WITHDRAWAL LIABILITY
TO MULTI-EMPLOYER
PENSION PLANS
UNDER ERISA

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This paper is intended as a general guide to the withdrawal liability provisions of ERISA, which were added in 1980 by the Multi-Employer Pension Plan Amendments Act ("MPPAA") for practitioners and executives. It discusses the MPPAA's background and the operation of its major provisions, with some emphasis on litigation procedures. Of necessity, however, it does not cover all of the MPPAA's numerous technical provisions in detail. For additional information, the reader should consult Employee Benefits Law Chapter 17 (Bloomberg BNA, 3d ed. 2013).

I. Introduction and Background

A multi-employer pension plan is a plan to which more than one employer contributes and which is maintained pursuant to collective bargaining contracts between the employers and a union or unions. (29 U.S.C. § 1301(a)(3)). Such plans are jointly trusteed and administered under Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186. Half of the trustees are appointed by the union and the other half by employers or employer associations. The size of the plans (in terms of employers, participants and assets) has varied widely. Some plans cover thousands of employers, with assets and liabilities in the billions. Typically, employers and unions have negotiated the amount of contributions to the plans on a cents-per-hour or similar basis. The trustees then establish the amount of plan benefits which, in their view, can be supported by the negotiated contribution levels.

Until 1980, if an employer's obligation to contribute to the plan ceased for any reason, the employer ordinarily had no further obligation with respect to the plan. Because the employer's obligation was limited to the payment of amounts set forth in the collective bargaining contract, the amount of plan benefits and the financial soundness of the plan were of no direct consequence to the employer. Accordingly, as a practical matter, unions frequently assumed the lion's share of responsibility for plan management.

The passage of ERISA, in 1974, created major and sweeping changes in virtually all aspects of pension law. Title IV of ERISA created the Pension Benefit Guaranty Corporation (PBGC) to federally insure certain plan benefits upon termination of a defined benefit pension plan. To fund this insurance program, Title IV required plan sponsors to pay premiums to the PBGC. If an employer terminated its plan, without plan assets sufficient to cover PBGC-guaranteed benefits, Title IV created potentially massive employer liability to the PBGC, up to 30 percent of the employer's net worth.

While ERISA required the PBGC to guarantee benefits from terminated single-employer pension plans, Congress left the matter of multi-employer plan terminations to the PBGC's discretion. In this respect, Congress feared that mandatory PBGC coverage could have caused the termination of numerous poorly funded multi-employer plans, creating enormous liabilities for the new agency, and concluded that further study of the multi-employer plan situation was necessary. Nonetheless, Congress initially established January 1, 1978 as the date on which multi-employer plan terminations also automatically would be covered by PBGC guarantees. This date subsequently was extended to August 1, 1980.

Under ERISA but prior to the passage of MPPAA in 1980, an employer still could withdraw from a multi-employer plan without further obligation unless it had contributed at least 10 percent of all employer contributions to the plan in the years preceding withdrawal. Even such a "substantial employer" merely was required to post a bond or other security and incurred liability only if the plan terminated within five years following its withdrawal. Thus, ERISA had little direct impact on employers contributing to multi-employer plans.

Significantly, however, virtually all multi-employer pension plans fell within ERISA's definition of "defined benefit plan," i.e., a plan in which an individual's benefits were not based solely on the amount contributed for him and maintained in a separate account. Thus, multi-employer pension plans became covered by Title IV.

The policy reasons for so classifying multi-employer plans were not obvious. Such plans were not dependent on the financial soundness or funding policies of individual employers and, moreover, they were controlled, to a large extent, by unions which could be expected to protect their members' interests. Because ERISA had little practical significance for most employers contributing to multiemployer plans, this major policy issue was not highlighted in the political process as much as it might have been. Nonetheless, the statute laid the foundation upon which employers have now become accountable for the financial soundness of the plans.

While the impact of ERISA on multi-employer plans was not readily apparent to most employers in 1974, the classification of such plans under ERISA represented, at least in theory, a dramatic departure from the widely held perception that an employer's responsibility was limited to making the collectively bargained contributions.

On September 26, 1980, Congress enacted MPPAA, amending ERISA and the Internal Revenue Code, to further regulate the conduct of multi-employer plans and to protect the PBGC in its role as guarantor of plan benefits. Among other things, the MPPAA established more stringent minimum funding requirements for such plans and added further funding requirements for plans in financial difficulty. The MPPAA also required plan trustees to collect "withdrawal liability" from employers whose covered operations or obligation to contribute terminated. Thus, the law removed the collectively bargained limitations on an employer's obligations, to bolster the funding of multi-employer plans and, indirectly, to protect the PBGC.

The Pension Protection Act of 2006 made minor changes to the withdrawal liability rules and modified the funding rules and procedures with special emphasis on plans with relatively weak levels of funding. The Multiemployer Pension Reform Act of 2014 made further changes to some of the technical rules for calculating withdrawal liability, which are discussed below.

II. <u>The Existence and Amount of Withdrawal Liability</u>

A. <u>Withdrawal Liability Generally</u>

The withdrawal liability created by the MPPAA generally applies to employers contributing to multi-employer plans, without regard to whether they are "substantial employers" or whether the plan terminates at any point following withdrawal. Moreover, the liability may be triggered by a complete or partial withdrawal (explained below) without regard to the reason for the withdrawal. Thus, employers may incur liability for reasons beyond their control, e.g., decertification of the union or economic circumstances requiring the closing of a facility.

In general, the amount of withdrawal liability is the employer's proportionate share of the plan's unfunded vested liabilities, as determined under a statutory formula. However, a withdrawing employer may be required to pay even if its employees are not entitled to benefits and do not form any part of the plan's liabilities. Even if the employees are immediately hired by another contributing employer that will continue to fund their benefits, the withdrawing employer may be liable. See Central States Pension Fund v. Bellmont Trucking Co., Inc., 788 F.2d 428 (7th Cir. 1986). Further, because the withdrawal liability is determined as of the end of the plan year preceding the withdrawal, the MPPAA does not take into account the ongoing funding policy of the plan which may be adequate to fully fund all benefits. Due to quirks in the statutory formulae, courts have assessed withdrawal liability where the plan had fully funded vested liabilities. See, e.g., Ben Hur Construction Co. v. Goodwin, 784 F.2d 876 (8th Cir. 1986), Wise v. Ruffin, 914 F.2d 570 (4th Cir. 1990); RXDC, Inc. v. OCAW Pension Fund, 781 F. Supp. 1516 (D. Colo. 1992). But see Berkshire Hathaway, Inc. v. Textile Workers Pension Fund, 874 F.2d 53 (1st Cir. 1989). In any event, it is not unusual for an employer's withdrawal liability to far exceed its net worth.

B. Identifying the Employer for Withdrawal Liability Purposes

In general, all trades or businesses "under common control" are treated as a single employer for purposes of withdrawal liability and other matters under Title IV of ERISA. ERISA §4001(b)(1), 29 USC §1301(b)(1). This applies to a determination of whether a withdrawal has occurred and means that controlled group members are jointly and severally liable for withdrawal liability. Thus, the discharge of a controlled group member's withdrawal liability in bankruptcy does not discharge the other controlled group members' withdrawal liability obligations. I.A.M. Nat'l Pension Fund v. TMR Realty Co., Inc., 431 F. Supp. 2d 1 (D.D.C. 2006). Partners and joint ventures are jointly and severally liable for the withdrawal liability. Teamsters Pension Trust Fund v. H.F. Johnson, 830 F.2d 1009 (9th Cir. 1987). Cf. Park South Hotel Corp. v. New York Hotel Ass'n Pension Fund, 851 F.2d 578 (2d Cir. 1988). Under certain circumstances, parent-subsidiary and brother-sister groups will be jointly and severally liable for the withdrawal liability. Corbett v. MacDonald Moving Servs., Inc., 124 F.3d 82 (2d Cir. 1997).

Corporate shareholders and officers will not be held personally liable unless the court can "pierce the corporate veil" under the general principles of corporate law. Debreceni v. Graf Bros. Leasing Inc., 828 F.2d 877 (1st Cir. 1987). See also Int. Brotherhood of Painters v. Geo. Kracher, Inc., 856 F.2d 1546 (D.C. Cir. 1988). However, a shareholder may also be liable for his corporation's withdrawal liability if he owns investment property or other assets which are treated as a trade or business under common control. See, e.g., Cent. States Pension Fund v. Messina Products, LLC, 706 F.3d 874 (7th Cir. 2013) (holding that renting property to the contributing employer is "categorically" a trade or business); Cent. States Pension Fund v. Personnel, Inc., 974 F.2d 789 (7th Cir. 1992); Western Conference of Teamsters Pension Fund v. LaFrenz, 837 F.2d 892 (9th Cir. 1988). The trade or business need not have an economic nexus to the company that incurred the withdrawal liability. Cent. States Southeast & Southwest Areas Pension Fund v. White, 258 F.3d 636 (7th Cir. 2001); Connors v. Incoal, Inc., 995 F.2d 245 (D.C. Cir. 1993). Generally, when determining whether an activity is a "trade or business," courts consider whether the person was engaged in the activity (1) for the primary purpose of income or profit and (2) with continuity and regularity. See Cent. States Pension Fund v. CLP Venture LLC, 760 F.3d 745, 749 (7th Cir. 2014).

It is not always clear whether a particular entity constitutes a "trade of business" in contrast to a "passive investment." For example, is a private equity fund treated as a trade or business, exposing all portfolio companies to potential withdrawal liability for the operations of any one portfolio company? In Sun Capital Partners III, LLP v. New England Teamsters Pension Fund, 724 F.3d 129 (1st Cir. 2013), cert. denied, 2014 WL 801176 (Mar. 3, 2014), the First Circuit held that a private equity fund was a trade or business and, thus, could be part of a controlled group with its portfolio company. The First Circuit applied "an investment plus approach," noting that "a mere investment made to make a profit, without more, does not itself make an investor a trade or business" but finding that the private equity fund at issue was "actively involved in the management and operation of the companies in which they invest." See also Board of Trustees, Sheet Metal Workers National Pension Fund v. Palladium Equity Partners LLC, 722 F.Supp.2d 854 (E.D. Mich. 2010) (denying cross motions for summary judgment on the issue).

Withdrawal liability may also be assessed on a company's "alter-ego" even if there is no common ownership. Ret. Plan of UNITE HERE Nat'l Ret. Fund v. Kombassan Holdings A.S., 629 F.3d 282 (2d Cir. 2010). The Second Circuit stated that "the test of alter ego status is flexible, allowing courts to weigh the circumstances of the individual case." Id. at 288. The successorship doctrine also has been applied to collect withdrawal liability in a few cases. Einhorn v. M.L. Ruberton Construction Co., 632 F.3d 89 (3d Cir. 2011); Chicago Truck Drivers Pension Fund v. Tasemkin, Inc., 59 F.3d 48 (7th Cir. 1995); but see In re Ormet Corp., 2014 WL 3542133, at *3 (Bankr. D. Del. Jul. 17, 2014) (holding that successor claims were barred following sale of assets pursuant to Section 369 of the Bankruptcy Code).

The courts are split as to whether an entity's obligation to contribute must be created by contract. Compare Central States v. Int'l Comfort Products, LLC, 585 F.3d 281 (6th Cir. 2010), cert. denied, 131 S.Ct. 223 (2010) ("employer" status may arise from a contractual obligation or an obligation under applicable labor-management relations laws) with Transpersonnel, Inc. v. Roadway Express, Inc., 422 F.3d 456 (7th Cir. 2005) (an employer is an entity that "has assumed a contractual obligation to make contributions to a pension fund"); Seaway Port Auth. of Duluth v. Duluth-Superior ILA Marine Ass'n Restated Pension Plan, 920 F.2d 503 (8th Cir. 1990) (same); H.C. Elliot Inc. v. Carpenters Pension Trust Fund for N. California, 859 F.2d 808 (9th Cir. 1988).

C. Definition of Complete Withdrawal

Subject to certain exceptions, a complete withdrawal occurs when an employer: (1) permanently ceases to have an obligation to contribute to the plan or (2) permanently ceases all covered operations. ERISA § 4203(a), 29 U.S.C. § 1383. This may result, for example, from the closing or sale of a business, from decertification of the union or from an agreement reached in collective bargaining, without regard to whether the affected employees will be covered by a different plan.

For these purposes, the "employer" includes all trades or businesses under common control. ERISA § 4001(b)(1); 29 U.S.C. § 1301(b)(1); Corbett v. MacDonald Moving Servs., Inc., 124 F.3d 82 (2d Cir. 1997); Teamsters Pension Trust Fund v. H.F. Johnson, 830 F.2d 1009

(9th Cir. 1987). Thus, if a corporation permanently ceases contributions to the plan while its wholly owned subsidiary continues to contribute, a complete withdrawal does not occur.

Under ERISA Section 4218(2), a withdrawal does not occur "solely" because an employer "suspends" contributions during a labor dispute. This provision is intended to prevent withdrawal liability from being used as a weapon in labor disputes. Note that at least one court has held that the Supreme Court's Advanced Lightweight Concrete decision is inapplicable to withdrawal liability cases so that the determination of whether a bargaining impasse has occurred is not within the primary jurisdiction of the NLRB for this purpose. See Colorado Pipe Indus. Pension Trust v. Howard Elec. Inc., 909 F.2d 1379 (10th Cir. 1990); Cent. States Pension Fund v. Houston Pipe Line Co., 713 F. Supp. 1527 (N.D. Ill. 1989). In any event, if a labor dispute ends without resumption of contributions, the date of withdrawal relates back to when the contribution obligation or covered operations ceased. See Marmon Coal Co. and UMWA Pension Plans, 10 EBC 2365 (Tilove, Arb. 1988); Sheet Metal Workers Pension Fund v. Advanced Metal & Welding Corp., 643 F. Supp. 1201 (N.D. Ga. 1986); Marvin Hayes Lines, Inc. & Central States Pension Fund, 8 EBC 1834 (Weckstein, Arb. 1987).

D. Definition of Partial Withdrawal

There are three types of partial withdrawals which, like the complete withdrawal rules, are subject to certain exceptions and to the controlled group rules. Under ERISA Section 4205, 29 U.S.C. Section 1385, each type of partial withdrawal is self-contained, i.e., a partial withdrawal can occur under any of the three types, even if the others are inapplicable.

A partial withdrawal occurs when an employer permanently ceases to have an obligation to contribute at one (but not all) facilities covered by the plan, if the employer continues to perform the same type of work at the facility. Alternatively, a partial withdrawal occurs when an employer permanently ceases to have an obligation to contribute under one or more (but not all) collective bargaining agreements while continuing to perform the same type of work in the union's jurisdiction or transferring the work to another location. See Nestle Holdings, Inc. v. Cent. States Southeast & Southwest Areas Pension Fund, 342 F.3d 801 (7th Cir. 2003) (addressing for the first time what "transfer" means under ERISA § 4205(b)(2)(A)(i)). In the "bargaining out" scenario, a partial withdrawal can also be triggered where the work is transferred to another entity owned or controlled by the employer, as a result of an amendment added by the PPA in 2006. Significantly, these types of partial withdrawals are not triggered by the mere closing or sale of a facility. Further, a withdrawal does not occur solely because an employer suspends contributions during a labor dispute.

Even if a partial withdrawal does not occur under either of the above tests, it may result from a "70-percent contribution decline." ERISA § 4205(b)(1), 29 U.S.C. § 1385(b)(1). This test seeks to measure substantial and long-term reductions in an employer's contribution level. A 70-percent contribution decline occurs as of the end of a plan year if the employer's "contribution base units" (e.g., hours worked, tons of coal, etc.) in each of the three most recent years (called the three-year testing period) is less than 30 percent of its average contribution base units in the two highest of the preceding five years (called the base period).

For example, to determine whether a partial withdrawal occurred as of June 30, 2006 (the end of a plan year), one would first compute the average contribution base units in the highest two years during the base period, i.e., years ending 1999 through 2003. If the contribution base units in each of the years ending 2004, 2005 and 2006 are less than 30 percent of such two-year average, a partial withdrawal occurs. The resulting withdrawal liability can be reduced or abated if the employer's decline in contributions is later reversed.

E. Changes in Corporate Form and Sales of Stock

Under ERISA §4218(1), 29 U.S.C. § 1398(1)(B), a withdrawal will not occur solely because an employer ceases to exist as a result in change of corporate structure (e.g., merger) or changes to an unincorporated form of business enterprise. However, the change in business form must not cause any interruption in employer contributions or the obligation to contribute under the plan. The language of this provision further ensures that the contribution history of an employer undergoing a change in corporate form will be "inherited" for withdrawal liability purposes by the successor employer. For an example of a reorganized corporation being assessed withdrawal liability as a successor to former subsidiaries, see CenTra Inc. v. Central States Pension Fund, 578 F.3d 592 (7th Cir. 2009).

Although ERISA has no provision directly addressing the impact of a stock sale, Section 4218(1) has been relied upon to justify the result of "no withdrawal" upon a stock sale. Dorn's Transportation, Inc. v. Teamsters Pension Fund, 787 F.2d 897 (3d Cir. 1986). See also Park South Hotel Corp. v. New York Hotel Ass'n Pension Fund, 851 F.2d 578 (2d Cir. 1988) (applying similar principles to sale of partnership interests). This provision also applies to employers that continue to do business in an altered form. The MPPAA's legislative history also shows that a stock sale was not intended to cause a withdrawal. Both the Senate and House explanations of the Act state that the sale of all stock of a corporation will not result in a withdrawal if the corporation's obligation to contribute continues.

However, Section 4218(1) will not apply to the sale of a company's assets to a third party and distribution of the cash proceeds to the company's shareholders. Teamsters Pension Trust Fund of Phila. & Vicinity v. Headley's Express & Storage Co., 1993 U.S. Dist. LEXIS 7245 (E.D. Pa. 1993). Further, the formation of a joint venture is not a change in corporate form. Bowers v. Andrew Weir Shipping, Ltd., 27 F.3d 800 (2d Cir. 1994).

F. Sales of Assets

Congress recognized that the sale of a business could create a complete or partial withdrawal even if the purchaser continued to employ plan participants and make the negotiated contributions on their behalf. To avoid such an unfair and unreasonable result, Congress provided a method for avoiding the withdrawal liability that otherwise occurs due to a sale of corporate assets.

Under ERISA Section 4204, 29 U.S.C. Section 1384, a complete or partial withdrawal will not occur solely because the employer sells the assets of its business if certain conditions are met. See Central States Pension Fund v. Georgia-Pacific LLC, 639 F.3d 757 (7th Cir. 2011) (discussing the term "solely"). First, there must be a "bona fide, arm's length sale of assets to an unrelated party."

Second, the purchaser must have an obligation to contribute to the plan with respect to the operations for substantially the same number of contribution base units as the seller previously had. Some arbitrators have suggested that it is sufficient for the sale agreement to create this obligation, without regard to whether the contribution base units actually decline after the sale. Hoffman Mgt. Corp. and CTDU Pension Fund, 11 EBC 1489 (Cornelius, Arb. 1989). An 85% standard was approved in Consol. Enterprises and Western Conference of Teamsters Pension Fund, 12 EBC 2078 (Slater, Arb. 1990). Other arbitrators have considered post-sale events, sometimes determining whether declines in contributions were normal or foreseeable. See, e.g., Dravo Corp. and IAM National Pension Fund, 6 EBC 2641, 2652 (Mittleman, Arb. 1985); Kroger Co. and Southern California Food Workers Pension Fund, 6 EBC 1345, 1364 (Nagle, Arb. 1985). The Seventh Circuit has ruled that the matter must be resolved as of "the time of the sale, not afterwards." Cent. States Pension Fund v. Cullum Companies, Inc., 973 F.2d 1333 (7th Cir. 1992).

Third, the purchaser must post a bond or similar security for a five-year period. The amount of the bond is the greater of: (1) the seller's average annual contribution for the three plan years preceding the year of sale or (2) the seller's contribution in the plan year preceding the sale. Twice the amount is required if the plan is in "reorganization." If the purchaser withdraws or fails to make timely contributions during the five-year period, the amount of the bond is paid to the plan.

Fourth, the contract of sale must provide that, if the purchaser withdraws during the five plan years following the sale, the seller is secondarily liable to the plan. This secondary liability is limited, however, to the amount the seller would have been required to pay absent a Section 4204 transaction.

Where the parties to a sale comply with Section 4204, the purchaser assumes the contribution history of the seller at the purchased facilities only for the plan year of the sale and the four preceding years. Accordingly, the amount of the purchaser's initial potential liability frequently will be less than the seller's. For this and other reasons, it may make economic sense to comply with Section 4204 where the purchaser intends to continue the business without major change. Of course, the purchase price may be affected and the parties may want to include appropriate indemnity provisions in the contract of sale.

Once a Section 4204 sale has occurred, the plan should not have the right to consider the contribution base units attributable to the divested operation in computing the seller's liability in the event of a subsequent withdrawal. Borden, Inc. v. Bakery & Confectionery Pension Fund, 974 F.2d 528 (4th Cir. 1992).

One court assessed withdrawal liability against a company which divested its covered operations in a series of transactions in which only the last one complied with Section 4204. The court held that a withdrawal occurred because the employer's cessation of contributions was not "solely because" of the Section 4204 asset sale. Penn Cent. Corp. v. Western Conference of Teamsters Fund, 75 F.3d 529 (9th Cir. 1996). Accord Southland Corp. v. Central States Pension Fund, 17 EBC 1817 (Glanzer, Arb. 1993). In contrast, in Central States Pension Fund v. Georgia-Pacific LLC, the court upheld an arbitrator's decision in favor of a company which ceased to contribute to the plan following a Section 4204 sale. 639 F.3d 757 (7th Cir. 2011). The fund argued that the sale was not "solely" responsible for the fact that the selling company no longer contributed to the fund, as the selling company had laid off employees and closed facilities that contributed to the fund in other business operations many years before the sale. The court, however, stated that the best understanding of the phrase "solely because" is one that "concentrates on the transaction at issue: If the sale had not occurred, everything else had remained the same, and no withdrawal liability would have accrued, then the sale to a buyer that continued the pension contributions does not entail withdrawal liability." Id. at 760. The court noted, however, that "[i]f the employer crafts a plan to withdraw by stages, and uses a sale only for the last stage, then all transactions may be consolidated and withdrawal liability assessed." Id. at 761.

In situations where the parties do not comply with Section 4204, the seller—and not the buyer—may incur withdrawal liability. This is true even if the buyer makes all applicable contributions. See, e.g., Cent. States Southeast and Southwest Areas Pension Fund v. Safeway, Inc., 229 F.3d 605 (7th Cir. 2000) (holding company liable for withdrawal liability after it sold the divisions that still employed most plan participants). At least one court has nonetheless applied a "successor liability doctrine" to assert liability against the buyer in such circumstances, where the result was deemed to be equitable. See, Einhorn v. M.L Ruberton Construction Co., 632 F.3d 89 (3d Cir. 2011); Cent. States Pension Fund v. Wiseway Motor Freight, Inc., 2000 WL 1409825 (N.D. Ill. 2000) (citing CTDU Pension Fund v. Tasemkin Inc., 59 F.3d 48 (7th Cir. 1995)).

G. Evading or Avoiding Liability

ERISA Section 4212(c) provides: "If a principal purpose of any transaction is to evade or avoid liability under [the MPPAA, the Act] shall be applied and liability shall be determined and collected without regard to such transaction." A principal purpose need not be the sole purpose. Sherwin-Williams Co. v. N.Y. State Teamsters Pension Fund, 158 F.3d 387 (6th Cir. 1998), cert. denied, 526 U.S. 1017 (1999). This section applies not only to sham or fraudulent transactions, but to any transaction where an employer's principal purpose is to avoid withdrawal liability. Supervalu, Inc. v. Bd. of Trustees of the Sw. Pa. and W. Md. Area Teamsters and Employers Pension Fund, 500 F.3d 334 (3d Cir. 2007).

For example, an employer entering into a bona fide collective bargaining agreement, which stated when the employer's contribution obligation would end, violated this section because the employer intended to avoid withdrawal liability by entering into that agreement. Id. In another case, the court held that the "selling back" of work to a third party to avoid triggering the five-year rule contained in the construction industry exemption amounted to an evade or avoid transaction. Ceco Concrete Constr., LLC v. Centennial State Carpenters Pension Trust, 2014 WL 7204614, at *6-7 (D. Colo. Dec. 18, 2014), appeal pending, Case No. 15-1021 (10th Cir. Jan. 20, 2015) (although the court held there were no damages because the employer would likely have strategically defaulted). On the other hand, a company that accelerated a plant closing in order to minimize the amount of its withdrawal liability did not engage in a "transaction" or otherwise violate Section 4212(c). CIC-TOC Pension Fund v. Weyerhauser Co., 2012 WL 5879525 (D. Ore. Nov. 20, 2012).

This Section has also been invoked to invalidate leveraged sales. Santa Fe Pacific Corp. v. Cent. States Pension Fund, 22 F.3d 725 (7th Cir. 1994); Sherwin Williams Co. v. N.Y. Teamsters Pension Fund, supra.

One court analogized this language to the common law of fraudulent conveyances as set out in the Uniform Fraudulent Transfers Act (UFTA). Connors v. Marontha Coal Co., 670 F. Supp. 45 (D.D.C. 1987). Under the UFTA, a creditor may sue the transferee of fraudulently transferred property to have the transfer declared voidable and to recover the transferred property. The plaintiffs alleged that the defendants transferred property to themselves and to corporations controlled by them. The plaintiffs did not name the corporations as defendants and they did not present any allegations that the corporate veil should be pierced. Consequently, the court held that the plaintiffs could only seek recovery of the assets actually transferred to the defendants personally.

In Pittsburgh Mack Sales & Service, Inc. v. International Union of Operating Engineers, Local Union No. 66, 580 F.3d 185 (3d Cir. 2009), however, the Third Circuit found an indemnification agreement regarding withdrawal liability between an employer and a union to be enforceable. While the decision focused generally on whether the indemnification agreement was contrary to public policy under ERISA and MPPAA rather than specifically on Section 4212, the court held that the indemnification agreement was enforceable because the employer remained primarily liable for the funding.

ERISA Section 4212(c) is particularly nettlesome with respect to the sale of a business, e.g., where ERISA Section 4204 expressly provides for avoiding withdrawal liability. In such circumstances, at least, a literal reading of Section 4212(c) seems inappropriate. Section 4212(c) was interpreted and applied by Arbitrator Mittelman in a lucid opinion, ITU Pension Plan, 5 EBC 1193 (1984). See also Banner Indus. and Cent. States Pension Fund, 11 EBC 1149 (Graham, Arb.), vacated by agreement, 12 EBC 1992 (1990); Cuyamaca Meats v. Butchers & Food Employers Pension Fund, 827 F.2d 491 (9th Cir. 1987), cert. denied, 485 U.S. 1008 (1988). The First Circuit has held that Section 4212(c) does not apply where two private equity funds purchased a contributing business and divided their ownership into 70/30 shares to avoid the 80% ownership requirement for parent-subsidiary controlled group status. The court stated that that Section 4212(c) does not permit a court to rewrite the terms of a transaction or to create a new transaction that never existed; rather, it only allows a court to put the parties in the position that would have existed if the transaction had never occurred. Sun Capital Partners III, LP v. New Eng. Teamsters & Trucking Ind. Pension Fund, 724 F.3d 129, 149-50 (1st Cir. 2013), cert. denied, 2014 WL 801176 (2014).

H. Gross Amount of Withdrawal Liability

In general, when a complete or partial withdrawal occurs, the amount of withdrawal liability is first determined under one of four statutory formulae contained in ERISA Section 4211, 29 U.S.C. Section 1391. That amount then becomes subject to several possible adjustments discussed below. The trustees of the plan select the formula applicable to all employers. The trustees also can invent a special formula for their own plan with PBGC approval.

In essence, all formulae attempt to determine the withdrawing employer's proportionate share of the plan's unfunded vested liabilities, determined as of the last day of the plan year preceding the withdrawal. Although the effect of each formula on employers in the aggregate is the same, the various methods can produce widely varying results as applied to a particular company.

1. The Presumptive Method

The first formula, called the "presumptive method," generally applies to plans where the trustees have not adopted one of the others. It is the most complicated method and probably the most frequently encountered. Although a full explanation of the presumptive method is beyond the scope of this paper, the highlights are as follows:

First, the plan's unfunded vested benefits as of the last day of the plan year ending before September 26, 1980 are multiplied by a fraction. The numerator is the amount of the withdrawing employer's contributions in that plan year and the four preceding years, and the denominator is the amount of all employers' contributions in the same period.

For each subsequent plan year, the change in the plan's unfunded vested liabilities is determined and multiplied by a similar fraction, based on contribution history for the five-year period ending on the last day of such plan year. The portion of the plan's unfunded vested liability which cannot be assessed or collected as withdrawal liability is also allocated to withdrawing employers on a similar basis.

The initial amount of unfunded vested liabilities, the amount of each year's change in unfunded vested liabilities and the amount of "reallocated" liabilities for each year are reduced by five percent of the base amount in each succeeding plan year. This reduction, of course, is reflected in the change in unfunded vested liabilities and reallocated liabilities on an annual basis. In computing the fractions, the contributions of employers which have previously withdrawn are disregarded.

In sum, the presumptive method requires numerous separate calculations as the plan's unfunded vested liabilities are subdivided in each year.

2. The Modified Presumptive Method

The second statutory formula, called the "modified presumptive method," is simpler to administer. Under this method, changes in unfunded vested benefits after the initial plan year are aggregated and the withdrawing employer's proportionate share of the changes is based on its proportionate share of total contributions to the plan during a five- to ten-year period ending on the last day of the plan year preceding the withdrawal.

3. The Rolling Five-Year Method

The third statutory formula is called the "rolling five-year method." It is the simplest method to administer. Here, one first determines the amount of the plan's unfunded vested liabilities as of the end of the plan year preceding withdrawal. This is then multiplied by a single fraction. The numerator is the withdrawing employer's contributions in the five plan years ending prior to the withdrawal and the denominator is the amount of contributions by all employers (which have not withdrawn) in the same period.

It is noteworthy that all of the above methods allocate the plan's unfunded vested liabilities to a withdrawing employer without regard to the amount of benefits payable to its employees. The only material factors used in the computation are the unfunded vested liabilities of the plan as a whole and the ratio of the withdrawing employer's contributions to the contributions of all employers during the relevant period.

4. The Direct Attribution Method

The fourth statutory formula, called the "direct attribution method," is substantially different from the others. Here, an employer's proportionate share of the plan's unfunded vested liabilities is based, not on the amount of its contributions, but on the extent to which the plan's liabilities are attributable to its employees. Accordingly, an employer which made relatively large contributions but had a relatively young and short-service work force could be far better off under the direct attribution method than under the other methods. Conversely, an employer with a work force composed of relatively older and longer-service employees may be worse off under the direct attribution method. In any event, most plans have found the direct attribution method to be administratively impractical and have disregarded it, despite the perception of some employers that it is more equitable than the other methods.

5. Withdrawal Liability Under a Merged Plan

Under PBGC regulations, 29 C.F.R. 4211.31-.37, a merged plan has three options for calculating an employer's withdrawal liability: (1) it may select one of the statutory allocations methods discussed above; (2) it may select one of the modified allocation methods prescribed by the PBGC regulations for merged plans; or (3) it may select its own allocation method, subject to PBGC approval.

6. Actuarial Assumptions and Methods

Under all of the above methods, it is readily apparent that the amount of the plan's unfunded vested liabilities is a critical factor in the determination of withdrawal liability. The amount of the plan's vested liabilities is significantly affected by the actuarial assumptions and methods used to compute it. In many circumstances, a minor increase in the interest assumption, for example, can eliminate or substantially reduce the amount of the plan's unfunded vested liabilities.

Under ERISA Section 4213, 29 U.S.C. Section 1393, actuarial assumptions and methods used to calculate withdrawal liability are selected by each plan. Such assumptions and methods must be reasonable in the aggregate, based on the experience of the plan and reasonable expectations. In combination, they must offer the actuary's best estimate of anticipated experience under the plan. Alternatively, the plan may use assumptions and methods set forth in PBGC regulations which have never been issued. The Seventh Circuit has held that a fund may use one set of assumptions for funding and another for withdrawal liability purposes. Artistic Carton Co. v. Paper Industry Pension Fund, 971 F.2d 1346 (7th Cir. 1992).

Most decisions by courts and arbitrators have upheld the assumptions and methods chosen by the fund. See, e.g., MM&P Pension Plan v. USX Corp., 900 F.2d 727 (4th Cir. 1990); Combs v. Classic Coal Corp., 12 EBC 1229 (D.D.C. 1990); Mich. United Food & Com. Workers v. Eberhard Foods, 831 F.2d 1258 (6th Cir. 1987); Loomis Armored, Inc. and Cent. States Pension Fund, 8 EBC 1899 (1987) (Tilone, Arb.); Perkins Trucking Co., 4 EBC 1489 (1983) (O'Loughlin, Arb.); Palmer Coking Coal Co. v. UMWA 1950 & 1974 Pension Plans, 5 EBC 2369 (1984) (Gordon, Arb.); Penn Textile Corp. and Textile Workers Pension Fund, 3 EBC 1609 (1982) (Pritzker, Arb.) (holding that the plan's six-percent interest assumption was proper). However, a few arbitrators have ruled in favor of the employer. See, e.g., Woodward Sand Company & Operation Eng'rs Pension Trust, 3 EBC 2351 (1982) (Kaufman, Arb.) (holding that the plan's actuarial assumptions were unreasonable and requiring the plan to increase the interest assumption from 6.5 percent to 7.9 percent); Carnation Co., Inc. and Cent. States Pension Fund, 9 EBC 1409 (Nagle, Arb. 1988) (rejecting assumptions of past service for participants with unknown attributes but upholding interest rate assumption).

The Supreme Court has held that interest does not accrue during the period from the withdrawal to the date of the first payment or in the year of withdrawal. See Milwaukee Brewery Workers Pension Fund v. Schlitz Brewing Co., 513 U.S. 414 (1995); ERISA § 4219(c)(1)(A)(i).

I. Adjustments to Withdrawal Liability

An employer's withdrawal liability, as discussed above, may be subject to one or more of the following adjustments:

1. The De Minimis Rule

Under ERISA Section 4209, an employer's withdrawal liability may be eliminated or reduced by up to $50,000 or 3/4 of one percent (.0075) of the plan's unfunded vested liabilities, whichever is less. The purpose of this "de minimis" rule is to relieve very small employers of withdrawal liability.

Assuming that the plan's unfunded vested liabilities exceed $6.7 million, an employer with unadjusted withdrawal liability of less than $50,000 would pay nothing based on the de minimis rule. If the unadjusted liability is between $50,000 and $100,000, the amount would be reduced by $50,000. If the unadjusted liability is between $100,000 and $150,000, the reduction would be less than $50,000. Specifically, the reduction would be $150,000 minus the amount of the unadjusted withdrawal liability. If the unadjusted liability exceeds $150,000, the de minimis rule is inapplicable.

The statute permits plans to adopt a $100,000 de minimis rule which operates in similar fashion, but is more advantageous to withdrawing employers. However, few plans have adopted this optional method.

It should be noted that, if the plan is poorly funded, an employer with only one or two employees may incur liability in excess of the de minimis adjustment. Ironically, if the plan is well funded, e.g., if its unfunded vested liabilities amount to less than $1 million, a small employer may have greater withdrawal liability, due to the 3/4 of one percent limitation, than it would have under a poorly funded plan.

2. Adjustment For Partial Withdrawal

In the case of a partial withdrawal, the first step is to determine the employer's liability for a complete withdrawal, adjusted by the de minimis rule, if applicable. Under ERISA § 4206, 29 U.S.C. § 1386, the resulting amount is then multiplied by one minus a fraction. The numerator of such fraction is the employer's contribution base units (e.g., hours worked, tons of coal, etc.) in the plan year following the partial withdrawal. The denominator is the employer's average contribution base units in a specified five-year period preceding the partial withdrawal. The five-year period selected depends on which type of partial withdrawal is involved.

If an employer's overall contribution activity has increased, the above fraction will be more than one, and there will be no partial withdrawal liability. On the other hand, if the employer's overall level of contributions has decreased significantly, the partial withdrawal liability may be a substantial portion of the complete withdrawal liability amount.

In such circumstances, anomalous results are possible. For example, if a partial withdrawal occurs due to the decertification of the union at a small facility which accounted for only one percent of the employer's contributions, the liability nevertheless could be 10, 20 or even over 50 percent of the employer's complete withdrawal liability. Thus, the partial withdrawal liability can be much higher than one would expect if one examined only the impact of contributions for the facility at which the partial withdrawal occurs. It is even possible to have a multimillion dollar withdrawal liability triggered by a decertification involving two or three employees.

3. Liquidation of Employer

If an employer withdraws due to the sale of all or substantially all of its assets in an arm's-length transaction to an unrelated buyer, its withdrawal liability may be limited under ERISA Section 4225, 29 U.S.C. § 1405. In such circumstances, the employer's liability generally is limited to a percentage of the liquidation or dissolution value of the employer after the sale. The applicable percentage is set forth in a table in ERISA Section 4225 and ranges from 30 percent for relatively small employers to over 80 percent in the case of large companies. This adjustment does not apply to employers undergoing reorganization under the United States Bankruptcy Code or similar state laws unless the ultimate purpose is liquidation. In re Advance United Expressways, Inc., 9 EBC 2340 (Bankr. D. Minn. 1988).

4. Twenty-Year Cap

Under ERISA Section 4219(c)(1), an employer's withdrawal liability may be reduced if the period required to amortize the liability in accordance with the statute exceeds 20 years. This limitation generally only applies in unusual circumstances or where a plan is very poorly funded.

J. Amount of Annual Payments

Under ERISA Section 4219(c), 29 U.S.C. § 1391(d), withdrawal liability ordinarily need not be paid in a lump sum. Generally, the maximum amount of an annual payment is the product of (1) the employer's highest average annual contribution base units during any three consecutive plan years out of the most recent ten years, multiplied by (2) the highest contribution rate, e.g. cents per hour or cents per ton of coal, in effect during the last ten years. The lump sum withdrawal liability is then amortized over the period necessary to pay the full amount. MPRA amended ERISA to provide that, as of December 31, 2014, the 5% and 10% surcharges imposed by the PPA are disregarded when calculating "the highest contribution rate." MPRA also excludes certain contribution rate increases that went into effect after December 31, 2014 from the "highest contribution rate."

As a practical matter, employers frequently are required to pay withdrawal liability in annual amounts substantially in excess of their pre-withdrawal annual contributions, despite the MPPAA's limitations. This occurs, in particular, where the employer's contribution base units have declined over the years while the negotiated contribution rate has increased. As a result, many withdrawing employers have less than five years in which to pay the entire liability. Moreover, it is noteworthy that withdrawing employers almost always are required to "fund" the plan's unfunded liabilities at a faster rate than on-going contributors.

For plans with poor funding, the combined effect of the annual payment limitation and the twenty year cap can often result in an effective liability that is significantly less than the gross withdrawal liability amount calculated by the fund. In these situations, the employer's true liability is the twenty-year payment stream, or the present value of those payments.

K. Special Industry Rules

The MPPAA established special industry rules applicable to the building and construction industry, the entertainment industry, the retail foods industry, the Great Lakes Maritime Industry and the United Mine Workers Plans. The MPPAA also provides special rules for plans in the "long and short haul trucking industry, the household goods moving industry or the public warehousing industry." However, the "trucking industry" rules have had little practical significance because the major Teamsters Union plans (and numerous smaller Teamsters plans) apparently are not covered by the definition because more than 15 percent of their contributions are received from employers outside the industry. See, e.g., Cent. States Pension Fund v. Bellmont, 610 F. Supp. 1505, 1509 (N.D. Ind. 1985), aff'd, 788 F.2d 428 (7th Cir. 1986).

In any event, if a special industry provision is applicable, the rules described in the preceding Section may be altered significantly. For example, the building and construction industry rules apply to an employer if substantially all of its covered employees work in the industry and the plan either primarily covers industry employees or is amended to provide such special treatment to industry employers. ERISA § 4203(b), 29 U.S.C. § 1383(b). If applicable, these rules generally provide that an industry employer is deemed to have withdrawn only if it ceases to have an obligation to contribute while continuing to perform the same type of work previously covered by the plan in the jurisdiction of the union. In other words, withdrawal occurs only if the employer goes non-union. Similar construction industry rules apply to partial withdrawals.

III. Procedural Rules Concerning Withdrawal Liability

ERISA Sections 4219 and 4221, 29 U.S.C. Sections 1399 and 1401, contain detailed procedures with respect to withdrawal liability assessments, challenges to the trustees' determinations and the payment of withdrawal liability. In several respects, these provisions are unique among federal laws and appear "stacked" against withdrawing employers.

A. Notice of Withdrawal Liability

Under ERISA Section 4219, trustees are required to provide notice of withdrawal liability to an employer after a withdrawal occurs and demand payment in accordance with a payment schedule. However, the trustee's notice need not inform the employer that it has a right to request a review of the original withdrawal liability assessment. Trustees of Laborers' Local 310 Pension Fund v. Able Contracting Group, Inc., 2006 U.S. Dist. LEXIS 79869 (N.D. Ohio Oct. 23, 2006). Courts have consistently held that notice to one employer within a control group is notice to all members of the control group. See, e.g., Ladies Garment Workers Nat'l Ret. Fund v. ESI Group, 28 EBC 1728 (S.D.N.Y. 2002), aff'd sub nom. Ladies Garment Workers Nat'l Ret. Fund v. Meredith Grey, Inc., 94 Fed. Appx. 850 (2d Cir. 2003); Cent. States Pension Fund v. Slotky, 956 F.2d 1369 (7th Cir. 1992). See also Teamsters Local 863 Pension Fund Trs. v. Foodtown, Inc., 296 F.3d 164 (3d Cir. 2002) (ruling that notice to the withdrawn employer constitutes sufficient notice to the employer's alter egos).

Depending on the circumstances, a revised assessment of withdrawal liability may or may not give the employer a new 90-day period for requesting review and a new 60-day period for beginning payments. Cf. Trustees of Tampa Mar. Ass'n Pension Fund v. S.E.L. Maduro, 849 F. Supp. 1535 (M.D. Fla. 1994) (new period allowed), with Cent. States Pension Fund v. Boise Cascade Corp., 1994 U.S. Dist. LEXIS 14851 (N.D. Ill. 1994) (no new period allowed). See also Nat'l Shopmen Pension Fund v. DISA Industries, Inc., 653 F.3d 573, 580 (7th Cir Aug. 8, 2011) (when a multiemployer plan issues a revised notice of withdrawal liability, "the revision resets the statutory time limitations governing when an employer may challenge the assessment").

The U.S. Supreme Court noted, in dictum, that there is no set time limit for the trustees' calculation of withdrawal liability. However, the court also noted that there may be possible claims for fiduciary breach or laches if the plan sponsors do not act promptly. Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp., 522 U.S. 192 (1997).

B. Requesting Review or Additional Information

Upon receiving a notice and demand for withdrawal liability from the plan trustees, an employer has 90 days in which to request a review of "any specific matter relating to the determination," ERISA § 4219, 29 U.S.C. § 1399, or to furnish additional relevant information. Within 60 days after receiving the trustees' decision in response to such request (but no later than 180 days after making the request) an employer wishing to challenge the determination must invoke arbitration. See Flying Tiger Line v. Teamsters Pension Fund of Phila., 830 F.2d 1241 (3d Cir. 1987) (company must arbitrate the issue of whether it is an "employer" within the meaning of MPPAA). An employer's request for information or merely stating that it disagrees with the liability assessment are not requests for review under section 1399. Nat'l Pension Plan of the UNITE HERE Pension Fund v. Westchester Lace & Textiles, Inc., 2006 U.S. Dist. LEXIS 49845, 39 EBC 1493 (S.D.N.Y. July 21, 2006).

C. **Arbitration of Withdrawal Liability Claims**

1. Initiating Arbitration

Under ERISA Section 4221, any dispute between the trustees and the employer regarding a determination made under ERISA Sections 4201 through 4219 "shall be resolved by arbitration." In order to compel arbitration of a dispute, either party must initiate the arbitration proceeding within the 60-day period after the earlier of: (1) the date of the trustees' notification to the employer of its decision regarding the employer's request for review or additional information or (2) 120 days after the employer's request for review or additional information. ERISA § 4221(a)(1). Alternatively, within 180 days after the date of the plan sponsor's demand for withdrawal liability payment, the parties may jointly initiate arbitration. Id.

If the employer fails to timely initiate arbitration, the withdrawal liability assessed by the plan sponsors is due and owing according to the payment schedule. ERISA § 4221(b)(1). Courts have routinely precluded employers who fail to initiate arbitration on a timely basis from challenging the plan sponsor's assessment of withdrawal liability. See, e.g., Nat'l Shopmen Pension Fund v. DISA Industries, Inc., 653 F.3d 573, 580 (7th Cir Aug. 8, 2011); Einhorn v. Kaleck Brothers Inc., 713 F.Supp.2d 417, 49 EBC 1225 (D.N.J. 2010); Cent. States Pension Fund v. Slotky, 956 F.2d 1369 (7th Cir. 1992); McDonald v. Centra, Inc., 946 F.2d 1059 (4th Cir. 1991); Teamsters Pension Trust Fund v. Allyn Transp. Co., 832 F.2d 509 (9th Cir. 1987); I.A.M. Nat. Pension Fund v. Clinton Engines Corp., 825 F.2d 415 (D.C. Cir. 1987). The waiver generally applies to the entire controlled group. See, e.g., IAM Pension Fund v. Slyman Industries, 901 F.2d 127 (D.C. Cir. 1990); McDonald v. Centra, Inc., 946 F.2d 1049 (4th Cir. 1991).

2. Arbitration Procedures

In arbitration, the key determinations made by the trustees and their actuary are "presumed correct" unless the employer "shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." ERISA § 4221(a)(3)(A). See Concrete Pine, Inc. v. Constr. Laborers Pension Trust, 508 U.S. 602 (1993) (upholding constitutionality of this provision and explaining the employer's burden of proof).

Upon completion of arbitration proceedings, either party may seek review in federal district court within 30 days after issuance of the arbitrator's award. Here, there is "a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." ERISA § 4221(c). Two district courts reached the opposite conclusion on whether a company's individual shareholders had a right to a jury trial in claims seeking to impose withdrawal liability on them. Compare Cent. States Pension Fund v. Brumm, 264 F. Supp. 2d 697 (N.D. Ill. 2003) (no right to a jury trial) with Cent. States Pension Fund v. Fulkerson, 2001 WL 1516728 (N.D. Ill. Nov. 28, 2001) (right to a jury trial). See also Colteryahn Dairy v. W. Pa. Teamsters Fund, 16 EBC 1566, 1576-77 (W.D. Pa. 1993) (right to a jury trial).

In certain unusual cases involving undisputed facts, employers have been permitted to bypass MPPAA arbitration procedures. Cent. States Pension Fund v. 888 Corp., 813 F.2d 760 (6th Cir. 1987); IAM National Pension Fund v. Stockton TRI Industries, 727 F.2d 1204

(D.C. Cir. 1984); Dorn's Transportation Inc. v. Teamsters Pension Fund, 787 F.2d 897 (3d Cir. 1986). Cf. Grand Union Co. v. Food Employers Pension Fund, 808 F.2d 66 (D.C. Cir. 1987). Further, a company can bypass arbitration for the limited purpose of asserting that it is not and has never been an "employer" subject to MPPAA. Nat'l Pension Plan of the UNITE HERE Workers Pension Fund v. Swan Finishing Co., Inc., 2006 U.S. Dist. LEXIS 28281 (S.D.N.Y. May 10, 2006); Transpersonnel, Inc. v. Roadway Express, Inc., 422 F.3d 456 (7th Cir. 2005); Rheem Mfg. Co. v. Cent. States Pension Fund, 63 F.3d 703, 1742-43 (8th Cir. 1995) (and cases cited therein).

D. Default and Payments Pending Arbitration

The plan's notice of withdrawal liability must include a schedule of payments "beginning no later than 60 days after the date of the demand notwithstanding any request for review." ERISA § 4219(c)(2), 29 U.S.C. § 1399(c)(2). If the employer fails to pay, the trustees may issue a past due notice. If the administrative review period has ended, upon the employer's failure to cure the delinquency within 60 days thereafter, the trustees can declare a default, accelerating the full amount of withdrawal liability. ERISA § 4219(c)(5), 29 U.S.C. § 1399(c)(5). However, the trustees must give notice of default before accelerating the withdrawal liability amount. CTDU Pension Fund v. El Paso CGP Co., 2006 U.S. Dist. LEXIS 38694, 38 EBC 1391 (N.D. Ill. Jun. 9, 2006).

If the employer has made timely requests for review and arbitration, the fund cannot declare a default to accelerate the liability, except in situations involving default for events indicating a substantial likelihood of an employer's inability to pay. 29 C.F.R. 4219.31(c); Cent. States Southeast & Southwest Areas Pension Fund v. O'Neill Bros. Transfer & Storage Co., 2010 WL 3421164 (7th Cir. 2010). However, monthly payments can be collected by the fund, with penalties, interest and attorneys' fees, even while review proceedings are pending. Connors v. Petitte Bros. Mining Co., 70 F.3d 637 (D.C. Cir. 1995); Lads Trucking Co. v. Western Conf. of Teamsters Pension Fund, 777 F.2d 1371 (9th Cir. 1985). After reviewing the decisions in every Circuit, the Sixth Circuit held that there are no equitable exceptions to the interim payment requirement and that the statute "divests us of the jurisdiction to bar interim payments." Findlay Truck Service, Inc. v. Central States Pension Fund, 726 F.3d 738 (6th Cir. 2013). However, some courts have held that the employer may defend upon a showing that the fund's claim is frivolous and that interim payments will cause irreparable harm. Trustees of the Chi. Truck Drivers Helpers & Warehouse Workers (Indep.) Union Pension Fund v. Rentar Indus., Inc., 951 F.2d 152 (7th Cir. 1991); Plumbers & Pipefitters Ntl. Pension Fund v. Mar-Len. Inc., 30 F.3d 621 (5th Cir. 1994); but see Galgay v. Beaverbrook Coal Co., 105 F.3d 137 (3d Cir. 1997) (declining to adopt this equitable exception). Penalties awarded to the fund will not be refunded even if the employer ultimately prevails on the merits of the withdrawal liability dispute. Cent. States Pension Fund v. Lady Baltimore Foods, Inc., 960 F.2d 1339 (7th Cir. 1992), cert. denied, 15 EBC 2776 (1992).

E. Statute of Limitations

Under ERISA Section 4301(f), withdrawal liability disputes are subject to a 6-year statute of limitations. The statute begins to run when the employer fails to make a scheduled payment. Bay Area Laundry & Dry Cleaning Pension Fund v. Ferbar Corp., 522 U.S. 192 (1997). Further, there is a separate cause of action for each missed payment, with a separate 6-year limitations period for each one. Id.

F. Pension Protection Act

The Pension Protection Act of 2006 added § 4221(g) to ERISA which modifies the general procedures for a narrow class of cases arising from a notice and demand served after August 17, 2006 involving certain claims for liability which involve allegations that a sale of a business was intended to evade or avoid liability.

G. Duty of Employer to Provide Information

ERISA § 4219(A), 29 U.S.C. § 1399(a), provides that employers are required to provide plan sponsors with any information that the sponsor reasonably determines is necessary to enable the sponsor to determine and collect withdrawal liability. Some courts have held that employers are barred from asserting defenses to liability assessments where they withheld information or failed to notify the sponsor of material information. Artistic Carton Co. v. Paper Industry Pens. Fund, 971 F.2d 1346 (7th Cir. 1992); RXDC Inc. v. OCAW Pension Fund, 781 F. Supp. 1516 (D. Colo. 1992). But cf. PBGC Op. Ltr. 91-3.

IV. Constitutional Challenges

In Connolly v. PBGC, 475 U.S. 211 (1986), the United States Supreme Court upheld the constitutionality of the MPPAA in general. Justice O'Connor's concurring opinion emphasized, however, that the Act still might be unconstitutional in particular factual circumstances if it produced a shockingly harsh and irrational result. However, lower courts have rejected challenges on issues which may have been left open by Connolly. Central States Pension Fund v. Safeway, Inc., 229 F.3d 605 (7th Cir. 2000); Central States Pension Fund v. Midwest Motor Express, 181 F.3d 799 (7th Cir. 1999). Upholding MPPAA against a Seventh Amendment challenge based on the constitutional right to a jury trial is Connors v. Ryan's Coal Co., 923 F. 2d 1461 (11th Cir. 1991). Also upholding the constitutionality of the Act are PBGC v. R.A. Gray & Co., 467 U.S. 717 (1984) and Concrete Pipe. Inc. v. Constr. Laborers Pension Trust, 508 U.S. 602 (1993).