

# WITHDRAWAL LIABILITY in the 21<sup>st</sup> CENTURY

A Whole New Ballgame



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*Presented by.*

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# MULTI-EMPLOYER PENSION PLAN WITHDRAWAL LIABILITY GOING INTO THE 21<sup>ST</sup> CENTURY

## I. THE SOURCE OF THE LAW

A. The Act . The Multi-employer Pension Plan Amendments Act of 1980 (“MPPAA”) (Pub. Law 96-364) amended the Employee Retirement Income Security Act of 1974 (ERISA), to impose liability for a share of the unfunded vested benefits of a multi-employer pension plan on employers who withdraw from the plan. Most recently the law was amended by the Pension Protection Act of 2006 (PPA of 2006) (Pub. Law 109-280).

### B. Where to find the law.

1. ERISA and the MPPAA are codified at 29 U.S.C. §1001, et seq. The principal location of the withdrawal liability provisions of the law are located in the US Code at 29 U.S.C. §1381 – §1453.

2. The text of the PPA of 2006 (Pub. Law 109-280) can be found at the Thomas website at:

[http://thomas.loc.gov/cgi-  
bin/bdquery/z?d109:HR00004:TOM:/bss/d109query.html](http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR00004:TOM:/bss/d109query.html)

*(Note: It is very lengthy – almost 400 pages.)*

3. Regulations – 29 C.F.R. §4000, et seq. There are no regulations yet on the PPA of 2006.

4. A good place to find information is at the PBGC website: [www.pbgc.gov](http://www.pbgc.gov) The “Practitioners” page contains more technical information and has links to the text of the code and the regulations.

C. The purpose of the MPPAA in creating withdrawal liability was to counter the threat to the viability of under funded multi-employer pension funds from voluntary employer withdrawals from the plans. MPPAA, Section 3; Borntrager v. Central States, Southeast and Southwest Areas Pension Fund, 425 F.3d 1087, 1089 (8<sup>th</sup> Cir. 2005).

## II. OVERVIEW OF THE LAW OF WITHDRAWAL LIABILITY

A. General. Under the MPPAA, when an employer withdraws from a multi-employer pension plan which has unfunded benefits, it generally is liable to the fund for a share of the unfunded vested benefits in amount to be determined under the Act.

### B. Complete Withdrawal / Partial Withdrawal

1. A complete withdrawal from a multi-employer plan occurs when an employer:

a) permanently ceases to have an obligation to contribute under the plan, or

b) permanently ceases all covered operations under the plan.

The date of a complete withdrawal is either the date of the cessation of the obligation to contribute or the cessation of covered operations. 29 U.S.C. §1383(a)

2. A partial withdrawal from a multi-employer plan occurs on the last day of a plan year in which there is either:

a) a seventy percent (70%) decline in contribution base units; or

b) a partial cessation of the employer's contribution obligation.

Under the PPA of 2006, contracting out of a bargaining unit to a company controlled by the employer may result in a partial withdrawal.

3. A non-construction industry plan can be amended to permit a "six-year free look", but both the employer and the plan each must meet several requirements.

[NOTE: UNDER THE PPA OF 2006, EFFECTIVE JANUARY 1, 2007, CONSTRUCTION INDUSTRY PLANS CAN ADOPT THE SIX-YEAR FREE LOOK.]

a) The employer:

i. had an obligation to contribute to the plan after September 26, 1980;

- ii. had an obligation to contribute to the plan for no more than the lesser of:
  - (a) six consecutive plan years preceding the date on which the employer withdraws or
  - (b) the number of years required for vesting under the plan.
- iii. was required to make contributions to the plan for each such plan year in an amount equal to less than 2 percent of the sum of all employer contributions made to the plan for each such year; and
- iv. Has never previously avoided withdrawal liability because of the application of this section with respect to the plan.

b) The plan must:

- i. not be a plan which primarily covers employees in the building and construction industry;
- ii. be amended to provide that the free look applies;
- iii. provide or be amended to provide for the reduction of benefits under Section 411(a)(3)(E) of the Internal Revenue Code applies with respect to employees of the employer; and,

iv. the ratio of plan assets to benefit payments must be 8:1 for the plan year preceding the first plan year in which the employer was required to contribute.

4. An employer is not considered to have withdrawn solely because it suspends contributions under a plan during a labor dispute with its employees. 29 U.S.C. §1398.

### C. Calculating Withdrawal Liability

1. Generally, withdrawal liability is the employer's proportional share of the pension plan's unfunded vested benefits (UVBs).

2. Methods of calculation. The statute provides several methods of calculation. It is important to determine which method the pension plan uses because the amount of withdrawal liability can vary depending on the method used.

a) Presumptive method – this method must be used by building and construction industry pension plans.

[UNDER THE PPA OF 2006, CONSTRUCTION INDUSTRY PLANS CAN ADOPT OTHER METHODS, EFFECTIVE JANUARY 1, 2007.]

Under this method, UVBs for the last 20 years are amortized and allocated to employers based on the percentage of the employer's contributions to the total amount of contributions made by all employers to the pension plan (minus contributions made by employers who withdrew from the plan in that year in

which the change arose), calculated for the 5 plan years immediately prior to withdrawal. 29 U.S.C. §1391(b).

- b) Rolling-Five method. A simplified version of the presumptive method. 29 U.S.C. §1391(c)(2).
- c) Direct Attribution method. UVBs are allocated based directly on the liabilities attributable to the employer's current and former employees and on the assets allocated to the employer. In addition, the employer is allocated a share of the UVBs of employers who previously withdrew without a withdrawal liability assessment. 29 U.S.C. §1391(c)(4).

### 3. Reductions or Limitations on the amount of withdrawal liability.

- a) The *de minimus* rule functions as a deduction; the amount depends on whether the plan has adopted an alternate rule and on the plan's amount of UVBs, but generally the deduction is \$50,000, reduced dollar for dollar for any amount of withdrawal liability over \$100,000. Pension plans can be amended to adopt an alternative *de minimus* rule. 29 U.S.C. §1389.
- b) For partial withdrawals, the liability is reduced proportionally based the employer's contributions after withdrawal. 29 U.S.C. §1386.



c) In the case of a withdrawal due to a sale of all assets, withdrawal liability may be limited based on the liquidation value of the employer after the sale of assets or on the UVBs attributable to employees of the employer. 29 U.S.C. §1405. \*\*\* Although the gist of this limitation remains the same, this provision was updated and amended under the PPA of 2006\*\*\*

#### D. Withdrawal Liability Payment

1. Payments are amortized based on the employer's contributions to the plan, not based on a typical loan amortization schedule. 29 U.S.C. §1399(c).

2. Payments begin within 60 days after the pension plan's demand for payment. 29 U.S.C. §1399(c)(2). Generally, payments must be made even if the employer challenges the assessment of withdrawal liability.

3. Payments are limited to a 20-year period, which may act to limit the amount of withdrawal liability to be paid. 29 U.S.C. §1399(c)(1)(B).

4. Upon a default in making a payment, which is not cured within 60 days of written notice from the plan, the plan may accelerate the debt plus interest accrued to date. 29 U.S.C. §1399(c)(5).

5. Withdrawal liability is treated like a delinquent contribution and can be collected by litigation brought in the federal courts. 29

U.S.C. §1451(b). Thus, the liquidated damages, interest, attorneys fees and costs provisions of 29 U.S.C. §1132(g)(2) apply. Connors v. Brady-Cline Coal Co., 668 F.Supp. 5 (D. D.C. 1987).

E. Disputes regarding withdrawal liability.

1. The employer must request review of the plan sponsor's determination of withdrawal liability within 90 days of receipt of the notice of withdrawal liability from the plan.

2. Disputes are determined by arbitration.

a) Again, it is the employer's obligation to demand arbitration in a timely manner. The time limit depends on whether the plan responds to the employer's request for review, so it is critical to keep track of these deadlines, but the approximate time limit is 6 months from the date the employer's request for review is filed.

b) The statute and regulations contain other procedural requirements for the arbitration process that must be followed, so it is important to act promptly. 29 U.S.C. §1401(a); 29 C.F.R. §4221.

c) The plan's determinations are presumed correct, and the burden is on the employer to overcome that presumption by a preponderance of the evidence. 29 U.S.C. §1401(a); 29 C.F.R. §4221.

d) Arbitration decisions are enforceable in federal court and the factual findings of the arbitrator are presumed correct. 29 U.S.C. §1401(b),(c).

3. An employer must continue to make withdrawal liability payments while the dispute and arbitration are pending. 29 U.S.C. §1401(d)

#### F. Mass Withdrawal Liability

1. A multi-employer pension plan can terminate due to the “mass withdrawal” of all contributing employers. 29 U.S.C. §1341a(a)(2). A “mass withdrawal” means

- a) the withdrawal of every employer from the plan,
- b) the cessation of the obligation of all employers to contribute under the plan, or
- c) the withdrawal of substantially all employers pursuant to an agreement or arrangement to withdraw.

29 C.F.R. §4001.2; 29 U.S.C. §1341a(a)(2).

2. A plan which terminates due to a mass withdrawal is subject to a number of notice and substantive obligations, including possible benefit reduction or suspension. 29 U.S.C. §1441; 29 C.F.R. §§4041A and 4268.

3. Employers involved in a mass withdrawal not only have to pay the “initial” withdrawal liability as outlined above, but also must pay the amounts reduced under the *de minimus* and 20-year limitation provisions. 29 U.S.C. §§1389(c), 1399(c)(1)(D); 29 C.F.R. §§4219.11, 4219.12.

4. Further, employers who withdraw within three years of a mass withdrawal are presumed to have withdrawn pursuant to an agreement or arrangement to withdraw and may be liable for reallocation liability. This presumption may be rebutted by a preponderance of the evidence. 29 U.S.C. §§1389(d), 1399(c)(1)(D); 29 C.F.R. §4219.12(g). [Reallocation liability is an amount of UVBs which are not otherwise collected or collectible by the pension plan, such as amounts uncollectible due to bankruptcy of employers.]

5. From the mass withdrawal or termination of the plan due to a mass withdrawal, a sequence of deadlines for computing and giving notice of liability occur under the regulations (29 C.F.R. §4219). This can be a lengthy period of time, extending over one year after the mass withdrawal occurs.

6. Any additional amounts owed due to a mass withdrawal are either added into the employer’s withdrawal liability payment schedule or, if the employer has no withdrawal liability payments, a new payment schedule is established in the same manner as an initial withdrawal liability payment schedule. 29 C.F.R. §4219.16(f).

7. The same review and arbitration procedures for withdrawal liability, as described above, apply to mass withdrawal liability determinations. 29 C.F.R. §4219.16(g). If the plan sponsor later

determines that a mass withdrawal has not occurred, then withdrawal liability payments and interest must be refunded to employers. 29 C.F.R. 4219.16(i).

### **III. THE PENSION PROTECTION ACT OF 2006.**

A. Signed into law by President Bush on August 17, 2006.

B. Probably the most significant pension legislation since the adoption of ERISA in 1974; changes not only to the law regarding multi-employer pension plans, but also single employer pension plans and individuals' pension options. The Act is huge, almost 400 pages.

C. Some of the provisions pertinent to multi-employer pension plans and withdrawal liability

1. Many changes and updates to pension plan law.

2. Most critical for employers, the PPA modified the funding provisions of ERISA for pension plans, including provisions to shore up ailing defined benefit pension plans. The additional/corrective funding provisions are effective through 2014.

a) New funding rules begin the first plan year beginning after 2007, with a phased transition from 90 percent funding to 100 percent funding by 2011.

- b) A pension fund can obtain an automatic 5 year amortization extension, plus 5 additional years at the discretion of the IRS, for unfunded past service liability, investment loss, or experience loss.
  
- c) The Act creates three status groups for Funds: funds which meet the funding standards; “endangered” or “seriously endangered” funds; and, “critical” funds. The Fund’s actuary must certify the Fund’s status within 90 days of the start of each plan year.
  
- d) Endangered status – either a funding percentage of 80% or less or facing a funding deficiency within the next six years. Seriously endangered status – both conditions.  
Effects:
  - i. The Fund must adopt a funding improvement plan to increase its funding over 10 years (15 if seriously endangered).
  
  - ii. The Fund must provide the bargaining parties with two schedules to pick from for the next CBA:
    - (a) One to maintain the current contributions but reduce benefits (the default schedule).
  
    - (b) One to maintain benefits and increase contributions.

- (c) If the parties don't select a schedule within 180 days after the contract expires (or upon impasse) the Fund must implement the default schedule.
- iii. Generally, there can be no plan changes or benefit increases that increase the fund's benefit obligations.
- iv. The Fund cannot accept a CBA or participation agreement that provides for
  - (a) a reduction in the level of contributions for any participants;
  - (b) a suspension of contributions with respect to any period of service, or
  - (c) any new direct or indirect exclusion of younger or newly hired employees from plan participation.
- v. Fines or excise taxes can be assessed against Trustees that don't comply with the funding improvement plan and employers that don't make the required contributions under a default schedule.
- e) Critical Status – a funding percentage of 65% or less or projected to have a funding deficiency or cash-flow crisis within three to six years. The effects are the same as being endangered, plus:

- i. Fund must adopt a “rehabilitation” plan to emerge from critical status in 10 years.
  - ii. Within 30 days of receiving notice from the Fund, the employer must pay a 5% surcharge on contributions (10% after the initial year) until the effective date of a CBA in which the parties adopt one of the Fund’s contribution schedules.
  - iii. Prospective benefit reductions are permitted for “adjustable benefits”, such as full early retirement, post-retirement death benefits, disability benefits not in pay status, or 60-month guarantees.
  - iv. Future benefit accrual rates can be reduced, but not to less than 1 percent of contributions.
- f) An employer can file suit to compel a plan in endangered or critical status to adopt, update, or comply with a funding improvement or rehabilitation plan.

### 3. Withdrawal liability changes (generally take effect upon enactment)

- a) Partial withdrawal for contracting out work. If an employer permanently ceases to have an obligation to contribute under one or more of its collective bargaining agreements, but not all of its CBAs, under which the employer is obligated to contribute, but the employer transfers such work covered by the CBA to an entity or



entities owned or controlled by the employer, a partial withdrawal occurs.

- b) Building and construction industry pension plans can now adopt the six-year free look provision and can now use methods of calculating withdrawal liability other than the presumptive method (effective January 1, 2007).
- c) Surcharges are disregarded in determining an employer's withdrawal liability (except for purposes of determining the unfunded vested benefits attributable to an employer under the direct attribution method of calculation)
- d) Benefit reductions are disregarded in computing an employer's withdrawal liability.
- e) Other more technical amendments:
  - i. The sale of assets limitation of 29 U.S.C. §1405 (a) is amended – the liquidation values of the limitation table are increased and language changed to refer to the direct attribution method of calculation in allocating the UVBs attributable to employees of the employer.
  - ii. A special rule for Funds imposing withdrawal liability and disregarding transactions more than five years ago is amended to benefit small employers and to add procedures and bonding to protect pension funds.

iii. The anti-discrimination provision of 29 U.S.C. §1140 is amended to make it unlawful for a multi-employer plan, the plan sponsor or any other person to discriminate against any contributing employer for exercising rights under ERISA or for giving information or testifying in an inquiry or proceedings relating to ERISA before Congress. The provision is intended to close a loophole in the existing whistleblower protections.

#### **IV. SPECIAL ISSUES CONCERNING WITHDRAWAL LIABILITY**

##### **A. Calculation of the amount of withdrawal liability.**

1. The statute permits the employer to request information from the Pension Plan. 29 U.S.C. §1401(e).

2. The key to the amount of withdrawal liability is the amount of UVBs the Pension Plan has.

a) Unfunded vested benefits are the value of the nonforfeitable benefits under the plan, minus the value of the assets of the plan. 29 U.S.C. §1393(c).

b) The amount of UVBs are dependent upon “hidden” factors such as the mortality rates and interest rates used by the Fund’s actuaries; these factors can change without any knowledge by the contributing employers and can change the withdrawal liability of employers drastically.

- c) The statute gives the Plan and its actuaries a great deal of leeway in setting and relying on these actuarial assumptions. 29 U.S.C. §1393(a),(b).

## B. Special Rules for the Building and Construction Industry:

1. Withdrawal. For employers who employ and pension plans with employees /participants primarily in the building and construction industry, the definitions of complete withdrawal and partial withdrawal are modified:

a) Generally, a construction industry employer will be permitted to withdraw from a plan without incurring any liability, unless it continues to perform work in the covered area of the sort performed by the covered employees.

i. A complete withdrawal occurs when an employer ceases to have an obligation to contribute under the plan, and the employer either

(a) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

(b) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

29 U.S.C. §1383(b)(2)

ii. A partial withdrawal occurs if the employer's obligation to contribute under the plan continues only for an insubstantial portion of the potentially covered work which the employer performs in the craft and area jurisdiction of the collective bargaining agreement.. 29 U.S.C. §1388(d)(1).

2. A construction industry pension plan must use the "presumptive" method of calculation. \*\*\*This is changed under the PPA of 2006 – construction industry pension plans can adopt other methods of calculation.\*\*\* (Non-construction industry plans can be amended to apply the presumptive method to employers with an obligation to contribute for work performed in the building and construction industry.)

### C. Special rules for trucking industry plans.

1. A limited exemption applies to plans in which substantially all the contributions are made by employers in the long and short-haul trucking industry, the household moving industry, or the public warehousing industry.

2. Withdrawal: an employer primarily engaged in such work who ceases to perform work within the geographical area covered by the plan will be considered to have completely withdrawn from the plan only if the employer permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan, and either:

a) The PBGC determines that the cessation has caused substantial damage to the plan's contribution base, or

b) The employer fails to post a bond or put an amount in escrow equal to fifty percent of its potential withdrawal liability.

[NOTE: If, after the employer posts the bond or escrow, the PBGC determines that the employer's cessation has substantially damaged the plan, the entire bond or escrow is to be paid to the plan. In such case, the employer will be considered to have withdrawn from the plan on the date that the cessation occurred and the employer will be liable for the remainder of the withdrawal liability in accordance with the usual withdrawal liability rules. In determining whether substantial damage has been done to the plan, the PBGC will consider the employer's cessation in the aggregate with any cessations by other employers. The PBGC has 60 months to make its determination; otherwise, the bond will be cancelled or the escrow returned, and the employer will have no further liability.

29 U.S.C. §1383(d).]

3. It is important to note that the trucking industry exception does not automatically apply to every plan covering employees in the trucking industry. For example, the Teamsters Central States, Southeast and Southwest Areas Pension Fund is not considered to be a trucking industry plan to which the special rules apply.

Therefore, an employer must check with the particular pension fund under which its trucking or warehouse employees are covered to determine whether the trucking industry rules are applicable to such pension fund.

D. A pension plan's governing documents and policies are important in withdrawal liability situations. Thus, it is critical to get and review those documents. A good example of this is the "Adverse Selection" policy of the Central States Pension Fund.

1. In November 1990, the Fund issued a "Special Bulletin" 90-7 to "emphasize" the policy of the Trustees which prohibits the Pension Fund from participating in collective bargaining arrangements which encourage adverse selection. This policy capitalizes on language in the Plan's trust agreement which permits the Trustees to reject any collective bargaining agreement and all contributions from an employer whenever the Trustees:

"determine either that the agreement is unlawful and/or inconsistent with any rule or requirement for participation by Employers in the Fund and/or that the Employer is engaged in one or more practices or arrangements that threaten to cause economic harm to, and/or impairment of the actuarial soundness of, the Fund (including but not limited to any arrangement in which the Employer is obligated to make contributions to the Trust Fund on behalf of some but not all of the Employer's bargaining unit employees, and any arrangement in which the Employer is obligated to make contributions to the

Trust Fund at different contribution rates for different groups of the Employer's bargaining unit employees.)”

#### Article III, Section 1, Central States Pension Trust Agreement

2. According to the bulletin, the Trustees have the authority to terminate the continued participation in the Pension Fund of an employer whose collective bargaining agreement results in “adverse selection”. Such termination causes a withdrawal to occur because the employer no longer has an obligation to contribute to the Fund; a withdrawal liability assessment follows such a termination.

3. What is “adverse selection”, according to the Fund?

- a) Contributing at different rates on behalf employees who perform the same type of work;
- b) Contributing on behalf of some employees and not others who perform the same type of work;
- c) Covering only certain specified individuals instead of all employees in a classification of employment, such as only covering older, more senior employees;
- d) Classifying as part-time, casual, or temporary employees who are in practice full-time.

4. Purpose of the rule: prevent unions and employers from limiting contributions to the Pension Fund, usually for the youngest employees or those new to the bargaining unit. Those contributions

are the most advantageous to the Fund because those employees are the least likely to be able claim benefits in the near term. There are no definitive court interpretations of the adverse selection rule yet.

- a) Borntrager v. Central States, 425 F.3d 1087 (8<sup>th</sup> Cir. 2005) Court found it had jurisdiction of the employer's claim under 29 U.S.C. §1451.
- b) White v. Sundstrand Corp., 2000 WL 713739 (N.D. Ill. 2000). Did not involve Central States or the adverse selection rule, but undercuts a potential claim against the rule using Section 510 of ERISA. The court held that Section 510 (29 U.S.C. §1140) only applies in instances in which an employer wrongfully alters the employment relationship to prevent benefit rights from vesting. [Note, with the amendment to Section 510 in the PPA of 2006, this argument may be more viable.]
- c) Fort Transfer Company, Inc. v. Central States, 2006 WL 1582451 (C.D. Ill. 2006) (Springfield, IL), suit by employer challenging action by Central States in threatening to terminate the under the adverse selection rule. The court dismissed the cases as having been brought in the wrong forum under the forum selection rules in the Pension Fund's trust agreement. (requires suit to be brought in the Northern District in Chicago)



## E. Who is liable for withdrawal liability?

1. Employers within a “controlled group” or under “common control” for are linked for withdrawal liability purposes. 29 C.F.R. §§4001.2, 4001.3 (incorporating regulations under §414(b), (c) of the Internal Revenue Code); see, e.g., Central States, Southeast and Southwest Areas Pension Fund v. NAVCO, 3 F.3d 167, 172 (7<sup>th</sup> Cir. 1993); Vaughn v. Sexton, 975 F.2d 498 (8<sup>th</sup> Cir. 1992). The core of these concepts is holding a controlling interest (as in a parent–subsidiary relationship) or common controlling ownership (in a brother–sister relationship). 26 U.S.C.A. §1563(a), Treas. Reg. §1.414(b)–1, §1.414(c)–1, 2.

2. Personal liability of shareholders, officers and directors for pension liabilities may be established by courts in cases where the corporate veil can be pierced. Whether a corporate veil may be pierced is an issue of state law. Cases from the contribution delinquency area:

- a) See, e.g., Laborers’ Pension Trust Fund v. Sidney Weinberger Homes, Inc., 872 F.2d 702 (6<sup>th</sup> Cir. 1988), the Sixth Circuit held that the corporate veil of a dissolved corporate employer could be pierced where the corporate form was not followed and the shareholder was held liable under ERISA for the corporation’s failure to properly fund employee benefit packages.
- b) Similarly, in Sasso v. Cervoni, 985 F.2d 49 (2<sup>d</sup> Cir. 1993), the Court found an individual corporate officer may be liable for ERISA obligations upon evidence that the officer

acted in concert with fiduciaries in breaching fiduciary obligations, intermingled assets of the corporation with personal assets or assets of related corporations and used corporate assets for personal benefit instead of meeting ERISA obligations. Further, a corporate officer may be liable for the ERISA obligations of his corporation where he has been convicted of engaging in a criminal conspiracy to defraud the funds of owed contributions.

### 3. Sale of Assets

#### a) Seller liability for withdrawal liability:

- i. Usually a sale of all or substantially all assets will coincide with a cessation of the seller's obligation to contribute to the pension fund and will constitute a complete withdrawal for the seller.
- ii. Safe Harbor provision. 29 U.S.C. §1384(a). The safe harbor provision may permit a seller to avoid liability for a complete or partial withdrawal due to a bona fide, arm's-length sale of assets to an unrelated party. The safe harbor requires:
  - (a) the purchaser must have an obligation to contribute to the pension plan;
  - (b) the purchaser must post a bond with the plan;and,

(c) under the contract for sale, the seller must remain secondarily liable for withdrawal liability.

iii. As noted above, the amount of the seller's liability may be limited under the sale of assets provision of the statute. 29 U.S.C. §1405.

## b) Purchaser

1. The purchaser can be liable by agreement.

2. Note: under the safe harbor rule, If the purchaser withdraws within five years of the sale, the purchaser's liability will be computed using the amount of the seller was required to contribute for such operations for five plan years. 29 U.S.C.A. §1384(b).

3. Successor liability.

a) Unfavorable cases from the Seventh Circuit Court of Appeals (governing Illinois), adopting a very broad concept of successor liability and finding a party can be liable for the withdrawal liability of a predecessor business if (1) the party had prior notice of the withdrawal liability and (2) there has been substantial continuity in the business operations of the predecessor and the successor. Chicago Truck Drivers, Helpers and Warehouse Workers (Independent) Pension Fund v. Tasemkin, Inc., 59 F.3d 48, 49 (7th Cir. 1995); Central States, Southeast and

Southwest Areas Pension Fund v. Wiseway Motor Freight, Inc., 2000 WL 1409825 (N.D. Ill. 2000).

b) No cases on point yet from the Eighth Circuit Court of Appeals (governing Missouri), but cases from the court suggest that court may take a more favorable view of the issue.

i. The court has adopted a more narrow definition of who is an “employer” under the MPPAA looking at who is obligated to contribute to the pension plan. Seaway Port Authority of Duluth v. Duluth-Superior ILA Marine Ass’n Restated Pension Plan, 920 F.2d 503, 507 (8th Cir. 1990); Rheem Manufacturing Company v. Central States Southeast and Southwest Areas Pension Fund, 63 F.3d 703 (8th Cir. 1995).

ii. See also, Greater Kansas City Laborer’s Pension Fund v. Superior General Contractors, Inc., 104 F.3d 1050 (8th Cir. 1997) a fringe benefit delinquency case. In this case the court found that the broad alter ego liability principles of labor law did not apply to an ERISA action to collect benefit contributions and that attempts to pierce the corporate veil must meet the traditional requirements for disregarding the corporate entity. This case takes a decidedly more conservative approach to the issue than that taken in the Seventh Circuit.

## V. CENTRAL STATES PENSION FUND – A CASE STUDY

A. The Pension Fund is one of the nation's largest Taft–Hartley Funds, with approximately 150,000 active participants and benefit payments to more than 210,000 retirees and surviving spouses each month. Since the Fund's inception in 1955 over \$36.4 billion in benefits have been paid. Benefit payments in 2005 exceeded \$2.53 billion. The Fund's assets as of December 31, 2005 were in excess of \$19 billion.

(<http://www.centralstatesfunds.org/cs/OurCompany.asp>; November 21, 2006)

B. The Pension Fund fell below the ERISA funding requirements in about 2002 due a number of reasons:

1. The Pension Fund is a mature fund, with an increasing number of retirees and a decreasing number of active employees (the number of retired employees exceeded the number of active employees beginning in 1999).

2. There are no new employers joining the Fund and adding to the contribution income of the Fund, at least in part due to the high unfunded vested liability of the Fund;

3. The trucking industry has seen a major shake–out due to deregulation, resulting in fewer employers to pay contributions;

4. The Fund has had growing operating deficits – contributions are not increasing and benefit obligations continue to go up. Since

1985, the amount of benefits paid out has exceeded the amount of contributions coming in.

5. In 2000 – 2002 the Fund experienced three consecutive years of investment losses, causing the Fund's asset base to decline from approximately \$21 billion in 1999 to less than \$16 billion in 2002. This decline damaged the Fund's ability to earn investment income for a long period of time.

C. The Trustees promptly implemented a plan of action:

1. Implement an appropriate (more aggressive) investment strategy;

2. Reduce future benefit accruals, mostly by eliminating the full early retirement options and reducing the benefit accrual rate (now 1 percent);

3. Obtain relief from the mandatory excise taxes required to be paid to the IRS under the Internal Revenue Code and obtain a 10-year amortization extension from the IRS; and,

4. Increase employer contributions.

D. Results of the Fund's plan of action.

1. Since 2002, the Fund's investment strategy has paid off and the returns have been good (as good or better than its peers). Some of the lost asset base has been recovered. Net assets are now about \$20 billion (as of October 31, 2006).

2. Benefit reductions slowed the growth of benefit obligations, reducing the Fund's operating deficit. The Fund's retirement age is increasing.

3. The Fund obtained an amortization agreement from the IRS, avoiding assessment of excise taxes, but the IRS set a number of conditions, including an increasing set of funding percentage goals that the Fund must meet..

4. Initially, the Fund was able to increase contributions by creating savings in the Health and Welfare Plan and redirecting contractual fringe benefit increases in the Carhaul, National Master Freight, and UPS contracts from the Health and Welfare Plan to the Pension Fund. However, to meet the funding goals mandated by the IRS, the Pension Fund is mandating contribution increases of 7 or 8 percent for collective bargaining agreements as they come up for negotiations in the next two years. (See attached Special Bulletin 2005-6.)

E. Pension Protection Act of 2006. This plan has been complicated by the passage of the Pension Protection Act of 2006, which for most pertinent purposes becomes effective for the first plan year after 2007 -- here January 1, 2008 -- because the Fund is on a calendar year.

1. It is unclear how the Pension Fund's pre-Act amortization agreement with the IRS fits into the statutory scheme. If the Pension Fund's pre-Act amortization schedule is ignored, the Pension Fund falls within the "critical" category

2. To deal with the ambiguity in the Act, the Fund is pressing for legislative action to clarify the law. Nevertheless, the Fund's amortization agreement largely meets the requirements of a rehabilitation plan under the PPA.

3. The Fund hopes to avoid implementation of surcharges for employers that adopt the proposed contribution increases. However, there is a possibility that employers may face surcharges until their collective bargaining agreements come up for negotiations and one of the Pension Fund's contribution schedules are adopted.

F. The Bottom Line. The bottom line is that the Fund is correcting the funding deficiency, but it will take many years to get the Fund back to fully funded status.

G. Unfunded Vested Benefits. Fund experienced a large jump in unfunded vested benefits recently, due in large part to change by the Fund's actuaries of the mortality table used. This change in the mortality table was the first such change in at least ten years. No significant further changes in the mortality table are anticipated.

H. Upshot. Employers participating in the Central States Pension Fund are largely stuck with it. Employers face increasing amounts of contributions to the Pension Fund. Due to the large amount of UVBs, withdrawal at this point will produce a large amount of withdrawal liability.