Multiemployer Pension Plan Withdrawal Liability

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Tweeting about this conference?
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Overview

- Approximately 1,435 PBGC-insured Multiemployer Pension Plans (MEPs)
- MEPs cover approximately 10 million participants
- PBGC claims in its 2013 annual report that only a minority of plans are in “trouble,” **YET**
- Without additional changes, PBGC projects plans covering hundreds of thousands of people will fail
- On Nov. 15, 2013, the Director of PBGC reported: “It is becoming clearer and clearer that most plans will fail within the next 10-15 years.”
PBGC Annual Report FY 2013

• Paid $89M to 44 insolvent MEPs covering 50,000 retirees

• MEP accumulated financial deficit -- $8.3B

• Projected obligation for future financial assistance to MEPs increased 42% to $9.9B
  • Due mainly to net addition of 22 probable insolvencies, for a total of 129 “probables”
  • A “probable” ongoing plan is a MEP projected to become insolvent within 10 years – 64 plans
  • A “probable” terminated plan is a MEP projected to lack sufficient assets to pay liabilities – 65 plans
PBGC 2013 Multiemployer Pension Plan Report

• In the past 30 years, the proportion of active to inactive participants in plans has basically flipped:

• More than 400 plans reported having over 1.3 million orphan participants out of 7.6 million total participants in 2010

• The lower the ratio of actives to inactives, the more difficult it is for underfunded plans to become fully funded or to recover from financial losses.
MEP AAA Arbitrations

- ERISA arbitration demands filed with the American Arbitration Association:
Controlled Group - see 26 CFR 1.1563-1

- **Parent-Subsidiary**
  - One business, the parent, owns 80% or more of the value or voting power of one or more other companies, directly or indirectly.

- **Brother-Sister**
  - Five or fewer individuals own a controlling interest (80% or more of the voting power or the value of all classes of shares) in two or more entities, and taking into account the concurrent ownership of each individual in each entity, such persons are in effective control (over 50% of the voting power or value) of the companies.
Sun Capital -- Private Equity as a Trade or Business under Common Control

*Sun Capital Partners III LP v. New England Teamsters & Trucking Indus. Pension Fund*, 724 F.3d 129 (1st Cir. 2013)

• Private equity funds invested in participating company “with the principal purpose of making profit”; became “actively involved in [its] management and operation.”
• Funds’ general partners had authority to make decisions about hiring, terminating, and compensating the company’s employees
• One of the Sun Funds received a direct economic benefit that an ordinary, passive investor would not receive
• Participating company made payments of more than $186K to the funds’ general partner; offset against fee the fund paid partner to manage the investment
• Court of Appeals concluded at least one of the funds was a “trade or business”
• Open issue on remand – was any fund in a trade or business with participating employer also under “common control” to create liability for withdrawal liability
Sole Proprietorships as a Trade or Business under Common Control

- **Central States v. Nagy**, 714 F.3d 545 (7th Cir. 2013)
  - Seventh Circuit held an individual personally liable for withdrawal liability because the individual owned the stock of the withdrawing corporate employer and also engaged in activities that qualified as trades or businesses by (i) owning and leasing property to the employer; and (ii) providing management services as an independent contractor

- **Central States Pension Fund v. Messina Products, LLC**, 706 F.3d 874 (7th Cir. 2013)
  - Stephen and Florence Messina held personally liable as commercial landlords who leased property directly to Messina Trucking, which signed the CBA requiring contributions.
  - Messina Products, LLC also jointly and severally liable because its principal business purpose was real estate rental for profit.
Alter Egos

_local 134 Board of Trustees of the Toledo Roofers Pension Plan v. Enterprise Roofing & Sheet Metal_, No. 3:10CV1869, 2013 WL 2425135 (N.D. Ohio, June 3, 2013)

- When Enterprise Roofing & Sheet Metal Co. failed to pay withdrawal liability assessment, the fund sought liability from Enterprise Roofing and Remodeling Services Inc. under an alter-ego theory.
- The alter-ego test requires the fund to show “pervasive intermingling of funds and operations” between the two entities.
- Significant factors included: father played major role in managing both companies; Sheet Metal was transferred from father to sons for nominal consideration; sons borrowed substantial money for Sheet Metal without evidence of the company taking action to seek repayment.

Successorship

• ERISA § 4218 states that a withdrawal will not occur under ERISA solely because an employer ceases to exist as a result in change in corporate structure.

• *CenTra, Inc. v. Central States Pension Fund*, 578 F.3d 592 (7th Cir. 2009)
  
  • While an exempt transaction (such as a merger under §1398) does not trigger a withdrawal, the successor becomes the employer liable for any and all withdrawal liability of the predecessor. The predecessor’s contribution history becomes the responsibility of the successor.
Complete Withdrawal – ERISA § 4203

• Occurs when employer:
  ▪ permanently ceases to have an obligation to contribute under plan,
    ▪ *Gastronomical Workers Union Local 610 v. LaMallorquina Inc.*—withdrawal liability attaches to a complete withdrawal regardless of whether or not employer voluntarily withdrew.
    ▪ *Central States, Southeast and Southwest Areas Pension Fund v. Sherwin-Williams Company*—as long as any member of a controlled group continues contributions to a multiemployer pension plan, there can be no complete withdrawal by any employer in the group from the plan.
    ▪ *Borntrager v. Central States, Southeast and Southwest Areas Pension Fund*—pension fund was entitled to expel a contributing employer from the fund for violation of the fund’s adverse selection policy, thereby triggering complete withdrawal liability.
  ▪ or, permanently ceases all covered operations under plan.
• **Industry and Transaction Exceptions to Complete Withdrawal**

  • **Building and Construction Industry (ERISA § 4203(b))** – withdrawal occurs if:
    - employer ceases to have an obligation to contribute under plan, **and**
    - employer either:
      - continues to perform work in jurisdiction of CBA of type for which contributions previously required, **or**
      - resumes such work within 5 years after date obligation to contribute ceased without renewal of obligation (3 years, in case of a plan termination by mass withdrawal).

    - *Warner & Sons Inc. v. Central States, Southeast and Southwest Areas Pension Fund*

  • **Entertainment Industry (ERISA § 4203(c))**

  • **Long and Short Haul Trucking Industry** – (ERISA § 4203(d))
• Sale of Assets (ERISA § 4204)

- No complete or partial withdrawal by employer solely because of bona fide, arm’s-length sale of assets to unrelated purchaser, if:
  - purchaser has obligation to contribute to plan with respect to such operations for substantially same number of CBUs.
  - purchaser provides plan a bond or escrow for 5-year period based upon annual contribution level.
  - sale contract provides if purchaser incurs complete or partial withdrawal within 5 years, seller is secondarily liable.
Sale of Assets – cont’d.

- if seller distributes substantially all assets or liquidates before end of 5-year period, required to provide bond or escrow.

- Purchaser’s liability determined as if required to contribute to plan in year of sale and 4 prior plan years the amount seller was required to contribute.

- Variances permitted to bond/escrow requirements and to sale-contract requirements.

- **HOP Energy L.L.C. v. Local 553 Pension Fund.**

- **Central States, Southeast and Southwest Areas Pension Fund v. Georgia-Pacific LLC.**
• Change in Business Form or Suspension of Contributions During Labor Dispute (ERISA § 4218) – Employer not considered to have withdrawn from plan solely because:
  - ceases to exist by reason of change in corporate structure described in ERISA § 4069(b) or change to unincorporated form, if no interruption in contributions or obligations under plan, or
  - suspends contributions during labor dispute involving employees.
    - *But, see: Marvin Hayes Lines, Inc. v. Central States, Southeast and Southwest Areas Pension Fund.*

Successor or parent corporation or other resulting entity considered original employer.
• Partial Withdrawals – ERISA § 4205 – occurs on last day of plan year if for such year:
  • there is 70% contribution decline; or
  • there is partial cessation of contribution obligation – occurs if employer permanently ceases to have obligation to contribute:
    ▪ under one or more but fewer than all CBAs but continues to perform work in jurisdiction of CBA of the type for which contributions were previously required or transfers such work to another location, or to an entity or entities owned or controlled by employer, or
    ▪ under the plan with respect to work performed at one or more but fewer than all of its facilities, but continues to perform work at the facility of the type for which obligation to contribute ceased.
    ▪ special rule for Retail Food Industry.
• Adjustments and Limitations to Withdrawal Liability
  • Reduction of partial withdrawal liability (ERISA § 4208)
  • Reduction or waiver of complete withdrawal liability (ERISA § 4207)
  • Free Look Rule (ERISA § 4210)
  • De Minimis Rule (ERISA § 4209)
  • 20-year Limitation of Annual Payments (ERISA § 4219(c)(1)(B))
  • ERISA § 4225 Limitations – unfunded vested benefits allocable to employer limited under certain circumstances:
    ▪ Sale of substantially all employer’s assets in bona fide, arm’s-length transaction to unrelated party.
    ▪ unfunded vested benefits allocable to insolvent employer undergoing liquidation or dissolution.
• **Mass Withdrawal – ERISA § 4219 (c)(1)(D)**
  • **Distinguish types of multiemployer plan terminations (ERISA § 4041A)**
    - amendment to cease benefit accruals for future service or to convert to individual account plan – employers have continuing obligation to contribute.
    - withdrawal of every employer from plan or cessation of obligation of all employers to contribute under plan – benefits are reduced or suspended.
  • **Three types of mass withdrawal (ERISA § 4001.2)**
    - termination by withdrawal of every employer from plan.
    - cessation of the obligation of all employers to contribute under plan.
    - withdrawal by substantially all employers by agreement or arrangement.
Impact of mass withdrawal (PBGC Reg. § 4219.12)

- redetermination liability, as limited by ERISA § 4225.
  - liability for de minimis amounts.
  - liability for 20-year limitation amounts.
- reallocation liability whereby total unfunded vested benefits of plan are fully allocated among all those employers which:
  - withdrew pursuant to an agreement or arrangement to withdraw from multiemployer plan from which substantially all employers withdrew pursuant to an agreement or arrangement
  - withdrew after beginning of second full plan year preceding termination date from plan that terminated by withdrawal of every employer;

subject to certain limiting factors.
Mass Withdrawal – cont’d.

- Employer not liable for initial withdrawal liability under Free-look Rule not liable for redetermination liability, but is liable for reallocation liability.
- Employer that withdrew during period of 3 consecutive plan years within which substantially all employers withdrew presumed to be by agreement or arrangement unless employer proves otherwise by preponderance of the evidence. ERISA § 4219(c)(1)(D).
- Reallocation liability computed by plan sponsor as of mass withdrawal valuation date to be adjusted:
  - but no employer liable for unfunded vested benefits allocated to another employer that are determined to be unassessable or uncollectible subsequent to plan sponsor’s demand for payment of reallocation liability.
- Employer’s payment of total initial withdrawal liability, whether by prepayment or otherwise, for a withdrawal later determined to be part of a mass withdrawal does not exclude employer from or otherwise limit employer’s mass withdrawal liability. PBGC Reg. § 4219.12(f).
• Transactions to Evade or Avoid Liability – ERISA § 4212(c).

• If a principal purpose of any transaction is to evade or avoid withdrawal liability, then liability is determined and collected without regard to such transaction.

  ▪ SuperValue, Inc. v. Bd. of Trustees of Southwestern Pennsylvania and Western Maryland Area Teamsters and Employers Pension Fund
  ▪ Cuyamaca Meats, Inc. v. San Diego and Imperial Counties Butchers’ and Food Employers’ Pension Trust Fund
  ▪ Trs. of the Utah Carpenters’ & Cement Masons’ Pension Trust v. Loveridge
  ▪ Teamsters Joint Council No. 83 of Virginia Pension Fund v. Empire Beef Co.
  ▪ CIC-TOC Pension Plan v. Weyerhaeuser Co.

• Special rules
Calculation Methodologies and Assumptions

• ERISA § 4211(b) – “presumptive method”
  • Specific statutory formula that assigns a share of unfunded liability to the employer that has withdrawn.

• ERISA § 4211(c)(4) - “direct attribution method”
  • Employer’s withdrawal liability based generally on the benefits and assets attributable to that employer’s participant service as of the end of the plan year preceding the withdrawal.

• ERISA § 4211(c)(3) “rolling-5 method”
  • Withdrawing employer is liable for a share of the plan’s UVBs as of the end of the plan year preceding the employer’s withdrawal allocated in proportion to the employer’s share of total plan contributions for the last five plan years ending before the withdrawal.
First Year Interest

  - Payments are calculated as if the “first payment were made on the first day of the year following withdrawal.”
  - The Court reasoned that interest does not begin to accrue until the debt arises.
PPA Surcharges and Withdrawal Liability Calculations

• PPA Surcharge as Part of Annual Payment
  • Is it part of the “highest contribution rate at which the employer had an obligation to contribute under the plan . . . .”? ERISA § 4219(c)(1)(C)(1).

• Board of Trustees of IBT Local 863 Pension Fund v. C&S Wholesale Grocers Inc./Woodbridge Logistics LLC, 2014 WL 1687141 (D.N.J. Mar. 19, 2014)
  • Court held the surcharge was not part of the annual payment.
  • It reasoned that while the term “contribution rate” is undefined in ERISA, there is a definition of “obligation to contribute” that is directly tied to a collective bargaining agreement. Since the surcharge was not part of collective bargaining agreement.
Pay First, Dispute Later Scheme

• ERISA § 4221(d) and *Central States v. Lady Baltimore Foods, Inc.*, 960 F.2d 1339, 1341 (7th Cir. 1992) (“the rule is pay first, arbitrate after.”)

• Depending on jurisdiction, there are limited exceptions:
  • if (1) the MEP’s claim is frivolous and (2) making interim payments would irreparably harm the employer
  • if the MEP determines that an employer is liable for a withdrawal due to a transaction designed to avoid or evade liability, an employer may be relieved of its duty to make interim payments. See ERISA §4221(f).
• **Effect of Bankruptcy or Insolvency of Employer**
  
  • Limitation on allocation of unfunded vested benefits to insolvent employer undergoing liquidation or dissolution per ERISA § 4225(b)
  
  • Liability of individual company owners:
    - to extent withdrawal liability is attributable to individual’s obligation to contribute to plan as sole proprietor or partner, property exempt under Bankruptcy Code is not subject to such liability. ERISA § 4225(c).
    - dischargeability in personal bankruptcy – courts have distinguished between unpaid contributions and withdrawal liability
  
  • Joint and several liability of solvent controlled group members
  
  • Portion of withdrawal liability attributable to post-bankruptcy petition time period as regarded as administrative expense entitled to priority
Other Emerging Issues

Reliance on broad reach of ERISA § 4301(a)(1) as to persons entitled to maintain actions – a plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under Subtitle E of Title IV of ERISA with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.
• Employer fiduciary claims
  ▪ DiGeronimo Aggregates, LLC v. Zemla
  ▪ Grand Union Company v. Food Employers Labor Relations Association
  ▪ Sysco Food Services of Metro New York LLC v. Tramontana

• Employer claims against other employers
  ▪ Knall Beverage, Inc. v. Teamsters Local Union No. 293 Pension Plan
Union Indemnification Clauses Lawful

- *Shelter Distrib., Inc. v. General Drivers, Wrhsmn & Hlprs Local Un. No. 89*, 674 F.3d 608 (6th Cir. 2012)
  - Contract provided union would indemnify for liability
  - Court upholds arbitration award enforcing requirement, rejects union public policy claims

- Sixth Circuit joins the Third Circuit in finding such provisions do not violate ERISA:
  - *Pittsburgh Mack Sales & Services, Inc. v. IUOE Local Union No. 66*, 580 F.3d (3d Cir. 2009)

- **Note**: May be a subject of mandatory bargaining
• How to Litigate

• Experts

  ▪ Challenging Actuarial Assumptions
    ▪ Withdrawal liability to be determined on basis of actuarial assumptions and methods either prescribed by PBGC regulations or which, in the aggregate, are reasonable and which, in combination, offer the actuary’s best estimate of anticipated experience under the plan. ERISA § 4213(a).
    ▪ Determination of plan’s unfunded vested benefits is presumed correct unless employer can show by a preponderance of evidence that:
      ▪ actuarial assumptions and methods used were, in the aggregate, unreasonable, or
      ▪ plan’s actuary made a significant error in applying the actuarial assumptions and methods. ERISA § 4221(a)(3)(B).
Requests for Review and Arbitration Demands

- Strict timing requirements

  - Retirement Plan of the National Retirement Fund v. Lackmann Culinary Services Inc.
Disputes under ERISA §§ 4201-4219 to be resolved through initiation of arbitration within 60-day period after earlier of:

- date of plan’s notification of employer under ERISA § 4219(b)(2)(B), or
- 120 days after date of employer’s request for review, except parties may jointly initiate arbitration within 180 days of plan’s demand. ERISA § 4221(a)(1).

**Central States, Southeast & Southwest Areas Pension Fund v. C.&V. Leasing, Inc.**

**Trucking Employees of North Jersey Welfare Fund Inc. – Pension Fund v. Parsippany Construction Co. Inc.**
Courts are split as to scope of exceptions to hear challenge to withdrawal liability when there has not first been arbitration.

- Trustees of the Utah Carpenters’ and Cement Masons’ Pension Trust v. New Star/Culp LLC
- Operating Engineers’ Pension Trust Fund v. Clark’s Welding and Machine
- Findlay Truck Line, Inc. v. Central States, Southeast & Southwest Areas Pension Fund
  - an employer’s “facial constitutional attack”;
  - an employer’s verifiable claim that arbitration would lead to irreparable injury;
  - the determination of whether a company is an “employer” within the meaning of MPPAA.
• Applicable Arbitration Rules

Arbitration proceedings under ERISA § 4221 are to be conducted:

- in accordance with fair and equitable procedures promulgated by PBGC. ERISA § 4221(a)(2).
- in the same manner, subject to the same limitations, carried out with the same powers (including subpoena power) and enforced in United States courts as an arbitration proceeding carried out under title 9, United States Code. ERISA § 4221(b)(3).
- with presumption that any determination made by a plan sponsor under ERISA §§ 4201-4219 and 4225 is correct unless contesting party shows by a preponderance of evidence that such determination was unreasonable or clearly erroneous. ERISA § 4221(a)(3)(A).
Arbitration Rules – cont’d.

- PBGC has promulgated Regulations §§ 4221.1-4221.14; PBGC Reg. § 4221.14 provides that in lieu of these procedures, arbitration may be conducted in accordance with an alternative procedure approved by the PBGC in accordance with its prescribed rules and conditions.
- *Central States, Southeast & Southwest Areas Pension Fund v. Allega Concrete Corp.*
- Query whether fund can compel employer to utilize AAA rules or payment of filing fee in order to initiate arbitration?
- Query whether fund can mandate venue of arbitration hearing?
- Query whether fund can mandate reimbursement of attorneys’ fees and expenses if fund prevails in arbitration of its assessment?
Scope of the Arbitration

• Interplay With the FAA - See Central States v. US Foods, Inc., 2014 U.S. App. LEXIS 14737 (July 30, 2014) (scope of arbitration is for the arbitrator to decide; court review follows final award)
Discovery in Arbitration

• 29 CFR sec. 4221.5(2):
  - Allows substantial prehearing discovery subject to the discretion of the arbitrator and permits the arbitrator to issue sanctions

• Section 16 of AAA’s Multi-Employer Pension Plan Arbitration Rules for Withdrawal Liability Disputes:
  - “The Arbitrator may allow any party to conduct prehearing discovery by interrogatories, depositions, requests for the production of documents, or other means, upon a showing that the discovery sought is likely to lead to the production of relevant evidence and will not be disproportionately burdensome to the other parties.”
  - Arbitration Hearings – Application of Federal Rules of Evidence
Federal Review of Arbitrator Award

- ERISA § 4221(c) -- Presumption respecting finding of fact by arbitrator.
  - “[T]here shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct.”
- The arbitrator’s findings of law are subject to *de novo* review.
- Arbitrator award in favor of employer extinguishes interim payment duty notwithstanding federal review. ERISA § 4221(d).
The Hybrid Plan Option for Electing Plans

- Allows payoff of contingent “legacy” liability and entry into “overfunded” new pool
- Lessens mass withdrawal redetermination and reallocation risks
- May require continued participation with a contribution/CBU guarantee for several years before a complete withdrawal can be effected
- No or lesser Rehabilitation Plan contribution increases
- Substantial actuarial analysis needed
- “Pay now or (maybe) pay later” Hobson’s choice