("Asahi") arising out of a U.S. subsidiary terminating its pension plan. The court concluded that it could exercise personal jurisdiction over the foreign defendant because when the Japanese parent had purchased the U.S. subsidiary, the parent undertook due diligence in the U.S., which diligence uncovered the possibility of "controlled group" liability and the parent incorporated this risk in negotiating the acquisition price.[71] The court held that these minimum contacts – the knowing decision to acquire a company in the U.S. and subject itself to "controlled group" liability – were sufficiently related to plaintiff's claims for termination liability.[72] The court distinguished *Reimer* and *Goldfarb* on grounds that here, unlike there, Asahi's minimum contacts—knowingly assuming the pension liability of a U.S. company and adjusting the deal price to reflect that liability—gave rise to its pension liability.[73] The court also distinguished *Goldfarb* and *Reimer* on the ground that they pertained to multiemployer withdrawal liability, whereas Asahi's pension liability arose from the termination of a single employer pension plan.[74]

Based on these cases, it is my opinion that if a U.S. court is asked to determine whether the ERISA's "controlled group" liability provisions have extraterritorial application, the relevant "conduct" for the second step of the extraterritoriality analysis would be the

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70 839 F. Supp. 2d 118 (D.D.C. 2012); *see also PBGC v. Satralloy, Inc.*, No. C-2-90-0630, 1993 U.S. Dist. LEXIS 21422, at *13 (S.D. Ohio Aug. 6, 1993) (finding general personal jurisdiction over an English affiliate for ERISA claims based on the defendant's use of a U.S. subsidiary to conduct business in the U.S. as its agent).

71 *Asahi*, 839 F. Supp. 2d at 124-26.

72 *Id.* at 130.

73 *Id.* at 127.

74 *Id.* at 128.

circumstances and transaction(s) leading to the foreign entity coming under the common control of the group parent. In addition, although the "controlled group" test itself applies mechanically based on stock ownership or voting control, given that Congress's "focus" in enacting those provisions was to deter corporate groups "shirking" their ERISA obligations by "fractioning operations" (*see supra*), I believe a U.S. court would also consider other conduct such as transactions between the foreign entity and the contributing employer or other group entities; contributions or other connections between the foreign entity and the pension plan or its members; and any acts or omissions of the foreign entity relating to withdrawal of the contributing employer.

As noted above, under U.S. Supreme Court precedent (*Morrison*, *RJR Nabisco*, *Kiobel*, *et al.*), if the relevant conduct predominantly occurred outside the U.S., applying ERISA's "controlled group" provisions to the Walter Canada Group would be an impermissible extraterritorial application of the statute. On the other hand, if the conduct primarily occurred in the U.S., application of ERISA's "controlled group" liability provisions to Petitioners would constitute a permissible domestic application of the statute.

Based on my review of materials provided to me, I believe the following facts support a finding that the relevant conduct occurred outside the U.S.:

- The Western Acquisition, pursuant to which Walter Energy acquired its Canadian operations, was consummated in Canada and approved by the British Columbia Supreme Court.
- Western Coal Corp. and its subsidiaries were in existence and operated in Canada prior to the Western Acquisition; they were not incorporated in an effort to fractionalize the group or shield the Canadian assets from the U.S. pension liabilities.

- In connection with the internal restructuring that followed the Western Acquisition, subsidiaries or assets of Walter Canada were transferred to the U.S. entities (thereby providing additional resources for the U.S. pension liabilities). I am unaware of any subsidiaries or assets of the U.S. entities that were transferred to Walter Canada.
- The Walter Canada Group does not have any assets or carry on any business in the U.S.
- The Walter Canada Group did not employ any persons who were members of the 1974 Plan and were not contributing employers to the 1974 Plan.
- The Walter Canada Group was not responsible for making the decisions leading to Walter Resources's withdrawal from the 1974 Plan.

On the other hand, the following facts point to relevant conduct that was domestic, *i.e.*, occurred in the U.S.:

- Pursuant to certain management and other intercompany agreements, Walter Energy and its subsidiaries, based in the U.S., provided services to the Walter Canada Group, including accounting, procurement, environmental management, tax support, treasury functions and legal advice.
- As of the time of the Western Acquisition, the 1974 Plan had an unfunded liability of greater than US$4 billion.

V. CONCLUSION

In light of the strong presumption recognized by U.S. courts that federal laws only apply within the territorial jurisdiction of the U.S. and given the absence of clear Congressional intent to extend the reach of ERISA's "controlled group" liability provisions to foreign entities, it is my opinion that a U.S. court should conclude that as a matter of U.S. law "controlled group" liability for withdrawal liability related to a multiemployer pension plan under ERISA does not extend extraterritorially.

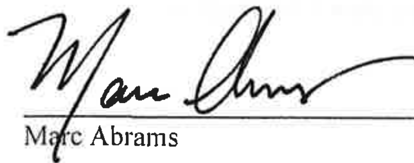
VI. CERTIFICATION

Pursuant to Rule 11-2 of the Supreme Court of British Columbia's Civil Rules, 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 and 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.



Marc Abrams

EXHIBIT A

WILLKIE FARR & GALLAGHER LLP

ATTORNEY BIOGRAPHY

MARC ABRAMS
New York/London*
Business Reorganization and Restructuring

Tel: 212 728 8200
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Tel: 011 44 (0) 20 3580 4708
Fax: 011 44 (0) 20 3580 4808
mabrams@willkie.com

EDUCATION
Widener University
JD, 1978
Villanova University
BA, 1975

PRACTICE

Marc Abrams is a partner and Co-Chair of the Business Reorganization and Restructuring Department of Willkie Farr & Gallagher LLP. He has served as a member of the firm's Executive Committee and is a member of its European Committee, in which capacity he is currently co-directing the firm's London based restructuring practice. Mr. Abrams has been instrumental, principally on behalf of debtors, in several complex chapter 11 cases and non-judicial restructurings. He also has extensive experience representing creditors' committees and groups, opportunistic investors, and lenders. Mr. Abrams has also maintained a substantial cross-border practice involving foreign insolvency regimes and related cases under the Bankruptcy Code, including chapter 15 cases.

Company Side

Throughout his career, Mr. Abrams has regularly produced superior results on behalf of company-side clients in numerous complex chapter 11 cases and in several out-of-court restructurings, including seminal cases such as Adelphia Communications Corp., Angiotech Pharmaceuticals (chapter 15) and Teksid, Inc. In addition, Mr. Abrams is a recognized leader and key advisor in cross-border representations. Mr. Abrams frequently represents clients in the automotive, cable, construction, entertainment/recreation, financial products, health care, high-tech, hospitality, manufacturing, media, mining, retail, telecommunications and transportation industries.

Transactional Side

Mr. Abrams also regularly represents key stakeholders in both chapter 11 and out-of-court restructurings, including official and unofficial committees, strategic investors, purchasers and major creditors. As an industry leader, Mr. Abrams is regularly called upon for his guidance and expertise. Mr. Abrams has regularly counseled many institutional clients, including: AlixPartners, LLC; Barclays Bank PLC; Brookfield Asset Management Inc.; and Monarch Alternative Capital LP.

SELECTED PROFESSIONAL AND BUSINESS ACTIVITIES

- Member of Board of Directors and Fellow, American College of Bankruptcy (Former Circuit Regent 2010-2014)
- Fellow, Litigation Counsel of America, The Trial Lawyer Honorary Society
- Member, Diversity Law Institute
- Member, Trial Law Institute
- Advisory Board Member - ABI's Annual "Views from the Bench" Conference

BAR ADMISSIONS

Mr. Abrams is admitted to the Delaware Bar (1978), the Pennsylvania Bar (1981), and the New York Bar (1985); the United States Courts of Appeal for the Second and Third Circuits; and the U.S. District Courts of Delaware and the Southern and Eastern Districts of New York.

EDUCATION

Mr. Abrams received a JD (cum laude) from Widener University in 1978 and a BA (cum laude) from Villanova University in 1975.

SELECTED SIGNIFICANT MATTERS

Company Side

Mr. Abrams' representative in-court and out-of-court restructuring matters include:

- Adelphia Communications Corp.
- Alliance Entertainment Corp.
- Allis-Chalmers Corp.
- AMF Bowling Worldwide, Inc.
- APS, Inc.
- Community Newspapers, Inc.
- Days Inn of America, Inc.
- Integrated Resources, Inc.

WILLKIE FARR & GALLAGHER LLP

MARC ABRAMS
New York/London
Biography, Continued

SELECTED SIGNIFICANT MATTERS, Continued

- Journal Register Company
- L.M. Sandler & Sons, Inc.
- LandAmerica Financial Group, Inc.
- Mosler, Inc.
- Orion Pictures, Inc.
- Petrie Retail, Inc.
- Phoenix Steel Corp.
- Prime Hospitality Corp.
- RathGibson, Inc.
- Schwinn Cycling & Fitness, Inc.
- Starter Corp.
- Sunterra Corp.
- The LTV Corp.
- The Multicare Companies
- The Weinstein Company
- USinternetworking, Inc.
- Woodward & Lothrop, Inc.

Mr. Abrams' representative cross-border matters include:

- Vivarte (ad hoc lender committee and anchor investors in the largest-ever fully consensual French restructuring; named as a 2015 Am Law Global Legal Awards "Deal of the Year")
- Angiotech Pharmaceuticals, Inc. (chapter 15 on behalf of the company)
- Arctic Glacier International, Inc. (chapter 15, pending; on behalf of CCAA Monitor)
- Crystallex International Corp. (chapter 15, pending; on behalf of the company)
- Great Basin Gold (chapter 15, on behalf of CCAA Monitor)
- Nortel Networks, Inc. (pending; on behalf of UK Pension Schemes and UK PPF)

SELECTED SIGNIFICANT MATTERS, Continued

- Readers' Digest Association, Inc. (on behalf of UK PPF)
- AMF Bowling (pending; on behalf of UK PPF)
- Teksid, Inc. (out-of-court restructuring involving operating assets located in 12 countries)

Transactional Side

Mr. Abrams' representative transactional side matters include:

- Cengage Learning, Inc. (pending; Investigations Counsel)
- Delphi Corporation (on behalf of the Ad Hoc DIP Lender Committee)
- General Growth Properties (on behalf of Brookfield Asset Management as cornerstone investor)
- Next Wave Communications (on behalf of Northrop Grumman)
- Residential Capital, LLC (on behalf of the Ad Hoc Committee)
- Resort Finance America, LLC (on behalf of GMAC)
- Rothschild, Inc. (as financial advisor to a major government-controlled company)
- Sea Containers Services, Ltd. (on behalf of the Official Committee of UK Pension Schemes)
- TOUSA, Inc. (pending; on behalf of the major debtholder)

PUBLICATIONS, NEWS AND EVENTS

Mr. Abrams serves as a contributing editor for *Collier on Bankruptcy,* the preeminent treatise on bankruptcy law. Mr. Abrams has authored or co-authored numerous published articles, including "Setting up the Sale: Bankruptcy 2015 – Views from the Bench," *Best of ABI 2015: The Year in Business Bankruptcy*, "Second Circuit Articulates the Standard for the Extinguishment of Liens Under a Chapter 11 Bankruptcy Pan," *Pratt's Journal of Bankruptcy Law* (November/December 2015), "Third Circuit Holds That Claims Are Disallowable Under Section 502(d) of the Bankruptcy Code No Matter Who Holds Them," *Metropolitan Corporate Counsel* (January 2014), "Exceptional Results Through Cross-Border Coordination," 24 Comm. Insol. R. 49-57 (June 2012), "Implications of the "Bad Faith Filing" Decision in GGP's Bankruptcy Proceeding", BNA, Inc., *Real Estate Law & Industry* (2009), and "Key Rulings from the Delaware

PUBLICATIONS, NEWS AND EVENTS, Continued
Bankruptcy Court's Rejection of Washington Mutual's Plan of Reorganization," *Pratt's Journal of Bankruptcy Law*, Vol. 7, Number 8 (2011). Two of Mr. Abrams' articles are published in *the Best of ABI 2012: The Year in Business Bankruptcy*, including "Confirmation Roundtable: Planning for an Exit and Other Developments in Confirmation Jurisprudence" and "Tranche Warfare II: Multifaceted Intercreditor Disputes." Mr. Abrams is the co-author of the LexisNexis *Practitioner's Guide to Chapter 15 Bankruptcies*, an extensive chapter in the *Lexis* Bankruptcy Portal. He lectures frequently, including at conferences sponsored by the American College of Investment Counsel, the American Bankruptcy Institute, Valcon, the American College of Bankruptcy, National Conference of Bankruptcy Judges and the Association of the Bar of the City of New York. He is also a certified mediator for the U.S. Bankruptcy Courts for the Southern District of New York and the District of Delaware.

AWARDS AND RECOGNITIONS

- Member of Vivarte deal team, named a 2015 Am Law "Global Finance Deal of the Year (Restructuring)"
- 2011 Professor Lawrence P. King Award in recognition of his achievements in the field of bankruptcy law and for his leadership in philanthropy
- "2009 Dealmaker of the Year" by *The American Lawyer* (April 2010) for his work in the Delphi Corporation restructuring
- Recognized as one of the 500 Leading Lawyers in America in the *Lawdragon 500* guide (2010)
- Received the 2012 IFLR Americas Awards in the "Restructuring Deal of the Year" category for his lead role in the cross-border (Canada/U.S.) restructuring of Angiotech Pharmaceuticals, Inc.
- Consistently recognized by *Chambers Global* and *Chambers USA* as a leading practitioner in Bankruptcy/Restructuring
- Member of Board of Directors and Fellow with the American College of Bankruptcy

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Abrams, Marc **EXHIBIT B**

From: Paterson, Mary <MPaterson@osler.com>
Sent: Tuesday, November 08, 2016 8:08 PM
To: Abrams, Marc
Cc: Caitlin Fell; Wael Rostom; Peter Reardon; Riesterer, Patrick; Buttery, Mary; Advani, Sameer; Eguchi, Weston
Subject: RE: Walter - Retainer of Willkie as Independent Expert

Marc,

Further to my note below, we understand that the question should be expanded as follows:

> If the 1974 Pension Plan's claim against the Walter Canada Group is governed by United States substantive law (including ERISA), as a matter of United States law does controlled group liability for withdrawal liability related to a multi-employer pension plan under ERISA extend extraterritorially?

Please answer this question.

Best regards,

Mary

Mary Paterson
Partner
Ext. 4924

From: Abrams, Marc [mailto:mabrams@willkie.com]
Sent: Wednesday, November 2, 2016 11:40 AM
To: Paterson, Mary <MPaterson@osler.com>
Cc: Caitlin Fell <Caitlin.Fell@mcmillan.ca>; Wael Rostom <Wael.Rostom@mcmillan.ca>; Peter Reardon <Peter.Reardon@mcmillan.ca>; Riesterer, Patrick <PRiesterer@osler.com>; Buttery, Mary <mary.buttery@dlapiper.com>
Subject: RE: Walter - Retainer of Willkie as Independent Expert

Thank you Mary. This is informative.

Marc

Marc Abrams
Willkie Farr & Gallagher LLP
787 Seventh Avenue | New York, NY 10019-6099
Direct: +1 212 728 8200 | Fax: +1 212 728 9200
mabrams@willkie.com | vCard | www.willkie.com bio

From: Paterson, Mary [mailto:MPaterson@osler.com]
Sent: Wednesday, November 02, 2016 11:31 AM
To: Abrams, Marc <mabrams@willkie.com>
Cc: Caitlin Fell <Caitlin.Fell@mcmillan.ca>; Wael Rostom <Wael.Rostom@mcmillan.ca>; Peter Reardon <Peter.Reardon@mcmillan.ca>; Riesterer, Patrick <PRiesterer@osler.com>; Buttery, Mary <mary.buttery@dlapiper.com>
Subject: Walter - Retainer of Willkie as Independent Expert

Marc,

This email is intended to be the "instructions provided to the expert in relation to the proceeding" (see Rule 11-6) and should be included in your report.

We understand that Willkie Farr is acting as counsel to the Monitor in the Canadian Walter Petitioners insolvency matter. We propose to retain Willkie Farr to act as the Walter Petitioners' independent expert on matters of US law to assist the Court in adjudicating the claim brought by the 1974 Plan in the Walter estate claims process. Given Willkie Farr's general familiarity with this issue as it affects the Walter estate, this is the most cost-efficient use of the estate's resources.

We have attached for your review an excerpt of the Supreme Court Civil Rules (BC), which includes the statement, "In giving an opinion to the court, an expert appointed under this Part by one or more of the parties or by the court has a duty to assist the court and is not to be an advocate for any party". It is our understanding that the Monitor has taken the position in its Response to Notice of Civil Claims that "the Monitor takes no position with respect to the adjudication of the 1974 Plan" (para. 5). We also note that the Monitor is an officer of the court and obliged to act independently (see *United Used Auto & Truck Parts Ltd. (Re)*, 1999 CanLII 5374 (BC SC) at para. 20; and *Can-Pacific Farms Inc. (Re)*, 2012 BCSC 760 (CanLII)). As a result, Willkie Farr's role as independent expert is consistent with its role as counsel to the Monitor in the specific context of the 1974 Plan's claim. Although this is not intended to be a joint retainer by the Monitor and Walter Petitioners, we have copied counsel to the Monitor for their information.

The specific question on which you will be asked to opine will be included in the Notice of Application (to be filed shortly) and is expected to be:

> If the 1974 Plan's claim against the Walter Petitioners is governed by United States substantive law (including ERISA), as a matter of United States law does controlled group liability for withdrawal liability related to a multiemployer pension plan under ERISA extend extraterritorially to corporations existing solely outside the territorial United States?

We expect that your report will be due on Monday, November 14. To the extent you require any factual evidence, you can rely on the admissions in the pleadings (attached) and the compendium of evidence (affidavits, Monitor's reports previously filed with the CCAA Court etc.). We currently expect the compendium to be served on November 7.

We acknowledge that you have a solicitor-client relationship with the Monitor and request that you not disclose any solicitor-client privileged material to us. Given the nature of the issue on which you have been asked to opine and the specific factual information that will be available in the adjudication proceeding, we do not anticipate that this will be an issue.

We look forward to working with you.

Mary

OSLER

Mary Paterson
Partner

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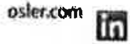

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EXHIBIT C

Index of Materials Reviewed

- Walter Canada Group's Statement of Uncontested Facts
- Notice of Civil Claim (1974 Plan)
- Amended Notice of Civil Claim (1974 Plan)
- Response to Civil Claim (Walter Canada Group)
- Amended Response to Civil Claim (Walter Canada Group)
- Response to Civil Claim (the Monitor)
- Response to Civil Claim (United Steelworkers)
- Amended Response to Civil Claim (United Steelworkers)
- Reply to United Steelworkers (1974 Plan)
- Order of Madam Justice Fitzpatrick dated December 7, 2015
- Reasons for Judgment of Madam Justice Fitzpatrick dated January 26, 2016
- Reasons for Judgment of Madam Justice Fitzpatrick dated September 23, 2016
- 1st Affidavit of William G. Harvey ("1st Harvey Aff.") dated December 4, 2015
    - List of Canadian Petitioners (Ex. A to the 1st Harvey Aff.)
    - List of U.S. Petitioners (Ex. C to the 1st Harvey Aff.)
- 1st Affidavit of Miriam Dominguez ("1st Dominguez Aff.") dated January 4, 2016
    - Proof of Claim filed by the 1974 Plan against Walter Resources in the US Bankruptcy Proceedings against Jim Walter Resources, Inc. dated October 8, 2015 (Ex. A. to the 1st Dominguez Aff.)
    - Proof of Claim filed by the 1974 Plan against Walter Energy, Inc. in the US Bankruptcy Proceedings dated October 8, 2015 (Ex. B. to the 1st Dominguez Aff.)
    - US Bankruptcy Court Memorandum of Opinion and Order granting Walter US Debtors' 1113/1114 Motion dated December 28, 2015 (Ex. C. to the 1st Dominguez Aff.)

- 2nd Affidavit of Miriam Dominguez dated March 29, 2016 ("2nd Dominguez Aff.")
    - US Bankruptcy Court Order Approving Global Settlement Among the Debtors, Official Committee of Unsecured Creditors, Steering Committee and Stalking Horse Purchaser Pursuant to Fed. R. Bankr. P. 9019 dated December 22, 2015 (Ex. A. to the 2nd Dominguez Aff.)
    - Order Granting Motion to Alter or Amend Memorandum Opinion and Order dated December 30, 2015 (Ex. B. to the 2nd Dominguez Aff.)
    - Appellants' Reply Brief seeking reversal of Bankruptcy Court's 1113/1114 Order dated February 15, 2016 (Ex. C. to the 2nd Dominguez Aff.)
    - Notice of Joint Motion for an Order (A) Authorizing Procedures to Implement the Global Settlement and (B) Granting Related Relief dated March 17, 2016 (Ex. D. to the 2nd Dominguez Aff.)
    - Order (A) Authorizing Procedures to Implement the Global Settlement and (B) Granting Related Relief dated March 24, 2016 (Ex. E to the 2nd Dominguez Aff.)
- 1st Affidavit of Linda Sherwood ("1st Sherwood Aff.") dated November 7, 2016, exhibiting corporation reports
    - BC Company Summary for Brule Coal ULC (Sch. A to the 1st Sherwood Aff.)
    - General Partnership Summary for Brule Coal Partnership (Sch. B to the 1st Sherwood Aff.)
    - BC Company Summary for Cambrian Energybuild Holdings ULC (Sch. C to the 1st Sherwood Aff.)
    - General Partnership Summary for Walter Canadian Coal Partnership (Sch. D to the 1st Sherwood Aff.)
    - BC Company Summary for Wolverine Coal ULC (Sch. E to the 1st Sherwood Aff.)
    - General Partnership Summary for Wolverine Coal Partnership (Sch. F to the 1st Sherwood Aff.)
- 2nd Affidavit of Linda Sherwood ("2nd Sherwood Aff.") dated November 14, 2016, exhibiting corporation reports
    - Form 8-K with attached press release filed by Walter Energy with the United States Securities and Exchange Commission (the "SEC") on its publicly-available Electronic Data Gathering, Analysis, and Retrieval system ("EDGAR") on November 18, 2010 (Sch. A to the 2nd Sherwood Aff.)

- Form 8-K with attached press release filed by Walter Energy with the SEC on EDGAR on December 2, 2010 (Sch. B to the 2nd Sherwood Aff.)
- Form 8-K with attached presentation and press release filed by Walter Energy with the SEC on EDGAR on December 3, 2010 (Sch. C to the 2nd Sherwood Aff.)
- Form 8-K with attached press release filed by Walter Energy with the SEC on EDGAR on January 21, 2011 (Sch. D to the 2nd Sherwood Aff.)
- Form 8-K with attached press release filed by Walter Energy with the SEC on EDGAR on February 15, 2011 (Sch. E to the 2nd Sherwood Aff.)
- Form 8-K with attached press release filed by Walter Energy with the SEC on EDGAR on March 2, 2011 (Sch. F to the 2nd Sherwood Aff.)
- Form 8-K with two attached press releases filed by Walter Energy with the SEC on EDGAR on March 11,2011 (Sch. G to the 2nd Sherwood Aff.)
- Form 8-K with attached press release filed by Walter Energy with the SEC on EDGAR on March 28, 2011 (Sch. H to the 2nd Sherwood Aff.)

- Order of Mr. Justice McEwan dated March 10, 2011 approving Western Acquisition Plan of Arrangement
- 1st Affidavit of Keith Calder dated February 1, 2011
- 2nd Affidavit of Keith Calder dated March 8, 2011
- 1st Affidavit of William Aziz ("1st Aziz Aff.") dated March 22, 2016
    - Monitor's First and Second Certificates related to Bulldozer Transaction (Ex. A to the 1st Aziz Aff.)
- Application Response of the 1974 Plan filed January 4, 2016
- Application Response of the 1974 Plan filed March 29, 2016

TAB 2

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**")

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

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[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

[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.

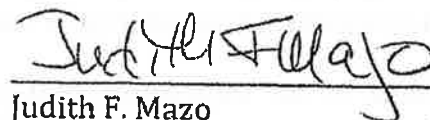
4. Certification

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.

November 2016

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.

TAB 3

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. c. 2002, c. 57, AS AMENDED

AND

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

PETITIONERS

EXPERT REPORT OF ALLAN L. GROPPER

Expert Report Filed by: Petitioners (the "Walter Canada Group")

A. Introduction

(a) Qualifications

I have been a member of the bar of the State of New York since 1969. From 1972 to 1999, I practiced commercial law in the New York office of the firm of White & Case, becoming a partner in the litigation department in 1978. In the 1980's I began to work extensively on bankruptcy and reorganization proceedings and was appointed head of the firm's Bankruptcy and Reorganization practice group. From 1999-2000 I was located in the firm's Hong Kong office.

In 2000 I was appointed a bankruptcy judge in the Southern District of New York, which encompasses Manhattan and the Bronx. I retired as a judge in January 2015 at the conclusion of my 14-year term. I am currently acting as an arbitrator and mediator and have provided expert testimony in the courts of Canada and England as well as in an arbitration proceeding in the United States.

I am an adjunct professor of law at Fordham Law School in New York City and have taught courses in basic business bankruptcy, Chapter 11 reorganization and international insolvency. I am a member of the National Bankruptcy Conference, the American College of Bankruptcy, and the National Conference of Bankruptcy Judges.

For many years I have had a particular interest in issues relating to cross-border insolvency. In addition to my judicial opinions, I was an editor of a two-volume text on International Insolvency, have written four articles on the subject published in law reviews, and have taught in the cross-border insolvency programs of the American College of Bankruptcy and INSOL International. I am a member of the United States delegation to UNCITRAL Working Group V on Insolvency Law. This is the working group that drafted the Model Law on Cross-Border Insolvency that has been adopted both in Canada and the United States, and it is now working on model laws on the enforcement of insolvency-related judgments and the insolvency of multinational enterprise groups.

During my pre-judicial career I was a member of White & Case's opinion committee and understand the nature and importance of a carefully considered and reasoned legal opinion.

A copy of my curriculum vitae is attached hereto as Exhibit A.

(b) Instructions Provided to Expert in Relation to Proceedings

I have been requested to reply to certain of the conclusions in the Report of Judith F. Mazo, submitted on behalf of the United Mine Workers of American 1974 Pension Plan and Trust (the "UMWA Plan"). Specifically, I have been asked for my opinion on the following question of United States law:[1]

Please review the report of Judith Mazo dated November 24, 2016, and provide such reply as you deem appropriate to the views expressed therein. In doing so, please review the report of Marc Abrams dated November 14, 2016, and advise whether or not you agree with his analysis of the question: If the claim of the United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Plan") against the Walter Canada Group is governed by United States substantive law (including ERISA), as a matter of United States law does controlled group liability for withdrawal liability related to a multiemployer pension plan under ERISA extend extraterritorially?

B. Factual Background

I have reviewed, among other materials, pleadings filed in the 1974 Plan's civil claim against Walter Canada Group arising under ERISA as well as Walter Canada Group's Statement of Uncontested Facts. A list of the materials I have reviewed in connection with this opinion is attached hereto as Exhibit C.

Based on my review of those materials, I adopt the statement of facts set out in the report of Marc Abrams submitted to this Court under the heading "Factual Background".

C. Opinion

Ms. Mazo's conclusion on the issue of controlled group liability is stated in paragraph 65 of her Report: "There is no indication that Congress expected controlled group membership to be cut off at the

---

[1] A copy of the instructions I received from Osler is attached hereto as Exhibit B.

borders of the United States." In my view, the Mazo Report has it backwards, and applicable U.S law is precisely the reverse: where there is no indication that Congress intended legislation to apply overseas, it does not. I have reviewed the Abrams Report and agree fully with its reasoning and conclusions.

As the Abrams Report states, quoting the most recent U.S. Supreme Court authority on point, "It is a basic premise of our legal system that, in general, United States law governs domestically but does not rule the world." *RJR Nabisco, Inc. v. European Community*, 136 S.Ct. 2090, 2100 (2016). "This principle finds expression in a canon of statutory construction known as the presumption against extraterritoriality: Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application....When a statute gives no clear indication of an extraterritorial application, it has none." *Id.*

The key point is not whether there is language in the statute that would "cut off" controlled group liability "at the borders of the United States." The point is that there is nothing in the statute to support the proposition that Congress intended to extend controlled group liability to foreign entities throughout the world. See also *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010) ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'") (quoting *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)).

The imposition of liability throughout a controlled group was itself a highly unusual result of ERISA pension legislation. It is a fundamental principle of American law – and I believe the law of most other nations -- that each entity holds its own assets and is responsible for its own liabilities, and that creditors rely on the separateness of the entities with which they do business. In the event of an insolvency proceeding, U.S. bankruptcy courts have the power to pierce the corporate veil, and they also have the power to substantively consolidate separate entities, a power that many other countries refuse to countenance. But the cases make it clear that the power to ignore entity separateness can be used only "sparingly" and in extreme circumstances. A recent influential opinion reiterated that "respecting entity separateness is a fundamental ground rule", as the "general expectation of State law and of the

Bankruptcy Code, and thus of the commercial markets, is that courts respect entity separateness absent compelling circumstances.... Because substantive consolidation is extreme (it may affect profoundly creditors' rights and recoveries) and imprecise, this rough justice remedy should be rare and, in any event, one of last resort. " *In re Owens Corning Corp.*, 419 F.3d 195, 211 (3d Cir. 2005) (internal citation omitted); see also *In re Augie/Restivo Baking Co., Ltd.*, 860 F.2d 515, 518-19 (2d Cir. 1988).

If the imposition of controlled group liability domestically was unusual, there is no reason to assume that Congress intended to extend that liability beyond the borders of the United States in the absence of a clear, affirmative indication. The Mazo Report does not cite any case in which a U.S. court has imposed withdrawal liability on a foreign affiliate of a U.S. company, or for that matter, where such liability has been imposed in a foreign proceeding.

One reason for the presumption against extraterritoriality is that "it serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries. But it also reflects the more prosaic 'common sense notion that Congress generally legislates with domestic concerns in mind.'" *RJR Nabisco*, 136 S.Ct. at 2100. [citations omitted] Both of these considerations are present here. Walter Energy Canada Holdings, Inc. and its Canadian affiliates have their own assets and liabilities, including very substantial liabilities to Canadian employees. They paid their own taxes to Canada, not to the United States. These Canadian entities are subject to their own insolvency proceedings, and there is no indication in the record that they took any part in the settlement negotiated in the United States that resulted in the acceptance of controlled group liability by the U.S. entities. As stated more fully in the Abrams Report, there is nothing in the statute to support the proposition that Congress intended to impose this liability on foreign entities – particularly where the imposition of liability throughout a control group is highly unusual and might result in "international discord" if applied to companies incorporated outside the U.S. "When a statute gives no clear indication of an extraterritorial application, it has none." *Id.*

The Mazo Report argues that Congress' purpose in adopting the principle of controlled group liability was to deter U.S. employers from shifting assets overseas to escape joint and several pension

liabilities as well as to impose as much liability as possible on as many entities as possible. I have seen nothing in the record to indicate that the purchase of Walter Canada shifted material assets outside of the United States. It appears that the U.S. entities became subject to the 2011 collective bargaining agreement at issue and liable to the joint and several pension liability asserted by the 1974 Plan *after* the acquisition – and that the Canadian entities did not. As to the collection of revenues, the PBGC and U.S. multiemployer plans would of course advocate collecting the maximum amount from as many sources as possible, but that does not mean that Congress, in adopting the underlying statute, not only pierced the corporate veil in a virtually unprecedented manner but also intended to pierce it internationally as well.

In my view, the Mazo Report also fails to take into account the important principle of comity. Both comity and extraterritoriality were considered extensively in the insolvency context in a decision released 9 days ago and a similar, earlier case, which addressed claims by a U.S. bankruptcy trustee to apply U.S. bankruptcy laws to foreign transactions. In connection with the collapse of the massive Ponzi scheme perpetrated by Bernard L. Madoff, several foreign investment funds that had acted as "feeder funds" investing most of their assets with Madoff also went into liquidation in their domestic jurisdictions. The trustee of the Madoff estate in the United States attempted to recover property redeemed from the feeder funds by feeder fund customers, on the theory that all redemptions made by the feeder fund had originated as transfers from Madoff. The trustee relied on §550(a)(2) of the Bankruptcy Code that allows a plaintiff in an avoidance proceeding to seek recovery not only from the immediate transferee (in this case, the feeder fund) but also from a subsequent transferee (the feeder fund's customer who received payment from the fund of money that originated from Madoff).

The U.S. courts have held that the Madoff trustee cannot recover from subsequent transferees for two reasons. *Picard, Trustee for the Liquidation of Bernard L. Madoff Inv. Sec. LLC v. Bureau of Labor Insurance*, Adv. No. 11-02732 (SMB), 2016 WL 6900689 (Bankr. S.D.N.Y. Nov. 22, 2016); *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 513 B.R. 222 (S.D.N.Y. 2014) First, they have held that application of U.S. avoidance law to a transfer that took place abroad would be an extraterritorial application of provisions of the U.S. Bankruptcy Code that Congress had not demonstrated a clear intent

to apply outside of the United States. Equally, they found that even if the presumption against extraterritoriality were rebutted, the principle of comity among nations required dismissal. Given the indirect relationship between the Madoff trustee and the subsequent transferees, and that the feeder funds were subject to their own insolvency proceedings where the liquidators had unsuccessfully sought similar relief from the same or similarly situated transferees, the U.S. courts have held that "those foreign jurisdictions had a greater interest in the application of their own laws than the United States had in the application of U.S. law."

This grant of comity is particularly interesting in that it demonstrates once again the principle that "Comity may have a strong bearing on whether application of U.S. law should go forward." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 938 (D.C. Cir. 1984); see also *In re Maxwell Communications Corp.*, 93 F.3d 1036, 1047 (2d Cir. 1996), where the Court describes comity as, among other things, "a canon of construction [that] might shorten the reach of a statute".[2] Comity should shorten the reach of controlled group liability, and where foreign insolvency proceedings are pending, the U.S. courts should be particularly willing to apply comity in favor of the foreign proceeding. *Royal & Sun Alliance Ins. Co. of Canada v. Century Int'l. Arms, Inc.*, 466 F.3d 88, 92-93 (2d Cir. 2006).

The Mazo Report addresses the question of whether the controlled group liability provisions of ERISA constitute a "penal, revenue or other public law" of the United States. I would expect U.S. courts to defer to Canada on the issue of whether the imposition of controlled group liability internationally would be a penalty or revenue measure or against public policy.[3] The Mazo Report states, without citation of authority, that under U.S. law the imposition of controlled group liability on all members of a corporate group is not considered a penalty or the collection of a tax by the government. She does not, however,

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[2] In U.S. law the classic definition of comity is from *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895): "'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."

[3] In the United States, comity is not granted to a foreign insolvency law or judicial determination that would contravene United States law or public policy. *Overseas Inns v. United States*, 911 F.2d 1146 (5th Cir. 1990).

explain why U.S. law would be relevant. I believe that the only relevant law on this issue would be the applicable law in Canada.

D. Conclusion

You have asked me to review the reports of Judith Mazo and Marc Abrams and reply to the views expressed in the Mazo Report. For the reasons set out above and in the Abrams Report, it is my view that there is no indication that Congress intended the controlled group liability provisions to extend to foreign affiliates of United States entities and thus, as a matter of US law, there is no such application under the presumption against extraterritoriality.

E. Certification

Pursuant to Rule 11-2 of the Supreme Court of British Columbia's Civil Rules, 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 has a duty to assist the court and 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.

Allan L. Gropper

EXHIBIT A

ALLAN L. GROPPER
115 CENTRAL PARK WEST
NEW YORK, NEW YORK 10023
917-714-7605

CURRICULUM VITAE
November 2016

Professional Employment

Arbitrator, mediator and expert witness
2015-present

United States Bankruptcy Judge
Southern District of New York
2000-2015

Partner, White & Case LLP
New York, New York
1978-2000

Associate, White & Case LLP
New York, New York
1972-1978

Education

Yale University, B.A., cum laude, 1965

Harvard Law School, J.D., cum laude, 1969

Professional Activities

Member, Roster of Arbitrators, American Arbitration Association

Adjunct Professor of Law, Fordham Law School

Fellow, American College of Bankruptcy

Member, National Bankruptcy Conference

Treasurer, Association of the Bar of the City of New York, 2011-2015, and past member and chair of the Executive Committee; past member, Committee on Bankruptcy Law

Publications

Author, The Curious Disappearance of Choice of Law as an Issue in Chapter 15 Cases, 9 Brook. J. Corp. Fin. & Com. L. 57 (2015)

Author, The Arbitration of Cross-Border Insolvencies, 86 Amer. Bankr. L. J. 201 (2012)

Author, The Model Law After Five Years: The U.S. Experience with COMI, 2011 Norton Ann. Rev. of Intl. Insolvency 13

Author, The Payment of Priority Claims in Cross-Border Insolvency Cases, 46 Tex. Intl. L. J. 559 (2011)

Author, Comments on the Articles of Professors Baird and Janger, 4 Brook. J. Corp. Fin. & Com. L. 59 (2009)

Contributing author, Bufford, U.S. International Insolvency Law (Oxford Univ. Press 2009)

Author, Current Developments in International Insolvency Law, 15 J. Bankr. L. & Proc. 2 (Apr 2006)

Editor, International Insolvency, with Carl Felsenfeld and Howard Beltzer (2000)

Contributing Editor, Collier on Bankruptcy (to 2015)

Lectures, Continuing Legal Education, Awards

Adjunct Professor, Fordham Law School, teaching courses in Business Bankruptcy, Chapter 11 Reorganizations, and International Insolvency, since 2007

Lecturer, INSOL International Global Insolvency Practice Course, since 2012

Lecturer, Practicing Law Institute, on aspects of Chapter 11 practice, since 2006

Lecturer, American College of Bankruptcy course in international insolvency, since 2010

Frequent lecturer to bar and professional groups and to judges on all aspects of insolvency law and practice, in the United States, Canada and Europe

Recipient, International Insolvency Institute's Outstanding Contributions Award, 2016

Bar Admissions

New York, 1969

U.S. District Courts, Southern and Eastern Districts of New York, 1971, and U.S. Supreme Court and Circuit Courts, various since 1971

EXHIBIT B

Paterson, Mary

From:	Paterson, Mary
Sent:	Thursday, December 1, 2016 10:23 AM
To:	'Allan Gropper'
Cc:	Patrick Riesterer (PRiesterer@osler.com); Wasserman, Marc; Buttery, Mary; Williams, Lance
Subject:	Walter - Retainer of Judge Gropper as Independent Expert
Attachments:	Supreme Court Civil Rules.pdf

Judge Gropper,

This email is intended to be the "instructions provided to the expert in relation to the proceeding" (see Rule 11-6) and should be included in your report.

I have attached for your review an excerpt of the Supreme Court Civil Rules (BC), which includes the statement, "In giving an opinion to the court, an expert appointed under this Part by one or more of the parties or by the court has a duty to assist the court and is not to be an advocate for any party".

The specific question on which we are asking you to opine is:

> Please review the report of Judith Mazo dated November 24, 2016, and provide such reply as you deem appropriate to the views expressed therein. In doing so, please review the report of Marc Abrams dated November 14, 2016, and advise whether or not you agree with his analysis of the question: If the claim of the United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Plan") against the Walter Canada Group is governed by United States substantive law (including ERISA), as a matter of United States law does controlled group liability for withdrawal liability related to a multiemployer pension plan under ERISA extend extraterritorially.

Thank you,

Mary

OSLER

Mary Paterson
Partner

416.862.4924 DIRECT
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Toronto, Ontario, Canada M5X 1B8

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EXHIBIT C

Index of Materials Reviewed

- Walter Canada Group's Statement of Uncontested Facts
- Amended Notice of Civil Claim (1974 Plan)
- Amended Response to Civil Claim (Walter Canada Group)
- Amended Response to Civil Claim (United Steelworkers)
- Response to Civil Claim (the Monitor)
- Reply to United Steelworkers (1974 Plan)
- Reasons for Judgment of Madam Justice Fitzpatrick dated January 26, 2016
- Reasons for Judgment of Madam Justice Fitzpatrick dated September 23, 2016
- Application Response of the 1974 Plan filed January 4, 2016
- Application Response of the 1974 Plan filed March 29, 2016
- Application Response of the Respondent Steelworkers filed November 24, 2016
- 1st Affidavit of William G. Harvey ("1st Harvey Aff.") dated December 4, 2015
    - List of Canadian Petitioners (Ex. A to the 1st Harvey Aff.)
    - List of U.S. Petitioners (Ex. C to the 1st Harvey Aff.)
- 1st Affidavit of William E. Aziz dated March 22, 2016
    - Monitor's First and Second Certificates related to Bulldozer Transaction
- 1st Affidavit of Miriam Dominguez ("1st Dominguez Aff.") dated January 4, 2016
    - Proof of Claim filed by the 1974 Plan against Walter Resources in the US Bankruptcy Proceedings against Jim Walter Resources, Inc. dated October 8, 2015 (Ex. A. to the 1st Dominguez Aff.)
    - Proof of Claim filed by the 1974 Plan against Walter Energy, Inc. in the US Bankruptcy Proceedings dated October 8, 2015 (Ex. B. to the 1st Dominguez Aff.)
    - US Bankruptcy Court Memorandum of Opinion and Order granting Walter US Debtors' 1113/1114 Motion dated December 28, 2015 (Ex. C. to the 1st Dominguez Aff.)

- 2nd Affidavit of Miriam Dominguez dated March 29, 2016 ("2nd Dominguez Aff.")
    - o US Bankruptcy Court Order Approving Global Settlement Among the Debtors, Official Committee of Unsecured Creditors, Steering Committee and Stalking Horse Purchaser Pursuant to Fed. R. Bankr. P. 9019 dated December 22, 2015 (Ex. A. to the 2nd Dominguez Aff.)
    - o Order Granting Motion to Alter or Amend Memorandum Opinion and Order dated December 30, 2015 (Ex. B. to the 2nd Dominguez Aff.)
    - o Notice of Joint Motion for an Order (A) Authorizing Procedures to Implement the Global Settlement and (B) Granting Related Relief dated March 17, 2016 (Ex. D. to the 2nd Dominguez Aff.)
    - o Order (A) Authorizing Procedures to Implement the Global Settlement and (B) Granting Related Relief dated March 24, 2016 (Ex. E to the 2nd Dominguez Aff.)
- Order of Mr. Justice McEwan dated March 10, 2011 approving Western Acquisition Plan of Arrangement
- 1st Affidavit of Keith Calder dated February 1, 2011 (without exhibits)
- 2nd Affidavit of Keith Calder dated March 8, 2011 (without exhibits)
- 1st Affidavit of Linda Sherwood ("1st Sherwood Aff.") dated November 7, 2016, exhibiting corporation reports
- 2nd Affidavit of Linda Sherwood ("2nd Sherwood Aff.") dated November 14, 2016, exhibiting selected items filed by Walter Energy with the United States Securities and Exchange Commission (the "SEC") on its publicly-available Electronic Data Gathering, Analysis, and Retrieval system ("EDGAR")
- 4th Affidavit of Miriam Dominguez ("4th Dominguez Aff.") dated November 24, 2016
    - o 2016 Annual Report of the Pension Benefit Guaranty Corporation
- 1st Affidavit of Dale Stover ("1st Stover Aff.") unsworn, with exhibits
- Expert Report of Marc Abrams
- Expert Report of Judith F. Mazo

TAB 4

KeyCite Yellow Flag - Negative Treatment
Mayo Foundation for Medical Educ. and Research v. U.S., U.S., January 11, 2011

102 S.Ct. 821

UNITED STATES, Petitioner,
v.
VOGEL FERTILIZER COMPANY.

No. 80–1251.
|
Argued Nov. 3, 1981.
|
Decided Jan. 13, 1982.

United States Court of Claims, 225 Ct.Cl. 15, 634 F.2d 497, rendered judgment for the taxpayer and certiorari was granted. The Supreme Court, Justice Brennan, held that a Treasury Regulation interpreting the statutory term "brother-sister controlled group", for purposes of the Internal Revenue Code provision limiting such groups to a single surtax exemption, to mean two or more corporations if the same five or fewer persons own "singly or in combination" at least 80 percent of the total combined voting power or at least 80 percent of the total value of each corporation and more than 50 percent of the total combined voting power or more than 50 percent of the total value of each corporation was invalid to the extent that it took into account, with respect to the 80-percent requirement, stock held by a shareholder who owned stock in only one corporation of the controlled group.

Affirmed.

Justice Blackmun filed a dissenting opinion in which

West Headnotes (5)

[1] **Administrative Law and Procedure**
Permissible or reasonable construction
Deference is ordinarily owing to agency construction statute if court can conclude that regulation implements congressional mandate in some reasonable manner, but this general principle of deference, while fundamental, only sets framework for judicial analysis and

61 Cases that cite this headnote

[2] **Internal Revenue**
Making, Requisites and Validity
Internal Revenue Service regulation promulgated only under Commissioner of Internal Revenue's general authority to prescribe all needful rules and regulations was owed less deference than regulation issued under specific grant of authority to define statutory term, particularly where regulation purported to do no more than add clarifying gloss on term already specifically defined by

92 Cases that cite this headnote

[3] **Internal Revenue**
Rules and regulations
Treasury regulation interpreting statutory term "brother-sister controlled group," for purposes of Internal Revenue Code provision limiting such groups to single surtax exemption, to mean two or more corporations if the same five or fewer persons own "singly or in combination" at least 80 percent of the total combined voting power or at least 80 percent of the total value of each corporation and more than 50 percent of the total combined voting power or more than 50 percent of the total value of each corporation was invalid to the extent that it took into account, with respect to the 80-percent requirement, stock held by shareholder who owned stock in only one corporation of
26 U.S.C.A. § 1563(a)(2)(A)

59 Cases that cite this headnote

[4] **Administrative Law and Procedure**
Statutory basis

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Regulation may not be sustained simply because it is not technically inconsistent with statutory language when that regulation is fundamentally at odds with manifest

54 Cases that cite this headnote

[5] **Administrative Law and Procedure**
Deference to agency in general

Court necessarily attaches great weight to agency representations to Congress when administrators participated in drafting statute and directly made known their views to

14 Cases that cite this headnote

**822 *16 *

Section 1561(a) of the Internal Revenue Code of 1954 limits a "controlled group of corporations" to a single

Section 1563(a)(2) provides that a "controlled group of corporations" includes a "brother-sister controlled group," defined as "[t]wo or more corporations if 5 or fewer persons ... own ... stock possessing (A) at least 80 percent of the total combined voting power ... or at least 80 percent of the total value ... of each corporation, and (B) more than 50 percent of the total combined voting power ... or more than 50 percent of the total value ... of each corporation, taking into account the **823 stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation." An implementing Treasury Regulation interprets the statutory term "brother-sister controlled group" to mean two or more corporations if the same five or fewer persons own *"singly or in combination"* the two prescribed percentages of voting power or total value. One shareholder, Vogel, owned 77.49 percent of the outstanding stock of respondent Vogel Fertilizer Co. Another shareholder, Crain, owned the remaining 22.51 percent. Vogel also owned 87.5 percent of the voting power in Vogel Popcorn Co. and 90.66–93.42 percent of the value of its stock. Crain owned no stock in Vogel Popcorn. Respondent claimed refunds for taxes paid in certain tax years for which it did not claim a full surtax exemption, asserting that respondent and Vogel Popcorn were not members of a controlled group and respondent was therefore entitled to a full surtax exemption for each taxable year. When the Internal Revenue Service disallowed the refund claims, respondent filed suit for a refund in the Court of Claims, which held that respondent was entitled to a refund.

Held: The implementing Treasury Regulation is invalid as not being a reasonable interpretation of the statute, which, as indicated by its language, structure, and legislative history, was intended to apply only where each person whose stock is taken into account for purposes of the 80-percent requirement owns stock in each corporation of the group. Pp. 826–832.

(a) Since the Regulation was promulgated only under the Commissioner of Internal Revenue's general authority to prescribe all needful rules and regulations, it is owed less deference than a regulation issued under a specific grant of authority to define a statutory term. Moreover, the Regulation purports to do no more than add a clarifying gloss on a term already specifically defined by Congress. P. 827.

*17 b) The statutory language is in closer harmony with respondent's interpretation than with the Regulation in question. The term the statute defines—"brother-sister controlled group"—connotes a close horizontal relationship *between* two or more corporations, suggesting that the same indivisible group of five or fewer persons must represent 80 percent of the ownership of each corporation. This interpretation is strengthened by the structure of the statute, which suggests that precisely the same shareholders must satisfy both the 80-percent and

s 50-percent

requirement, stock ownership is taken into account only to the extent it is "identical," that part of the statutory test clearly includes a common ownership requirement. And the mere fact that there are no words in Part (A) explicitly requiring each shareholder to own stock in each corporation does not mean that the Regulation's interpretation, "singly or in combination," must be accepted as reasonable. Pp. 827–828.

(c) The statute's legislative history makes it plain that the Regulation is not a reasonable statutory interpretation,

§ 1563(a)(2)

were groups of *interrelated* corporations—corporations

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characterized by *common* control and ownership—and that Congress intended the *80-percent* requirement, as an expanded version of the former statute, to be the primary requirement for defining the interrelationship between two or more corporations, the 50-percent requirement being an additional proviso necessary in light of the expanded number of shareholders whose overlapping interests were to be considered. The "singly or in combination" provision of the Regulation is clearly

225 Ct.Cl. 15, 634 F.2d 497,

Attorneys and Law Firms

Stuart A. Smith, Washington, D. C., for petitioner.

****824**

Opinion

***18** Justice BRENNAN delivered the opinion of the

Section 1561(a) of the Internal Revenue Code of 1954 26 U.S.C. § 1561(a), limits a "controlled group of

Section 1563(a)(2) provides that a "controlled group of corporations" includes a "brother-sister controlled group," defined as "[t]wo or more corporations if 5 or fewer persons ... own ... stock possessing (A) at least 80 percent of the total combined voting power ... or at least 80 percent of the total value ... of each corporation, and (B) more than 50 percent of the total combined voting power ... or more than 50 percent of the total value ... of each corporation, taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such

[2] ***19** The interpretation of the statutory Treas.Reg. § 1.1563–1(a)(3) 26 CFR § 1.1563–1(a)(3) (1981), is that the "term 'brother-sister controlled group' means two or more corporations if the same five or fewer persons ... own ... *singly or in combination* " the two prescribed percentages of voting

[3] The question presented ****825** is whether the regulatory interpretation—that the statutory definition is met by the ownership of the prescribed stock by five or fewer persons "singly or in combination"—is a reasonable implementation of the statute or whether Congress intended the statute to apply only where each person whose stock is taken into account owns stock in each corporation of the group.

I

Respondent Vogel Fertilizer Co. (Vogel Fertilizer), an Iowa corporation, sells farm fertilizer products. During the tax years in question—1973, 1974, and 1975—Vogel Fertilizer ***20** had only common stock issued and outstanding and Arthur Vogel (Vogel) owned 77.49 percent of that stock. Richard Crain (Crain), who is unrelated to Arthur Vogel, owned the remaining 22.51 percent. Vogel Popcorn Co. (Vogel Popcorn), another Iowa corporation, sells popcorn in both ***21** the wholesale and retail markets. For the tax years in question Crain owned no stock in Vogel Popcorn. Vogel, however, held 87.5 percent of the voting power, and between 90.66 percent and 93.42 percent of the value of Vogel Popcorn's

[4]

Vogel Fertilizer did not claim a full surtax exemption

[5] believing

Treas.Reg. § 1.1563–1(a)(3) barred such a claim. But when the United States Tax Court, in 1976, held

Treas.Reg. § 1.1563–1(a)(3) was invalid because the statute did not permit the Commissioner to take a person's stock ownership into account for purposes of the 80-percent requirement unless that person owned stock in each corporation within the brother-sister controlled

Fairfax Auto Parts of Northern Virginia, Inc. v. Commissioner, 65 T.C. 798 (1976) 548 F.2d 501 (CA4 1977), Vogel Fertilizer filed timely claims for refunds, asserting that Vogel Fertilizer and Vogel Popcorn were not members of a controlled group and that Vogel Fertilizer was therefore entitled to a full surtax exemption for each taxable year. The Internal Revenue Service disallowed the claims and respondent brought this suit for a refund in the United States Court of Claims. The Court of Claims held that Vogel Fertilizer and Vogel Popcorn did not ***22** constitute a brother-sister controlled group

§ 1563(a)(2)(A) Treas.Reg. § 1.1563–1(a)(3) is invalid to the extent that it takes into account, with respect to the 80-percent requirement, stock held by a shareholder who owns stock in only one corporation of the controlled group; and that respondent was, accordingly, entitled to a refund. 225 Ct.Cl. 15, 634 F.2d 497 (1980). We granted certiorari to resolve

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II

Vogel's ownership of more than 50 percent of both Vogel Fertilizer and Vogel Popcorn satisfies Part (B) of the statutory test the 50-percent identical-ownership requirement. The controversy centers on Part (A) of the test—the 80-percent requirement.

Respondent argues that the statute must be construed as including a common-ownership requirement—Congress was attempting to identify interrelated corporations that are in reality subdivided portions of a larger entity. In the taxpayer's view, Congress thus did not intend that a person's stock ownership be taken into account for purposes of the 80-percent requirement unless that shareholder owned stock in *all* *23 of the corporations within the controlled group. The same "5 or fewer" individuals cannot be said to control 80 percent of both Vogel Fertilizer and Vogel Popcorn because Crain owns no stock in Vogel Popcorn and therefore his 22.51 percent of Vogel Fertilizer cannot be added to Vogel's 77.49 § 1563(a)(2)(A). The Commissioner takes the position, however, reflected in his addition of the words "singly or in combination" Treas.Reg. § 1.1563–1(a)(3) to the statutory language, that there is no common-ownership requirement—various subgroups of "5 or fewer persons" can own the requisite 80 percent of the different corporations within the controlled group. The Commissioner acknowledges that under this s 80-percent requirement in no respect measures the interrelationship between two corporations. The Commissioner's view is that only the 50-percent requirement measures this interrelationship. He contends the 80-percent requirement "continues to have independent significance" in that it "insures that all the members of the corporate group will be closely held," so that "the more-than-50-percent shareholder control group can obtain additional control in those instances where a greater interest is needed without the necessity of dealing with a large number of other shareholders." Brief for

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*24 **827

[1]
Treas.Reg. § 1.1563–1(a)(3). Deference is ordinarily owing to the agency construction if we can conclude that the regulation "implement[s] the congressional mandate in *United States v. Correll*, 389 U.S. 299, 307, 88 S.Ct. 445, 450, 19 L.Ed.2d 537 (1967). But this general principle of deference, while fundamental, only sets "the framework for judicial analysis; it does not *United States v. Cartwright*, 411 U.S. 546, 550, 93 S.Ct. 1713, 1716, 36 L.Ed.2d 528 (1973)

[2] The framework for analysis is refined by consideration of the source of the authority to promulgate the regulation at issue. The Commissioner Treas.Reg. § 1.1563–1(a)(3) interpreting this statute only under his general authority to "prescribe 26 U.S.C. § 7805(a). Accordingly, "we owe the interpretation less deference than a regulation issued under a specific grant of authority to define a statutory term or prescribe a method of *Rowan Cos. v. United States*, 452 U.S. 247, 253, 101 S.Ct. 2288, 2292, 68 L.Ed.2d 814 (1981) Treas.Reg. § 1.1563–1(a)(3) purports to do no more than add a clarifying gloss on a term "brother-sister controlled group" that has already been defined with considerable specificity by Congress. The Commissioner's authority is consequently more circumscribed than would be the case if Congress had used a term " 'so general ... as to render an interpretive regulation appropriate.' " *National Muffler Dealers Assn., Inc., v. United States*, 440 U.S. 472, 476, 99 S.Ct. 1304, 1306, 59 L.Ed.2d 519 (1979) *Helvering v. R. J. Reynolds Co.*, 306 U.S. 110, 114, 59 S.Ct. 423, 425, 83 L.Ed. 536 (1939). See also *Rowan Cos. v. United States, supra*.

[3] We consider first whether the Regulation harmonizes *National Muffler Dealers Assn., Inc. v. United States, supra*, 440 U.S., at 477, 99 S.Ct., at 1307. That language, set forth *supra*, at 824, and n. 2, while not completely unambiguous, is in closer harmony with the taxpayer's interpretation than with the Commissioner's Regulation. The term that

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the statute defines—"brother-sister controlled group"—connotes a close horizontal relationship *between* two or more corporations, suggesting that the same indivisible group of five or fewer persons must represent 80 percent of the ownership of each corporation.

This interpretation is strengthened by the structure of Section 1563(a)(2) defines the controlling group of shareholders ("5 or fewer"), and then sets forth the two ownership requirements (80 percent and 50 percent). This structure suggests that precisely the same shareholders must satisfy both the 80-percent and 50-percent requirements. As the Tax Court stated it, "5 or fewer persons" is the "conjunctive subject" of *both* *Fairfax Auto Parts of Northern Virginia, Inc. v. Commissioner*, 65 T.C., at 803. Since under Part s 50-percent requirement, stock ownership is taken into account only to the extent it is "identical," that part of the statutory test clearly includes a common-ownership requirement. If, as the statutory structure suggests, the shareholders whose holdings are considered for purposes of Part (A) must be precisely the same shareholders as those whose holdings are considered for purposes of Part
8

***26** [4] Of course, a Treasury Regulation is not invalid simply because the statutory language will support a contrary interpretation. But the mere fact that there are no words in Part (A) explicitly requiring that each shareholder own stock in each corporation does not mean that the Regulation's interpretation, "singly or in combination," must be accepted as reasonable. This Court has firmly rejected the suggestion that a regulation is to be sustained simply because it is not "technically inconsistent" with the statutory language, when that regulation is fundamentally at odds with the manifest *United States v. Cartwright, supra*, at 557, 93 S.Ct., at 1719. The challenged Regulation is not a reasonable statutory interpretation unless it harmonizes *National Muffler Dealers Assn., Inc. v. United States, supra*, 440 U.S., at 477, 99 S.Ct., at 1307.

C

§ 1563(a)(2) resolves any ambiguity in the statutory language and makes it plain Treas.Reg. § 1.1563–1(a)(3) is not a reasonable statutory interpretation. Through the controlled-group test, Congress intended to curb the abuse of multiple incorporation—large organizations subdividing into smaller corporations and receiving unintended ***27** tax benefits from the multiple use of surtax exemptions, accumulated earnings credits, and various other tax S.Rep.No. 91–552, p. 134 (1969), U.S.Code Cong. & Admin.News 1969, p. 1645. The House Ways and Means Committee Report noted: "Large organizations have been able to obtain substantial benefits ... by dividing the organization's income among a number of related corporations. Your committee does not believe that large organizations which operate through multiple corporations should be allowed to receive the substantial and unintended tax benefits resulting from the multiple use of the surtax exemption and the other provisions of H.R.Rep.No. 91–413, pt. 1, p. 98 (1969), U.S.Code Cong. & Admin.News 1969, pp. 1746–1747. § 1563(a)(2) were groups of *interrelated* corporations—corporations characterized by *common* control and ownership. Although the 50-percent requirement measures, to a lesser degree, the overlap between two corporations, the history of the enactment § 1563(a)(2) illustrates that Congress intended that the *80-percent* requirement be the primary requirement for defining the interrelationship between two or more corporations.

Until 1964, the method prescribed by the Code to curb the abuse of multiple incorporation was subjective: Multiple exemptions or benefits were allowed or disallowed
9

The Revenue Act of 1964 ****829** changed this approach, §§ 1561 1563 to the Code. Pub.L. 88–272, § 235(a), 78 Stat. 116–125. These sections prescribed the application of mechanical, objective ***28** tests for determining whether two corporations were a "controlled group" and thereby restricted to one surtax exemption. The original, 1964, definition of a "brother-sister controlled group" was:

"Two or more corporations if stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of each of the corporations is owned ... by one person who is

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26 U.S.C. § 1563(a)(2) (1964 ed.).

Because corporations were not part of a controlled group unless the same person owned 80 percent of all corporations within the group, the 1964 provision clearly included a common-ownership requirement.

In 1969 Congress adopted the present two-part percentage § 1563(a)(2). Pub.L. 91–172, § 401(c), 83 Stat. 602. This change was proposed by the Treasury Department as part of an extensive package of tax reform proposals. See Hearings Before the House Committee on Ways and Means on the Subject of Tax Reform, 91st Cong., 1st Sess., pt. 14, pp. 5050–5478 (1969) (hereinafter Hearings). The Treasury Department proposed, *inter alia*, that the definition of a brother-sister controlled group "be broadened to include groups of corporations owned and controlled by five or fewer persons, rather than only those owned and controlled by one person," as was the case under then existing law. *Id.*, at 5166. In setting forth the "Technical Explanation" ***29** for this new definition of brother-sister controlled groups, the Treasury Department was most explicit that the 80-percent requirement, like the 50-percent requirement, included common ownership: "[T]he *same five* or fewer persons [must] own at least 80 percent of the voting stock or value of shares of *each* corporation and ... *these* five or fewer individuals" must satisfy the 50-percent requirement in Part (B). *Id.*, at 5168 (emphasis added except for "*five* ").

The Treasury Department's "General Explanation" of § 1563(a)(2) defined a brother-sister controlled group as one "in which five or fewer persons own, to a large extent in identical proportions, at least 80 percent of the stock of each of the corporations." Hearings, at 5394 (footnote omitted). The General Explanation then set forth the respective roles of the expanded 80-percent requirement and the new 50-percent requirement:

> "This provision expands present law by considering the combined stock ownership of five individuals, rather than one individual, in applying the 80-percent test....
>
> "However, in order to insure that this expanded definition of brother-sister controlled group applies only to those cases where the five or fewer individuals hold their 80 percent in a way which allows them to operate the corporations as one economic entity, the proposal would add an additional rule that the ownership of the five or fewer individuals must constitute more than 50 percent of the stock of each corporation considering, in this test of ownership, stock of a particular person only to the extent that it is owned identically with respect to each corporation." *Ibid.*

The General Explanation made it clear that, under § 1563(a)(2), the 80-percent requirement ****830** would remain the primary basis for determining whether two or more corporations represent the *same* financial interests. Part (A) of the 1969 test was simply an expansion of the 1964 test, which considered the two or more corporations to be a ***30** brother-sister controlled group only when one person owned 80 percent of all of the corporations. This "expansion" was necessary to "close the present opportunity for easy avoidance" of the 80-percent test. Hearings, at 5396. Because five persons now played the role previously played by one, this expanded version of the test required a new safeguard —the 50-percent requirement—to "insure that the new expanded definition is limited to cases where the brother-sister corporations are, in fact, *controlled* by the group of stockholders as one economic enterprise." *Ibid.* (emphasis

10

Treas.Reg. § 1.1563–1(a)(3) is clearly incompatible with the explanation offered by the Treasury Department when it proposed the statute. In addition to the explicit statement that the members of the controlling group must own stock in "each" corporation, the Treasury Department presented a test in which the 80-percent requirement remained the primary indicia of interrelationship. But under the challenged Regulation, the 80-percent requirement measures *only* whether or not the brother-sister corporations are closely held. The fact that a corporation is closely held, absent common ownership, is irrelevant to the congressional purpose of identifying interrelationship: "It is not the *smallness* of the number § 1563; it is the *sameness* *T. L. Hunt, Inc. v. Commissioner*, 562 F.2d 532, 537 (CA8 1977) (Webster, J.

11

[5] ***31** The Treasury Department's explanations of the proposed statute are not, as the dissent in the Court of Claims suggested, a mere "admission against interest" by 225 Ct.Cl., at 44, 634 F.2d, at 514. The expanded definition of "brother-sister controlled group" was proposed by the Treasury Department and adopted

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in the same form in which it was presented. Of course, it is Congress' understanding of what it was enacting that ultimately controls. But we necessarily attach "great weight" to agency representations to Congress when the administrators "participated **831 in drafting and directly made known their views to Congress in committee *Zuber v. Allen*, 396 U.S. 168, 192, 90 S.Ct. 314, 327, 24 L.Ed.2d 345 (1969). The subsequent legislative § 1563(a)(2) confirms that Congress adopted not only the proposal of the Treasury Department, but also the Department's explanation *32 and interpretation which are wholly incompatible with the "singly or in combination" interpretation of the Regulation. The Ways and Means Committee Report stated:

"This bill expands the definition [of a brother-sister controlled group] to include two or more corporations which are owned 80 percent or more (by voting power or value) by five or fewer persons (individuals, estates, or trusts) provided that these five or fewer persons own more than 50 percent of each corporation when the stock of each person is considered only to the extent it

H.R.Rep.No. 91–413, pt. 1, p. 99 (1969) U.S.Code Cong. & Admin.News 1969, p. 1748.

The House Committee Report thus reflects the Treasury Department's explanations—the 80-percent requirement is an expanded version of the 1964 statute and measures overlapping interests, while the 50-percent requirement is an additional proviso necessary in light of the expanded number of shareholders whose overlapping interests were [12]

D

The Commissioner's further reasons for sustaining his interpretation are unpersuasive.

The Commissioner relies on the fact that, in expanding § 1563(a)(2), Congress expressly adopted § 1551(b)(2) of the Code to describe a transfer from one corporation to another "controlled" by the same "five or fewer" individuals. The Commissioner contends that Congress thereby approved § 1551(b)(2). Even if we could assume that Congress was aware of Treasury Regulations interpreting § 1551, § 1563 was enacted, 32 Fed.Reg. 3214-3216 (1967), the promulgated regulations do not support the Commissioner's present § 1563(a)(2) § 1551 contain no language similar to the words "singly or in Treas.Reg. § 1.1563–1(a)(3) and they contain no suggestion that the Treasury Department § 1551(b)(2) as *not* having a common- Treas.Reg. § 1.1551–1(e) 26 CFR § 1.1551–1(e) (1981) [13]

**832 Also unpersuasive is the Commissioner's reliance § 1563(a)(2) is referred to in § 1015 of

26 U.S.C. § 414 [14] *34 From this the Commissioner infers congressional approval of all the Regulations § 1563(a)(2), including the Regulation at issue in this case. But it is the intent of the Congress § 1563(a), not the views of the subsequent § 414 *Teamsters v. United States*, 431 U.S. 324, 354, n. 39, 97 S.Ct. 1843, 1864, n. 39, 52 L.Ed.2d 396 (1977). In 26 U.S.C. § 414(b), Treas.Reg. § 1.1563–1(a)(3) 37 Fed.Reg. 8068–8070 (1972), hardly constitutes legislative approval of a longstanding administrative interpretation, from which we could infer *United States v. Correll*, 389 U.S., at 305–306, 88 S.Ct., at 448–449.

Finally, the Commissioner seeks to uphold the Regulation on the ground that a common-ownership requirement leads to the assertedly nonsensical result that ownership of only one share could be determinative. For example, if Crain owned but one share of Vogel Popcorn, then the 80-percent requirement would be met and the taxpayer corporation would be part of a controlled group even under the taxpayer's interpretation of the statute. This argument is without merit, for several reasons. First, Congress purposefully substituted the mechanical § 1563(a)(2) for the subjective, case-by-case analysis that had previously prevailed. Inherent in such an objective test is a sharp dividing line that is crossed by incremental changes in ownership. Moreover, it is obvious that a shareholder would not buy a small amount of stock in order to *create* a controlled group, since it is to the taxpayer's advantage not to be part of such a group. Finally, a person's "mere" ownership

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of one share of stock plays an important role in the operation of the test. It insures that each of the "5 or fewer" shareholders representing the bulk of the financial interest of the corporations actually knows of the other corporations within the putative brother-sister controlled group. Under this construction of the statute, controlled-group membership cannot ***35** catch such a shareholder by surprise, as it could under the Commissioner's construction.

Affirmed.

Justice BLACKMUN, with whom Justice WHITE joins, dissenting.

I cannot deny that the Court's opinion persuasively 26 U.S.C. § 1563(a)(2). In my view, however, the Court has totally failed to establish that the *Commissioner's* interpretation is incorrect. Because I believe that the only certainty about § 1563(a)(2) is that both are ambiguous, I would defer to the Commissioner's judgment.

The Court begins by declaring that the statutory language, "while not completely unambiguous, is in closer harmony with the taxpayer's interpretation than with the Commissioner's Regulation" because the term " 'brother-sister controlled group'—connotes a close horizontal relationship *between* two or more corporations." *Ante*, at 827 (emphasis in original). In taking this approach, however, the Court simply assumes its conclusion. The 50-percent test of Part (B) already ensures a horizontal relationship between the corporations that constitute the controlled group; nothing in the language of the statute suggests that Part (A) was designed directly to serve the same purpose. § 1563(a)(2) can be read to require that the same *set* of five or fewer persons must satisfy the 50- and 80-percent tests; the statute is entirely silent ****833** as to whether each *member* of the set must own stock in each corporation. And, unlike the Court, I have difficulty inferring this conclusion from the term "brother-sister controlled group," a phrase that appears only in the heading of the subsection and that is hardly a household term with an intuitively obvious meaning.

Similar problems attend the Court's analysis of the statute's structure. In the Court's view, the fact that the controlling group of shareholders is defined as "5 or fewer" for both the 50- and 80-percent tests "suggests that precisely the ***36** same shareholders must satisfy both the 80-percent and 50-percent requirements." *Ante*, at 827. Even if this were true, however, it would not mean that *each member* of the set of five or fewer shareholders must own stock in each corporation; it suggests only that the total number of shareholders considered in relation to both tests may not exceed five. In any event, the common-ownership requirement—which takes "into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each § 1563(a)(2)(B)—is embedded in Part (B), and the simpler and normal reading of the statute therefore would apply the common-ownership restriction s 50 [1] It is the Court's reading, then, that seemingly runs counter to the structure of the statute, for under its approach the 80-percent test would "tend to overlap or swallow the 50% identical *Allen Oil Co. v. Commissioner*, 614 F.2d 336, 339 (CA2 1980).

The confusing nature of the statutory text leads the § 1563(a)(2)'s legislative history, which it cheerfully reads as "resolv [ing] any ambiguity in the statutory language." *Ante*, at 828. It seems to me that this conclusion is substantially overstated. It is undoubtedly true, as the Court observes, § 1563(a)(2) was aimed at curbing the abuses of multiple incorporation. But this is beside the ***37** point, for—as the Court notes—the 50-percent test of Part (B) itself serves to "measur[e] ... the overlap between two corporations." *Ante*, at 828. The Court's further conclusion "that Congress intended that the *80-percent* requirement be the primary requirement for defining the interrelationship between two or more corporations," *ibid.* (emphasis in original), is entirely without support in [2] Certainly, such a view appears nowhere ****834** in the congressional Reports. These simply echo the statutory definition, declaring that a controlled group includes "two or more corporations which are owned 80 percent or more ... by five or fewer persons ... provided that these five or fewer persons own more than 50 percent of each corporation when the stock of each person is considered only to the extent it

H.R.Rep.No. 91-413, pt. 1, p. 99 (1969) U.S.Code Cong. S.Rep.No. 91-552, p. 135 (1969) U.S.Code Cong. & Admin.News 1969, p. 2167. Again, however, the legislative documents prove

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only that the same *set* must satisfy the 80- and 50-percent ***38** tests; they cannot easily be read to require that each *member* of the set own stock in every corporation.

Ironically, then, the Court at bottom is forced to rely on the rationale advanced by the Treasury Department §

1563(a)(2). The Court's analysis of this proposal, which it explores in some detail, *ante*, at 829–830, is certainly credible. But even this legislative material contains an

[3] Neither the "General Explanation" nor the "Technical" one addresses whether the 80-percent test requires common ownership, or whether a person excluded from the 50-percent calculation because he owns no stock in one of the controlled corporations may nevertheless be included in the 80-percent test, so long as the total number of relevant shareholders does not exceed five. For example, while the Treasury Department suggested that "the same *five* or fewer persons [must] own at least 80 percent of the voting stock or value of shares of each corporation" to satisfy Part (A), and that "these five or fewer individuals" must satisfy the 50-percent test of Part (B), Hearings Before the House Committee on Ways and Means on the Subject of Tax Reform, 91st Cong., 1st Sess., pt. 14, p. 5168 (1969) (emphasis in original), the Department's explanation—despite the Court's suggestion to the contrary—need not be read as requiring that *each* of the five own stock in every controlled corporation. To the contrary, the Technical Explanation declares that the 80 percent test "is satisfied if the *group* of five or fewer persons *as a whole* owns at least 80-percent of the voting stock or value of shares of each corporation, *regardless of the size of the individual* ***39** *holdings of each person.*" *Id.*, at 5169 (emphasis added). This obviously suggests that the crucial inquiry is whether a given set of five satisfies both tests, not whether each individual owns stock in each corporation.

Certainly, I do not suggest that the Commissioner's interpretation is compelled by the legislative materials. But the Court, by putting so much effort into reading between the lines, has lost sight of the fact that certain statutory ambiguities cannot be neatly and finally resolved. Here, the Commissioner's interpretation is not "unreasonable or meaningless," for "it insures that the

Allen Oil Co. v. Commissioner, 614 F.2d, at 340. In such a situation, "[t]he choice among reasonable interpretations is for the Commissioner, not

National Muffler Dealers Assn., Inc. v. United States, 440 U.S. 472, 488, 99 S.Ct. 1304, 1312, 59 L.Ed.2d 519 (1979) *United States v. Correll*, 389 U.S. 299, 307, 88 S.Ct. 445, 449, 19 L.Ed.2d 537 (1967). For that reason,

All Citations

455 U.S. 16, 102 S.Ct. 821, 70 L.Ed.2d 792, 49 A.F.T.R.2d 82-491, 82-1 USTC P 9134, 1982-1 C.B. 121, 3 Employee Benefits Cas. 1041

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

1 For two of the tax years in question in this case—the years ending November 30, 1973 and 1974—the Code exempted the first $25,000 of corporate earnings from the federal surtax on corporate income, 26 U.S.C. § 11(d) (1970 ed.), and for the third year—ending November 30, 1975—the Code exempted the first $50,000. 26 U.S.C. § 11(d). For each of these tax years, however, § 1561 of the Code limited the members of a "controlled group" of corporations to a single shared surtax exemption. Amendments to the Code in 1978 replaced the surtax exemption with a graduated five-step tax rate structure on taxable corporate income. 26 U.S.C. § 11 (1976 ed., Supp.III). Now members of a controlled group must share a single rate schedule. 26 U.S.C. § 1561(a) (1976 ed., and Supp.III).

2 The full text of § 1563(a)(2) is:

"Brother-sister controlled group

"Two or more corporations if 5 or fewer persons who are individuals, estates, or trusts own (within the meaning of subsection (d)(2)) stock possessing—

"(A) at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of the stock of each corporation, and

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"(B) more than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of stock of each corporation, taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation."

3 The full text of the Treasury Regulation is:

"*Brother-sister controlled group.*

"(i) The term 'brother-sister controlled group' means two or more corporations if the same five or fewer persons who are individuals, estates, or trusts own (directly and with the application of the rules contained in paragraph (b) of § 1.1563–3), singly or in combination, stock possessing—

"*(a)* At least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of the stock in each corporation; and

"*(b)* More than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of stock of each corporation, taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation.

"(ii) The principles of this subparagraph may be illustrated by the following examples:

"*Example (1).* The outstanding stock of corporations P, Q, R, S, and T, which have only one class of stock outstanding, is owned by the following unrelated individuals:

Individuals	Corporations					Identical ownership
	P	Q	R	S	T	
A	60%	60%	60%	60%	100%	60%
B	40%	....	....	....	....	....
C	....	40%	....	....	....	....
D	....	....	40%	....	....	....
E	....	....	....	40%	....	....
Total	100%	100%	100%	100%	100%	60%

Corporations P, Q, R, S, and T are members of a brother-sister controlled group.

"*Example (2).* The outstanding stock of corporations U and V, which have only one class of stock outstanding, is owned by the following unrelated individuals:

Individuals	Corporations		ownership
	U	V	
F	5%	....	
G	10%	....	
H	10%	....	
I	20%	....	
J	55%	55%	55%
K		10%	....
L		10%	....
M		10%	....
N		10%	....
O		5%	....
Total	100%	100%	55%

Corporations U and V are not members of a brother-sister controlled group because at least 80 percent of the stock of each corporation is not owned by the same five or fewer persons."

4 The remainder of the Vogel Popcorn stock—voting preferred stock—was owned by Vogel as trustee of the Alex Vogel Family Trust. Under the attribution rules of 26 U.S.C. §§ 1563(d)(2), (e), Vogel is not deemed to own this stock for tax purposes. See 225 Ct.Cl. 15, 18, 634 F.2d 497, 499 (1980).

5 In the original version of §§ 1561–1563, controlled groups retained the option of taking multiple surtax exemptions and paying a penalty. See 26 U.S.C. § 1562 (1964 ed.). During the tax years in question this option was being gradually phased out. 26 U.S.C. § 1564. For 1973 and 1974 respondent utilized the multiple surtax exemption under 26 U.S.C. § 1564(a), and paid the penalty imposed by § 1562(b) (1970 ed.). For the tax year ending November 30, 1975, respondent elected to allocate entirely to Vogel Popcorn the single surtax exemption then allowed to members of a controlled group of corporations.

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6 The Court of Appeals for the Fifth Circuit is in agreement with the Court of Claims and the Tax Court that Treas.Reg. § 1.1563–1(a)(3), 26 CFR § 1.1563–1(a)(3) (1981), is invalid insofar as it permits the 80-percent requirement to be satisfied without common ownership. *Delta Metalforming Co. v. Commissioner*, 632 F.2d 442 (1980). The Tax Court has adhered to its view that the Regulation is invalid. See *e.g., Charles Baloian Co. v. Commissioner*, 68 T.C. 620, 629–631 (1977); *Davidson Chevrolet Co. v. Commissioner*, 39 TCM 299 (1979), [¶ 79,414] P–H Memo TC; *Allen Oil Co. v. Commissioner*, 38 TCM 355 (1979), [¶ 79,088] P–H Memo TC; *Delta Metalforming Co. v. Commissioner*, 37 TCM 1485 (1978), [¶ 78,354] P–H Memo TC; *T. L. Hunt, Inc. v. Commissioner*, 35 TCM 966 (1976), [¶ 76,221] P–H Memo TC. This adherence has persisted in the face of reversals by the Courts of Appeals for the Second, Fourth, and Eighth Circuits. *Allen Oil Co. v. Commissioner*, 614 F.2d 336 (CA2 1980); *Fairfax Auto Parts of Northern Virginia v. Commissioner*, 548 F.2d 501 (CA4 1977) *(per curiam); T. L. Hunt, Inc. v. Commissioner*, 562 F.2d 532 (CA8 1977).

7 The difference between the Commissioner's and the taxpayer's positions is illustrated by the following example:

Individuals	Corporations					Identical Ownership
	U	V	W	X	Y	
A	55%	51%	55%	55%	55%	51%
B	45%	49%	...	...	...	.....(45% in U&V)
C	...	...	45%	...	...	....
D	...	...	...	45%	...	....
E	...	...	...	...	45%	....

The parties would agree that the 50-percent identical-ownership requirement in Part (B) is met for all corporations by shareholder A's identical ownership of 51 percent of all of the corporations. The Commissioner would find the 80-percent requirement met as well, and would therefore define all five corporations as part of a controlled group, because various subgroups of the five or fewer shareholders can account for 80 percent of each corporation. The taxpayer's position is that only corporations U and V are part of a brother-sister controlled group, because they are the only two corporations in which precisely the same five or fewer persons account for 80 percent of the stock of the putative "brother-sister controlled" corporations.

8 This interpretation of the statutory language is also strengthened by the presence of the phrase "each such person" in Part (B). The Tax Court pointed out:

"The words 'each such person' appearing therein refer to the 'five or fewer persons' constituting the ownership group for purposes of both the 80-percent and 50-percent tests. The import of such usage is that each person—and not just some of the persons—counted for purposes of the 80-percent test must be also counted for purposes of the 50-percent test." *Fairfax Auto Parts of Northern Virginia, Inc. v. Commissioner*, 65 T.C., at 803.

The Government argues that there is no justification for singling out the phrase "each such person" in Part (B) of the test and transporting it for application in the context of Part (A). This argument, however, mischaracterizes the reasoning of the Tax Court. The court merely intended to show that the term "each such person" refers back to the antecedent "5 or fewer persons," which precedes the 80-percent requirement, thereby strengthening the suggestion that there is one fixed, indivisible group of shareholders whose holdings are to be considered throughout application of both the 80-percent requirement in Part (A) and the 50-percent requirement in Part (B).

9 Before 1964, the Code provisions designed to prevent taxpayers from using the multiple form of corporate organization in order to avoid taxes were §§ 269, 482, and 1551. H.R.Rep.No. 749, 88th Cong., 1st Sess., 117 (1964), U.S.Code Cong. & Admin.News 1964, pp. 1313, 1636. Section 269 gives the Secretary the authority to disallow a tax deduction, credit, or other allowance when an acquisition was made to avoid income tax. Section 482 gives the Secretary the authority to allocate income, deductions, credits, or allowances between or among taxpayers if he determines that such an allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of the taxpayers. Section 1551 permits the Secretary to disallow a surtax exemption or accumulated earnings credit when a transfer of property between two "controlled" corporations occurs, unless the taxpayer can show that the "major purpose" of the transfer was not the securing of such benefits. All of these sections are still in effect, but they are no longer the primary weapons employed against the abuse of multiple incorporation. Rather, the purely objective tests of §§ 1561–1563 have proved to be more effective. See Thomas, Brother-Sister Multiple Corporations—The Tax Reform Act of 1969 Reformed by Regulation, 28 Tax L.Rev. 65, 66–67 (1972).

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10 The Treasury Department's explanations included several examples applying the new definition of a brother-sister controlled group. In these examples, all shareholders whose stock was taken into account for purposes of the 80-percent requirement owned stock in each of the other corporations within the controlled group. See Hearings, at 5169, 5170, 5395–5396.

11 The Commissioner strains to find some ambiguity in the Treasury Department's explanations. He points to the statement in the General Explanation that a brother-sister controlled group is a "group of corporations in which five or fewer persons own, *to a large extent in identical proportions*, at least 80 percent of the stock of each of the corporations." *Id.*, at 5394 (footnote omitted, emphasis added). The Commissioner contends that the italicized phrase suggests that there need not be common ownership among all those persons taken into account for purposes of the 80 percent requirement. But the words the Commissioner relies on only further support the taxpayer's position. If the shareholders own stock "to a large extent in identical proportions" they certainly own the stock *to some extent* in identical proportions—there is some overlap among *each* shareholder's holdings in *each* brother-sister corporation.

The dissent makes a similar effort, relying on the statement in the Technical Explanation that the 80-percent requirement "is satisfied if the *group* of five or more persons *as a whole* owns at least 80-percent of the voting stock or value of shares of each corporation, *regardless of the size of the individual holdings of each person*." *Post*, at 834 (emphasis in opinion). This language, however, also supports the taxpayer's interpretation since it appears to assume that "each person" *has* holdings in each corporation. This assumption is demonstrated by the three examples which directly follow this language and are used to illustrate it: The 80-percent requirement "is met whether one person owns 80 percent of the voting stock of each corporation, four persons each own 20 percent of the voting stock of each corporation, or one person owns 60 percent of the voting stock of one corporation and 40 percent of another, and another person owns 40 percent of the voting stock of the first and 60 percent of the second." Hearings, at 5169.

12 The Senate Committee Reports describe the amendment in language almost identical to that employed by the House Report. See S.Rep.No. 91–552, p. 135 (1969); Senate Committee on Finance, Summary of H.R. 13270, Tax Reform Act of 1969, 91st Cong., 1st Sess., 49 (Comm. Print 1969).

13 The Commissioner relies on one of the examples used to define a "transfer" for purposes of § 1551—a concept that obviously has no application under § 1563(a)(2). See Treas.Reg. § 1.1551–1(g)(4), 26 CFR § 1.1551–1(g)(4). The example the Commissioner relies on provides:

"Individual A owns 55 percent of the stock of corporation X. Another 25 percent of corporation X's stock is owned in the aggregate by individuals B, C, D, and E. On June 15, 1963, individual A transfers property to corporation Y (newly created for the purpose of acquiring such property) in exchange for 60 percent of the stock of Y, and B, C, and D acquire all of the remaining stock of Y. The transfer is within the scope of section 1551(a)(3)." Treas.Reg. § 1.1551–1(g)(4), Example (4), 26 CFR § 1.1551–1(g)(4), Example (4) (1981).

Even if this example were read to suggest that a transferor "controls," within the meaning of § 1551(b)(2), a transferee although the persons owning 80 percent of the transferor do not each own stock in the transferee, the example would be inapplicable to § 1563(a)(2) because, as the Tax Court has pointed out, there is no method for determining which brother-sister corporation is to be regarded as the transferor and which as the transferee. See *Fairfax Auto Parts of Northern Virginia, Inc.*, 65 T.C., at 807. See also Bonovitz, Brother-Sister Controlled Groups under Section 1563: The 80 Percent Ownership Test, 28 Tax Lawyer 511, 524, 528–530 (1975).

14 Section 414(b) provides in relevant part that "all employees of all corporations which are members of a controlled group of corporations (within the meaning of section 1563(a), determined without regard to section 1563(a)(4) and (e)(3)(C)) shall be treated as employed by a single employer."

1 The Court concludes that the phrase "each such person" in Part (B) refers back to the "5 or fewer persons," which precedes Part (A), "strengthening the suggestion that there is one fixed, indivisible group of shareholders whose holdings are to be considered throughout application of both the 80-percent requirement in Part (A) and the 50-percent requirement in Part (B)." *Ante*, at 828, n. 8. But this language proves only that the total number of shareholders considered may not exceed five; it need not be read to require that each 80-percent shareholder own stock in each corporation. Indeed, the presence of an explicit common-ownership requirement in Part (B), along with the absence of analogous language in Part (A), suggests that Congress did not intend to write such a requirement into the 80-percent test.

2 The Court apparently derives this conclusion from the nature of the pre-1969 statutory scheme, under which corporations were considered to be part of a controlled group only if the same person owned 80 percent of the stock in each controlled corporation. *Ante*, at 828–829. In the Court's view, § 1563(a)(2) simply expanded the ownership group to five, retaining the 80-percent requirement as the primary test for interrelatedness. The problem with this approach is that it is entirely speculative. Congress nowhere stated that it had any such intention with regard to the 80-percent test. And the Treasury

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Department, when it proposed § 1563(a)(2), simply stated the obvious: it declared that the new statute "expand[ed] present law" by considering the ownership interests of five individuals, while adding a 50-percent test "to insure" that controlled corporations operate as one economic entity. Hearings Before the House Committee on Ways and Means on the Subject of Tax Reform, 91st Cong., 1st Sess., pt. 14, p. 5394 (1969). Certainly, the Court can credibly read its conclusion into this history. But the legislative materials are not inconsistent with the Commissioner's contrary view that the newly devised 50-percent test was to serve as the primary indicium of interrelatedness. Because of the absence of any explicit statement on the question in the legislative history, I find the Court's certainty somewhat surprising.

3 Indeed, throughout the course of litigation over § 1563(a)(2), both the Commissioner and the various taxpayers involved have drawn support from precisely the same portions of the Treasury Department proposals. Compare *Fairfax Auto Parts of Northern Virginia, Inc. v. Commissioner*, 65 T.C. 798, 803–804 (1976), rev'd, 548 F.2d 501 (CA4), cert. denied, 434 U.S. 904, 98 S.Ct. 300, 54 L.Ed.2d 190 (1977), with 65 T.C., at 809–810 (dissenting opinion). See also *Allen Oil Co. v. Commissioner*, 614 F.2d 336, 340, n. 4 (CA2 1980).

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TAB 5

KeyCite Yellow Flag - Negative Treatment
Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc.-Pension Fund v. Kero Leasing Corp., 3rd Cir. (N.J.), July 12, 2004

860 F.Supp. 1044
United States District Court,

BOARD OF TRUSTEES OF TRUCKING EMPLOYEES OF NORTH JERSEY WELFARE FUND, INC. —PENSION FUND, Plaintiff,
v.
GOTHAM FUEL CORPORATION, a New Jersey Corporation, and Hobin Fuel Oil, a New Jersey Corporation, Oil City Petroleum, a New York Corporation, Ray Combustion Corporation, a New Jersey Corporation, Jersey York Corporation, a New Jersey Corporation, Murray Haber, a sole proprietorship, jointly and severally, Defendants.

Civ. A. No. 92–4094.
|
April 27, 1993.

Welfare and pension plan trustees sought to impose withdrawal liability under ERISA and Multiemployer Pension Plan Amendments Act (MPPAA). Trustees moved for partial summary judgment and to strike defenses, and the members of a controlled group moved Harold A. Ackerman, J., held that: (1) trades or businesses under common control with a withdrawing employer were liable for withdrawal liability under MPPAA; (2) the controlled group waived the right to contest the amount of withdrawal liability by not demanding review or arbitration of the assessment; (3) once a judgment had been obtained against any member of the controlled group, any subsequent action against other members of the group was an action to enforce the judgment, governed by the state statute of limitations for enforcement of judgments; and (4) the action to enforce withdrawal liability was to be treated like an ERISA action for delinquent contributions and, thus, the trustees who prevailed were entitled to a mandatory award of interest on the unpaid contributions, reasonable attorney fees and costs, and liquidated damages of the greater of 20% of the withdrawal liability assessment or the amount of accrued interest.

Trustees' motion for summary judgment granted; motion to strike defenses denied; cross-motion for summary

West Headnotes (12)

[1] **Labor and Employment**
Multi-Employer Plans

Under Multiemployer Pension Plan Amendments Act (MPPAA), when contributing employer withdraws from participation, plan's trustees may collect withdrawal liability from employer. Employee Retirement Income Security Act of 1974, § 29 U.S.C.A. § 1381(b)
(1)

1 Cases that cite this headnote

[2] **Labor and Employment**
Trade or business under common control

Under Multiemployer Pension Plan Amendments Act (MPPAA), all trades or businesses under "common control" with contributing employer are treated as single employer and each member of controlled group is liable for withdrawal liability of any other member of group. Employee Retirement Income Security Act of 1974, §§ 4001(b) 29 U.S.C.A. §§ 1301(b)(1) 1381(b)(1)

1 Cases that cite this headnote

[3] **Labor and Employment**
Trade or business under common control

Primary purpose of controlled group concept under Multiemployer Pension Plan Amendments Act (MPPAA) is to prevent employer from avoiding its responsibilities under ERISA by conducting its operations through many related but separate entities. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001(b)(1), 4201(b)(1), as

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29 U.S.C.A. §§ 1001 et seq., 1301(b)(1) 1381(b)(1)

Cases that cite this headnote

[4] **Federal Civil Procedure**
Burden of proof

Party moving for summary judgment bears burdens of production—of making prima facie showing that it is entitled to summary Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A

Cases that cite this headnote

[5] **Federal Civil Procedure**
Burden of proof

Party moving for summary judgment can meet its burden of production by demonstrating that there is no genuine issue of fact and that party must prevail as matter of law or by demonstrating that nonmoving party has not shown facts relating to essential element of issue for which nonmoving party Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A

Cases that cite this headnote

[6] **Labor and Employment**
Trade or business under common control

Trades or businesses under common control of withdrawing employer were liable for withdrawal liability imposed under Multiemployer Pension Plan Amendments Act (MPPAA). Employee Retirement Income Security Act of 1974, § 4001(b)(1), as 29 U.S.C.A. § 1301(b)(1)

1 Cases that cite this headnote

[7] **Labor and Employment**
Exhaustion of remedies

Trades or businesses under common control of withdrawing employer waived right to contest amount of withdrawal liability imposed under Multiemployer Pension Plan Amendments Act (MPPAA) by not demanding review or arbitration of withdrawal liability assessment. Employee Retirement Income Security Act of 1974, § 29 U.S.C.A. § 1301(b)(1)

1 Cases that cite this headnote

[8] **Limitation of Actions**
Liabilities Created by Statute

Cause of action arises for purposes of statute of limitations under Multiemployer Pension Plan Amendments Act (MPPAA) when employer fails to make its first payment following demand by pension fund. Employee Retirement Income Security Act of 1974, § 29 U.S.C.A. § 1451(f)

Cases that cite this headnote

[9] **Federal Courts**
Federally created rights

Labor and Employment
Time to sue and limitations

Once judgment for withdrawal liability under Multiemployer Pension Plan Amendments Act (MPPAA) has been obtained against any member of controlled group, any subsequent action against other members of controlled group is action to enforce judgment, governed by state statute of limitations for enforcement of judgments. Employee Retirement Income Security Act of 1974, §§ 4001(b)(1), 4301(f), as 29 U.S.C.A. §§ 1301(b)(1) 1451(f) N.J.S.A. 2A:14–5

3 Cases that cite this headnote

[10] **Federal Courts**
Federally created rights

Labor and Employment
Time to sue and limitations

ERISA's preemption provision did not prevent application of state statute of limitations on enforcement of judgments to action against other members of controlled group once judgment for withdrawal liability under Multiemployer Pension Plan

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Amendments Act (MPPAA) has been obtained against any member of controlled group; use of state limitations period would serve ERISA's and MPPAA's remedial policies. Employee Retirement Income Security Act of 1974, §§ 4001(b)(1), 4301(f), as
29 U.S.C.A. §§ 1301(b)(1) 1451(f)
N.J.S.A. 2A:14–5

2 Cases that cite this headnote

[11] **Labor and Employment**
Judgment and relief
Labor and Employment
Actions to enforce contributions
Action to enforce withdrawal liability under Multiemployer Pension Plan Amendments Act (MPPAA) was to be treated like ERISA action for delinquent contributions and, thus, plan that prevailed was entitled to mandatory award of interest on unpaid contributions, reasonable attorney fees and costs, and liquidated damages of the greater of 20% of withdrawal liability assessment or the amount of accrued interest. Employee Retirement Income Security Act of 1974, §§ 502(g), 515,
29 U.S.C.A. §§ 1132(g)
1145 1451(b)

Cases that cite this headnote

[12] **Federal Civil Procedure**
Motion and proceedings thereon
Factual issues existed on whether individual defendant was member of controlled group for purposes of imposing withdrawal liability under Multiemployer Pension Plan Amendments Act (MPPAA) and, thus, his defenses would not be stricken until completion of discovery. Employee Retirement Income Security Act of 1974, §§
29 U.S.C.A.
§§ 1401(b)(1) 1451 Fed.Rules Civ.Proc.Rule 12(f), 28 U.S.C.A

4 Cases that cite this headnote

Attorneys and Law Firms

Herbert New and David W. New, P.C., Clifton,

Elizabeth Roberto, Detroit, MI, for plaintiff.

Kirsten Hotchkiss,
Roseland, NJ, for defendants.

HAROLD A. ACKERMAN, District Judge:

In this action, plaintiff Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc. Pension Fund ("Trustees") seeks to collect a statutory assessment of withdrawal liability from defendants Gotham Fuel Corporation, Hobin Fuel Oil, Oil City Petroleum, Ray Combustion Corporation, Jersey York Corporation, and
[1] pursuant to the Employee Retirement
29 U.S.C. §
1001, *et seq.* as amended by the Multiemployer Pension
29 U.S.C. §
1381, *et seq.* Before me now are the following motions: 1) plaintiff's motion for partial summary judgment
Fed.R.Civ.P. 56(a) as to the corporate defendants Gotham Fuel Corporation, Hobin Fuel Oil, Oil City Petroleum, Ray Combustion Corporation, and Jersey York Corporation ("Oil Group") and to strike defenses as to all the defendants; 2) defendants' cross-motion for summary ***1047**
Fed.R.Civ.P. 56(b). For the following reasons, plaintiff's motion for partial summary judgment is granted and defendants' cross-motion is denied. Plaintiff's motion to strike defenses is granted in part and denied in part.

[1] Under ERISA, an employer may contribute to a pension plan on behalf of its employees who belong to a participating union. Congress found, however, that ERISA did not adequately protect pension plans from the adverse consequences that resulted when employers
Flying Tiger Line v. Teamsters Pension Trust Fund of Philadelphia, 830 F.2d 1241, 1243 (3d Cir.1987) (*Pension Benefit Guaranty Corp. v. R.A. Gray & Co.,* 467 U.S. 717, 722, 104 S.Ct. 2709, 2714, 81 L.Ed.2d 601 (1984)). Congress, therefore, enacted the

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MPPAA in order to protect the solvency of multiemployer pension plans. *IUE AFL CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 127 (3d Cir.1986) ("The MPPAA was designed '(1) to protect the interests of participants and beneficiaries in financially distressed multiemployer plans, and (2) ... to ensure benefit security to plan participants.' ") (*quoting* H.R.Rep. No. 869, 96th Cong., 2d Sess. 71, *reprinted in* 1980 U.S.Code Cong. & Admin.News 2918, 2939). Pursuant to the MPPAA, when a contributing employer to a multiemployer pension plan withdraws from participation in the plan, the plan's trustees may collect withdrawal liability from the 2

Under the MPPAA's statutory scheme, once an employer withdraws from a pension plan, the plan's trustees must make a determination of the amount of the withdrawal 29 U.S.C. §§ 1381 1382(1). The trustees must then notify the employer of the amount of the 29 U.S.C. §§ 1382(2) 1399(b)(1). The employer then has 90 days from receipt of the Notice to request a review of the liability 29 U.S.C. § 1399(b)(2)(A)(i). If the dispute over the existence or amount of the liability is not resolved, either party may 29 U.S.C. § 1401(a)(1). If the employer fails to initiate arbitration proceedings, the withdrawal liability assessment becomes due and owing and the trustees may commence an action to collect the 29 U.S.C. §§ 1401(b)(1) 1451

[2] **[3]** Under the MPPAA, all trades or businesses under "common control" with a contributing employer 29 U.S.C. § 1301(b)(1). Such a group of business entities is known as a "controlled group." Since all the members of a controlled group are to be treated as one employer, each member is liable for the withdrawal liability of any other member *Flying Tiger,* 830 F.2d at 1244. The primary purpose of the controlled group concept is to prevent an employer from avoiding its responsibilities under ERISA by conducting its operations through many related but separate entities. *See* S.Rep. No. 383, 93d Cong., 2d Sess. 43, *reprinted in* 1974 U.S.Code Cong. & Admin.News 4639, 4890, 4928; *see also* H.Rep. No. 807, 93d Cong., 2d Sess. 50, *reprinted in* 1974 U.S.Code Cong. & Admin.News 4670, 4716.

II. Factual Background

The following facts are undisputed.

Plaintiff Trustees is the plan sponsor of a multiemployer 29 U.S.C. §§ 1002(37) 1301(a)(3). The Fund provides retirement benefits to plan participants who are members of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 560 ("Local 560").

Oil City Petroleum Company, a New Jersey corporation, ("Oil City–NJ") was a contributing employer to [3] Pursuant ***1048** to collective bargaining agreements with Local 560, Oil City–NJ agreed to make contributions to the Fund on behalf of its employees covered by the agreements. In September 1984, Oil City–NJ ceased operations and ceased paying contributions to the Fund.

The Trustees determined that Oil City–NJ had permanently terminated operations and calculated its withdrawal liability. On November 19, 1984, the Fund sent Oil City–NJ a notice and demand for payment of its withdrawal liability under the provisions of the MPPAA ("Notice"). The Notice set forth the total amount of the withdrawal liability assessment, $59,966.00, which was to be paid in monthly installments of $1,738.00 beginning on February 1, 1985. The Notice also informed Oil City NJ that it had 90 days from receipt of the Notice to request a review of the Trustees' assessment determination and to seek arbitration before the New Jersey State Board of Mediation—Pension and Welfare Panel. The Notice also stated that the Trustees had a right to look to another company under common control with Oil City NJ in the event the assessment could not be collected from it.

No review or arbitration proceedings were initiated within ninety days of receipt of the Notice and no payment of the withdrawal liability assessment was made. On February 7, 1985, the Trustees sent a past due Notice to Oil City–NJ.

On October 8, 1985, the Fund commenced an action in United States District Court in New Jersey against Oil City–NJ. *See Trucking Employees of North Jersey Welfare Fund, Inc. v. Oil City Petroleum,* Civ.Act. No. 85-4782. A default judgment was entered against Oil City–NJ on September 25, 1986 in the amount of $59,966.00, plus

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interest of $10,194.22, liquidated damages of $11,993.20, and attorneys' fees and costs of $2,750.00, totalling $84,897.42. To date, no part of this judgment has been paid.

Over six years later, and eight years after Oil City–NJ first defaulted on its withdrawal liability, the Trustees instituted this action against the defendants, alleging that they are liable for the withdrawal liability assessment and the 1986 judgment.

It is conceded that defendants Gotham Fuel Corporation, Hobin Fuel Oil, Oil City–NY, Ray Combustion Corporation and Jersey York Corporation ("Oil Group") were, as of the date of the withdrawal, members of a controlled group with the contributing employer, Oil City–NJ.

III. Discussion

A. Standard for Summary Judgment

Summary judgment may be granted only if the pleadings, supporting papers, affidavits, and admissions on file, when viewed with all inferences in favor of the nonmoving party, demonstrate that there is no genuine issue of material fact and that the movant is entitled to judgment Fed.R.Civ.P. 56(c); *Todaro v. Bowman,* 872 F.2d 43, 46 (3d Cir.1989) *Chipollini v. Spencer Gifts, Inc.,* 814 F.2d 893, 896 (3d Cir.), *cert.* 483 U.S. 1052, 108 S.Ct. 26, 97 L.Ed.2d 815 (1987). Put differently, "summary judgment may be granted if the movant shows that there exists no genuine issues of material fact that would permit a reasonable jury to find *Miller v. Indiana Hospital,* 843 F.2d 139, 143 (3d Cir.), 488 U.S. 870, 109 S.Ct. 178, 102 L.Ed.2d 147 (1988). An issue is "genuine" if a reasonable jury could possibly hold in the nonmovant's favor with regard to that issue. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–48, 106 S.Ct. 2505, 2509–10, 91 L.Ed.2d 202 (1986). A fact is material if it influences *Id.* at 248, 106 S.Ct. at 2510

[4] **[5]** Within the framework set out above, the moving party essentially bears two burdens. First, there is the burden of production, of making a prima facie showing that it is entitled to summary judgment. This may be done either by demonstrating that there is no genuine issue of fact and that as a matter of law, the moving party must prevail, or by demonstrating that the nonmoving party has not shown facts relating to an essential element of the issue for which it bears the burden. Once either showing is made, this burden shifts to the nonmoving party who must demonstrate facts supporting each element for which it bears the burden ***1049** as well as establish the existence of genuine issues of material fact. Second, there is the burden of persuasion. This burden is a stringent one which always remains with the moving party. If there remains any doubt as to whether a trial is necessary, summary judgment should not be granted. *Celotex Corp. v. Catrett,* 477 U.S. 317, 330–33, 106 S.Ct. 2548, 2556–58, 91 L.Ed.2d 265 (1986) *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157–61, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); Fed.R.Civ.P. 56(e), 1963 Amendment; C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727 (2d ed. 1983).

B. Plaintiff's Motion and Defendants' Cross–Motion for Summary Judgment

The plaintiff seeks partial summary judgment against the Oil Group arguing that the members of the Oil Group, as members of a controlled group with Oil City–NJ, are liable jointly and severally for the withdrawal liability as a matter or law. Defendants have cross-moved for summary

[6] **[7]** As noted above, under the MPPAA, all trades or businesses under "common control" are treated as a 29 U.S.C. § 1301(b)(1). Thus, members of a group of businesses under common control with a contributing employer are liable for the employer's *Flying Tiger,* 830 F.2d at 1244 ("Since a controlled group is to be treated as a single employer, each member of such a group is liable for the withdrawal [4] Here, it is undisputed that the Oil Group defendants were trades or businesses under common control with Oil City–NJ at the time of withdrawal in 1984. Thus, as members of a controlled group with Oil City–NJ, they are liable for its withdrawal liability assessment. Moreover, by failing to demand review and arbitration of the withdrawal liability assessment, the controlled group has waived the right to contest the amount of withdrawal. *Local 478 Trucking and Allied Industries Pension Fund v. Jayne,* 778 F.Supp. 1289, 1313 (D.N.J.1991). The only issue that remains [5]

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[8] Defendants argue that the present action is barred by the statute of limitations set forth in the MPPAA. 29 U.S.C. § 1451(f) Section 1451(f) provides:

An action under this section may not be brought after the later of—

(1) 6 years after the date on which the cause of action arose, or

(2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery

29 U.S.C. § 1451(f). Defendants argue that because plaintiff did not institute this action until September 1992, more than six years after the cause of action arose, the

6

[9] Plaintiff argues, however, that the MPPAA statute of limitations applies only to the initial action against a controlled group member. Once a judgment is obtained against any one or more members of a controlled group, the judgment can be enforced against any other member of the controlled group and the MPPAA limitations period is no longer applicable. Rather, the applicable statute of limitations is the one governing enforcement of judgments. Plaintiff thus concludes that New Jersey's 20–year statute ***1050** of limitations applies to the present

[7] Because the present action was commenced within six years after the judgment against Oil City–NJ was entered, application of this limitations period would render the present action timely commenced.

Plaintiff's argument that the judgment obtained against the employer can be subsequently enforced against controlled group members is based on the premise that under the MPPAA, members of a controlled group are statutory alter-egos. Plaintiff argues that the MPPAA makes members of a controlled group into a single entity and that once an action is brought the statute of limitations is tolled as to the entire controlled group.

Recently, my colleague, Judge Lifland, had occasion to consider this very same issue. *Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc.—Pension Fund v. Able Truck Rental Corp., et al.,* 822 F.Supp. 1091 (D.N.J.1993). In *Able Truck,* the Court found that "pursuant to the single employer concept adopted by the Third Circuit ... only one withdrawal liability judgment can exist against members

Id., 822 F.Supp. at 1095. The Court therefore concluded that "all subsequent actions against different members of the controlled group are actions to enforce the judgment previously entered, and such an action is timely if brought within the period of the statute of limitations for enforcement of judgments." *Id.*

I find Judge Lifland's reasoning persuasive. Members of a controlled group are deemed, by law, to constitute a single entity. 29 U.S.C. § 1301(b)(1) (businesses under

Barker & Williamson, 788 F.2d at 127 ("language of ERISA indicates that pension funds should be entitled to deal

Connors v. Calvert Development Co., 622 F.Supp. 877, 881 (D.D.C.1985) ("The requirement that members of a controlled group, such as defendants, be treated as a single employer means that plan trustees can operate as if defendants were one entity."). Accordingly, the Third Circuit has held that notice to one controlled group member constitutes constructive notice to *all*

Barker & Williamson, 788 F.2d at 127. Similarly, a judgment against one member constitutes a judgment

[8] As such, once a judgment is obtained against one controlled group member, any subsequent action against other controlled group members is an action to enforce the judgment, governed by the statute of limitations for the enforcement of judgments. Fed.R.Civ.P. 69.

This analysis is consistent with the legislative intent underlying ERISA and the MPPAA.

> The legislative background of ERISA and the MPPAA makes it abundantly clear that, for the purpose of these two statutes, Congress was unconcerned with the actual ***1051** corporate form of a business. In promulgating the control group definition, Congress instructed the trustees, arbitrators, and the courts to disregard the corporate form and treat several

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inter-related corporations as one

Robbins v. Pepsi–Cola Metropolitan Bottling Co., 636 F.Supp. 641, 659 (N.D.Ill.1986).

Members of a controlled group are, in effect, "statutory *Able Truck,* 822 F.Supp. at 1095. As such, actions permitting a plaintiff to pierce the corporate veil and enforce a judgment against an alter ego of a judgment debtor are applicable. Courts have consistently held that the applicable statute of limitations in collection actions against an alter ego of a judgment debtor is the one governing enforcement of judgments.
Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc., 933 F.2d 131, 143 (2d Cir.1991) *United States v. Southern Fabricating Co.,* 764 F.2d 780, 783 (11th Cir.1985) *Matter of Holborn Oil Trading Ltd. & Interpetrol Bermuda Ltd.,* 774 F.Supp. 840, 847 (S.D.N.Y.1991) *United States v. Clawson Medical Rehabilitation & Pain Care Center,* 722 F.Supp. 1468, 1471 (E.D.Mich.1989); *see also* 1 *Fletcher's Cyclopedia on Corporations,* § 45 at 821 (Perm. ed.) ("the alter ego theory means that, when a party is regarded as identical to a corporation, the filing of a cause of action against the corporation will toll the limitations period as to the alter ego"). In such actions, the alter egos are treated as a single entity. Thus, because "the previous judgment is ... being enforced against entities who were, in essence, parties to the underlying dispute," the applicable limitations period

Wm. Passalacqua, 933 F.2d at 143.

Defendants argue that controlled group members are not *per se* alter egos and that controlled group liability is an independent cause of action, distinct from a claim based

[9] Because plaintiff's action is brought pursuant to ERISA and the MPPAA, defendants contend that the only applicable statute of limitations is that set forth in ERISA. Defendants argument misses the point. Plaintiff is not relying on a common law alter ego theory and, indeed, such reliance is unnecessary. The MPPAA and the Third Circuit have established that controlled group members are to be treated as a single entity. Thus, the cases involving common law alter egos are being used by analogy. Certainly, controlled group members are at least analogous to common law alter egos. In fact, permitting a plaintiff to enforce a judgment against a controlled group member is more justified than in the case of common law alter egos. Controlled group members are statutorily determined to be "single entities," without the necessity of a finding of improper motive or wrongdoing.
Pension Benefit Guaranty Corp. v. Ouimet Corp., 711 F.2d 1085, 1093 (1st Cir.), 464 U.S. 961, 104 S.Ct. 393, 78 L.Ed.2d 337 (1983) *Jayne,* 778 F.Supp. at 1306. In essence, Congress intended to make it easier for pension funds to collect withdrawal liability from business entities related to a contributing employer. As this Court has recognized,

> The significance of the statutory determination that all members of the controlled group are to be treated as though they constitute a single employer is that the Fund is not required to prove that the controlled group members abused their separate identities to evade or avoid withdrawal liability. *The Fund is not required to*
>
> *Jayne,* 778 F.Supp. at 1306 (emphasis in original) (*quoting* *O'Connor v. DeBolt Transfer, Inc.,* 737 F.Supp. 1430, 1442 (W.D.Pa.1990) [10]

Defendants also rely on a report and recommendation of a Magistrate Judge who found in favor of defendants' position on this issue. *See Central States, Southeast and Southwest Areas Pension Fund v. Mississippi Warehouse Corporation,* 1992 U.S.Dist. LEXIS 14829 (N.D.Ill.1992). As in this case, the plaintiff in *Mississippi Warehouse* sought to enforce a judgment previously obtained against an employer against other controlled group members. The action was brought ten years after the initial default. Magistrate Weisberg held that the plaintiff was bound to Section 1451(f).

I find Magistrate Weisberg's opinion unpersuasive. First, the Magistrate found that although controlled group members constitute a "single employer," they are not § 1301(b)(1) does not purport to deny the separate existence of trades or businesses under common control with a withdrawing employer...." Slip. op. at 9. I emphatically disagree. The law is clearly to the contrary. *Barker & Williamson,* 788 F.2d at 127 (controlled group members are to be *Robbins,* 636 F.Supp. at 641 (courts are to disregard the corporate form and treat *Calvert,* 622 F.Supp. at 881 (single employer concept "means that plan trustees can operate as if defendants were one entity.").

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The Magistrate also reasons that if a pension fund brings Section 1451, then it must be bound Section 1451(f). I believe the better view, one that comports with the policies underlying ERISA and the MPPAA, is that the initial action brought by a pension plan to obtain a judgment of withdrawal liability must be brought within the six- Section 1451(f). Once a judgment is obtained, however, it can be enforced against other controlled group members in the same way it could be enforced against an alter ego, that is, pursuant to the statute of limitations governing enforcement of

[10] Finally, Magistrate Weisberg points to the ERISA 29 U.S.C. § 1144(a), which preempts all state laws relating to any employee benefit plan, concluding that Congress did not intend to give pension plans "alternate routes" to collect withdrawal liability. Slip op. at 9. First, it is doubtful that statutes of limitations are state laws "relating to any employee benefit plan." *Retirement Fund Trust of Plumbing v. Franchise Tax Board,* 909 F.2d 1266, 1274 (9th Cir.1990) ("state law of general application with only a 'tenuous' *Rebaldo v. Cuomo,* 749 F.2d 133, 137 (2d Cir.1984) (to fall within preemption provision, state law must purport to regulate terms and conditions of employee benefit plans), *cert.* 472 U.S. 1008, 105 S.Ct. 2702, 86 L.Ed.2d 718 (1985). Moreover, the Federal Rules of Civil Procedure expressly incorporate state procedures with respect to the enforcement of judgments. Fed.R.Civ.P. 69. Finally, the Magistrate's assertion that Congress did not intend to give pension funds "alternate routes" to collect withdrawal liability is completely contrary to Congress 11

***1053** As noted above, Congress enacted the MPPAA to protect the solvency of multiemployer pension plans and the interests of participants and beneficiaries of pension plans. *Barker & Williamson,* 788 F.2d at 127. As the Third Circuit has observed, "because ERISA (and the MPPAA) are remedial statutes, they should be liberally construed in favor of protecting the participants in employee benefit plans." *Id.* Application of the limitations period for the enforcement of judgments clearly would 12

Based on all these reasons, plaintiff's motion for partial summary judgment as against the Oil Group defendants is granted and defendants' cross-motion for summary 13

C. Plaintiff's Request for Interest, Liquidated Damages, Attorneys' Fees and Costs

Plaintiff also argues that it is entitled to an award of interest, double interest or liquidated damages, and

[11] 29 U.S.C. § 1451(b) provides that the failure to make a withdrawal liability payment is to be treated as a 29 U.S.C. § 1145 *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.,* 787 F.2d 128, 134 (3d Cir.1986), 481 U.S. 735, 107 S.Ct. 2171, 95 L.Ed.2d 692 (1987). Thus, plaintiff's action to enforce Oil City–NJ's withdrawal liability is to Section 1145 29 U.S.C. § 1132(g) provides that in any action brought by a Section 1145 in which a judgment is awarded in favor of the plan, the court must award interest on the unpaid contributions, reasonable attorneys' fees and costs, and the greater of either 20% of the unpaid

29 U.S.C. § 1132(g). Such an award is mandatory. *Yahn,* 787 F.2d at 134 § 1132 made attorney's fees, costs and liquidated damages mandatory upon a judgment in favor of a pension plan").

As noted above, plaintiff is entitled to a judgment in its favor on defendants' withdrawal liability as a matter of 29 U.S.C. §§ 1132(g) 1145, it is entitled to an award of interest on the amount of the unpaid withdrawal liability assessment, liquidated damages (the greater of 20% of the withdrawal liability assessment or interest), and reasonable attorneys' fees and costs. *See Able Truck, supra,* 14

D. Motion to Strike Defenses

Fed.R.Civ.P. 12(f) to strike defenses one through ***1054** nine against all defendants. These defenses are: 1) failure to state a claim; 2) failure to state a claim for liquidated damages; 3) failure to state a claim for an award of attorneys' fees; 4) waiver; 5) estoppel; 6) failure to pursue arbitration; 7) statute

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of limitations; 8) noncompliance with administrative procedures; and 9) laches.

Defendants have not opposed plaintiff's motion as to the Oil Group defendants and expressly concede that if the court finds that New Jersey's 20–year statute of limitations applies to this action, the Oil Group defendants are subject to Oil City–NJ's withdrawal liability. Therefore, plaintiff's motion to strike defenses is granted as to the Oil Group

[12] Defendants oppose the motion, however, as to the individual defendant Murray Haber ("Haber"). They argue that the parties are in the midst of discovery and that in the absence of any proof that Haber is a member of the controlled group, the motion to strike his defenses

Rule 12(f) provides, in part: "[u]pon motion made by a party ... the court may order stricken from the pleading Fed.R.Civ.P. 12(f). Motions to strike are generally disfavored by the courts.

> Thus, even when technically appropriate and well-founded, they often are not granted in the absence of a showing of prejudice to the moving party.... [E]ven when the defense presents a purely legal question, the courts are very reluctant to determine disputed or substantial issues of law on a motion to strike; these questions quite properly are viewed as determinable only after discovery and a hearing on the merits.
>
> Rule 12(f) motion be granted if there is a substantial question of fact or a mixed question of law and fact that cannot be resolved, even if it is possible to determine the issue by drawing inferences from facts and statements that are not disputed.... In sum, a motion to strike will not be granted if the insufficiency of the defense is not clearly apparent, or if it raises factual issues that should be determined on a hearing

5A Wright & Miller, *Federal Practice and Procedure,* § 1380 at 672–78. "[T]he court's discretion is narrowly

United States v. Kramer, 757 F.Supp. 397, 410 (D.N.J.1991). As the Third Circuit has cautioned, "a court should not grant a motion to strike a defense unless the insufficiency of the defense is 'clearly apparent.' The underpinning of this principle rests on a concern that a court should restrain from evaluating the merits of a defense where, as here, the factual background for a case *Cipollone v. Liggett Group, Inc.,* 789 F.2d 181, 188 (3d Cir.1986) (citations omitted).

Here, the parties concede that they are in the middle of discovery with respect to the individual defendant Haber. Because the factual background remains undeveloped, I find that this part of plaintiff's motion to strike is premature. *Kramer,* 757 F.Supp. at 410 (holding that it was premature to strike defenses where parties had little opportunity for discovery). Plaintiff's motion as to defendant Haber is, therefore, denied.

Conclusion

For the foregoing reasons, plaintiff's motion for partial summary judgment is granted and defendants' summary judgment motion is denied. Plaintiff is entitled to the full amount of the withdrawal assessment liability of $59,966, as well as interest, liquidated damages and reasonable attorneys' fees and costs from the Oil Group defendants. Plaintiff's motion to strike defenses is granted as to the Oil Group defendants and denied as to defendant Haber.

All Citations

860 F.Supp. 1044, 18 Employee Benefits Cas. 2510

Footnotes

1 Defendants have stipulated to the filing of an amended complaint which names Alfred Haber and Tessie Haber as additional defendants.

2 Withdrawal liability is defined as the employer's adjusted "allocable amount of unfunded vested benefits." 29 U.S.C. § 1381(b)(1).

3 Oil City–NJ is not a party to this action. Defendant Oil City Petroleum, a New York Corporation, is a separate entity and will be referred to as "Oil City–NY."

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4 ERISA incorporates the Internal Revenue Code's "controlled group" standards for determining control group status under ERISA. 29 U.S.C. § 1301(b); *see* 26 U.S.C. §§ 414, 1563.

5 The Oil Group defendants concede that in the event plaintiff's action is found by the court not to be time-barred, they are subject to Oil City–NJ's withdrawal liability.

6 A cause of action arises when the employer fails to make its first payment following demand for payment by the pension fund. *See Joyce v. Clyde Sandoz Masonry,* 871 F.2d 1119, 1124 (D.C.Cir.), *cert. denied,* 493 U.S. 918, 110 S.Ct. 280, 107 L.Ed.2d 260 (1989).

7 Under Fed.R.Civ.P. 69, the procedure applicable to the enforcement of judgments is derived from the procedure of the state in which the district court sits. The New Jersey statute of limitations for the enforcement of judgments is set forth in N.J.S.A. 2A:14–5, which provides that an action on a judgment may be commenced within 20 years from the date of the judgment.

8 Although, as defendants argue, the statute of limitations issue was not before the Third Circuit in *Barker & Williamson,* the Court's reasoning nevertheless provides guidance for deciding other cases involving controlled group liability under the MPPAA.

Defendants also rely on *Central States, Southeast and Southwest Areas Pension Fund v. Van Vorst Industries, Inc.,* 1992 WL 37448, 1992 U.S.Dist. LEXIS 5200 (N.D.Ill.1992) in arguing that the Third Circuit's holding in *Barker & Williamson* actually supports their position. Defendants' contention is unpersuasive. *Van Vorst* did not address the issue of whether a judgment against one controlled group member may be enforced against other controlled group members. In *Van Vorst,* none of the controlled group members had been sued within the six-year limitations period under Section 1451(f). The issue in *Van Vorst* was whether a cause of action arises under Section 1451(f) every time a pension fund learns of the existence of a controlled group member. The court relied on the holding that notice to one member constitutes notice to all members in reaching its conclusion that a cause of action arises as to all controlled group members at the same time, that is, when demand for payment has not been met. This conclusion, however, is consistent with a determination that a judgment against one member constitutes a judgment against all members.

9 In arguing that controlled group liability is an independent cause of action, distinct from alter ego liability, defendants rely on *Connors v. Peles,* 724 F.Supp. 1538 (W.D.Pa.1989). Defendants' reliance, however, is misplaced. In *Connors,* the plaintiffs proceeded exclusively on a common law theory of alter ego liability; no controlled group claim under ERISA was ever asserted in that case. Under those circumstances, the *Connors* court stated that the plaintiffs could not rely on controlled group concepts to establish liability under the common law alter ego theory advanced by plaintiffs. *Id.* at 1577.

10 See also 1 *Fletcher's Cyclopedia on Corporations,* § 45 at 822, which states:

> There is some authority for the position that the corporate form, being a creation of the state and controlled by state law, does not impose restrictions on the application of federal statutes.... Accordingly, in cases justified by underlying public policy purposes—such as the pension plan termination liability provisions of ERISA, the separate entities of an affiliated group of corporations may be disregarded without any need to demonstrate the existence of factors, such as fraud, wrongdoing, dominance, or undercapitalization, that are usually associated with state law alter ego principles.

11 I note that another Magistrate from the Northern District of Illinois recently reached the opposite conclusion from that of Magistrate Weisberg. In *Central States, Southeast and Southwest Areas Pension Fund v. Profit–Sharing Plan of G & S Terminals, Inc.,* Civ.Act. No. 92 C 0668 (March 26, 1993), Magistrate Pallmeyer held that the applicable statute of limitations was the one governing enforcement of judgments. The Magistrate reasoned that "controlled group members under ERISA, like common law alter egos, are deemed by law to constitute a single entity. Indeed, the argument for unitary treatment of controlled group members may be stronger than the argument for such treatment of alter egos...." Slip op. at 13. The Magistrate also found that application of the limitation period for enforcement of judgments would further congressional intent underlying ERISA. *Id.* at 14.

12 Defendants also argue that application of the limitations period for enforcement of judgments would permit piece-meal litigation and that the Trustees should have sued all the controlled group members together in the first action against Oil City–NJ. Defendants rely on *Connors,* 724 F.Supp. at 1579. As noted above, reliance on *Connors* is misplaced. The *Connors* court stated, in *dicta,* that the plaintiff was precluded from bringing the second action based on the doctrine of *res judicata.* Here, the defendants have not even raised a *res judicata* defense, nor could they. Liability under a controlled group theory is joint and several. It is well-settled that in the case of joint and several liability, the plaintiff can sue one or more defendants, separately or together, at the plaintiff's option. *Central States, Southeast & Southwest Areas Pension Fund v. Sztanyo Trust,* 693 F.Supp. 531, 540 (E.D.Mich.1988). Thus, "the Fund is not required to sue all of the controlled group in one action or lose its rights against unjoined parties; it may even sue each member separately

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if it elects to." *Central States, Southeast & Southwest Areas Pension Fund v. Hayes*, 789 F.Supp. 1430, 15 EBC 1168, 1172 (N.D.Ill.1992).

13 In light of this court's disposition, the court need not consider plaintiff's alternative argument based on 29 U.S.C. § 1451(f)(2), which tolls the ERISA statute of limitations until plaintiff discovers or should have discovered the existence of a cause of action.

14 Defendants have also requested an award of their attorneys' fees pursuant to 29 U.S.C. § 1451(e), which permits a court to award reasonable attorneys' fees to the "prevailing party." Because defendants are not the prevailing party in this action, defendants' request is denied.

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TAB 6

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Research

Document:Pension Benefit Guar. Corp. v. Smith-Morris Corp., 1995 U.S...

Pension Benefit Guar. Corp. v. Smith-Morris Corp., 1995 U.S. Dist. LEXIS 22510

Copy Citation

United States District Court for the Eastern District of Michigan

September 13, 1995, Decided; September 13, 1995, Filed

C.A. No. 94-CV-60042-AA

Reporter

1995 U.S. Dist. LEXIS 22510 *

PENSION BENEFIT GUARANTY CORPORATION, Plaintiff, vs. SMITH-MORRIS CORPORATION, et. al., Defendants.

Subsequent History: Dismissed by Pension Benefit Guar. Corp. v. Smith-Morris Corp., 1996 U.S. Dist. LEXIS 22956 (E.D. Mich., June 24, 1996)

Core Terms

stock, terminated, common control, pension, summary judgment, instant case, ownership

Case Summary

Procedural Posture

Plaintiff corporation commenced an action against defendants, an engineering services company, an office services company, associates, an engineering company, and a design services company, under Title IV of the Employee Retirement Income Security Act of 1974 (ERISA). The corporation moved for summary judgment.

judgment dissolving Smith-Morris was entered on July 20, 1988. See, Affidavit of Douglas Stiles, Auditor, Trusteeship Processing Division, PBGC P 9.

12

On February 17, 1988, 100% of the stock of MGM Office was owned by Mary Lou Janes, wife of Richard Janes. Under **[*5** 26 C.F.R. §1.414(c)-4(b)(5)(i); an individual is considered to own an interest in an organization owned, directly or indirectly, by his or her spouse unless that individual is not a member of the board of directors, a fiduciary, or an employee of such organization and did not participate in the management of such organization during the taxable year. Mr. Janes was an officer, specifically, Treasurer, of MGM Office.

13

See, Affidavit of Douglas Stiles at P 15 and annexed exhibits to the Affidavit.

14

More specifically, the stock transfer of 41,125.5 shares of common stock of Smith-Morris were transferred from David Chase, Cheryl Chase Freedman **[*6** and Arnold Chase.

15

14 F.3d 1122 (6th Cir. 1994).

16

See, *In re Challenge Stamping & Porcelain Co.*, 719 F.2d 146 (6th Cir. 1983).

17

See, *East Dayton*, at 1126.

18

Id. at 1126.

19

See, Exhibit **[*8** 5 annexed to Stiles Affidavit, i.e., letter dated September 28, 1987 signed by Cheryl Chase Freedman with receipt, acknowledgement and acceptance by Richard J. Janes.

20

The statute makes no mention of an "economic nexus" requirement. See, *Connors v. Incoal, Inc.*, 995 F.2d at 249 (D.C. Cir. 1993).

[21] Pursuant to 29 U.S.C. §1368(d)(2), the PBGC is authorized to institute an action to collect any liability owed under 29 U.S.C. §1362 if "the proceeding is commenced within 6 years after the date upon which the plan was terminated. . ." The Plan terminated February 17, 1983 and this Complaint was filed February 17, 1994. Generally, in computing a period of time, the day the event occurred is excluded. Thus, Plaintiff's action was instituted timely. See, *Burnet v. Willingham Loan & Trust Co.*, 282 U.S. 437, 51 S. Ct. 185, 75 L. Ed. 448, 1931-1 C.B. 258 (1931).

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TAB 7

724 F.3d 129
United States Court of Appeals,

SUN CAPITAL PARTNERS III, LP; Sun Capital Partners III QP, LP; Sun Capital Partners IV, LP, Plaintiffs, Appellees,
v.
NEW ENGLAND TEAMSTERS & TRUCKING INDUSTRY PENSION FUND, Defendant, Third Party Plaintiff, Appellant, Scott Brass Holding Corp.; Sun Scott Brass, LLC, Third Party Defendants.

No. 12–2312.
|

Synopsis

Background: Private equity investment funds, which were limited partnerships, sought a declaratory judgment that they were not liable under Multiemployer Pension Plan Amendments Act (MPPAA) to multiemployer pension fund for the payment of withdrawal liability stemming from the bankruptcy of employer, one of the companies in which the funds invested. Parties filed cross-motions The United States District Court for the District of Massachusetts, Douglas P. Woodlock, J., 903 F.Supp.2d 107, granted funds' motion. Defendants appealed.

Holdings: Lynch, Chief Judge, held

[1] Pension Benefit Guaranty Corporation's (PBGC) letter was owed no more than *Skidmore*

[2] as a matter of first impression, investment fund was "trade or business" subject to withdrawal liability under

[3] genuine issue of material fact existed as to whether investment fund was "trade or business" subject to

[4] MPPAA provision prohibiting transactions whose purpose was to evade or avoid liability could not serve as a basis to impose liability on funds.

West Headnotes (16)

[1] **Federal Courts**
Summary judgment
Court of Appeals reviews a grant or denial of summary judgment, as well as pure issues of

1 Cases that cite this headnote

[2] **Federal Courts**
Theory and Grounds of Decision of Lower Court
Court of Appeals may affirm the district court on any independently sufficient ground

Cases that cite this headnote

[3] **Federal Courts**
Summary judgment
Presence of cross-motions for summary judgment does not distort the standard of review; rather, Court of Appeals views each motion separately in the light most favorable to the non-moving party and draw all

3 Cases that cite this headnote

[4] **Labor and Employment**
Trade or business under common control
Under Multiemployer Pension Plan Amendments Act (MPPAA), to impose withdrawal liability on an organization other than the one obligated to a pension fund, two conditions must be satisfied: 1) the organization must be under common control with the obligated organization, and 2) the

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**3 In 2006, the Sun Funds began to take steps to invest in SBI, the acquisition of which was completed in early 2007. Leder and Krouse made the decision to invest in SBI in their capacity as members of the limited partner committees.

SBI, a Rhode Island corporation, was an ongoing trade or business, and was closely held; its stock was not publicly

copper, and other metals "used in a variety of end markets, including electronics, automotive, hardware, fasteners, jewelry, and consumer products." In 2006, it shipped 40.2 million pounds of metal. SBI made contributions to the TPF on behalf of its employees pursuant to a collective bargaining agreement.

On November 28, 2006, a Sun Capital affiliated entity sent a letter of intent to SBI's outside financial advisor to purchase 100% of SBI. In December 2006, the Sun Funds formed Sun Scott Brass, LLC (SSB–LLC) as a vehicle to invest in SBI. Sun Fund III made a 30% investment ($900,000) and Sun Fund IV a 70% investment ($2.1 million) for a total equity investment of $3 million. This purchase price reflected a 25% discount because

[8] SSB–LLC, on December 15, 2006, formed *136 a wholly-owned subsidiary, Scott Brass Holding Corp. (SBHC). SSB–LLC transferred the $3 million the Sun Funds invested in it to SBHC as $1 million in equity and $2 million in debt. *Id.* at 111. SBHC then purchased all of SBI's stock with the $3 million of cash on hand and $4.8 million in additional borrowed money. *Id.* The stock purchase agreement to acquire SBI's stock was entered into on

9

On February 9, 2007, SBHC signed an agreement with the subsidiary of the general partner of Sun Fund IV to provide management services to SBHC and its subsidiaries, *i.e.*, SBI. Since 2001, that general partner's subsidiary had contracted with SCAI to provide it with advisory services. In essence, as the district court described, the management company acted as a middle-man, providing SBI with employees and consultants from SCAI. *Id.*

Numerous individuals with affiliations to various Sun Capital entities, including Krouse and Leder, exerted substantial operational and managerial control over SBI, which at the time of the acquisition had 208 employees and continued as a trade or business manufacturing metal products. For instance, minutes of a March 5, 2007 meeting show that seven individuals from "SCP" attended a "Jumpstart Meeting" at which the hiring of three SBI salesmen was approved, as was the hiring of a consultant to analyze a computer system upgrade project at a cost of $25,000. Other items discussed included possible acquisitions, capital expenditures, and the management of SBI's working capital. Further, Leder, Krouse, and Steven Liff, an SCAI employee, were involved in email chains discussing liquidity, possible mergers, dividend payouts, and concerns about how to drive revenue growth at SBI. Leder, Krouse, and other employees of SCAI received weekly flash reports from SBI that contained detailed information about SBI's revenue, key financial data, market activity, sales opportunities, meeting notes, and action items. According to the Sun Funds, SBI continued to meet its pension obligations to the TPF for more than a year and a half after the acquisition.

C. *SBI's Bankruptcy and This Litigation*

**4 copper prices reduced the value of SBI's inventory, resulting in a breach of its loan covenants. Unable to get its lender to waive the violation of the covenants, SBI lost its ability to access credit and was unable to pay its bills. *See id.*

In October 2008, SBI stopped making contributions to the TPF, and, in so doing, became liable for its proportionate share of the TPF's unfunded vested benefits. 29 U.S.C. §§ 1381(a) 1383(a)(2). In November 2008, an involuntary Chapter 11 bankruptcy proceeding was brought against SBI. The Sun Funds assert that they lost the entire value of their investment in SBI as a result of the bankruptcy.

On December 19, 2008, the TPF sent a demand for payment of estimated withdrawal liability to SBI. The TPF also sent a notice and demand to the Sun Funds demanding payment from them of SBI's withdrawal

Sun Capital, 903 F.Supp.2d at 111. The TPF asserted that the Sun Funds had entered into a partnership or joint venture in common control with SBI and were therefore jointly and severally *137

29 U.S.C. § 1301(b)(1) *Id.*

On June 4, 2010, the Sun Funds filed a declaratory judgment action in federal district court in Massachusetts. The Sun Funds sought a declaration that they were not

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§ 1301(b)(1) because: (1) the Sun Funds were not part of a joint venture or partnership and therefore did not meet the common control requirement; and (2) neither of the Funds was a "trade or business."

The TPF counterclaimed that the Sun Funds were jointly and severally liable for SBI's withdrawal liability in the amount of $4,516,539, and also that the Sun Funds had

29 U.S.C. § 1392(c). The parties both filed cross-motions for summary judgment in September 2011.

The district court issued a Memorandum and Order on October 18, 2012, granting summary judgment to the Sun *Id.* at 109. The district court did not reach the *id.* at 118, instead basing its decision on the "trade or business" portion of the two-part statutory test. It also decided the "evade or avoid" liability 10

On the "trade or business" issue, the district court addressed the level of deference owed to a September 2007 PBGC appeals letter that found a private equity fund to be a "trade or business" in the single employer pension plan *Id.* at 114–16. The appeals letter found the equity fund to be a "trade or business" because its controlling stake in the bankrupt company put it in a position to exercise control over that company through its general partner, which was compensated for its efforts.

The district court held that the appeals letter was owed *Id.* at 115. The district court found the letter unpersuasive for two reasons: (1) the appeals board purportedly incorrectly attributed activity of the general partner to the investment fund; and (2) the appeals board letter supposedly conflicted with governing Supreme Court tax *Id.* at 115–16. Engaging in its own analysis, the court found that the Sun Funds were not "trades or businesses," relying on the fact that the Sun Funds did not have any offices or employees, and did not make or sell goods or report income other than investment income *Id.* at 117. Moreover, the Sun Funds were not engaged in the general partner's management *Id.*

****5** As to its "evade or avoid" liability analysis, the § 1392(c) was not meant to apply to an outside investor structuring a transaction *Id.* at 122. The language of the statute suggested that "it is aimed at *id.,* and imposing liability on investors for trying to avoid assumption of such liability would disincentivize investing in companies subject to multiemployer pension plan obligations, thereby *id.* at 124.

The TPF has timely appealed. It argues that the district court erred in finding that the Sun Funds were not "trades or businesses" and that the Sun Funds should be subject § 1392(c). The PBGC has filed an amicus brief on appeal in support of reversal of the district court's "trades or businesses" decision, but § 1392(c) claim.

*138 II.

A.

[1] [2] [3] We review a grant or denial of summary *Rodriguez v. Am. Int'l Ins. Co. of P.R.,* 402 F.3d 45, 46–47 (1st Cir.2005). We may affirm the district court on any

OneBeacon Am. Ins. Co. v. Commercial Union Assurance Co. of Can., 684 F.3d 237, 241 (1st Cir.2012). The presence of cross-motions for summary judgment does not distort the standard of review. Rather, we view each motion separately in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party. *Id.* We make a determination "based on the undisputed facts whether either [party] deserve[s] *Hartford Fire Ins. Co. v. CNA Ins. Co. (Eur.) Ltd.,* 633 F.3d 50, 53 (1st Cir.2011). To prevail, the moving party must show "that there is no genuine dispute as to any material fact," and that it "is Fed.R.Civ.P. 56(a).

B. *Withdrawal Liability Under the MPPAA*

The MPPAA was enacted by Congress to protect the viability of defined pension benefit plans, to create a disincentive for employers to withdraw from multiemployer plans, and also to provide a means of *Pension Benefit Guar. Corp. v. R.A. Gray & Co.,* 467 U.S. 717, 720–22, 104

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S.Ct. 2709, 81 L.Ed.2d 601 (1984). As such, the MPPAA requires employers withdrawing from a multiemployer plan to pay their proportionate share of the pension fund's vested but unfunded benefits. 29 U.S.C. §§ 1381 1391 *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.,* 508 U.S. 602, 609, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993) *R.A. Gray,* 467 U.S. at 725, 104 S.Ct. 2709. An employer withdraws when it permanently ceases its obligation to contribute or 29 U.S.C. § 1383(a)

[4] [5] The MPPAA provides: "For purposes of this subchapter, 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 29 U.S.C. § 1301(b)(1). So, "[t]o impose withdrawal liability on an organization other than the one obligated to the [pension] Fund, two conditions must be satisfied: 1) the organization must be under 'common control' with the obligated organization, and 2) the organization must be *McDougall v. Pioneer Ranch Ltd. P'ship,* 494 F.3d 571, 577 (7th Cir.2007). The Act's broad definition of "employer" extends beyond the business entity withdrawing from the pension fund, thus imposing liability on related entities within the definition, which, in effect, pierces the corporate veil and disregards formal business structures. *Cent. States, Se. & Sw. Areas Pension Fund v. Messina Prods., LLC,* 706 F.3d 874, 877 (7th Cir.2013) ("When an employer participates in a multiemployer pension plan and then withdraws from the plan with unpaid liabilities, federal law can pierce corporate veils and impose liability on owners and related businesses.").

****6** § 1301(b)(1) authorizes the PBGC to prescribe regulations, ***139** those regulations "shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under 26 U.S.C. § 414(c) [11] 29 U.S.C. § 1301(b)(1). The PBGC has adopted regulations pertaining to the meaning of "common control," 29 C.F.R. §§ 4001.2 4001.3(a), but has not adopted regulations defining or explaining the meaning of "trades [12]

§ 1301(b)(1) is not defined in Treasury regulations and has not been given a definitive, uniform definition by the Supreme Court. *Comm'r of Internal Revenue v. Groetzinger,* 480 U.S. 23, 27, 107 S.Ct. 980, 94 L.Ed.2d 25 (1987) (observing that despite the widespread use of the phrase in the Internal Revenue Code, "the Code has never contained a definition of the words 'trade or business' for general application, and no regulation has been issued expounding its meaning for all purposes"). The Supreme Court has warned that when it interprets the phrase, it "do[es] not purport to construe the phrase where it appears in other places," except those *Id.* at 27 n. 8, 107 S.Ct. 980. The Court has not provided an § 1301(b)(1).

C. *Failing to Have Promulgated Regulations, the PBGC Nonetheless Offers Guidance on the Meaning of "Trades or Businesses"*

The only guidance we have from the PBGC is a 2007 appeals letter, defended in its amicus brief.

[13] the PBGC, in a letter, applied a two-prong test it purported to derive *Commissioner of Internal Revenue v. Groetzinger,* 480 U.S. 23, 107 S.Ct. 980, to determine if the private equity fund was a "trade or business" for purposes of the first § 1301(b)(1) requirement. The PBGC asked (1) whether the private equity fund was engaged in an activity with the primary purpose of income or profit and (2) whether it conducted that activity with continuity and regularity. *id.* at 35, 107 S.Ct. 980 ("We accept ... that to be engaged in a trade or business, the taxpayer must be involved in the activity with continuity and regularity and that the taxpayer's primary purpose for engaging in the activity must be for income or profit.").

The PBGC found that the private equity fund involved in that matter met the profit motive requirement. It also determined that the size of the fund, the size of its profits, and the management fees paid to the general partner established continuity and regularity. The PBGC also observed ***140** that the fund's agent provided management and advisory services, and received fees for those services. Indeed, the Appeals Board noted that the equity fund's agent, "N," received 20% of all net profits received in exchange for its services and that its acts were [14] In addition,

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the fund's controlling stake in the portfolio company put it in a position to exercise control through its general partner, consistent with its stated purpose. The approach taken by the PBGC has been dubbed an "investment plus" standard. *Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Palladium Equity Partners, LLC,* 722 F.Supp.2d 854, 869 (E.D.Mich.2010).

[6] The PBGC does not assert that its 2007 letter *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). It does, however, claim *Auer v. Robbins,* 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). We disagree. The PBGC's letter stating its position is owed no more than *Skidmore* deference. *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)

[7] The letter was not the result of public notice and comment, and merely involved an informal adjudication resolving a dispute between a pension fund and the equity fund. Thus far, the letter has received no more deference than the power to persuade. *Sun Capital,* 903 F.Supp.2d at 115; *Palladium,* 722 F.Supp.2d at 869. And rightly so. "[I]nterpretations contained in formats such as opinion letters are 'entitled to respect' ... only to the extent that those interpretations have the 'power to *Christensen v. Harris Cnty.,* 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000) *Skidmore,* 323 U.S. at 140, 65 S.Ct. 161).

[8] The PBGC contends that, because it is interpreting a phrase that appears in its own regulations, 29 C.F.R. §§ 4001.2 4001.3, its interpretation is owed deference under *Auer.* Which is to say that the court must defer to that interpretation unless it is plainly erroneous or inconsistent *Auer,* 519 U.S. at 461, 117 S.Ct. 905

[9] The letter is not owed *Auer* deference in this case because such deference is inappropriate where significant monetary liability would be imposed on a party for conduct that took place at a time when that party lacked fair notice of the interpretation at issue. *Christopher v. SmithKline Beecham Corp.,* — U.S. ——, 132 S.Ct. 2156, 2167, 183 L.Ed.2d 153 (2012). *Christopher* stressed that the agency in that case had taken decades before acting, during which time the industry practice at issue developed [15] *Id.* at 2168 ("But where, as here, an agency's announcement of its interpretation is preceded by a very lengthy period ***141** of conspicuous inaction, the potential for unfair surprise is acute."). In this case, the Sun Funds made their investment and operational arrangements in early 2007, while the PBGC did not issue its appeals letter until September 2007.

Moreover, even if *Christopher* was not an impediment to *Auer* *Gonzales v. Oregon,* 546 U.S. 243, 257, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006) ("Simply put, the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute. An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language."). The PBGC regulations make 29 C.F.R. § 4001.3(a), and merely refer to Treasury regulations, which, as mentioned, also do not define the phrase.

****8** Nonetheless, the views the PBGC expressed in the letter are entitled to *Skidmore* deference. *Skidmore,* 323 U.S. at 140, 65 S.Ct. 161 (observing that the "weight" of an agency's determination "depend[s] upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade").

D.

§ 1301(b)(1), the PBGC's "Investment Plus" Approach is Persuasive, and the Same Approach Would Be Employed Even Without Deference

The Sun Funds argue that the "investment plus" test is incompatible with Supreme Court tax precedent. Regardless, they argue, the Sun Funds cannot be held responsible for the activities of other entities in the management and operation of SBI. And even if the Sun Funds had engaged in those activities, they argue, that

[10] **[11]** Where the MPPAA issue is one of whether there is mere passive investment to defeat pension withdrawal liability, we are persuaded that some form of an "investment plus" approach is appropriate when § 1301(b)(1), depending on what the "plus" is. Further, even if we were

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to ignore the PBGC's interpretation, we, like the Seventh Circuit, would reach the same result through independent *Central States, Southeast & Southwest Areas Pension Fund v. Messina Products, LLC,* 706 F.3d 874, the Seventh Circuit employed an "investment plus"-like analysis without reference to any PBGC interpretation. We agree with that approach. We see no need to set forth general guidelines for what the "plus" is, nor has the PBGC provided guidance on this. We go no further than to say that on the undisputed facts of this case, Sun Fund § 1301(b)(1) [16]

[12] In a very fact-specific approach, we take account of a number of factors, cautioning that none is dispositive in and of itself. The Sun Funds make investments in portfolio companies with the principal purpose of making a profit. Profits are made from the sale of stock at higher prices than the purchase price and through dividends. But a mere investment made ***142** to make a profit, without more, does not itself make an investor a trade or business. *Cent. States, Se. & Sw. Areas Pension Fund v. Fulkerson,* 238 F.3d 891, 895–96 (7th Cir.2001) *Palladium,* 722 F.Supp.2d at 868.

Here, however, the Sun Funds have also undertaken activities as to the SBI property. The Sun Funds' limited partnership agreements and private placement memos explain that the Funds are actively involved in the management and operation of the companies in which *Pioneer Ranch,* 494 F.3d at 577–78 (observing that an entity's own statements about its goals, purposes, and intentions are "highly relevant, because [they] *Connors v. Incoal, Inc.,* 995 F.2d 245, 254 (D.C.Cir.1993)) (internal quotation mark omitted)). Each Sun Fund agreement states, for instance, that a "principal purpose" of the partnership is the "manag[ement] and supervisi[on]" of its investments. The agreements also give the general partner of each Sun Fund exclusive and wide-ranging management authority.

****9** In addition, the general partners are empowered through their own partnership agreements to make decisions about hiring, terminating, and compensating agents and employees of the Sun Funds and their portfolio companies. The general partners receive a percentage of total commitments to the Sun Funds and a percentage of profits as compensation—just like the general partner of the equity fund in the PBGC appeals letter.

It is the purpose of the Sun Funds to seek out potential portfolio companies that are in need of extensive intervention with respect to their management and operations, to provide such intervention, and then to sell the companies. The private placement memos explain [17] typically work to reduce costs, improve margins, accelerate sales growth through new products and market opportunities, implement or modify management information systems and improve reporting and control functions." More specifically, those memos represent that restructuring and operating plans are developed for a target portfolio company even before it is acquired and a management team is built specifically for the purchased company, with "[s]ignificant changes ... typically made to portfolio companies in the first three to six months." The strategic plan developed initially is "consistently monitored and modified as necessary." Involvement can encompass even small details, including signing of all checks for its new portfolio companies and the holding of frequent meetings with senior staff to discuss operations, competition, new products and personnel.

Such actions are taken with the ultimate goal of selling the portfolio company for a profit. On this point, the placement memos explain that after implementing "significant operating improvements ... during the first two years [,] ... the Principals expect to exit investments in two to five years (or sooner under appropriate circumstances)."

Further, the Sun Funds' controlling stake in SBI placed them and their affiliated entities in a position where they were intimately involved in the management and operation of the company. *Harrell v. Eller Maritime Co.,* No. 8:09–CV–1400–T–27AEP, 2010 WL 3835150, at *4 (M.D.Fla. Sept. 30, 2010) (the involvement in decisionmaking at management level goes ***143** "well beyond that of a passive shareholder" and supports a conclusion that an organization is a "trade or business"). Through a series of appointments, the Sun Funds were able to place SCAI employees in two of the three director positions at SBI, resulting in SCAI employees controlling [18]

Through a series of service agreements described earlier, SCAI provided personnel to SBI for management and consulting services. Thereafter, individuals from

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those entities were immersed in details involving the management and operation of SBI, as discussed.

Moreover, the Sun Funds' active involvement in management under the agreements provided a direct economic benefit to at least Sun Fund IV that an ordinary, passive investor would not derive: an offset against the management fees it otherwise would have paid its general [19] Here, SBI made payments of more than $186,368.44 to Sun Fund IV's general partner, which were offset against the fees [20] This offset was not from an ordinary investment activity, which in the Sun Funds' words "results solely in investment returns." *United States v. Clark,* 358 F.2d 892, 895 (1st Cir.1966) (holding that taxpayer not engaged in a "trade or business" in part because no evidence he received compensation "different from that flowing to an investor").

****10** In our view, the sum of all of these factors satisfy the "plus" in the "investment plus" test. The conclusion we reach is consistent with the conclusions of other appellate court decisions, though none has addressed this precise question. In *Messina,* where the Seventh Circuit employed an "investment plus"-like analysis on its own, the pension fund was seeking to impose withdrawal liability on a limited liability company (LLC) that owned rental [21] 706 F.3d at 877. The Seventh Circuit rejected the LLC's argument that it was a passive investment *Id.* at 885–86.

The Seventh Circuit looked to the stated intent in the creation of the enterprise, as well as to the enterprise's [22]

Id. at 885. The company's operating agreement, which explained that it had developed a business plan to produce, sell, and market gravel, was highly relevant to [23] *Id.* at 886 (stating that "[i]t was entirely appropriate for the district court to take these documents at face value"). The court also found it relevant that the activity was conducted "under *id.,* as are the Sun Funds.

Likewise, in an earlier case, the Seventh Circuit rejected an argument that a limited liability company that owned [24]

Cent. States, Se. & Sw. Areas Pension Fund v. SCOFBP, LLC, 668 F.3d 873, 879 (7th Cir.2011). It noted that the company was a for-profit LLC, earned rental income, paid business management fees, and contracted with professionals to provide legal, management, and accounting services. *Id.* Hence, the company was "a formal business organization, engaged in regular and continuous activity for the purpose of generating income or profit and thus is ... a 'trade or business' for purposes *Id.*

The Sun Funds, however, argue that they cannot be "trades or businesses" because that would be *Higgins v. Commissioner of Internal Revenue,* 312 U.S. 212, 61 S.Ct. 475, 85 L.Ed. 783 (1941) *Whipple v. Commissioner of Internal Revenue,* 373 U.S. 193, 83 S.Ct. 1168, 10 L.Ed.2d 288 (1963)—which interpret that phrase. The Sun Funds argue that cases interpreting the phrase "trade or business" as used anywhere in the Internal Revenue Code are binding because Congress intended for that phrase to be a term of art with a consistent meaning across uses. Also, the Sun Funds essentially argue that, by relying on *Groetzinger,* which stated that it was not cutting back on *Higgins,* the PBGC's "investment plus" test must be interpreted in a way consistent with *Higgins* and its progeny. Under *Higgins,* the Funds contend, they cannot be "trades or businesses."

As to the first argument, we reject the proposition 26 U.S.C. § 414(c), interpretations of other provisions of the Internal Revenue Code are *determinative* of the issue of whether § 1301(b)(1). *United Steelworkers of Am., AFL–CIO & Its Local 4805 v. Harris & Sons Steel Co.,* 706 F.2d 1289, 1299 (3d Cir.1983) (explaining that a term used for tax purposes does not have to have the same meaning for purposes of pension fund plan termination ***145** insurance). We are particularly convinced this is the case because the Supreme Court has been hesitant to express a uniform definition even within the Code itself. *Groetzinger,* 480 U.S. at 27 n. 8, 107 S.Ct. 980; *Carpenters Pension Trust Fund for N. Cal. v. Lindquist,* 491 Fed.Appx. 830, 831 (9th Cir.2012) (rejecting argument that *Groetzinger* test § 1301(b)(1) *Bd. of Trs. of the W. Conference of Teamsters Pension Trust Fund v. Lafrenz,* 837 F.2d 892 (9th Cir.1988) § 1301(b)(1) *Groetzinger*). § 1301(b)

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(1)'s statement that it must be construed consistently with only *certain* uses of the phrase in the Code undercuts the Sun Funds' assertion that the phrase must be uniformly interpreted.

****11** As to the second argument, we see no inconsistency with *Higgins* or *Whipple.* Those cases were concerned with different issues and did not purport to provide per se rules, much less rules determinative of withdrawal liability under the MPPAA. The premise of the Sun Funds' argument is that *Higgins* and *Whipple* mean that entities that make investments, manage those investments, and earn only investment returns cannot be "trades or businesses" for any purpose. That argument is too blunt an instrument. In *Higgins,* the issue was whether certain claimed expenses were eligible for the deduction the taxpayer sought. The taxpayer, who had extensive investments in real estate, bonds, and stocks, spent a considerable amount of effort and time administratively 312 U.S. at 213, 61 S.Ct. 475. The taxpayer hired others to assist him and also rented offices to oversee his investments. *Id.* He claimed those expenses were deductible under Section 23(a) of the Revenue Act of 1932 as ordinary and necessary expenses paid or incurred *Id.* at 213–14, 61 S.Ct. 475. The Supreme Court held that those expenses were not incurred while carrying on a "trade or business" and were *Id.* at 217–18, 61 S.Ct. 475.

The Supreme Court reasoned that this was true because "[t]he petitioner merely kept records and collected interest and dividends from his securities, through managerial *Id.* at 218, 61 S.Ct. 475. The Court held that, no matter the size of the estate or the continuous nature of the work required to keep a watchful eye on investments, that by itself could not constitute a "trade or business." *Id.* Significantly, the Court noted that the taxpayer "did not participate directly or indirectly in the management of the corporations in which he held *Id.* at 214, 61 S.Ct. 475.

The facts of this case are easily distinguishable from those *Higgins.* *id.* at 217, 61 S.Ct. 475 ("To determine whether the activities of a taxpayer are 'carrying on a business' requires an examination of the facts in each case."). First, the taxpayer in *Higgins* was trying to claim a deduction to avoid paying taxes. Second and more important, unlike the investor in *Higgins,* the Sun Funds did participate in the management of SBI, albeit through 25

Whipple is also distinguishable: The taxpayer there sought to deduct a worthless loan made to a business he controlled as a bad business debt incurred in the taxpayer's 373 U.S. at 194–97, 83 S.Ct. 1168. The taxpayer claimed that, because he furnished regular services, namely his time and energy to ***146** the affairs of

Id. at 201–02, 83 S.Ct. 1168. The Supreme Court rejected the argument, stating:

> Devoting one's time and energies to the affairs of a corporation is not of itself, and *without more,* a trade or business of the person so engaged. Though such activities may produce income, profit or gain in the form of dividends or enhancement in the value of an investment, this return is distinctive to the process of investing and is generated by the successful operation of the corporation's business as distinguished from the trade or business of the taxpayer himself. When the only return is that of an investor, the taxpayer has not satisfied his burden of demonstrating that he is engaged in a trade or business since investing is not a trade or business and the return to the taxpayer, though substantially the product of his services, legally arises not from his own trade or business but from that of the corporation.

Id. at 202, 83 S.Ct. 1168 (emphasis added). The Sun Funds say that, because they earned no income other than dividends and capital gains, they are not "trades or businesses." But the Sun Funds did not simply devote time and energy to SBI, "without more." Rather, they were able to funnel management and consulting fees to Sun Fund IV's general partner and its subsidiary. Most significantly, Sun Fund IV received a direct economic benefit in the form of offsets against the fees it would otherwise have paid its general partner. It is difficult to see why the *Whipple* "without more" formulation is inconsistent with an MPPAA "investment plus" test.

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The "investment plus" test as we have construed it in this
Groetzinger, Higgins,
and *Whipple* [26] *SCOFBP,* 668 F.3d at 878 ("[I]t seems highly unlikely that a formal for-profit business organization would not qualify as a 'trade or business' under the *Groetzinger* test."); Rosenthal, *Taxing Private Equity Funds as Corporate 'Developers',* at 365 ("[P]rivate equity funds are active enough to be in a trade or business.").

The Sun Funds make an additional argument: that because none of the relevant activities by agents and different business entities can be attributed to the Sun Funds themselves, withdrawal liability cannot be imposed upon them. We reject this argument as well. Without resolving the issue of the extent to which Congress intended in this area to honor corporate formalities, as have the parties we look to the Restatement of Agency.
Vance v. Ball State Univ., ––– U.S. ––––, 133 S.Ct. 2434, 2441, 186 L.Ed.2d 565 (2013) (looking to Restatement of Agency to decide when Title VII vicarious liability appropriate). And, because the Sun Funds are Delaware

[13] Under Delaware law, a partner "is an agent of the partnership for the purpose of its business, purposes or activities," ***147** and an act of a partner "for apparently carrying on in the ordinary course the partnership's business, purposes or activities or business, purposes or activities of the kind carried on by the partnership
Del.Code Ann.tit. 6, § 15–301(1);
Comm'r of Internal Revenue v. Boeing, 106 F.2d 305, 309 (9th Cir.1939) ("One may conduct a business through others, his agents, representatives, or employees."). To determine what is "carrying on in the ordinary course" of the partnership's business, we may
Rudnitsky v. Rudnitsky, No. 17446, 2000 WL 1724234, at *6 (Del.Ch. Nov. 14, 2000)

[14] Here, the limited partnership agreements gave the Sun Funds' general partners the exclusive authority to act on behalf of the limited partnerships to effectuate
[27] These purposes included managing and supervising investments in portfolio companies, as well as "other such activity incidental or ancillary thereto" as deemed advisable by the general partner. So, under Delaware law, it is clear that the general partner of Sun Fund IV, in providing management services to SBI, was acting as an agent of the Fund.

****13** Moreover, even absent Delaware partnership law, the partnership agreements themselves grant actual authority for the general partner to provide management services to portfolio companies like SBI. Restatement (Third) of Agency §§ 2.01 3.01; *cf. id.* § 7.04 (principal incurs tort liability vicariously where agent acts with actual authority). And the general partners' own partnership agreements giving power to the limited partner committees to make determinations about hiring, terminating, and compensating agents and employees of the Sun Funds and their portfolio companies show the existence of such authority. Hence, the general partner was acting within the scope of its authority.

Even so, the Sun Funds argue that the general partner entered the management service contract with SBI on its
[28] The
[29]

Restatement (Third) of Agency § 1.02 cmt. a (stating "how the parties to any given relationship label it is not dispositive").

The argument is unpersuasive for at least two reasons. First, it was within the general partner's scope of authority to provide management services to SBI. Second, ***148** providing management services was done on behalf of and for the benefit of the Sun Funds. *Messina,* 706 F.3d at 884 (individuals acting for benefit of married couple are agents whose acts are attributable to the couple). The investment strategy of the Sun Funds could only be achieved by active management through an agent, since the Sun Funds themselves had no employees. Indeed, the management services agreement was entered into just one day after the execution of the stock purchase agreement. In addition, Sun Fund IV received an offset in the fees it owed to its general partner because of payments made from SBI to that general partner. That provided a benefit by reducing its expenses. The services paid for by SBI were the *same services* that the Sun Funds would otherwise have paid for themselves to implement and oversee an
[30]

The Sun Funds also make a policy argument that
§ 1301(b)
(1) control group provision. They argue that the purpose

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of the provision is to prevent an employer "from circumventing ERISA obligations by divvying up its business operations into separate entities." It is *not,* they say, intended to reach owners of a business so as to require them to "dig into their own pockets" to pay withdrawal liability for a company they own. *Messina,* 706 F.3d at 878.

These are fine lines. The various arrangements and entities meant precisely to shield the Sun Funds from liability may be viewed as an attempt to divvy up operations to avoid ERISA obligations. We recognize that Congress may wish to encourage investment in distressed companies by curtailing the risk to investors in such employers of acquiring ERISA withdrawal liability. If so, Congress has not been explicit, and it may prefer instead to rely on the usual pricing mechanism in the private market for assumption of risk.

****14** We express our dismay that the PBGC has not given more and earlier guidance on this "trade or business" "investment plus" theory to the many parties affected. The PBGC has not engaged in notice and comment rulemaking or even issued guidance of any kind which was subject to prior public notice and comment. *See* C. Sunstein, *Simpler* 216 (2013) ("[G]overnment officials learn from public comments on proposed rules.... It is not merely sensible to provide people with an opportunity to comment on rules before they are finalized; it is indispensable, a crucial safeguard against error."). Moreover, its appeals letter that provides for the "investment plus" test leaves open many questions about exactly where the line should be drawn between a mere passive investor and one engaged in a "trade or

[15] § 1301(b)(1) the entity must both be a "trade or business" and be under common control, we reverse entry of summary judgment § 1301(b)(1) claim in favor of Sun Fund IV and vacate the judgment in favor of Sun Fund III. We remand § 1301(b)(1) claim of liability to the district court to resolve whether Sun Fund III received any benefit from an offset ***149** from fees paid by SBI and for the district court to decide the issue of common control. We determine only that the "trade or business" requirement has been satisfied as to Sun Fund IV.

III.

We deny, for different reasons than the district court, the TPF's appeal from entry of summary judgment against 29 U.S.C. § 1392(c). That provision of the MPPAA states "[i]f a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) *without regard to such transaction.* 29 U.S.C. § 1392(c) (emphasis added).

§ 1392(c) applies because the Sun Funds, during the acquisition, purposefully divided ownership of SSB–LLC into 70%/30% shares in order to avoid the 80% parent-subsidiary common control § 1301(b)(1). Under Treasury regulations, to be in a parent-subsidiary group under common control, 26 C.F.R. § 1.414(c)–2(b)(2)(i). The TPF asserts that, because a Sun Fund representative testified that a principal purpose of the 70%/30% division was to avoid unfunded pension liability and because an email states that a reason ownership was divided was "due to [the] unfunded pension

§ 1392(c) [31]

[16] § 1392(c) cannot serve as a basis to impose liability on the Sun Funds because, by applying the remedy specified by the statute, the TPF would still not be entitled to any payments from the Sun Funds for withdrawal liability. We begin (and ultimately end) our § 1392(c). *United States v. Kelly,* 661 F.3d 682, 687 (1st Cir.2011) ("We begin our analysis by reviewing the plain language of the [statute].").

****15** § 1392(c) instructs courts to apply withdrawal liability "without regard" to any transaction the principal purpose of which is to evade or avoid such 29 U.S.C. § 1392(c). The instruction requires courts to put the parties in the same situation as if the offending transaction never occurred; that is, to erase that transaction. It does not, by contrast, instruct or permit a court to take the affirmative step of writing in new terms to a transaction or to create a transaction that never existed. In order for the TPF to succeed, we would have to (improperly) do the latter because simply doing the former

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would not give the TPF any relief, but would only sever any ties between the Sun Funds and SBI.

Disregarding the agreement to divide SSB–LLC 70%/30% would not result in Sun Fund IV being the 100% owner of SBI. At the moment SSB–LLC was divided 70%/30%, the transaction to purchase SBI had not been completed. There is no way of knowing that the acquisition would have happened anyway if Sun Fund IV were to be a 100% owner, but it is doubtful. SSB–LLC was formed on December 15, 2006, at which point the 70%/30% division ***150** became official. SBI did not enter into a stock purchase agreement to be acquired until February 8, 2007. In essence, the TPF requests that we create a transaction that never occurred—a purchase by Sun Fund IV of a 100% stake in SBI. But as stated, that we cannot do. *Teamsters Pension Trust Fund of Phila. & Vicinity v. Cent. Mich. Trucking, Inc.*, 857 F.2d 1107, 1109 (6th Cir.1988) ("There is no congressional mandate to engage in legal gymnastics in order to guarantee pension plans at all costs[,] ... or to apply the statute in a nonsensical fashion in order to assure full payment of withdrawal liability."). Moreover, the TPF does not provide a single case in which

§ 1392(c) liability.

The TPF argues that because Sun Fund IV had already signed a letter of intent to purchase 100% of SBI before the decision was made to divide ownership between the Sun Funds, we can rely on the letter of intent. The TPF claims that the decision to split ownership to avoid the automatic assumption of withdrawal liability at 80% ownership was made after a binding transaction was entered into through the letter of intent. That is not true. The letter of intent was so named because it was not a binding contract or any sort of purchase agreement. Rather, the letter explicitly contained a clause stating that:

> The first five captioned paragraphs of this letter ('Purchase Price', 'Purchase Agreement Terms', 'Financing', 'Timing & Process', and 'Due Diligence') represent only the intent of the parties, do not constitute a contract or agreement, are not binding, and shall not be enforceable against the Sellers, the Company, or Sun Capital.... [N]either party shall have any legally binding obligation to the other unless and until a definitive purchase agreement is executed.

****16** This is simply not a case about an entity with a controlling stake of 80% or more under the MPPAA seeking to shed its controlling status to avoid withdrawal liability. As such, disregarding the agreement to divide ownership of SSB–LLC would *not* leave us with Sun Fund IV holding a controlling 80% stake in SBI.

§

1392(c) and the district court's conclusion that they are not is affirmed.

IV.

Accordingly, the district court's grant of summary judgment is *reversed in part, vacated in part,* and *affirmed in part.* The case is remanded to the district court for further proceedings, including those needed to determine the "trade or business" issue as to Sun Fund III, and the issue of common control. *So ordered.* No costs are

All Citations

724 F.3d 129, 2013 WL 3814984, 56 Employee Benefits Cas. 1139

Footnotes

1 Those related entities are not before us in this appeal. An entry of default was entered against those parties in the district court, but judgment was never entered on the claims against those parties. However, it is apparent from the procedural history and actions of the TPF that the TPF has abandoned the claims against those parties, and therefore, we have appellate jurisdiction under 28 U.S.C. § 1291. *See, e.g., Balt. Orioles, Inc. v. Major League Baseball Players Ass'n,* 805 F.2d 663, 667 (7th Cir.1986) ("[A]n order that effectively ends the litigation on the merits is an appealable final judgment even if the district court did not formally enter judgment on a claim that one party has abandoned.").

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2 The authority of the PBGC to promulgate regulations for § 1301(b)(1) is set forth in the statute. The PBGC is a wholly owned United States government corporation, which is modeled after the FDIC and administers and enforces Title IV of ERISA. *Pension Benefit Guar. Corp. v. LTV Corp.,* 496 U.S. 633, 637, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990). The PBGC also acts as an insurer of multiemployer plans when a covered plan terminates with insufficient assets to satisfy its pension obligations (*i.e.,* is insolvent). *Id.* at 637–38, 110 S.Ct. 2668. When a multiemployer plan becomes insolvent, benefits must be reduced to the PBGC-guaranteed level, and the PBGC provides the plan with financial assistance. *See* 29 U.S.C. §§ 1322a, 1426, 1431. In this case, it is not clear whether the plan will become insolvent if the private equity funds are not determined to have withdrawal liability, and as a result, it is not clear whether the PBGC will incur any losses.

The PBGC insures about 1450 multiemployer plans covering about 10.3 million participants. Pension Benefit Guaranty Corporation, *2012 PBGC Annual Report* 33, available at http://www.pgbc.gov/documents/2012–annual–report. pdf. It provides about $95 million in annual financial assistance to 49 insolvent multiemployer plans covering 51,000 participants. *Id.* As of the end of fiscal year 2012, the PBGC's multiemployer insurance fund had a negative net position of $5.237 billion. *Id.*

3 Sun Fund III is technically two different funds, Sun Capital Partners III, LP and Sun Capital Partners III QP, LP. Like the district court, we consider them one fund for purposes of this opinion because they are "parallel funds" run by a single general partner and generally make the same investments in the same proportions. *Sun Capital Partners III, LP v. New Eng. Teamsters & Trucking Indus. Pension Fund,* 903 F.Supp.2d 107, 109 n. 1 (D.Mass.2012).

4 For ERISA purposes, the Sun Funds are Venture Capital Operating Companies (VCOC). According to the Sun Funds' private placement memos to potential investors, this requires that the partnerships:

> (i) ... ha[ve] direct contractual rights to substantially participate in or substantially influence the management of operating companies comprising at least 50% of its portfolio (measured at cost) and (ii) in the ordinary course of [their businesses], actively exercis[e] such management rights with respect to at least one of the operating companies in which [they invest]. An "operating company" is an entity engaged in the production or sale of a product or service, as distinguished from a reinvesting entity.

See also 29 C.F.R. § 2510.3–101(d)(1), (d)(3). We do not adopt the TPF's argument that any investment fund classified as a VCOC is necessarily a "trade or business."

5 For instance, Sun Fund IV, the larger of the Funds, reported total investment income of $17,353,533 in 2007, $57,072,025 in 2008, and $70,010,235 in 2009.

6 The aggregate capital commitment of Sun Fund IV was $1.5 billion, which the TPF asserts means the management fee at the 2% rate was $30 million.

7 This sort of fee arrangement is common in private equity funds. *See* S. Rosenthal, *Taxing Private Equity Funds as Corporate 'Developers',* Tax Notes, Jan. 21, 2013, at 361, 362 n. 6 (explaining that equity funds usually pay the fees to their general partners, which often redirect the fee to a management services company that renders the management services for the partnership, and that the general partner or management company will often receive fees from the portfolio company, in which case the partnership (the equity fund) receives a fee offset).

8 The Sun Funds contend that they reduced the purchase price based on the expectation that a future buyer would pay less for a company with unfunded pension obligations, not because of a concern that they were incurring potential withdrawal liability.

9 The cover page of the agreement states the agreement is dated February 8, 2007, but the text of the stock purchase agreement says it is dated February 9, 2007. The discrepancy is not of importance here.

10 No party demanded a jury trial in the event the district court found that the case should proceed to trial rather than be resolved at summary judgment.

11 In turn, § 414(c) is concerned with seven further sections and sub-sections of the Code, which are themselves concerned with qualified pension plans, profit-sharing plans, stock bonus plans, and individual retirement accounts. *See* 26 U.S.C. § 414(c); *see also id.* §§ 401, 408(k), 408(p), 410, 411, 415, 416.

12 29 C.F.R. § 4001.3(a) references regulations issued by the Treasury under § 414(c) of the Code, but the Treasury regulations cross-referenced do not define "trades or businesses" either. *See, e.g.,* 26 C.F.R. § 1.414(c)–2.

13 The PBGC's Appeals Board renders final agency decisions on various liability and benefit determinations in writing pursuant to 29 C.F.R. § 4003.59. According to the PBGC's website, only three-member decisions are made available on its website. The 2007 letter was a one-member decision and was apparently not published, or at least not made widely publicly available through its website. *See* Pension Benefit Guaranty Corporation, *Appeals Board Decisions,* http://www.pbgc. gov/prac/appeals-board-decisions.html.

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14 The letter did not mention whether the equity fund received any offsets to the fees paid to "N" for fees "N" may have received from the portfolio company, *i.e.,* the withdrawing employer.

15 So too, here. Private equity funds date back to the nineteenth century, and have grown exponentially since around 1980. N. Jordan et al., *Advising Private Funds: A Comprehensive Guide to Representing Hedge Funds, Private Equity Funds, and Their Advisers* § 16:2 (2012) (observing that investor commitments were $10 billion in 1991, $160 billion in 2000, and $680 billion in 2008). And, before the PBGC's appeals letter, many fund managers did not think they were exposed to withdrawal liability for portfolio companies. *Id.* § 18:5 (explaining also that "the principles set out by the PBGC are likely to apply across a wide spectrum of private equity firms").

16 We do not decide if Sun Fund III is a "trade or business" for reasons discussed later.

17 "Principals" are defined in the private placement memos as individuals who work for the general partner of the Fund.

18 The Vice President of SSB–LLC, formed by the Sun Funds, selected the board of SBHC. Two of those three board members were employees of SCAI. On February 9, 2007, those same two SCAI employees were named directors of SBI, along with the CEO, Barry Golden, who had been retained after the purchase.

19 Specifically, the general partner of each private equity fund is entitled to an annual fee of 2% of the aggregate commitments to the fund, but fees the general partner and/or its wholly-owned subsidiary or their officers, partners, or employees receive from other sources are offset against the management fees owed by the Sun Funds to the general partner.

20 We do not determine if Sun Fund III is a "trade or business" because we cannot tell from the record before us if the Fund received an economic benefit from the offset. Therefore, we leave that factual issue and the ultimate "trade or business" conclusion about Sun Fund III for the district court to resolve on remand.

21 The LLC was owned by a couple who also owned the withdrawing employer (a trucking company), establishing common control. *See Cent. States, Se. & Sw. Areas Pension Fund v. Messina Prods., LLC,* 706 F.3d 874, 877 (7th Cir.2013). The pension fund also sought to impose liability on the couple for owning and renting a separate property to the withdrawing employer. *Id.* at 879–80.

22 Admittedly, here, the Sun Funds did not list trade or business income on their Form 1065, which cuts in favor of the Sun Funds' argument.

23 As to the couple, the court looked to actions of the couple's agents to impose withdrawal liability on the couple. *Messina,* 706 F.3d at 884. However, to the extent the Seventh Circuit imposed liability because the purpose of the couple's separate rental business was to fractionalize assets of the withdrawing employer, *see id.* at 883, we do not adopt a rule that in order to impose withdrawal liability the purpose of having a separate "trade or business" must be to fractionalize assets.

24 The court defined "personal investments" as:

> [T]hings like holding shares of stock or bonds in publicly traded corporations. Ownership of this type of property "without more is the hallmark of an investment." Owning property can be considered a personal investment, at least where the owner spends a negligible amount of time managing the leases, although a more substantial investment of time may be considered regular and continuous enough to rise to the level of a "trade or business."

Cent. States, Se. & Sw. Areas Pension Fund v. SCOFBP, LLC, 668 F.3d 873, 878–79 (7th Cir.2011) (citations omitted) (quoting *Cent. States, Se. & Sw. Areas Pension Fund v. Fulkerson,* 238 F.3d 891, 895 (7th Cir.2001)).

25 *Higgins* stated that the size of the portfolio and the amount of time making investment decisions and taking care of administrative matters does not transform an investor into a "trade or business"; we do not rely on those factors in our analysis.

26 Very late in this case the TPF, for the first time, argued that a series of tax cases from the tax court supported its view that the Sun Funds are "trades or businesses" because they are engaged in the development, promotion, and sale of companies. The TPF cites *Deely v. Commissioner of Internal Revenue,* 73 T.C. 1081 (1980), *Farrar v. Commissioner of Internal Revenue,* 55 T.C.M. (CCH) 1628 (1988), and *Dagres v. Commissioner of Internal Revenue,* 136 T.C. 263 (2011). The argument was presented too late. The "developing business enterprises for resale" theory was not presented to the district court nor in the opening briefs to us. Whatever the merit of the theory, our decision does not engage in an analysis of it.

27 The Sun Funds try to divert our attention from the Sun Funds' limited partnership agreements and instead focus on the purposes of the general partners as provided in their partnership agreements. But it is the principal's purposes, *i.e.,* the Sun Funds' purposes, that are relevant.

28 The Sun Funds' citation of the Restatement (Third) of Agency's comment that "[a]n agent may enter into a contract on behalf of a disclosed principal and, additionally, enter into a separate contract on the agent's own behalf with the same third party," is unpersuasive. Restatement (Third) of Agency § 6.01 cmt. b. In that comment, the Restatement is explaining

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that an agent may enter into a contract that binds the agent and not the principal even where there is a separate contract which the agent entered into on behalf of the principal. That is not the case here where there is just one contract to provide management services to SBI. Additionally, in the illustration that follows, the agent permissibly enters into a second contract with the same third party in an area outside the scope of his agency. Again, that is not the case here where it was within the scope of authority for the general partner of Sun Fund IV to manage the investment in SBI.

29 Likewise, the fact that the general partner did not sign the management services agreement with SBI explicitly on behalf of Sun Fund III or Sun Fund IV is not determinative.

30 Contrary to the Sun Funds' argument, attributing activities of an agent to a principal to determine if the principal is engaged in a "trade or business" does not result in the principal assuming the status of the agent. That is too simplistic of a way to view the inquiry. Instead, "the court must attribute the *activities* of an agent that is acting on behalf of a principal to the principal, to determine whether there are sufficient activities of the principal to constitute a trade or business." Rosenthal, *Taxing Private Equity Funds as Corporate 'Developers'*, at 365 n. 43.

31 The claim raises a number of issues that we need not address. We do not decide whether an agreement between Sun Fund III and Sun Fund IV can be considered a "transaction." Nor do we decide whether, as the district court found, § 1392(c) can serve as an independent basis for liability even if none were to exist under § 1301(b)(1) (that is, that the Sun Funds need not first be "trades or businesses"). We also need not resolve whether an outside investor who structures an investment in a manner to avoid assuming unfunded pension liabilities can ever be held to be evading or avoiding withdrawal liability.

End of Document

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TAB 8

KeyCite Yellow Flag - Negative Treatment
Chicago Regional Council of Carpenters Pension Fund v. Schal Bovis, Inc., 7th Cir.(Ill.), June 10, 2016

706 F.3d 874
United States Court of Appeals,

CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al., Plaintiffs–Appellees and Cross–Appellants,
v.
MESSINA PRODUCTS, LLC, a Michigan limited liability company, Defendant–Appellant,
and
Stephen Messina and Florence Messina, Defendants and Cross–Appellees.

Nos. 11–3513, 12–1333.
|
Argued Sept. 12, 2012.
|

Synopsis
Background: Pension fund, a multi-employer pension plan, and its trustee sued employer and related entities under the Employee Retirement Income Security Act (ERISA), seeking to recover withdrawal liability that the employer allegedly incurred when it withdrew from the fund. The United States District Court for the Northern Robert M. Dow, Jr. 821 F.Supp.2d 1000, granted in part, and denied in part, parties' cross-motions for summary judgment. Parties appealed.

Holdings: Hamilton, Circuit Judge,

[1]

[2] sporadic rental activity constituted engaging in trade or business, so as to render individuals who controlled employer jointly and severally liable under ERISA for

[3] limited liability company under common control was a trade or business and was thus jointly and severally liable under ERISA for the employer's withdrawal liability.

West Headnotes (10)

[1] Labor and Employment
Trade or business under common control
Each trade or business found to be under common control is jointly and severally liable under ERISA for any withdrawal liability of any other; the purpose of the controlling provision is to prevent businesses from shirking their ERISA obligations by fractionalizing operations into many separate entities. Employee Retirement Income Security Act of 1974, §§ 4001(b)(1), 29 U.S.C.A. §§ 1301(b)(1) 1381

9 Cases that cite this headnote

[2] Labor and Employment
Trade or business under common control
In assessing whether a person operated a "trade or business," for purposes of imposing ERISA withdrawal liability, the Court of Appeals relies on the Supreme *Groetzinger* test, under which a person must engage in the activity: (1) for the primary purpose of income or profit, and (2) with continuity and regularity. Employee Retirement Income Security Act of 1974, § 29 U.S.C.A. § 1301(b)(1)

2 Cases that cite this headnote

[3] Labor and Employment
Trade or business under common control
Groetzinger test, which is used to assess whether a person operated a "trade or business" for purposes of imposing ERISA withdrawal liability, is to distinguish trades or businesses from passive

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investments, which cannot form a basis for imputing ERISA withdrawal liability. Employee Retirement Income Security Act of 29 U.S.C.A. § 1301(b)(1)

6 Cases that cite this headnote

[4] **Federal Courts**
Pension and benefit plans
Federal Courts
Pension and benefit plans
Federal Courts
Pension and benefit plans

Ordinarily, de novo review applies to a district court's grant of summary judgment in an ERISA case because the issues involved require statutory interpretation and are issues of law; yet when the only issue before the district court is the characterization of undisputed subsidiary facts, and where a party does not have the right to a jury trial, the clearly-erroneous standard of review applies. Employee Retirement Income Security Act of 29 U.S.C.A. § 1001 et seq.

2 Cases that cite this headnote

[5] **Federal Courts**
Pension and benefit plans

De novo review was appropriate as to issue of whether limited liability company was a trade or business, and was thus jointly and severally liable under ERISA for the withdrawal liability of an employer under common control, since resolution of issues in appeal was not matter of properly characterizing undisputed facts, but instead was matter of proper interpretation of statute and precedents as applied to undisputed facts. Employee Retirement Income Security Act of 29 U.S.C.A. § 1301(b)(1)

4 Cases that cite this headnote

[6] **Labor and Employment**
Trade or business under common control

Individual under common control who had sporadically leased property to withdrawing employer was operating trade or business as commercial and residential landlord within meaning of Multiemployer Pension Plan Amendments Act (MPPAA), so as to render individual jointly and severally liable under ERISA for withdrawal liability of employer, since rental was for profit, leasing property to withdrawing employer was "categorically" trade or business, and property maintenance activities of employer's employees without formal agreement had to be imputed to individual in his capacity as landlord; although individual leased residences to individual tenants, that activity was incidental to rental activity in favor of employer. Employee Retirement Income Security Act 29 U.S.C.A. §§ 1301(b)(1) 1381

14 Cases that cite this headnote

[7] **Labor and Employment**
Multi-Employer Plans
Labor and Employment
Trade or business under common control

The Multiemployer Pension Plan Amendments Act (MPPAA) does not impose liability for a withdrawing employer on purely passive investment entities, including those that invest in real estate, but where the real estate is rented to or used by the withdrawing employer and there is common ownership, it is improbable that the rental activity could be deemed a truly passive investment; in such situations, the likelihood that a true purpose and effect of the "lease" is to split up the withdrawing employer's assets is self-evident. Employee Retirement Income Security Act 29 U.S.C.A. §§ 1301(b)(1) 1381

11 Cases that cite this headnote

[8] **Labor and Employment**
Trade or business under common control

Under test used to determine whether enterprise is trade or business for purposes of Multiemployer Pension Plan Amendments

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Act (MPPAA), real estate activity unrelated to business of the withdrawing employer can be for the primary purpose of income or profit where that activity increases equity, appreciates value, and generates tax deductions that reduce the overall tax burden, even if the activity does not produce a net gain. Employee Retirement Income Security Act of
29 U.S.C.A. § 1301(b)(1)

2 Cases that cite this headnote

[9] Labor and Employment
Trade or business under common control

Limited liability company (LLC) under common control was trade or business, not investment vehicle, and was thus jointly and severally liable under ERISA for withdrawal liability of employer; company's operating agreement stated, in part, that "Members have adopted a business plan for the development of properties and for the production, sale and marketing ...," its tax return for "trade or business income" listed that its principal business activity was "real estate rental," and activities, though minimal, had been conducted with sufficient continuity and regularity, particularly where they were under auspices of formal, for-profit organization. Employee Retirement
29
U.S.C.A. § 1301(b)(1)

8 Cases that cite this headnote

[10] Labor and Employment
Multi-Employer Plans

When deciding Multiemployer Pension Plan Amendments Act (MPPAA) cases involving withdrawal liability, the defendant's intent in creating the enterprise, how the enterprise is treated for tax purposes, and its legal form, among other things, are particularly relevant to the analysis. Employee Retirement
29
U.S.C.A. § 1301(b)(1)

Cases that cite this headnote

Attorneys and Law Firms

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FLAUM WOOD HAMILTON, Circuit

Opinion

HAMILTON, Circuit Judge.

When an employer participates in a multiemployer pension plan and then withdraws from the plan with unpaid liabilities, federal law can pierce corporate veils and impose liability on owners and related businesses. These appeals present issues on the scope of such liabilities. Plaintiff Central States, Southeast and Southwest Areas Pension Fund is a multiemployer pension plan within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan
29 U.S.C. §§
1381 1461. Messina Trucking, Inc. was a closely-held corporation owned, along with several other closely-held entities, by Stephen and Florence Messina. For several years, Messina Trucking was subject to a collective bargaining agreement that required it to contribute to the Fund for its employees' retirement benefits. In October 2007, however, Messina Trucking permanently ceased to have an obligation to contribute to the Fund, triggering a "complete withdrawal" from the Fund, and incurring
29
U.S.C. § 1383 [1]

The Fund sued Stephen and Florence Messina, Messina Trucking, Messina Products, Messina Product Operations LLC, Utica Equipment Co., Washington Lakes, LLC, and Auburn Supply Co. seeking a declaratory judgment that the named defendants were jointly and severally liable for the withdrawal liability obligation incurred
29 U.S.C. § 1301(b)(1) of
the MPPAA as "trades or businesses" under "common control" with Messina Trucking. All parties aside from

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Stephen and Florence Messina and Messina Products either conceded liability or for various reasons were dismissed from the proceedings.

The Messinas and Messina Products argued that they section 1301(b)(1) and thus that they could not be held liable for Messina Trucking's withdrawal. On cross-motions for summary judgment, the district court held that Mr. and Mrs. Messina, who owned and leased several residential properties as well as the property from which Messina Trucking operated, were not engaged in a "trade or business" and thus could not be held liable for Messina *Central States, Southeast and Southwest Areas Pension Fund v. Messina Trucking, Inc.*, 821 F.Supp.2d 1000, 1009 (N.D.Ill.2011). The district court found that Messina Products, as a formal business organization whose documents showed that its purpose was to generate profit, was a "trade or business" that could be held liable for Messina Trucking's *Id.* at 1007. The Fund appeals the portion of the judgment in favor of the Messinas, and Messina Products appeals the portion of the judgment in favor of the Fund. We resolve both appeals in favor of the Fund, affirming in part and reversing in part the district court's judgment, and remanding for further 2

***878** I. *Commonly Controlled "Trades or Businesses" under the MPPAA*

Under ERISA, the Pension Benefit Guaranty Corporation, a government corporation, protects covered employees by insuring their benefits against insolvency or termination of their pension funds. Before the 1980s, ERISA's contingent liability provisions gave employers a perverse incentive to withdraw from financially weak multiemployer plans to avoid liability in the event the plan terminated in the future. The MPPAA amended ERISA to discourage such voluntary withdrawals from multiemployer plans by imposing mandatory liability on all withdrawing employers for their proportionate shares 29 U.S.C. § 1381

[1] Not only the withdrawing employer can be held liable. Congress also provided that all "trades or businesses" under "common control" with the withdrawing employer are treated as a single entity for purposes of assessing 29 U.S.C. § 1301(b)(1) *Central States, Southeast and Southwest Areas Pension Fund v. Neiman*, 285 F.3d 587, 594 (7th Cir.2002). Each trade or business found to be under common control is jointly and severally liable for any withdrawal *Central States, Southeast and Southwest Areas Pension Fund v. SCOFBP, LLC*, 668 F.3d 873, 876 (7th Cir.2011) *McDougall v. Pioneer Ranch Ltd. Partnership*, 494 F.3d 571, 574 (7th Cir.2007). The provision's purpose is "to prevent businesses from shirking their ERISA obligations by

Central States, Southeast and Southwest Areas Pension Fund v. White, 258 F.3d 636, 644 (7th Cir.2001) *Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. H.F. Johnson, Inc.*, 830 F.2d 1009, 1013 (9th Cir.1987). Because Mr. and Mrs. Messina and Messina Products conceded that they were under "common control" with Messina Trucking, the only issues here are whether the Messinas and Messina Products were involved in a "trade or business" and accordingly can be held jointly and severally liable for Messina Trucking's

[2]

section 1301(b)(1). To apply the term under the MPPAA, we have adopted the test adopted by the Supreme *Commissioner of Internal Revenue v. Groetzinger*, 480 U.S. 23, 35, 107 S.Ct. 980, 94 L.Ed.2d 25 (1987) *Neiman*, 285 F.3d at 594; *White*, 258 F.3d at 642; *Central States, Southeast and Southwest Areas Pension Fund v. Fulkerson*, 238 F.3d 891, 895 (7th Cir.2001) *Groetzinger* test" requires that for economic activity to be considered the operation of a trade or business the activity must be performed (1) for the primary purpose of income or profit; and (2) with

[3] *Groetzinger* test is to distinguish trades or businesses from passive investments, which cannot form a basis for imputing withdrawal liability section 1301(b)(1) *Central States, Southeast and Southwest Areas Pension Fund v. Personnel, Inc.*, 974 F.2d 789, 794 (7th Cir.1992). The question is whether Mr. and Mrs. Messina and Messina Products should be considered "trades or businesses" under this test, or whether their activities are more akin to passive investments. We conclude that the record shows that they are all "trades or businesses" and can be held liable under

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section 1301(b)(1) for Messina Trucking's withdrawal liability.

II. *Stephen and Florence Messina*

A.

[4] Ordinarily, we review *de novo* a district court's grant of summary judgment in an ERISA case because the issues involved require statutory interpretation and are issues *White,* 258 F.3d at 639–40; *Fulkerson,* 238 F.3d at 894. Yet when the only issue before the district court is the characterization of undisputed subsidiary facts, and where a party does not have the right to a jury trial, we have applied the clearly-erroneous standard of *Pioneer Ranch,* 494 F.3d at 575–77; *Personnel,* 974 F.2d at 792; *Central States, Southeast and Southwest Areas Pension Fund v. Slotky,* 956 F.2d 1369, 1373 (7th Cir.1992)

[5] The Fund argues that its appeal against the Messinas presents pure questions of law and that we should resolve these questions *de novo.* The Messinas contend that the more forgiving clear error standard should govern because there are no disputed facts, only disputed characterizations of those facts. As we explain below, resolution of the issues in this appeal is not a matter of properly characterizing undisputed facts. It is instead a matter of proper interpretation of the statute and our precedents as applied to undisputed facts. Because these are issues of law, *de novo* *Fulkerson,* 238 F.3d at 894.

B. *The Relevant Facts*

When Messina Trucking withdrew from the Fund in October 2007, the Messinas owned at least 80 percent of the stock and ownership interest in each of the Messina entities, including Messina Trucking. Stephen Messina had served as the president of Messina Trucking since its inception in 1955. Florence Messina had served as vice president and secretary since 1964.

Because the ownership, rental, and use of real estate are critical to our decision, we must trace them in some detail. In 1963, Stephen Messina purchased a parcel of real property located at 6386 Auburn Road in Shelby Township, Michigan ("the Auburn Road Property"). Stephen and Florence Messina have been joint owners of the Auburn Road Property since at least 1971. After he purchased the Auburn Road Property, Stephen Messina demolished the existing building and replaced it with a new one. He then constructed a second building and, over time, several additions to the two buildings. Messina Trucking and a couple of other Messina entities operated out of the Auburn Road Property.

Messina Trucking paid rent to the Messinas for its use of the Auburn Road Property for many years, but it stopped paying rent at some point prior to 2005 due to financial difficulties. There was never any written lease agreement between the Messinas and Messina Trucking, but the practice was that the Messinas paid the property taxes on the property, while Messina Trucking paid for property insurance and utilities. All repairs and maintenance on the Auburn Road Property were performed by employees of Messina Trucking. The other Messina entities that operated from the Auburn Road Property never paid any rent to the Messinas to use the property.

***880** Stephen Messina also owned two properties located at 45245 Merrill Road and 45041 Merrill Road in Utica, Michigan (the "Merrill Road Properties"). 45245 Merrill Road adjoins the Auburn Road Property. Mr. Messina testified that he purchased the properties in part because they were adjacent to the Auburn Road Property, and that the additional land allowed him to expand a garage on the Auburn Road Property that was used by Messina Trucking, and to permit Messina Trucking to have additional means of ingress to and egress from its operations.

Stephen Messina also stated that he purchased the Merrill Road Properties to generate rental income. At one time Messina Trucking paid rent for its use of the Merrill Road Properties, but again, it stopped paying rent sometime prior to 2005. Two homes were located on the 45245 Merrill Road property. One of the homes was leased to a Messina Trucking employee and his wife pursuant to a written agreement with Stephen Messina. That employee was able to provide additional security for the Messina Trucking facilities on nights on weekends and to care for the guard dog. The second home on the 45245 Merrill Road property also was leased to a residential tenant. A third home located on the 45041 Merrill Road property was leased pursuant to a written agreement.

Either Stephen Messina or his daughter negotiated the terms of the residential leases for the Merrill Road

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Properties. The rent for the properties was paid on a monthly basis, and either Florence Messina or the Messinas' daughter deposited the rent checks into the Messinas' personal joint bank account. A Messina Trucking employee monitored the rent payments to ensure that they were paid on time. The Messinas paid the property taxes and insurance on the Merrill Road Properties. The tenants paid all other utilities aside from water, which was paid by Messina Trucking. Employees of Messina Trucking took care of the lawns and removed snow at the Merrill Road Properties. The Messina Trucking shop foreman was responsible for maintenance. These Messina Trucking employees were not paid any additional money for their maintenance work on these residential properties owned by Mr. and Mrs. Messina. During the tax years 2005 to 2008, the Messinas reported the rental income from the properties on Schedule E of their federal tax returns, and they deducted expenses for insurance, professional fees, repairs, taxes, and utilities from the rental income.

C.

[6] The Fund does not seek to hold Mr. and Mrs. Messina liable merely because of their ownership of or

White, 258 F.3d at 640 n. 3; *Fulkerson,* 238 F.3d at 896 ("Given the prevalence of investing, permitting the holding of investments ... without more to be considered regular and continuous activity would eviscerate the § 1301(b)(1) *Slotky,* 956 F.2d at 1374 ("[T]he purpose of limiting controlled group membership to persons engaged in trades or businesses is to protect the owners of corporations from having to dig into their pockets to make good the withdrawal liability of their corporations."). Instead, the Fund seeks to hold the Messinas liable for operating as a "trade or business" as commercial and residential landlords.

The district court found that the Messinas' rental activities did not amount to a "trade or business" under the *Groetzinger* test. Considering only the sporadic rental activity undertaken by the Messinas themselves, the district court ***881** concluded that their rental activity was not sufficiently continuous and regular to be a trade or business rather than an investment. In rendering its decision, however, the district court did *Central States, Southeast and Southwest Areas Pension Fund v. SCOFBP, LLC,* 668 F.3d 873 (7th Cir.2011), issued after the district court's *SCOFBP,* and particularly its teaching that renting property to a withdrawing employer is "categorically" a trade or business, the district court did not consider properly the legal implications of the facts that the Messinas permitted Messina Trucking, their closely-held corporation and the withdrawing employer, to operate on the property they owned without a formal written lease and without paying rent for several years. *SCOFBP,* 668 F.3d at 879. The district court also did not account properly for the property maintenance activities of the Messina Trucking employees, which, without a formal agreement, must be imputed to the Messinas. We therefore reverse the judgment in favor of Mr. and Mrs. Messina.

Fulkerson. *Messina Trucking,* 821 F.Supp.2d at 1007–09, *Fulkerson,* 238 F.3d 891.[3] The Fulkersons were the only shareholders of Holmes Freight Lines, Inc., a trucking company. They also owned three parcels of land that they leased to Action Express, Inc., a different trucking company that was owned by their sons. Holmes Freight and Action Express were maintained as separate corporations; the Fulkersons owned no interest in and were not involved in the management of Action Express. The written leases under which Action Express leased the Fulkersons' property were so-called "triple net leases" under which the tenant, Action Express, was responsible for most obligations, including maintenance, operating expenses, real estate taxes, and insurance. All the Fulkersons did was collect rent payments and make mortgage payments. When Holmes Freight ceased operations and withdrew from the Fund, the Fund argued that the Fulkersons' leasing activities constituted a "trade or business" and that the Fulkersons could be held liable *Fulkerson,* 238 F.3d at 893–94. We held otherwise, finding that the Fulkersons' leasing activity did not automatically *Groetzinger* test, and remanded for further development of the record. We explained that, "possession of a property, be it stocks, commodities, leases, or something else, without more is the hallmark of an investment. Thus, mere ownership of a property (as opposed to activities taken with regard to the property) cannot be considered in determining *Fulkerson,* 238 F.3d at 895–96. Once we removed from consideration the fact that the Fulkersons owned the leased property, all that remained was the fact that Tom Fulkerson

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spent approximately five hours a year dealing with the leases or the leased properties. *882 This, we found,

Groetzinger that the activity be regular or continuous to *Id.* at 896.

White, 258 F.3d 636, that by renting out two residential apartments above their garage, the Whites had not engaged in a "trade or business" sufficient to impose withdrawal liability on them personally when the trucking company owned by Gary White went bankrupt and withdrew from the Fund. Importantly, we found that there was no possibility that the Whites' rental activity was being used to dissipate or fractionalize the withdrawing employer's assets to avoid withdrawal *Id.* at 644. Although the Whites realized some income and tax benefits from the rentals, an important purpose of their ownership of the rental apartments was the additional security the tenants provided for the Whites' own home. The existence of the apartments had not been a deciding factor in the Whites' decision to purchase their home, and though they performed some maintenance and upkeep on the property, the apartments were appendages of their primary residence and such normal upkeep benefitted them personally. We found that their actions were routine for any homeowner and were *White*, 258 F.3d at 643.

Fulkerson *White* are easily distinguishable from the rental activities conducted by the Messinas. Simply put, neither the Fulkersons nor the Whites rented property to the withdrawing employer itself. The Fulkersons rented property to their sons' separately owned and managed trucking company; the Whites rented their garage

[7] The Messinas, though, rented their property to their own, closely-held company—Messina Trucking, the withdrawing employer. They also leased residences to individual tenants, but that activity was incidental to

SCOFBP, we stated explicitly that "leasing property to a withdrawing employer is a 'trade or business' 668 F.3d at 878, 879 ("Furthermore, we have held that leasing property to a withdrawing employer itself is categorically a *Central States, Southeast and Southwest Areas Pension Fund v. Ditello*, 974 F.2d 887, 890 (7th Cir.1992) *Slotky*, 956 F.2d at 1374 (rejecting argument that property owner, who was majority shareholder of withdrawing employer that was operating on the property and sporadically paying rent, was not engaged in a "trade or business" but was merely holding property for withdrawing employer as a trustee). The MPPAA does not impose liability for a withdrawing employer on purely passive investment entities, including those that invest in real estate. But where the real estate is rented to or used by the withdrawing employer and there is common ownership, it is improbable that the rental activity could be deemed a truly passive investment. In such situations, the likelihood that a true purpose and effect of the "lease" is to split up the withdrawing employer's assets is self-evident. We see no reason why that principle should not apply here.

SCOFBP or its implications. They also fail to cite any appellate authority, and we are aware of none, holding that an individual under common control with a withdrawing employer and who leases property to the withdrawing employer is *not* operating a trade or business. Without authority in support of their position, the Messinas *SCOFBP*, arguing *883 that it is "inapplicable" and "fails to account for the state of the law in this circuit on such issue." In holding that leasing property to a withdrawing employer is *SCOFBP* *Ditello.* *Ditello*, *SCOFBP* by extension, are not good law because instead of relying *Groetzinger* and its two-part test, they relied instead on the underlying purpose of the statute—to prevent the fractionalization of assets.

Ditello was

Groetzinger test is the test for determining whether entities section 1301(b)(1). There *White*, 258 F.3d at 642 *Groetzinger* test is "appropriate" for determining whether an activity is a section 1301(b)(1) *Fulkerson*, 238 F.3d at 895 *Groetzinger* section 1301(b)(1); test "comports with the common meaning of trade or business" and thus has broad applicability).

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Ditello *Groetzinger,* its reasoning [4] Its analysis, which was section 1301(b)(1), is *Groetzinger* *SCOFBP,* in turn, remains sound. Its conclusion that an owner's or related entity's leasing of property to a withdrawing employer was *Groetzinger* section 1301(b)(1).

White, we said that there was no possibility that the Whites' rental activity was being used to dissipate or fractionalize the withdrawing employer's assets to 258 F.3d at 644. Here, we must draw the opposite conclusion. Stephen Messina purchased the Auburn Road Property and then the Merrill Road Properties for the benefit of Messina Trucking's operations. There was no formal lease (triple-net or otherwise). Without formal documentation, the inescapable conclusion is that the Messinas' leasing activity was simply an extension of the business operations of Messina Trucking, the withdrawing employer, and was a means to fractionalize Messina Trucking's assets. One way or the other, the Messinas profited from the leasing arrangement. While Messina Trucking was paying rent, they profited directly from the rent payments. When Messina Trucking ceased paying rent, rather than evict their tenant, the Messinas continued to receive the tax benefits of their arrangement. They deducted expenses such as insurance, professional fees, repairs, taxes, and utilities from the rental income. And as owners of Messina Trucking, they profited from their decision as landlords to permit Messina ***884** Trucking to operate rent-free. In other words, they engaged in their leasing activity "for the primary purpose of income or profit," satisfying the *Groetzinger*

[8] Real estate activity unrelated to the business of the withdrawing employer also can be "for the primary purpose of income or profit" where that activity "increases equity, appreciates value, and generates tax deductions that reduce the overall tax burden," even if the activity *SCOFBP,* 668 F.3d at 878, *Personnel,* 974 F.2d at 795–96. Accordingly, the fact that the Messinas did not rent exclusively to Messina Trucking, the withdrawing employer, but also incidentally rented a few residences located on the Merrill Road Properties, does not change our analysis.

Groetzinger test, "continuity and regularity," is also satisfied. We reject the Messinas' contention that the acts undertaken by the Messina Trucking employees to maintain the Messinas' property cannot be imputed to the Messinas. There was no formal lease in place that would have imposed a duty or any other legal obligation on the Messina Trucking employees to take on those responsibilities. Without one, the Messina Trucking employees who maintained the property could not have been doing so for the benefit of Messina Trucking. They could have been acting only at the behest of and for the benefit of the Messinas, who owned the business and the property. The employees' activities as agents of the Messinas should be imputed to the Messinas. When considering the actions of the Messinas and their agents in total, there is no question that their leasing activities were continuous and regular.

In sum, it is clear that the Messinas' rental activities *Groetzinger* test and were a "trade or business." We therefore reverse the district court's judgment in favor of Stephen and Florence Messina.

III. *Messina Products*

A. *Standard of Review*

We turn now to Messina Products' appeal from the district court's determination that it was operating as a "trade or business." Messina Products asserts that our review of its appeal should be [5] However, because the only issue before the district court was the characterization of undisputed subsidiary facts and no party has the right to a jury trial, we apply the clearly erroneous standard of *Pioneer Ranch,* 494 F.3d at 575; *Personnel,* 974 F.2d at 792; *Slotky,* 956 F.2d at 1373. Our resolution of Messina Products' appeal would remain the same, though, even if we reviewed these issues *de novo.*

B. *The Relevant Facts*

Messina Products was a Michigan limited liability company formed on August 7, ***885** 1998, and commonly owned with Messina Trucking. Stephen Messina was the president of Messina Products, while Florence was the vice-president and secretary. The company was governed by an operating agreement stating that the "Members have adopted a business plan for the development of properties and for the production, sale and marketing

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of gravel for road, subdivision, City and community development, both wholesale and retail."

Vito Palazzolo was the controller for Messina Trucking. He had access to and kept records not only for Messina Trucking but also for the other Messina Entities, including Messina Products. He testified that Messina Products had no employees and owned no real estate. It never sold any goods or performed any services. Its sole asset was a 50% partnership interest in Messina Lombardo, LLC, a company that owned and rented properties. In turn, Messina Lombardo had no employees and was run by Lombardo Management Co. Neither the Messinas nor Messina Products had any ownership interest in Lombardo Management. Every year, Messina Products received a K–1 tax form for LLC income from Messina Lombardo. Palazzolo reviewed the K–1 and forwarded it to the outside tax preparer. Messina Products did not require any additional bookkeeping. In its federal tax returns, Messina Products reported "trade or business" income and stated that its principal business activity was "real estate rental."

C.

[9] [10] Messina Products argued before the district court that it was a passive investment vehicle and thus *Groetzinger* test. *Groetzinger,* the economic activity in question must be performed (1) for the primary purpose of income or profit and (2) *Groetzinger,* 480 U.S. at 35, 107 S.Ct. 980. In deciding MPPAA cases involving withdrawal liability, we have determined certain factors to be particularly relevant to this analysis, including the defendant's intent in creating the enterprise, how the enterprise is treated for tax purposes, and its legal form. See, *Pioneer Ranch,* 494 F.3d at 577–78; *Fulkerson,* 238 F.3d at 895; *Personnel,* 974 F.2d at 795. The district court considered these factors and found that Messina Products had continually maintained and operated a real estate rental company. It relied on the fact that Messina Products was formally organized as a business enterprise and had expressed its business purpose in its operating statement and in its tax filings. The district court concluded that Messina Products operated as a "trade or *Groetzinger* test and thus could be held liable for Messina Trucking's withdrawal liability.

Messina Products disagrees, arguing that it had no employees, owned no real estate or assets aside from its interest in Messina Lombardo, and did not engage in regular business activity. It attempts to characterize itself as a passive investment vehicle, akin to the passive, triple- *Fulkerson,* 238 F.3d at 893, 896, and the residential rental activity we *White,* 258 F.3d at 643–44. We disagree.

We have written that it is "highly unlikely" that a formal for-profit business organization would not qualify as a *Groetzinger* test, but our circuit has not adopted a *per se* rule that formal, for-profit entities

SCOFBP, 668 F.3d at 878. Nevertheless, we explained *Pioneer Ranch* that "a defendant's stated intention of forming a business is highly relevant, because it constitutes ***886** *Pioneer Ranch,* 494 F.3d at 577–78. Accordingly, the district court appropriately took note of the Messina Products operating agreement stating that the "Members have adopted a business plan for the development of properties and for the production, sale and marketing of gravel for road, subdivision, City and community development, *Pioneer Ranch,* and as the district court did here, we find this evidence *Messina Trucking,* 821 F.Supp.2d at 1006, *Pioneer Ranch,* 494 F.3d at 577–78. The fact that Messina Products filed a Form 1065 tax return for "trade or business income" and listed on that return that its principal business activity was "real estate rental" is also "strong evidence" that Messina Products was *Personnel,* 974 F.2d at 795. And the activities, although minimal, were conducted

Groetzinger test, particularly where they were done under the auspices of a formal, for-profit organization.

We reject Messina Products' argument that we should not consider the operating agreement because it was written several years before Messina Trucking's withdrawal. *IUE AFL–CIO Pension Fund v. Barker & Williamson, Inc.,* 788 F.2d 118, 125–126 (3d Cir.1986), but that case decided a different issue, holding that whether organizations are under "common control" is determined as of the date of the withdrawal. Also, Messina Products' argument *Groetzinger* analysis, we routinely consult an entity's documentary

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evidence and other activities that necessarily predate the withdrawal. See, *Pioneer Ranch,* 494 F.3d at 577–78 (relying on decade-old partnership agreement and

White, 258 F.3d at 643–44 (considering 32 years of *Fulkerson,* 238 F.3d at 895–97 (considering defendant's leasing activities over ten years).

If the evidence were otherwise—if, for example, Messina Products had amended its operating agreement to reflect an intent to discontinue business operations and to operate as a passive investment vehicle, or had filed tax documents suggesting that it had only an investment purpose or that it had earned only investment income —we could not ignore such evidence simply because it preceded the withdrawal. In this case, however, Messina Products' operating agreement was never amended in a manner that could suggest that Messina Products had ceased its business operations and was instead an investment vehicle, and it consistently filed its tax returns asserting a business purpose and listing business income. It was entirely appropriate for the district court to take these documents at face value. With regard to Messina Products, therefore, we find no error and affirm the district court.

The judgment of the district court is affirmed with regard to Messina Products and reversed with regard to Stephen and Florence Messina, and the case is remanded for

All Citations

706 F.3d 874, 55 Employee Benefits Cas. 2196, Pens. Plan Guide (CCH) P 24013G

Footnotes

1 Messina Trucking initiated arbitration to challenge the merits of its withdrawal liability. See 29 U.S.C. § 1401(a)(1). That arbitration is pending.

2 Mr. and Mrs. Messina have argued that, in the event of a reversal of the judgment in their favor, the arbitrator must decide whether they were in the control group at the time of the withdrawal. See *Doherty v. Teamsters Pension Trust Fund of Philadelphia,* 16 F.3d 1386, 1390 (3d Cir.1994); *Central States, Southeast and Southwest Areas Pension Fund v. Slotky,* 956 F.2d 1369, 1373 (7th Cir.1992). Because the district court found that the Messinas were not operating a "trade or business" and thus were not employers within the control group and subject to liability, it did not address this question. On remand, the district court should address this issue of arbitrability in the first instance.

3 The district court also relied heavily on *Central States, Southeast and Southwest Areas Pension Fund v. Nagy Ready Mix, Inc.,* 2011 WL 3021524 (N.D.Ill. July 22, 2011). Nagy leased his property to Nagy Ready Mix, a closely-held corporation, through a formal triple-net lease under which Nagy Ready Mix was responsible for upkeep of the property. The district court held that Nagy's rental activity more closely resembled investment activity than "trade or business" activity, and found that he could not be held liable for Nagy Ready Mix's withdrawal liability under section 1301(b)(1). See 2011 WL 3021524, at *4–6. The Fund's appeal from the district court's decision in *Nagy* is pending before this court in No. 11–3055. In the meantime, unlike the district court, we do not give *Nagy* persuasive weight.

4 Another portion of *Ditello* has been abrogated. *Ditello* and *Personnel* were decided within two weeks of each other, and diverged on the question of whether withdrawal liability could be imposed where there was no economic relationship between the withdrawing company and unrelated leasing activities. In *Personnel,* we held that for businesses to be considered under "common control," the businesses did not have to be economically related. Instead, to establish withdrawal liability, the Fund needed to prove only that the defendants engaged in a trade or business. See 974 F.2d at 793. In *Ditello,* however, we stated, "this circuit has never squarely faced the issue of whether businesses must be economically related to be considered members of a controlled group of trades or business under section 1301(b)(1), and it remains an open question." 974 F.2d at 890. This discrepancy in our law has been resolved, and is no longer an open question in our circuit. See *Fulkerson,* 238 F.3d at 895 n. 1 (confirming that no economic nexus is required to impose liability).

5 Specifically, Messina Products contends that the district court based its determination on a mistaken finding of fact that Messina Products had employees when it actually did not. Though the district court mentioned Messina Products' supposed employees in its denial of Messina Products' motion to alter or amend, the district court did not rely on this point in reaching its original decision. Even if it had, the only dispute is over the characterization of undisputed facts. (There is no dispute that the Messinas were corporate officers for Messina Products and that an employee of Messina

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Trucking handled the bookkeeping and administrative work for Messina Products.) Messina Products also contends that the district court made a legal error in considering its statement of business intent, which predates Messina Trucking's withdrawal from the Fund by several years. As explained in the text, we find no error on that point, legal or otherwise, and clear error review is appropriate.

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