

Strafford

Presenting a live 90-minute webinar with interactive Q&A

ERISA Successor and Affiliate Liability in Asset Sales and Distressed Benefit Plans

Mitigating Controlled Group and Successor Liability for
Affiliated Companies, M&As and Corporate Reorganizations

TUESDAY, JULY 23, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Justin S. Alex, Attorney, **Proskauer Rose**, Washington, D.C.

Eric R. Keller, Partner, **Paul Hastings**, Washington, D.C.

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1.**

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-866-258-2056** and enter your PIN when prompted. Otherwise, please send us a chat or e-mail sound@straffordpub.com immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the ^ symbol next to “Conference Materials” in the middle of the left-hand column on your screen.
- Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today's program.
- Double click on the PDF and a separate page will open.
- Print the slides by clicking on the printer icon.

ERISA Controlled Group Pension Liabilities

July 23, 2019

Justin S. Alex

202.416.6816

jalex@proskauer.com

Proskauer >>

Overview

- Joint and Several Pension Liability Claims
- Identifying Controlled Groups
 - Parent-Subsidiary
 - Brother-Sister
- Private Investment Fund Issues

Joint and Several Pension Liabilities

- Single-Employer Plans
- Multiemployer Plans

Single-Employer Pension Plans

- Sponsors of Single-Employer Pension Plans and Controlled Group Members Treated as One Employer and Jointly and Severally Liable for Certain Liabilities
- Joint and Several Liability for:
 - Minimum Required Contributions
 - Potential liens against all controlled group members for missed contributions in excess of \$1 million
 - PBGC Insurance Premiums
 - Termination Liability (distress/involuntary termination)
 - Calculated using more conservative assumptions than ongoing funding assumptions

Multiemployer Pension Plans

- Same Principle Applies for Contributing Employers to Multiemployer Pension Plans and the Employers' Controlled Group Members
- Joint and Several Liability for Withdrawal Liability
- Controlled Group Principles Also Relevant for Determining Whether Certain Liabilities are Triggered
 - Example: Applicability of building and construction industry exemption to withdrawal liability
- Controlled Group Members Generally *Not* Jointly and Severally Liable for Contributing Employer's Delinquent Contributions

Identifying Controlled Groups

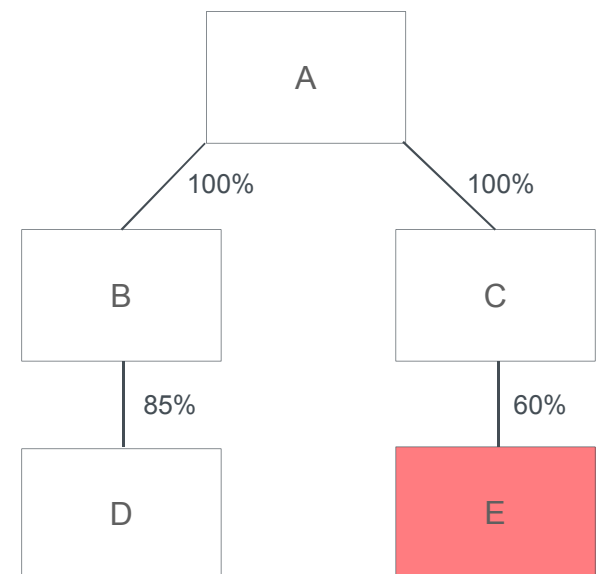
- What is a Controlled Group?
- Parent-Subsidiary Controlled Group
- Brother-Sister Controlled Group
- Combined Groups
- Attribution Rules
- Disregarded Transactions

What is a Controlled Group?

- ERISA Definition is Two or More “Trades or Businesses” under “Common Control”
- “Common Control” is Determined by Reference to Tax Code Rules
- Numerical Tests Based on Ownership Interests without regard to Actual Control
- Comprised of “Parent-Subsidiary” Groups, “Brother-Sister” Groups, and Combinations of Such Groups
- Can Include Partnerships, Individuals/Sole Proprietorships, Joint Ventures, and Trusts/Estates

Parent-Subsidiary Groups

- Two or More Entities Linked by 80% Common Ownership
- “Ownership” means:
 - Voting power or stock value for corporations
 - Capital or profits interests for partnerships
 - Actuarial interests for trusts or estates
- Additional Attribution Rules



Brother-Sister Groups

- Two or More Entities Where Same Five or Fewer Individuals, Estates, or Trusts Collectively Own at Least 80% of Each Entity and Have “Effective Control” of Each Entity
 - “Ownership” has same meaning as in parent-subsidary context
- What is “Effective Control”?
 - Ownership of more than 50% of each entity, counting only the lowest percentage held by each individual, estate, or trust across all of the entities

Brother-Sister Groups / Examples

Owner	A Corp.	B. Corp.	Eff. Cont.
1	80%	20%	20%
2	10%	50%	10%
3	5%	15%	5%
4	5%	15%	5%
Total	100%	100%	40%

Owner	A Corp.	B. Corp.	Eff. Cont.
1	20%	10%	10%
2	20%	20%	20%
3	20%	20%	20%
4	20%	40%	20%
Total	80%	90%	70%

Combined Groups

- Combined Group Consists of Three or More Entities Where Each Entity is in a Parent-Subsidiary or Brother-Sister Group and One Entity is Common Parent of a Parent-Subsidiary Group and Also a Member of a Brother-Sister Group
- Example
 - Individual owns 80% of A Corp. and 90% of B Corp.
 - A Corp. owns 85% of C Corp.
 - A Corp. and B Corp. are in brother-sister group
 - A Corp. and C Corp. are in parent-subsubsidiary group
 - A Corp., B Corp., and C. Corp. are in combined group

Selected Attribution Rules

- Options Treated as Exercised
- Certain Employee-Owned Equity Disregarded
- Familial Attribution Rules (Only for Brother-Sister Controlled Groups)
 - Spouses (with some exceptions)
 - Minor children/Parents of minor children
 - Where individual owns more than 50% of business, includes:
 - Parents/adult children
 - Grandparents/grandchildren

Disregarded Transactions

- ERISA Disregards Certain Controlled Group Breakups
- ERISA § 4069 for Single-Employer Plans
 - Applies “if principal purpose of any person in entering a transaction is to evade liability to which such person would be subject to under [Title IV of ERISA]” and plan terminates within five years after the transaction
- ERISA § 4212(c) for Multiemployer Plans
 - Similar standard, but not limited to five-year period

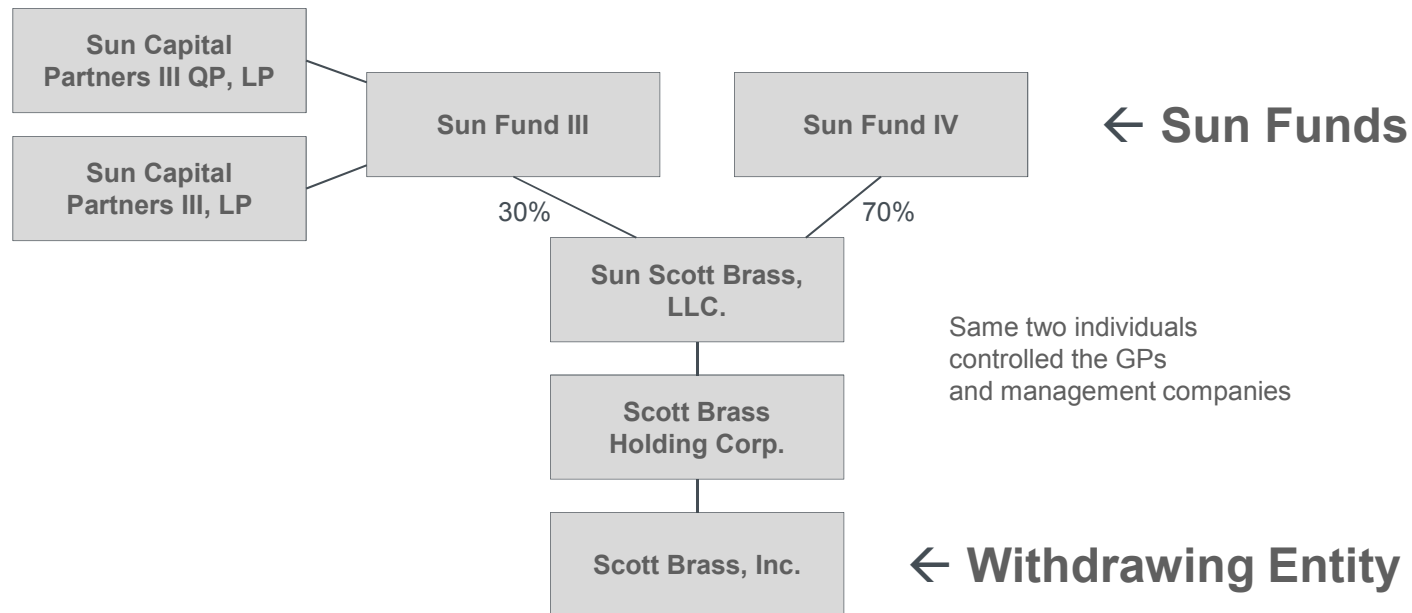
Private Investment Fund Issues

- PBGC Appeals Board Decision
- Sun Capital

PBGC Appeals Board Decision (2007)

- Applied Controlled Group Rules to Find Private Equity Fund Liable for Underfunded Pension Liabilities of Fund's Portfolio Company
- Determined that Private Equity Fund was "Trade or Business" under Two-Part "Investment Plus" Test

Sun Capital / Scott Brass Structure



- Scott Brass Inc. Withdrew from a Multiemployer Plan before Bankruptcy
- Plan Asserted Joint and Several Withdrawal Liability Claim Against Sun Funds

The Sun Capital Saga

- 2012 – District Court for the District of Massachusetts Rejected PBGC’s Analysis in 2007 PBGC Appeals Board Decision and Concluded that the Sun Funds were not “Trades or Businesses”
- 2013 – First Circuit Reversed in Part and Held that Sun Fund IV was a “trade or business” and Remanded to District Court Question of “Trade or Business” Status of Sun Fund III and Question of “Common Control” (aggregation of Sun Fund’s interests)

2013 – First Circuit Decision

- Noted that “Trade or Business” is not defined for this purpose in applicable guidance
- Adopted the PBGC’s “investment plus” analysis and stated “[w]e see no need to set forth general guidelines for what the “plus” is”
- Concluded Sun Fund IV is a “trade or business” taking into account “a number or factors... cautioning that none is dispositive in and of itself”

2013 – First Circuit Decision

- The factors included:
 - The funds seek portfolio companies in need of extensive interaction and turn around management
 - The funds were actively involved in management and operation of the companies
 - The general partners were empowered to make decisions about hiring and terminating employees and agents of the portfolio companies
 - Individuals working for the Sun entities became immersed in management and operation of Scott Brass
 - The funds received a management fee offset for fees paid for management and consulting services to portfolio companies
 - The Sun Funds appointed Sun employees to two of the three director seats on Scott Brass board

2013 – First Circuit Decision

- The sum of all of these factors satisfy the “plus” in the “investment plus” test
- Remanded to District Court to resolve whether Sun Fund III receives any benefit from offset of management and consulting fees paid by Scott Brass and to decide issue of “common control”

2016 – District Court Decision

- Ironically, Sun Fund IV waived its management fees so there was no management fee offset (although the Sun Funds stated that there was a management fee offset in Sun Fund III) but instead management fee offset “carryforwards”
- Court held that “the generation of management fee offset carryforwards is a valuable benefit that accrued to the Sun Funds as a result of the Sun Fund’s management activities related to Scott Brass” and “[t]his is sufficient to satisfy the “investment plus” test”
- On the question of “common control” the court held “it is clear ... that a partnership-in-fact existed sufficient to aggregate the Sun Funds’ interest and place them under common control with Scott Brass”

2016 – District Court Decision

- Factors considered by the Court regarding “common control” holding:
 - Sun Funds III and IV co-invested in five other companies using the same organizational structure
 - Prior to entity formation and purchases joint activity took place in order for the two Sun Funds to co-invest
 - The choice to organise Sun Scott Brass, LLC to permit each fund to remain under 80% ownership “shows an identity of interest and unity of decision making between the Funds rather than independence and mere incidental contractual coordination
 - The Sun Funds are closely affiliated entities and part of the larger ecosystems of Sun Capital entities created and directed by Marc Leder and Rodger Krouse
- Partially appealed to First Circuit

ERISA Controlled Group Pension Liabilities

July 23, 2019

Justin S. Alex

202.416.6816

jalex@proskauer.com

Proskauer >>

ERISA Successor Liability in M&A Transactions

July 23, 2019

Eric Keller
202.551.1770
erickeller@paulhastings.com

Overview

1. State Common Law Successor Liability
2. Federal Common Law Successor Liability
3. Substantial Continuity of Operations
4. Types of ERISA Liabilities
5. Special Types of Transactions
6. Transaction Considerations

State Common Law Successor Liability

1. Purchaser agrees to assume the seller's liability
2. Transaction amounts to "de facto merger" (four factors)
 - (a) continuity of enterprise (same management, personnel, physical location, assets general business operations);
 - (b) same shareholders (key factor),
 - (c) seller liquidates;
 - (d) buyer assumes obligations necessary for uninterrupted obligation of business
3. Transaction is "mere continuation" of seller (same officers, directors and shareholders in both seller and buyer and only one entity remains)
4. Fraudulent transfer for purpose of escaping liability of seller's debts

Federal Common Law Successor Liability

1. Adopted by Courts to Fill Perceived “Gaps” Between Statutory Liability and State Common Law
2. Derived in Part from Supreme Court Opinions Defining Who is Successor Employer for NLRA Purposes – *Golden State Bottling* and *Fall River*
3. Applied Not Only under ERISA But Also Other Federal Labor Statutes (such as Title VII and FLSA)
4. Holds a Buyer of Assets Liable As a Successor if:
 - a. Buyer had notice of the claim before the acquisition (does not require finding of actual notice; knowledge can be inferred based on facts), and
 - b. There is substantial continuity in the operation of the business before and after the sale.

Substantial Continuity Of Operations

1. Whether new employer uses the same facilities;
2. Whether new employer uses the same or substantially the same work force;
3. Whether new employer uses the same or substantially the same supervisory personnel;
4. Whether the same jobs exist under substantially the same working conditions;
5. Whether the new employer uses the same machinery, equipment and methods of production; and
6. Whether the new employer produces the same products.

Types of ERISA Liabilities

1. Multiemployer Plan Withdrawal Liability

- a. *Upholsterers' Int'l Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323, 1327 (7th Cir. 1990)
- b. *Resilient Floor Covering Pension Trust v. Michael's Floor Covering, Inc.*, 801 F.3d 1079, 1093-94 (9th Cir. 2015)

2. Multiemployer Plan Contributions

- a. *Stotter Div. of Graduate Plastics Co. v. Dist. 65, UAW, AFL-CIO*, 991 F.2d 997, 1002 (2d Cir. 1993)
- b. *Einhorn v. M.L. Ruberton Constr. Co.*, 632 F.3d 89, 98-99 (3d Cir. 2011)

3. Nonqualified Deferred Compensation Benefits

Brend v. Sames Corp., 2002 WL 148877 (N.D. Ill)

Types of Liabilities (continued)

4. Health Benefits

Schilling v. Interim Healthcare of Upper Ohio Valley, Inc., 2008 WL 2355831 (S.D. Ohio)

5. Single Employer Pension Plan Termination Liabilities

PBGC v. Findley Industries, Inc., 902 F.3d 597 (6th Cir. 2018)

- PBGC brought lawsuit against buyer of assets alleging buyer was liable as successor under federal common law or seller's unpaid Title IV plan termination liabilities
- District court declined to adopt theory
- 6th Circuit reversed and applied the theory
- Claim represents a departure in over 30 years of PBGC's administrative position
- PBGC likely will pursue same theory in future cases

Special Types of Transactions

1. Asset Purchases in Bankruptcy
 - a. *In re. Oman Corp.*, 2014 WL 3542133 (D. Del.) (holding 363(f) allows asset buyer in 363 asset sale to take assets without successor liability for multiemployer plan withdrawal liability)
 - b. *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Indep.) Pension Fund v. Tasemkin, Inc.* (holding buyer of assets in bankruptcy liable as successor for multiemployer plan withdrawal liability outside 363 sale and declining to rule whether 363(f) overrides successor liability)
2. Lender Foreclosure: *Board of Trustees of UNITE HERE Local 25 Pension Fund v. MR Watergate LLC*, 677 F. Supp.2d 229 (D. D.C. 2010).

Transaction Considerations

- Understanding assets being purchased and employees being offered employment
- Understanding seller, relationship of assets being purchased to seller and whether seller will remain in business or will likely liquidate or wind down
- Understanding that avoiding or taking light touch on benefits diligence for asset purchases may be hazardous depending on context of transaction