

# Casting a Wider Net: Court Finds Private Equity Funds Liable for ERISA Withdrawal Liability

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## Background

Under the Multiemployer Pension Plan Amendments Act of 1980, as amended (MPPAA), an employer withdrawing from an underfunded multiemployer defined benefit pension plan may face an assessment of withdrawal liability. Under the MPPAA enforcement scheme, “trades or businesses” (the first prong) under “common control” with the withdrawing employer (the second prong) are jointly and severally liable for payment of any assessment of withdrawal liability. Here, Scott Brass, Inc., the portfolio company and signatory employer, withdrew from the plan and was assessed withdrawal liability, but was unable to pay it as a result of bankruptcy.

The First Circuit held that, if an “investment plus” test was satisfied, a private equity fund could be engaged in a “trade or business” (as opposed to being a passive investor) and thereby satisfy the first prong of the test. The First Circuit declined to provide guidelines for what the “plus” in the investment plus test requires, but concluded that the specific facts indicated that one of the Sun Capital private equity funds was engaged in a trade or business.

The First Circuit remanded the case back to the district court for a full determination of (1) whether the other Sun Capital private equity funds were engaged in a trade or business, and (2) whether any of the Sun Capital private equity funds engaged in a trade or business were under common control with the withdrawing employer.

### **Massachusetts District Court Decision**

The district court answered both questions in the affirmative. The district court's analysis of the limited partnership and management agreements led to its determination that the Sun Capital private equity funds received an economic benefit in the form of offsets and carryforwards for fees, and that these economic benefits demonstrated that the Sun Capital private equity funds were more than passive investors—and therefore satisfied the “plus” requirement in the “investment plus” test.

Regarding the second prong of the test—common control—the district court disregarded the organizational formality that a single Sun Capital private equity fund did not own 80 percent or more of the portfolio company and instead analyzed the economic realities of the arrangement, focusing on the number of similar investments, similar language in the governing documents, and coordinated investment strategies. Although the Sun Capital private equity funds were organizationally separate and individually fell below the 80 percent ownership threshold, in the eyes of the district court, they together formed a partnership-in-fact that was under common control with the withdrawing portfolio company. As a result, the Sun Capital private equity funds were jointly and severally liable for the \$4.5 million withdrawal liability assessed against Scott Brass, Inc. as the withdrawing employer.

### **Key Takeaways**

If other courts follow this decision in holding private equity funds liable for the assessments on withdrawing portfolio companies, private equity funds may not be able to rely on numerical thresholds and organizational forms to avoid these liabilities going forward. Instead, each underlying portfolio investment would be subject to a fact-specific analysis to determine potential exposure. Other employers that contribute to multiemployer plans should also be cautious in arranging the structures of interconnected entities.

Courts appear to be increasingly sympathetic to underfunded plans and may continue to expand the reach of the MPPAA to find other ways to impose liability on deep-pocketed but unsuspecting entities that may have some financial relationship to employers facing withdrawal liability. This concern is especially highlighted by the bleak financial future of underfunded multiemployer plans and the multiemployer plan insurance program, which the Pension Benefit Guaranty Corporation has announced will likely be insolvent by 2025 without additional revenue. Certainly, these developments will affect more entities and industries than originally contemplated.

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