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View From McDermott: Multiemployer Union Plans Implement Aggressive Litigation Strategies to Fill $390 Billion Funding Deficit

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While the funded status of single-employer corporate defined benefit pension plans has improved, the funded status of multiemployer union pension plans has remained stagnate and, in some cases, further deteriorated. The Pension Benefit Guaranty Corporation recently reported to Congress that the aggregate funding ratio of all multiemployer plans was 48 percent.[1] From the most recent data available, the PBGC reports that multiemployer pension plans have $366 billion in assets to satisfy $757 billion in vested liabilities—in short, a funding deficit of $390 billion.[2]

Of even greater concern, active participants in multiemployer plans constitute less than half of the total multiemployer plan population.[3] In mature multiemployer plans, there are significant challenges to address these funding deficiencies. Prudent investing can make up only a portion of the underfunding deficit. A contraction in the percentage of active participants means that fewer dollars are coming into the plan for active work and more dollars are leaving the plan to pay pensions for a growing retiree population. Moreover, bankrupt employers have had their multiemployer plan liabilities discharged in bankruptcy. For example, in the Hostess bankruptcy, $1 billion in liability was discharged with respect to The Bakery and Confectionery Union and Industry International Pension Fund, where Hostess represented 13 percent of the multiemployer plan's contributions.

As a result of these demographic changes, multiemployer plans are left with a limited number of tools to address underfunding. The most powerful tool is withdrawal liability collection. Recently, many multiemployer plans have used aggressive and creative legal theories to collect withdrawal liability from other entities that are alleged to be related to the withdrawing employer. A number of courts have endorsed these theories. In siding with the multiemployer plans, the courts have applied an expansive interpretation of what constitutes a trade or business. This article reviews this recent trend by examining cases where private equity and real estate investment activities have been treated

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[1] PBGC, Multiemployer Pension Plans: Report to Congress Required by the Pension Protection Act of 2006, Jan. 22, 2013, pp. 22-23, available at *http://www.pbgc.gov/documents/pbgc-report-multiemployer-pension-plans.pdf* (last visited Dec. 3, 2013) (based on data for the 2010 plan year, the most recently reported from Form 5500 and compiled by the PBGC); *see also id.* at 23 ("In 2010, nearly 90% of all [multiemployer] plans – which cover 96% of all [multiemployer] plan participants – had a funding ratio of less than 70%.").

[2] *Id.* at 22.

[3] *Id.* at 15 (in 2010, active participants constituted 39.3 percent of multiemployer plan participants, which is a 12 percent drop from 10 years earlier when active participants constituted 51.1 percent of the multiemployer plan population in 2000 and a 37 percent drop from 30 years earlier when active participants constituted 75.9 percent of the multiemployer plan population in 1980).

as a "trade or business" and not as passive investment activities.

Withdrawal Liability Background

Withdrawal liability is a statutory liability that represents an employer's pro rata share of a plan's underfunding, based on contribution history and the overall funded status of the multiemployer plan. Withdrawal liability is assessed when the employer's plan contribution obligation ends. Historically, withdrawals occurred when an employer liquidated or ceased operations at a union-covered facility. More recently, employers and unions have contractually agreed to cease participation in multiemployer plans.[4]

Withdrawal liability is a joint and several liability of the contributing employer and all "trades or businesses (whether or not incorporated) which are under common control" with the contributing employer.[5] PBGC regulations cross reference the "common control" analysis by pointing to the controlled group regulations promulgated under Section 414(c) of the Internal Revenue Code.[6] Under Internal Revenue Service regulations, there are three types of controlled groups: a parent-subsidiary controlled group, a brother-sister controlled group, and a combination of the two earlier types.[7] A parent-subsidiary controlled group exists when a common parent company owns at least 80 percent or more of a subsidiary company.[8] For example, if a parent company owns at least 80 percent of a subsidiary company, a parent-subsidiary controlled group would exist, and both the parent and subsidiary would be liable for withdrawal liability incurred by either company. Controlled group liability can also exist as a brother-sister controlled group where multiple, unrelated owners hold 80 percent or more of a company. In addition to the 80 percent combined ownership requirement, the brother-sister controlled group requires "effective control," whereby five (or fewer) owners hold at least 50 percent of each company, but only taking into account ownership to the extent it is identical in each company.[9] For example, if four investors each held 20 percent ownership interests in four different companies, a brother-sister controlled group would exist, and each of those companies would be liable for withdrawal liability incurred by any of the companies.

What Constitutes a Trade or Business

Neither PBGC regulations nor the tax code contain a definition of "trade or business." Thus, courts and governmental agencies have been left to interpret this concept. Courts and regulators have distinguished purely passive investment from a trade or business by applying the two-part test set forth by the U.S. Supreme Court in *Commissioner v. Groetzinger*.[10] The first prong evaluates whether a taxpayer is engaged in an activity with "the primary purpose of income or profit,"[11] which is a subjective test based on the taxpayer's intent. The second prong evaluates whether the act is conducted with "continuity and regularity."[12] The latter component of the *Groetzinger* test is objective, reviewing how much time the taxpayer engages in an activity.

Case Study: Private Equity Funds

Private equity funds typically do not operate in a corporate structure. Instead, they are structured as partnerships or in some cases limited liability companies, pass-through structures where income and losses are recognized by the investors and not at the private equity fund level. The fund is managed by a general partner, which has full management authority under the fund's operating documents, and typically receives a 20 percent share of any investment return for its work (the carried interest). In most cases, neither the private equity fund nor the general partner has any employees or operations. Instead, the management responsibilities are performed by a management company, which is often a subsidiary of the general partner and has employees and consultants to identify investment targets, perform due diligence, negotiate the purchase, supervise management of the portfolio companies and exercise all of the private equity fund's rights under the operating documents.

2007 PBGC Appeals Board Opinion. Whether private equity funds are subject to controlled group liability for pension plans has been a matter of debate amongst tax professionals for many years. The debate came to a head in 2007 when the Appeals Board of the PBGC upheld a 2005 determination by the PBGC that a private equity fund was engaged in a trade or business, and thus based on ownership of an operating portfolio company, the private equity fund was jointly and severally liable for unfunded liabilities under the bankrupt portfolio company's single employer defined benefit plan.[13]

The PBGC decision took a broad view holding that the private equity fund constituted a trade or business because the general partner had the ability to exercise

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[4] Unions have been amenable to employers' concerns about growing liabilities, especially when funding rules under the Pension Protection Act of 2006 have compelled many multiemployer plans to significantly reduce future benefit accruals for active participants, while also requiring substantial year-over-year increases in contribution rates from employers for work performed by active participants. Many employers are paying more to participate in multiemployer plans and for those increased contributions employees are accruing benefits at lower levels.

[5] Section 4001(b)(1) of the Employee Retirement Income Security Act of 1974, as amended; 29 U.S.C. § 1301(b)(1).

[6] PBGC Reg. § 4001.3(a)(1); *see also* Treas. Reg. § 1.414(c)-2.

[7] Treas. Reg. § 1.414(c)-2(a).

[8] *Id.* at § 1.414(c)-2(b).

[9] *Id.* at § 1.414(c)-2(c).

[10] 480 U.S. 23 (1987).

[11] *Id.* at 35; *see also Central States, S.E. & S.W. Areas Pension Fund v. Fulkerson*, 238 F.3d 891, 896, 25 EBC 1842 (7th Cir. 2001)(21 PBD, 1/31/01; 28 BPR 608, 2/6/01) (holding of investments "will normally satisfy the first prong of *Groetzinger* since the purpose is to produce income").

[12] *Groetzinger*, 480 U.S. at 35; *see also Fulkerson*, 238 F.3d at 895-96 (whether activities for the purpose of producing profit were "regular or continuous" is determined by considering the "activities taken with regard to the property," as opposed to the "mere ownership of property").

[13] The 2007 decision was rendered by a single reviewer. Typically, the PBGC only publishes appeals decisions rendered by three-member panels. Notwithstanding this normal practice, the 2007 appeal decision has been published on the PBGC website. *See* http://op.bna.com/UTILS/lk.nsf/r/dbrh9eksrx?opendocument (last visited on Dec. 3, 2013) [Hereinafter "PBGC Appeals Board"].

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management activities under the private equity fund's partnership agreement and under the Delaware Revised Uniform Partnership Act, the state law governing the formation of the private equity fund.[14] The ability alone to exercise these management rights caused the private equity fund to qualify as a trade or business. The PBGC's review appears to have been limited to the private equity fund's operating documents, without inquiry into whether and how any of these rights were exercised.

The private equity fund's general partner was treated as the agent of the fund and the general partner's ability under the operating documents to exercise management rights was attributable to the private equity fund.[15] The fact that such activities were executed by a management company, pursuant to a management agreement, was irrelevant to the PBGC's analysis, as such delegation did not relieve the general partner of its responsibilities.[16] The PBGC also rejected the argument that the private equity fund was not a trade or business as it was a passive investment vehicle that had no employees, no involvement in the day-to-day operations of its portfolio investments and no income other than passive income such as dividends, interest and capital gains.[17] In the PBGC's analysis, these facts were irrelevant, as the general partner held management rights under the partnership agreement.

In applying the *Groetzinger* test, the PBGC easily found that the first factor was satisfied, as the private equity fund's investment activities were clearly intended to generate a profit, with the fund's principal business activity listed as investment services on the fund's partnership information return.[18] As to the second component of the *Groetzinger* test, the PBGC found that the private equity fund's activities were conducted with regularity, even though the PBGC records on review did not contain any documentation regarding how much time was devoted by the private equity fund to the management of its portfolio companies.[19] As a proxy for the ''continuity or regularity'' requirement of *Groetzinger*, the PBGC relied on the value of the private equity fund's portfolio of investments, profits generated and the management fees paid.[20] The responsibilities of the general partner, as agent for the private equity fund, also supported the PBGC's finding ''continuity or regularity'' components of a trade or business.[21] The responsibilities alone—without reviewing whether and how they were executed—provided adequate evidence to the PBGC that the private equity fund constituted a trade or business. The approach taken by the PBGC has since been dubbed the ''investment plus'' standard.[22]

With the trade or business requirement under ERISA Section 4001(b)(1)[23] satisfied, the private equity fund's 96.3 percent controlling interest in its portfolio company triggered liability to the PBGC for $3.2 million in underfunding under the bankrupt portfolio company's single-employer defined benefit plan.[24] The 2007 PBGC Appeals Board opinion was not appealed.

Sun Capital. Although the PBGC Appeals Board concerned liability to the PBGC for an underfunded single-employer corporate pension plan, the same logic in the PBGC Appeals Board opinion has been applied to hold a private equity fund potentially liable for a $4.5 million withdrawal liability assessment due to a multiemployer union pension plan. In *Sun Capital Partners III, LP v. New England Teamsters & Trucking Industry Pension Fund*,[25] the U.S. Court of Appeals for the First Circuit held that a private equity fund constituted a trade or business that could be liable for a portfolio company's withdrawal liability.[26] The court endorsed the PBGC's ''investment plus'' approach,[27] but applied a more detailed analysis that did not rely solely on the ability to effect management of the portfolio company.

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[14] PBGC Appeals Board at 9, 12.

[15] *See id.* at 3 (Under the partnership agreement, the private equity fund was formed for the ''principal purposes of (i) creating and realizing long-term capital gains primarily from investments in United States industrial businesses, including without limitation, the general buying, selling, holding, and otherwise investing in securities of every kind and nature . . ., (ii) exercising all rights, powers, privileges, and other incidents of ownership or possession with respect to investments held or owned by the Partnership, (iii) entering into, making, and performing all contracts and other undertakings with respect to such investments, (iv) managing and supervising such investments and (v) engaging in such other activities incidental or ancillary thereto as the General Partner deems necessary, advisable or desirable.'').

[16] *Id.* at 10.

[17] *Id.* at 5.

[18] *Id.* at 11; *see also id.* at 3, 11 (partnership agreement provided private equity fund was principally organized for the purpose of ''creating and realizing long-term capital gains primarily from investments in United States industrial businesses, including without limitation, the general buying, selling, holding, and otherwise investing in securities of every kind and nature'').

[19] *Id.* at 11.

[20] *Id.* Under the PBGC's interpretation, many investment vehicles long assumed to be passive, including mutual funds, would be treated as a ''trade or business'' if the ''continuity or regularity'' requirement reviewed only portfolio size and investment management fees.

[21] *Id.* at 12 (''This is reflected in the responsibilities of its agent [the general partner], who: (i) provides investment advisory and management services to others (i.e., its partners); (ii) hires a third-party (i.e., [the management company] to assist in selecting and purchasing potential investments (e.g., the Other Companies) and in distributing the net profits and losses from these companies to itself and limited partners; and (iii) receives compensation for such services (e.g., 20% of all realized profits from the Fund's investments).'').

[22] *See Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund*, 724 F.3d 129, 140, 2013 BL 197393, 56 EBC 1139 (1st Cir. 2013)(143 PBD, 7/25/13; 40 BPR 1852, 7/30/13); *Board of Trustees, Sheet Metal Workers' Nat'l Pension Fund v. Palladium Equity Partners, LLC*, 722 F. Supp. 2d 854, 869, 2010 BL 314116 (E.D. Mich. 2010).

[23] 29 U.S.C. § 1301(b)(1).

[24] PBGC Appeals Board at 14-15.

[25] 724 F.3d 129, 2013 BL 197393, 56 EBC 1139 (1st Cir. 2013). The private equity funds organized by Sun Capital Advisors, Inc. have filed a petition for a writ of certiorari, asking the U.S. Supreme Court to reverse this decision (No. 14-648 (petition filed Nov. 21, 2013)).

[26] *Id.* at 133 (''at least one of the private equity funds which operated [the portfolio company], through layers of fund-related entities, was not merely a 'passive' investor, but sufficiently operated, managed, and was advantaged by its relationship with its portfolio company, the now bankrupt [portfolio company]'').

[27] *Id.* at 141 (''we are persuaded that some form of an 'investment plus' approach is appropriate when evaluating the 'trade or business' prong of § 1301(b)(1), depending on what the 'plus' is'').

Sun Capital's investment model provided for "extensive intervention"[28] with its portfolio companies,[29] with the private equity fund's general partner holding the authority to hire, fire, and set the compensation of employees and agents of the portfolio companies.[30] A subsidiary of the general partner contracted directly with the portfolio company to provide employees and consultants.[31] Any fees paid by the portfolio company to the management company would offset fees due from the private equity fund to the general partner.[32] The private equity fund's investment documents described detailed restructuring and operating plans for each target portfolio company, with "[i]nvolvement [that] 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."[33] Similar to the PBGC Appeals Board analysis, the First Circuit attributed actions of the general partner and the management company to the private equity fund.[34]

The portfolio company in the *Sun Capital* case was owned by two private equity funds: Sun Capital Partners III, LP (30 percent ownership) and Sun Capital Partners IV, LP (70 percent ownership).[35] The First Circuit made its conclusions with respect to Sun Capital Partners IV and remanded the case to the district court for further findings, including whether Sun Capital Partners III constituted a trade or business and to resolve whether the two funds should be treated as under common control.[36] In the district court, supplemental briefing is due in December 2013 and February 2014. A hearing has been set for March. 12, 2014. Sun Capital has also filed a petition asking the U.S. Supreme Court to overturn the First Circuit's decision.[37]

Palladium Equity Partners. Similar to the *Sun Capital* case, a federal district court in Michigan also endorsed the PBGC's "investment plus" standard and found that three affiliated private equity funds, each with the same general partner and the same management company (Palladium Equity Partners), constituted a trade or business.[38] The court applied the *Groetzinger* test in swift fashion by primarily focusing on the attributes of the "overall functional model for private equity funds," without specific discussion of how the private equity funds and its manager intervened in the portfolio company's operations.[39]

As typical with any significant shareholder, the private equity funds retained the right to appoint directors to the portfolio company. The court in *Palladium Equity Partners* appeared to attribute to the private equity fund actions taken by the portfolio company directors, who were also employees of the management company.[40] This simplistic approach ignores the legal and business realities that an individual can have independent duties and wear multiple "hats" at different times. For example, a director's fiduciary duties to the portfolio company would trump any employment responsibilities to the management company. Without more support, the approach taken in *Palladium Equity Partners* improperly conflates the separate roles an individual may play as a director and as an employee or principal of the shareholder that appoints the director.

The *Palladium Equity Partners* decision denied summary judgment and held that more factual development was needed to determine whether the three private equity funds constituted a joint venture or partnership, such that the common control requirement would be satisfied.[41] The largest ownership position held by any one of the funds in the portfolio company was 57 percent of the equity, less than the 80 percent threshold required for parent-subsidiary controlled group liability.[42] Although the funds invested on substantially similar terms and had the same general partner and management company, there were some differences in the limited partners and the preferential rights held by some limited partners, and each of the partnership agreements contractually disclaimed any joint venture or partnership.[43] After summary judgment was denied, the parties entered a confidential settlement agreement,[44] and, therefore, the court never addressed the joint venture/partnership question to determine whether there was common control amongst the three private equity funds.

Private Equity Fund Conclusion. Unfortunately, there is no bright line test to determine when the "continuity and regularity" prong of the "trade or business" test has been met. The First Circuit in *Sun Capital* specifically declined to provide any guidance as to what qualifies as "investment plus": "We see no need to set forth general guidelines for what the 'plus' is, nor has the PBGC provided guidance on this."[45]

The lack of guidance is particularly frustrating in the modern world where major management decisions of a business have been escalated to the director level, with expectations that directors will take a "hands on" approach, beyond typical oversight. Nowhere is this exemplified more than with the modern realities of shareholder activism, where shareholders are demanding input on day-to-day management issues, and regulators, including the Securities and Exchange Commission, are promoting shareholder access to the company's proxy statement.

Even if a private equity fund engaged in "investment plus" activities that would cause it to be treated as a

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[28] *Id.* at 142.
[29] *Id.* at 134 ("The stated purpose of the Sun Funds is to invest in underperforming but market-leading companies at below intrinsic value, *with the aim of turning them around* and selling them for a profit.") (emphasis added).
[30] *Id.* at 135 (pursuant to the general partner's limited partnership agreement, this authority was vested in a limited partner committee).
[31] *Id.* at 136.
[32] *Id.* at 135, 143.
[33] *Id.* at 141.
[34] *Id.* at 146-47.
[35] *Id.* at 135.
[36] *Id.* at 148-49.
[37] No. 13-648, petition filed on Nov. 21, 2013, response due on Jan. 29, 2014.
[38] *Board of Trustees, Sheet Metal Workers' National Pension Fund v. Palladium Equity Partners, LLC*, 722 F. Supp. 2d 854, 869-70, 2010 BL 314116 (E.D. Mich. 2010).
[39] *Id.*
[40] *Id.* at 864-65.
[41] *Id.* at 867.
[42] *Id.* at 859.
[43] *Id.* at 862-63.
[44] Order dismissing case, No. 2:08cv12586 (Mar. 2, 2011) (Lawson, J.).
[45] *Sun Capital*, 724 F.3d at 141.

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trade or business, controlled group liability can be avoided if the fund holds less than 80 percent of the portfolio company. While limiting ownership may help avoid controlled liability to underfunded pension plans, this approach may not be workable as a business matter, when substantial efforts are expended to identify portfolio company investments and perform due diligence on the investment. For that effort expended, holding less than an 80 percent interest may make the economics unworkable.

The approach advocated by the PBGC and these two courts also raises additional issues beyond pension liability, including grounds to recharacterize private equity gains as ordinary income, as opposed to capital gains reporting, unrelated business taxable income (UBTI) issues for tax-exempt investors in private equity funds and withholding issues for non-US investors for effectively connected income (ECI) if the private equity fund is treated as a trade or business. Officials from the IRS have indicated that there is no rush to issue guidance in light of *Sun Capital*, but that the IRS continues to monitor the situation.[46]

Case Study: Unincorporated Businesses

In recent litigation, multiemployer plans have also been successful in asserting that leasing of commercial property can constitute a trade or business. In these cases, the leasing activities were not conducted through a corporate entity. Instead, the activities were conducted through an unincorporated business, which ultimately subjected the owner to personal liability for the withdrawal liability assessments.

Messina Products. In *Central States Southeast and Southwest Areas Pension Fund v. Messina Products, LLC*,[47] the Seventh Circuit ruled that an owner can be personally liable for multiemployer withdrawal liability when the owner leased property to its closely-held corporation that withdrew from a multiemployer pension plan. The Seventh Circuit applied the same two-part test used in *Groetzinger* to determine whether an economic activity constitutes a trade or business. First, the activity must be performed for the primary purpose of income or profit and, second, the activity must be performed with continuity and regularity. The court held that in this case renting property to the withdrawing employer is categorically a trade or business. The absence of a formal written lease, the lapse in rent payments for several years, the failure to account properly for property maintenance by company employees and the company's operations on the property were each imputed to the owners. This level of activity exceeded passive investment, in the court's opinion. Therefore, the unincorporated realty business became liable for the $3.1 million withdrawal liability assessment due to the multiemployer plan.

Nagy. In *Central States Southeast and Southwest Areas Pension Fund v. Nagy*,[48] the Seventh Circuit again asserted personal liability on the owner of a trucking company because of such owner's other activities that constituted trades or businesses. Nagy owned and operated several businesses, including personally owned real estate that he leased to the trucking company for its business operations. The Seventh Circuit found that the activity of the business owner in leasing property that he owned to his business was *per se* a trade or business. Because the ''leasing business'' was within common control with the trucking company, the unincorporated leasing business was jointly and severally liable for the trucking company's withdrawal liability.

Unincorporated Business Conclusion. The decisions in these cases have particular significance as the property in both cases was held by the owners in their personal capacities and not in corporate form. Therefore, the owners in their unincorporated landlord ''trade or business'' have been rendered personally liable for the withdrawal liability. The owner's personal assets are now at risk, including assets that are unrelated to the property used for company operations.

Procedural Issues

The procedural rules for challenging withdrawal liability assessments present another challenge when it is unclear whether liability would attach to a private equity fund or unincorporated business. Under ERISA, withdrawal liability disputes are subject to a mandatory dispute resolution process, which first requires the employer to dispute the assessment with the multiemployer plan directly[49] and thereafter mandatory arbitration applies.[50] The internal request for review with the plan must be filed within 90 days of receiving the assessment.[51] Arbitration thereafter must be initiated within 60 days of the date the multiemployer plan responds to the request for review or 120 days of the date the request for review was filed, whichever is earlier.[52] The failure to follow this process causes the employer to waive all affirmative defenses, making it effectively impossible to challenge the withdrawal liability assessment.

The liability amount can grow significantly in litigation to collect an unpaid withdrawal liability assessment. In addition to the withdrawal liability amount, the multiemployer plan is entitled to prejudgment and postjudgment interest, liquidated damages (typically 20 percent of the unpaid amount), and reasonable attorneys' fees.[53] Unlike a participant claim for benefits, the grant to attorneys' fees is not discretionary. Fee shifting is automatic in a successful collection action.

Disputes regarding whether an employer is part of a controlled group are not subject to mandatory arbitra-

[46] ''Sun Capital Could Affect Both Main Street, Wall Street, Analyst Says,'' Daily Tax Report, Bloomberg BNA (Oct. 2, 2013). (Statement by Craig Gerson, attorney-advisor, Treasury Office of Tax Legislative Counsel, panel discussion during the real estate session of the American Bar Association Section of Taxation Meeting, San Francisco, Sept. 23, 2013).

[47] 706 F.3d 874, 2013 BL 35790, 55 EBC 2196 (7th Cir. 2013)(28 PBD, 2/11/13; 40 BPR 376, 2/12/13).

[48] 714 F.3d 545, 2013 BL 107708, 56 EBC 2542 (7th Cir. 2013)(78 PBD, 4/23/13; 40 BPR 1063, 4/30/13).

[49] ERISA § 4219(b)(2); 29 U.S.C. § 1399(b)(2).

[50] ERISA § 4221(a)(1); 29 U.S.C. § 1401(a)(1).

[51] ERISA § 4219(b)(2)(A); 29 U.S.C. § 1399(b)(2)(A).

[52] ERISA § 4221(a)(1); 29 U.S.C. § 1401(a)(1).

[53] ERISA § 502(g)(2); 29 U.S.C. § 1132(g)(2).

tion.[54] Nevertheless, the liability amount can only be challenged through the internal request for review and mandatory arbitration process. A private equity fund or unincorporated property leasing operation could take a ''wait and see'' approach to see if a multiemployer plan will initiate a collection action, but by that time, the liability amount will already be fixed, which may provide significant leverage for the multiemployer plan to force a settlement. It is for these reasons that it is likely that Sun Capital initiated the declarative judgment action, in an attempt to have more control over the litigation. Finally, as evidenced by these cases, it is unlikely that an employer could prevail on a motion to dismiss or summary judgment motion in a withdrawal liability collection action, as the ''trade or business'' analysis requires a factual inquiry for which a hearing or trial would be required. The prospect of protracted and expensive litigation gives a multiemployer plan additional leverage to force a settlement.

[54] *See Central States, SE &SW Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1373, 14 EBC 2753 (7th Cir. 1992); *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 122, 14 EBC 1776 (4th Cir. 1991); *Flying Tiger Lane v. Teamsters Pension Trust Fund of Philadelphia*, 830 F.2d 1241, 1249-50, 8 EBC 2505 (3d Cir. 1987).

Final Thoughts

Any entity that has significant investments in or performs services for an entity that participates in a multiemployer plan must be aware of these theories of liability, the procedural processes that favor the multiemployer plan, and the aggressive litigation efforts taken by the plans to fill their underfunding gaps. The absence of guidance on what constitutes the ''plus'' in the ''investment plus'' trade or business analysis makes planning difficult. The *Sun Capital* case has been remanded to the trial court for final resolution and other cases have been filed alleging controlled group trade or business liability to multiemployer plans for private equity funds.[55] For entities that have exposure to multiemployer plans, monitoring the underfunding status of those plans and this evolving area of the law should be a priority.

[55] *See, e.g., Radio, Tel., and Recording Arts Pension Fund v. Venue Servs. Group, Inc.*, No. 1:12cv7684 (S.D.N.Y. filed Oct. 15, 2012)(Failla, J.) (complaint alleges that Candlewood Capital Partners, LLC is trade or business responsible for unpaid withdrawal liability of portfolio company).

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