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THE CONTROLLED GROUP RULE FOR PURPOSES OF THE WITHDRAWAL LIABILITY PROVISIONS OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

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I. INTRODUCTION

Employers that withdraw from multiemployer pension plans incur withdrawal liability pursuant to Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended.¹ For purposes of Title IV, all trades or businesses under common control are considered a single employer.² This article discusses the general effects of the "controlled group" rule and the effect of the rule on certain specialized procedural issues.

II. BACKGROUND

A. *Employer Liability for Guaranteed Benefits*

ERISA is a comprehensive statute designed to protect employees' rights to their retirement benefits. To ensure that promised benefits will be paid, Congress established the Pension Benefit Guaranty Corporation ("PBGC"). PBGC, a government agency funded by insur-

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1. 29 U.S.C. §§ 1381-1461 (1982 & Supp. III 1985).

2. 29 U.S.C. § 1301(b)(1) (1982).

ance premiums, pays guaranteed benefits in the event a defined benefit pension plan is terminated with insufficient assets.³

Under Section 4062(b) of ERISA, where PBGC pays benefits under a terminated plan, the "employer" is liable over to PBGC for any asset deficiency, not to exceed 75% of the employer's net worth.⁴ In this regard, Section 4001(b)(1) of ERISA provides in relevant part that "all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades or businesses as a single employer."⁵ Section 4001(b)(1) authorizes PBGC to prescribe regulations to define these terms in a manner "consistent and coextensive" with Treasury regulations prescribed for similar purposes under Section 414(c) of the Internal Revenue Code ("Code").⁶

The PBGC's regulations provide that "trades or businesses . . . under common control" shall have the "same meaning" as in Code § 414(c) and the regulations issued thereunder.⁷ The Treasury regulations, in turn, define three types of controlled groups:

1. Parent-subsidiary;
2. Brother-sister; and
3. Combined.⁸

As more fully discussed in part IV-C of this Article, a parent-subsidiary controlled group exists where one business owns at least 80% of one or more other businesses, and a brother-sister controlled group may exist where the same five or fewer individuals own at least 80% of two or more businesses.⁹ A combined controlled group is a com-

3. 29 U.S.C. §§ 1302-1381 (1982).

4. 29 U.S.C. § 1362(b) (1982).

5. 29 U.S.C. § 1301(b)(1).

6. *Id.* Section 414(c) of the Code provides that all commonly controlled trades or businesses shall be considered a single employer for purposes of the anti-discrimination requirements for tax-qualified plans. It is designed to prevent employers from avoiding those requirements by operating through separate corporations. H. R. REP. NO. 807, 93d Cong., 2d Sess. 3, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4670, 4716.

7. 29 C.F.R. § 2612.2 (1986).

8. Treas. Reg. § 1.414(c)-2 (1988).

9. Treas. Reg. § 1.414(c)-2(c).

mination of a parent-subsidary controlled group and a brother-sister controlled group.¹⁰

The leading case applying the controlled group rule under ERISA is *PBGC v. Ouimet Co.*¹¹ *Ouimet* involved a single-employer plan maintained by a wholly-owned subsidiary of the Ouimet Corporation.¹² The plan was terminated with insufficient assets to pay benefits, and because the subsidiary was in bankruptcy, PBGC sought to recover the shortfall from the Ouimet Corporation and several other affiliates, asserting that they were members of a combined brother-sister/parent-subsidary controlled group.¹³ The court agreed that these businesses constituted a controlled group and thus a single “employer,” as meant by Section 4001(b)(1) of ERISA.¹⁴ The court further held that this definition of “employer” applied under Section 4062(b) of ERISA and that all members of the Ouimet controlled group were therefore jointly and severally liable to PBGC.¹⁵

B. Employer Liability for Withdrawal

Initially, only single-employer plans were covered by the PBGC’s mandatory guaranty program. The effective date of mandatory coverage for multiemployer plans was deferred pending study, although PBGC could pay benefits under a terminated multiemployer plan in its discretion. In the event of termination of a covered multiemployer plan with insufficient assets, the only employers who would be liable to PBGC were those who had remained in the plan until it terminated and those who had withdrawn within the preceding five years.¹⁶ Congress became concerned that, if this remained the law, it would create an incentive to withdraw early when the guarantees became mandatory for multiemployer plans, and would thereby shift an ever-increasing

10. Treas. Reg. § 11.414(c)-2(a) (1987). See *infra* section IV(C) for a detailed discussion of the regulations.

11. *PBGC v. Ouimet Corp.*, 470 F. Supp. 945 (D. Mass. 1979), *aff’d*, 630 F.2d 4 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981) [Ouimet I].

12. *Ouimet I*, 470 F. Supp. at 948.

13. *Id.* at 947-48.

14. *Id.* at 948-49.

15. *Id.* at 945.

16. See *PBGC v. R.A. Gray & Co.*, 467 U.S. 717 (1984); *Connolly v. PBGC*, 475 U.S. 211 (1986).

share of the plan's funding burden to remaining employers.¹⁷ Therefore, in 1980, Congress enacted the Multiemployer Pension Plan Amendments Act ("MPPAA"),¹⁸ which established an immediate and non-contingent liability to a multiemployer plan in the event of employer withdrawal.

Section 4201(a) of ERISA, as amended,¹⁹ provides that an "employer" that withdraws from a multiemployer plan is liable to the plan for its share of any unfunded vested benefits. The term "employer" pervades the withdrawal liability provisions of ERISA. Though Title IV of ERISA contains no general definition of "employer," in enacting MPPAA Congress reaffirmed the validity of the *Ouimet* decision:

[I]f a terminating single employer plan is maintained by one or more members of a controlled group, the entire group is the "employer" and is responsible for any employer liability. The leading case in this area is *[PBGC] v. Ouimet Corp.* [citation omitted], in which the court correctly held that all members of a controlled group are jointly and severally liable for employer liability imposed under section 4062 of ERISA. *The bill does not modify the definition of "employer" in any way, and the Ouimet decision remains good law.*²⁰

Accordingly, the courts have uniformly applied the controlled group rule in withdrawal liability cases.²¹ Because the controlled group rule is central to the withdrawal liability provisions of ERISA, an understanding of the rule and its effects is important whenever a business that participates in a multiemployer plan, such as the United Mine Workers of America 1950 or 1974 Pension Plan, has affiliates that may be under common control. This is so even though those affiliates may be non-union or even in a different industry.²²

III. GENERAL SUMMARY OF WITHDRAWAL LIABILITY PROVISIONS AND EFFECTS OF THE CONTROLLED GROUP RULE

An employer incurs a complete withdrawal from a multiemployer pension plan when it permanently ceases all covered operations or

17. *R. A. Gray*, 467 U.S. at 717; *Connolly*, 475 U.S. at 211.

18. Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1206-1311.

19. 29 U.S.C. § 1381(a).

20. 126 CONG. REC. 23287 (1980) (joint statement of Senators Javits and Williams) (emphasis added).

21. See *infra* section IV.

22. See *Connors v. Peles Coal Co.*, 637 F. Supp. 321 (D.D.C. 1986) (non-union coal proprietorship plan for controlled group members withdrawn from U.M.W.A 1950 and 1974 Pension Plans); *Connors v. Calvert Dev. Co.*, 622 F. Supp. 877 (D.D.C. 1985) (same: non-coal partnership).

ceases to have an obligation to contribute.²³ Upon withdrawal, an employer is liable for its allocable share of the plan's unfunded vested benefits.²⁴ With one exception, the alternative allocation methods authorized by ERISA take into account the employer's required contributions for a particular base period in determining its allocable share of unfunded vested benefits.²⁵

When a plan determines that an employer has withdrawn and computes the amount of its liability, it notifies the employer and demands payment.²⁶ This "notice and demand" triggers a requirement that the employer begin paying its withdrawal liability in installments within 60 days. It also triggers a 90-day deadline for the employer to request plan sponsor review.²⁷ Thereafter, the employer must initiate arbitration within a maximum of 180 days from the date of its request for review.²⁸ If no arbitration is initiated, the employer's withdrawal liability is "due and owing" according to the schedule set forth in the notice and demand.²⁹ In that event, if the employer is in default of its scheduled payments, the plan may accelerate the principal amount of the employer's withdrawal liability upon 60 days' notice and sue

23. 29 U.S.C. § 1383(a). Though there has been considerable litigation concerning the meaning of "permanent," e.g., *Western Dominion Coal Co. v. UMWA 1950 and 1974 Pension Plans*, 6 Employee Benefits Cas. (BNA) 2353 (1985) (collecting cases), it is clear that once a cessation matures into permanency the date of withdrawal relates back to the date the cessation began. E.g., *Loomis Armored, Inc. v. Central States Pension Fund*, 8 Employee Benefits Cas. (BNA) 1899, 1907-10 (1987). "Partial" withdrawals, 29 U.S.C. § 1385, are also affected by the controlled group rule. See *Robbins v. Pepsi-Cola Metro. Bottling Co.*, 636 F. Supp. 641 (N.D. Ill. 1986).

24. 29 U.S.C. §§ 1381(b), 1391.

25. 29 U.S.C. § 1391(b),(c),(2)-(4). The UMWA 1950 and 1974 Plans use the so-called "rolling-five" method, under which the base period is the five plan years preceding withdrawal. 29 U.S.C. § 1391(c)(3). Congress decided to impose very strict rules for withdrawal liability from the UMWA Plans, due to their historic financial difficulties. See *Calvert & Youngblood Coal Co. v. UMWA 1950 Pension Trust*, 6 Employee Benefits Cas. (BNA) 1106, 1110-11 (1985); *Combs v. Miller*, No. 84-842 (D.D.C. Sept. 28, 1984). In addition to mandating the rolling-five method absent a plan amendment, Congress specified that certain relief provisions would not apply absent a plan amendment. 29 U.S.C. § 1391(d). The Plans' settlors, the United Mine Workers of America and the Bituminous Coal Operators' Association, Inc., have exclusive authority to amend the Plans in most circumstances. See *UMWA Health and Retirement Funds v. Robinson*, 455 U.S. 562 (1982). They have adopted only the "sale of assets" rule of Section 4204 of ERISA. 29 U.S.C. § 1384.

26. 29 U.S.C. § 1382, 1399(b)(1).

27. 29 U.S.C. § 1399(b)(2)(A),(c)(2).

28. 29 U.S.C. § 1401(a)(1). If the plan sponsor issues its decision on review in less than 120 days, the employer has only 60 additional days within which to initiate arbitration. *Id.* See *Babler v. Roy L. Houck Construction Co.*, 6 Employee Benefits Cas. (BNA) 1997 (1985).

29. 29 U.S.C. § 1401(b)(1). The courts have construed this to mean that the employer has forfeited its withdrawal liability if it does not sue within 180 days. See *W. Union Eng'rs Corp.*, 825 F.2d 415 (D.C. Cir. 1987) 5

for that amount, plus interest, liquidated damages, and attorney's fees.³⁰

Although Congress' endorsement of *Ouimet* makes it clear that the controlled group rule renders all commonly-controlled businesses jointly and severally liable for withdrawal, the rule is more than a collection device. Because it defines "employer," it applies to all of the withdrawal liability provisions of ERISA that refer to the "employer."³¹

Thus, there is no withdrawal unless all controlled group members have permanently ceased all covered operations or ceased to have an obligation to contribute.³² In the event of withdrawal, all controlled group members' required contributions within the applicable base period are aggregated for purpose of calculating withdrawal liability.³³ In addition, a notice and demand to one controlled group member will be deemed notice to all.³⁴ Separate demands inadvertently issued to two members of a controlled group may be consolidated, as may separate arbitration proceedings initiated by the two members.³⁵

IV. DEFINITION OF CONTROLLED GROUP

A. Trade or Business

A threshold question under Section 4001(b)(1) of ERISA is the meaning of "trade or business." The leading case is *PBGC v. Center*

30. 29 U.S.C. §§ 1399(c)(5)(A), 1451(b) (incorporating by reference 29 U.S.C. §§ 1132(g)(2), 1145 (1982)). See *Combs v. Western Coal Corp.*, 611 F. Supp. 917, 922-23 (D.D.C. 1985). The plan is also entitled to enforce the employer's obligation to make installment payments pending arbitration. *E.g.*, *Lads Trucking v. Board of Trustees*, 777 F.2d 1371 (9th Cir. 1986); *Connors v. Brady-Cline Coal Co.*, 668 F. Supp. 5 (D.D.C. 1987). Of course, if the arbitrator holds in the employer's favor, the employer is entitled to a refund of its interim payments, with interest. 29 U.S.C. § 1401(d); 29 C.F.R. § 2644.3 (1987). Though the arbitrator has authority to award fees and costs to the prevailing party, this is rarely done.

31. *Pepsi-Cola Metro. Bottling Co.*, 636 F. Supp. at 654-60; *Dorn's Transp., Inc. v. Teamsters Pension Trust Fund*, 596 F. Supp. 350, 355 (D.N.J. 1984), *aff'd*, 787 F.2d 897 (3d Cir. 1986).

32. *Peles Coal Co.*, 637 F. Supp. 321; *UMWA 1974 Pension Plan v. Williamson Shaft Contracting Co.*, 6 Employee Benefits Cas. (BNA) 1593 (1984); *Dyck v. Southern Pacific Milling Co.*, 4 Employee Benefits Cas. (BNA) 1346 (1983).

33. *Manor Mines, Inc. v. UMWA 1950 and 1974 Pension Plans*, 5 Employee Benefits Cas. (BNA) 1709 (1984).

34. *E.g.*, *IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 126-30 (3d Cir. 1986); *Calvert Dev. Co.*, 622 F. Supp. 877. See *infra* section V(B) for a detailed discussion on this point.

35. *Manor Mines, 5 Employee Benefits Cas. (BNA) at 1711-13.*
<https://researchrepository.wvu.edu/wvllr/vol90/iss3/5>

*City Motors, Inc.*³⁶ Center City, an automobile dealership, had maintained a single-employer plan.³⁷ Upon termination, PBGC sued not only Center City but its sole shareholders, who personally owned the land and building where the dealership was located.³⁸ The shareholders leased the property to the corporation under a “net lease,” where the lessee is obligated to pay all expenses.³⁹ Therefore, the shareholders contended that they took no part in management of the property.⁴⁰ Accordingly, they argued, they were not in the real estate “trade or business,” but were essentially passive investors receiving rental income.⁴¹

The court disagreed. Although it acknowledged that property rented under a net lease is not a “trade or business” for tax purposes,⁴² the court declined to follow that definition for employer liability purposes. The purpose of the tax rule, the court noted, is to prevent taxpayers from converting capital losses on investment property into ordinary losses.⁴³ The purpose of ERISA, however, is to maximize protection of employees. To this end, the court held, the controlled group rule should be liberally construed to prevent the owners of a business from limiting their pension obligations by “fractionalization” of that business.⁴⁴

The question of what constitutes a “trade or business” may also arise in the case of informal or short-term ventures carried out for profit. For example, if an individual received income from intermittent free-lance carpentry work during a period when he owned all the stock of a mining corporation, he might contend that the carpentry work did not rise to a trade or business, because he did not hold himself out as the proprietor of a carpentry business. Though tax treatment

36. *PBGC v. Center City Motors, Inc.*, 609 F. Supp. 409 (S.D. Cal. 1984).

37. *Id.* at 410.

38. *Id.* at 412.

39. *Id.* at 411.

40. *Id.*

41. *Id.*

42. *Id.* at 412-13. The IRS' position on this has not always been consistent. See Jackson, *IRS Modifies its Position on a Unit of Rental Property as a Trade or Business*, 62 J. OF TAX'N 284 (1985).

43. *Id.* at 411.

44. *Center City*, 609 F. Supp. at 412. *Accord* *United Food & Commercial Workers v. Progressive Supermarkets*, 644 F. Supp. 633 (D.N.J. 1986).

would not be dispositive under the *Center City* case, if this individual had claimed "profit or loss from a business or profession" on Schedule C to his federal tax return, this admission would probably be sufficient at least to raise a triable issue.⁴⁵ Certainly, it would be reasonable for the individual to be required to show why he should not be bound by his representations to the Internal Revenue Service.

B. *Necessity of Employees*

It could be argued that an entity without any employees cannot be part of a controlled group because it is not a common-law employer. In *Ouimet*, one of the commonly controlled entities, the Warham Trust, was a holding company organized as a Massachusetts business trust.⁴⁶ The defendants argued that the Trust was not a controlled group member because it had no employees, which they contended was a predicate to a finding that it was part of an "employer" under ERISA § 4001(c)(1).⁴⁷ ("All employees of trades or businesses under common control . . . shall be treated as employed by a single employer, and all such trades or businesses as a single employer.") The court rejected that argument, relying on the first sentence of that Section, which specifies that "an individual who owns the entire interest in an unincorporated business is treated as his own employee."⁴⁸

In the case of a corporation, the analysis is different, but the result is the same. The antecedent of "all such" trades or businesses in Section 4001(b)(1) is "trades or businesses under common control," even though that phrase appears within the separate rule that "all employees of trades or businesses under common control . . . shall be treated as employed by a single employer." Therefore, even if such a trade or business has no employees, it is a controlled group member.⁴⁹

45. See *Curphey v. Commissioner*, 73 T.C. 766 (1980) (taxpayer's "systematic and continuous" activities placed him in the trade or business of real estate rental).

46. *Ouimet I*, 470 F. Supp. at 949.

47. *Id.*

48. *Id.*

49. See *id.* at 951 n.16. Cf. *Spring Branch Mining Co. v. UMWA 1950 Pension Trust*, No. 2:86-0149, slip op. at 8-13 (S.D. W.Va. Sept. 30, 1987) (Congress intended contributor to UMWA 1950 Pension Plan to be considered an "employer," even if it never had employees who vested in a benefit under that plan); accord *Warrior Coal Co. v. Connor*, 649 F. Supp. 1090 (W.D.Va. 1986).

If it were otherwise, employers would be able to avoid their statutory liabilities by “fractionalization” of their business enterprise and attendant dispersion of assets.

C. *Ownership*

1. In General

As noted in Part II-A, above, the pertinent Treasury regulations set a general 80% common ownership threshold, referred to as a “controlling interest,” for each of the three types of controlled groups.⁵⁰ The regulations also set a separate 50% identical ownership test, referred to as “effective control,” for brother-sister controlled groups.⁵¹ The best way to explain the controlling interest and effective control requirements is by example.

Suppose three unrelated persons, Smith, Jones, and Doe, own the following percentages of corporations X and Y.⁵²

<i>Persons</i>	<i>Corporations</i>		<i>Identical Ownership Percentage</i>
	<i>X</i>	<i>Y</i>	
Smith	30%	20%	20%
Jones	40%	10%	10%
Doe	30%	60%	30%
	100%	90%	60%

(Table 1)

Corporations X and Y are members of a brother-sister controlled group because the same five or fewer persons (Smith, Jones, and Doe)

50. Treas. Reg. § 11.414(c)-2(b)(2) (1987).

51. See Treas. Reg. § 11.414(c)-2(c) (1987). See generally *United States v. Vogel Fertilizer Co.*, 455 U.S. 16 (1982) (Regulation’s 50% identical ownership test ensures that the brother-sister organizations are in fact controlled by the group of stockholders as one economic enterprise).

52. “Persons” may be individuals, estates or trusts, but not corporations. See Treas. Reg. § 11.414(c)-2(c). Ownership with respect to a corporation is measured as the total voting power or total value of all classes of stock. See Treas. Reg. § 11.414(c)-2(b)(2)(A) (1987).

together own at least 80% of each corporation (100% of X and 90% of Y), and the sum of their identical ownerships in X and Y (represented by the fourth column of the table) exceeds 50%.

In Table 2 below, however, corporations W and Z are not in a brother-sister group because the effective control test is not satisfied, even though the 80% "controlling interest" test is satisfied.

<i>Persons</i>	<i>Corporations</i>		<i>Identical Ownership Percentage</i>
	<i>W</i>	<i>Z</i>	
Smith	70%	10%	10%
Jones	5%	85%	5%
Doe	25%	5%	5%
	100%	100%	20%

(Table 2)

Suppose that it can be proven, however, that Jones so dominated the management and operations of corporation W that Smith and Doe, although retaining their respective 70% and 25% ownership interests, had no say in W's management. That fact should not alter the conclusion that W and Z are not under common control. In the *Western Dominion* case,⁵³ the arbitrator held that the controlled group tests are "bright line" tests and, therefore, that even 75% common ownership fails the controlling interest test.⁵⁴ We believe this is a sound result. Employers should be entitled to make business decisions surrounding withdrawal liability in reliance on the controlled group regulations. A pension plan should also be entitled to make withdrawal liability decisions based on a consistent and objective measure.⁵⁵ The "bright line" approach results in necessary predictability in the law.

53. *Western Dominion*, 6 Employee Benefits Cas. (BNA) 2353. *But see* Central Transport, Inc. v. Central States Pension Fund, 640 F. Supp. 56 (E.D. Tenn. 1986), *aff'd mem.*, 816 F.2d 678 (6th Cir. 1987), *cert. denied*, 56 U.S.L.W. 3320 (Nov. 3, 1987) (purchaser in stock transaction, which is subject to ICC approval, does not have ownership, constructive or otherwise, of that stock for controlled group purposes).

54. *Western Dominion*, 6 Employee Benefits Cas. (BNA) at 2369.

55. Cf. 29 C.F.R. § 1794.6(b)(4)(v) (1990) (consistently).

As a final example of the controlling interest and effective control tests, suppose Smith, Jones, and Doe own the following percentages of corporations U and V.

<i>Persons</i>	<i>Corporations</i>		<i>Identical Ownership Percentage</i>
	<i>U</i>	<i>V</i>	
Smith	33-1/3%	50%	33-1/3%
Jones	33-1/3%	0%	0%
Doe	33-1/3%	50%	33-1/3%
	100%	100%	66-2/3%

(Table 3)

Both tests of the brother-sister definition appear to be met, but a third element, not found in the regulations, is lacking.

In the *Vogel* case,⁵⁶ the Supreme Court concluded that Section 1563 of the Internal Revenue Code of 1954, from which Treas. Reg. § 11.414(c) was indirectly derived,⁵⁷ requires that each of the “five or fewer persons” own at least some percentage of each of the subject organizations.⁵⁸ In Table 3, Jones owns no interest in V, and excluding Jones from the set of five or fewer persons means that the 80% controlling interest test cannot be satisfied.⁵⁹ Smith and Doe together own only 66-2/3% of U.

The *Vogel* requirement ensures that members of a controlled group will know of the existence of all other controlled group members. Under *Vogel*, the persons owning the controlling interest in a business are necessarily the same persons owning the controlling interest in all other members of the controlled group.⁶⁰ Therefore, the consequences

56. *Vogel*, 455 U.S. at 16.

57. See, e.g., *Barker & Williamson*, 788 F.2d at 126.

58. *Vogel*, 455 U.S. at 19.

59. Courts and arbitrators have applied *Vogel* in withdrawal liability matters. See, e.g., *Barker & Williamson*, 788 F.2d at 123.

60. *Vogel*, 455 U.S. at 34. “Under this construction of the statute, controlled group membership cannot catch such a shareholder by surprise.” *Id.*

of common control, such as the "notice to one is notice to all" rule described in part V-B, *infra*, are fair because each of the owners will be in a position to know the affairs of each business.

The controlled group regulations can cast a broad net. As noted in parts IV-A and -B above, not only a corporation, but a proprietorship, partnership, estate or trust, or any other "organization" that conducts a "trade or business" can be a controlled group member.⁶¹ The ownership interests in such organizations, moreover, are measured broadly. With respect to a corporation, ownership can be measured as a percentage of all voting stock *or* as a percentage of the total value of shares of all classes of stock.⁶² With respect to a partnership, ownership can be measured as a percentage of the partners' interest in profits *or* capital.⁶³ Similarly, the regulations set forth numerous rules for attributing the ownership of one person or business to another and for excluding a person's or business' interest from the calculus.⁶⁴ For instance, a spouse's or child's interest can be attributed, respectively, to the other spouse or to the child's parent.⁶⁵ In addition, the ownership interest of an officer, partner, or owner of a "parent" organization can be excluded in measuring the outstanding ownership of its subsidiary organization.⁶⁶ Further, some interests not commonly perceived as a business "ownership," such as an option to purchase stock, are treated as ownership interests under the regulations.⁶⁷

In sum, because of their intricacies, the controlled group regulations require a cautious reading.

2. Timing

The statute and regulations are silent concerning the effect of changes in ownership that result in a controlled group coming into being or ceasing to exist. The courts, however, have uniformly rec-

61. Treas. Reg. § 11.414(c)-2(b)(2).

62. Treas. Reg. § 11.414(c)-2(b)(2)(A).

63. Treas. Reg. § 11.414(c)-2(b)(2)(C) (1987).

64. See generally Treas. Reg. §§ 11.414(c)-3, -4 (1987).

65. Treas. Reg. § 11.414(c)-4(b)(5), (6) (1987).

66. Treas. Reg. § 11.414(c)-3(b)(4) (1987).

67. Treas. Reg. § 11.414(c)-4(b)(1) (1987). See *Booker & Williamson*, 788 F.2d at 118.

ognized that for purposes of identifying trades or businesses that have joint and several liability for withdrawal, common control must be determined as of the date of withdrawal.⁶⁸ Section 4203(e) of ERISA⁶⁹ pinpoints the date of a complete withdrawal as the date covered operations or the obligation to contribute ceased, so it is usually clear what the relevant date is.⁷⁰ If, for example, P corporation, which does not itself participate in the plan, sells its 80% interest in S corporation one day after S had permanently ceased its covered operations under the plan, P remains jointly and severally liable to the plan with respect to S's withdrawal.⁷¹ Conversely, if P disposed of its 80% interest in S one day before S permanently ceased covered operations, P would, at least presumptively, escape liability with respect to S's complete withdrawal from the plan.⁷²

As noted, this timing rule is not found in the pertinent Treasury regulations. Indeed, for tax purposes, there is generally a different timing rule.⁷³ The date-of-withdrawal timing rule is nevertheless intuitively appealing, and courts have embraced it with little or no discussion.⁷⁴ Moreover, it appears to be consistent with the intent of Congress, because it parallels the timing rule for single employer plan terminations, that the "employer," *i.e.*, the controlled group, that maintained a single employer plan at the time the plan was terminated is liable to the PBGC.⁷⁵ This timing rule is also supported by the PBGC reentry regulations under Section 4207(a) of ERISA.⁷⁶ Those regulations define the employer eligible for reentry relief as the trades or businesses under common control on the date of the initial withdrawal.⁷⁷

68. *E.g.*, *Barker & Williamson*, 788 F.2d 118; *Brady-Cline Coal Co.*, 668 F. Supp. 5; *Connors v. Ryan's Coal Co.*, No. CV87-H-57-S (N.D. Ala. May 7, 1987); *Connors v. Childress Serv. Corp.*, No. 86-337 (D.D.C. Feb. 13, 1987).

69. 29 U.S.C. § 1383(e); *see generally Loomis Armored*, 8 Employee Benefits Cas. (BNA) 1901.

70. *E.g.*, *Hatfield Enterprises, Inc. v. UMW 1950 & 1974 Pension Plans*, 9 Employee Benefits Cas. 1980 (1988) (Jaffe, Arb.).

71. *Brady-Cline Coal Co.*, 668 F. Supp. at 5.

72. *But see infra* part IV(C).

73. *See, e.g.*, 26 U.S.C. § 1504(a)(3) (Supp. III 1985); *Barker & Williamson*, 788 F.2d at 118.

74. *See supra* note 55.

75. *See* 29 U.S.C. § 1362(a) (1982) *Pension Benefit Guaranty Corp.* Opinion Letter 76-115 (Oct. 27, 1976) (available at the West Virginia Law Review Office).

76. 29 C.F.R. §§ 2640, 2647 (1987).

77. *Id.* at § 2640.6.

Joint and several liability is, as noted, only one consequence of being under "common control." The controlled group configuration will also determine whether and when a withdrawal has occurred and the amount of required contributions taken into account in the calculation of the withdrawal liability.⁷⁸ A date-of-withdrawal timing rule will affect these determinations as well.

Suppose that brother-sister corporations A and B participated in a multiemployer plan, that A permanently ceased covered operations in plan year 1982, and that B permanently ceased covered operations in plan year 1986. Suppose also that A and B ceased to be under common control in plan year 1984, due to a sale of B's stock to unrelated persons.

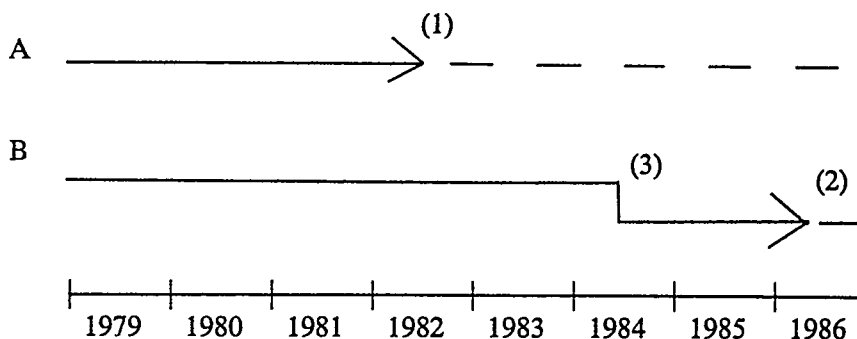


Figure 1.

Table 1 suggests three possible answers to the question of when A withdrew: (1) in 1982, when A ceased covered operations; (2) in 1986, when former sister corporation B ceased covered operations; or

(3) in 1984, when A and B ceased to be under common control.

Alternative 1 has a logical flaw under the general controlled group timing rule. Until the 1984 severance of the controlled group, A and B were part of a single employer for purposes of Title IV. Thus, A's 1982 permanent cessation of covered operations probably should not constitute a complete withdrawal from the plan.⁷⁹ Alternative number 2 has a similar flaw. By 1986, A was no longer part of the same "employer" as B. For this reason, even though B clearly withdrew in 1986 when it permanently ceased covered operations, it would probably be incorrect to include A's contribution history in calculating B's withdrawal liability.⁸⁰ Indeed, doing so could be unfair to B's new owners, who may have been unaware of A's existence. Alternative 3, therefore, would probably be the most logical answer. Upon the controlled group's severance, the "employer" of which A was a part permanently ceased covered operations and thereby incurred a complete withdrawal.

One possible objection to this approach is that the plan loses part of A's contribution base in its withdrawal liability calculation. Under the "rolling-5" method,⁸¹ A's liability for its 1984 complete withdrawal is based on A's required contributions during the 1979 through 1983 plan years. During one of those years, 1983, A had no required contributions. That result, however, is typical in the case of withdrawals by controlled groups. If A and B remained under common control through the 1986 cessation of B's covered operations, for example, then the 1980 part of A's base period would similarly be lost. To the knowledge of the authors, no arbitrator or court has yet addressed this difficult question of controlled group timing.

3. Issues of Fairness and Due Process

Joint and several liability for controlled group members can produce harsh results. Assume that the sole shareholder of a mining corporation inherits a rental property on the eve of his corporation's

79. See *supra* note 33 and accompanying text.

80. See *supra* note 53 and accompanying text.

81. 29 U.S.C. § 1391(c)(3).

cessation of covered operations. Assuming the rental property represents a trade or business, the shareholder could find his personal assets exposed to the withdrawal liability debt incurred by his corporation. This result would follow even though the shareholder took the affirmative step of incorporating his mining business to insulate himself from personal liability, took no affirmative steps to pursue the trade or business of renting real property, and punctiliously kept the mining and rental businesses separate.

The plain meaning of ERISA § 4001(b)(1), the uniform recognition of joint and several liability under that Section by the courts,⁸² and the clearly-expressed legislative intent underlying § 4001(b)(1)⁸³ give courts and arbitrators little room to stray from the conclusion that the shareholder will incur personal liability by virtue of his unincorporated rental business. Indeed, most courts have expressly rejected the notion that joint and several liability extends only to those controlled group members with employees or operations covered under the plan.⁸⁴

Not surprisingly, therefore, numerous employers have attacked the controlled group liability rule on due process or "taking" grounds. Courts have uniformly recognized, however, that the controlled group rule and its consequences are rational; therefore, the rule survives a due process or "taking" attack.⁸⁵ Joint and several liability, according to the courts, is a rational means of overcoming the dispersion of assets through related businesses.⁸⁶ Indeed, as the Supreme Court ob-

82. *E.g.*, Board of Trustees v. H.F. Johnson Inc., 830 F.2d 1009 (9th Cir. 1987); *Barker & Williamson*, 788 F.2d 118; *Calvert Dev. Co.*, 622 F. Supp. 877; *United Food v. Progressive Supermarkets*, 644 F. Supp. 633 (D.N.J. 1986).

83. 126 CONG. REC. S11672 (1980) (Senate Floor Explanation), 126 CONG. REC. H7898 (1980) (remarks of Rep. Thompson); *see generally Pepsi-Cola Metro. Bottling Co.*, 636 F. Supp. at 641.

84. *See, e.g., H.F. Johnson*, 830 F.2d at 1013.

85. *E.g., Pepsi-Cola Metro. Bottling Co.*, 636 F. Supp. at 641. One early district court decision, *PBGC v. Anthony Co.*, 537 F. Supp. 1048 (N.D. Ill. 1982), 542 F. Supp. 43 (N.D. Ill. 1982) (supplementary opinion) endorsed a narrow application of controlled group liability in the single employer plan context to those affiliates which derived some financial benefit from the organization that maintained the plan. The *Anthony* analysis, however, has been soundly rejected. *PBGC v. Ouimet Corp.*, 711 F.2d 1085, 1089 (1st Cir.), *cert. denied*, 464 U.S. 961 (1983) [*Ouimet II*] ("The analysis in *Anthony* ignored the realities of business affiliation, such as that a parent does not have to actually receive dividend payments to benefit from its subsidiary's successful operations"); *accord Pepsi-Cola Metro. Bottling Co.*, 636 F. Supp. at 641 (*Anthony* rejected in withdrawal liability context).

86. *Pepsi-Cola Metro. Bottling Co. v. PBGC*, 900 F.2d 560-66; *H.F. Johnson*, 830 F.2d at 1013.

served in *Vogel*, Congress made a legislative judgment that the common ownership tests in Code § 1563(a)(2) ensured that the group of organizations are, in fact, controlled by the same group of stockholders as “one economic enterprise.”⁸⁷ Incorporation and its attendant limitation of liability is, of course, a creature of state law, and Congress’ power to “pierce” the corporate veil through the controlled group device cannot be questioned.⁸⁸

Indeed, the “unfairness” of controlled group liability is often more apparent than real. The business organization that participates in a multiemployer plan should be on notice of its potential withdrawal liability.⁸⁹ Such potential liability is but one cost of doing business, and nothing prevents such a participating business from preparing, through adequate capitalization, for the possibility of incurring withdrawal liability. Where the participating business is adequately capitalized, the plan will not have to look beyond that business for payment.

In this regard, the common law recognizes that a deliberately undercapitalized corporation’s veil may be pierced to prevent unfairness to the corporation’s creditors.⁹⁰ No great leap of logic is required to analogize the controlled group rule to this common law rule.

D. Foreign Controlled Group Members

Generally, the labor laws do not have extraterritorial effect, absent clear evidence that Congress so intended.⁹¹ Section 4001(b)(1) of ERISA, the PBGC regulations, and the Treasury regulations they incorporate are silent concerning whether a foreign entity can be considered a controlled group member. There are two arguments, however, that would support the proposition that Congress intended the controlled group rule to have such extraterritorial effect.

87. *Vogel*, 455 U.S. at 30 (emphasis in original).

88. *Pepsi-Cola Metro. Bottling Co.*, 636 F. Supp. at 660-66; *H.F. Johnson*, 830 F.2d at 1013.

89. Section 4221(e) of ERISA requires a plan to provide an employer with an estimate of its potential withdrawal liability upon request. 29 U.S.C. § 1401(e).

90. See generally 1 W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 41 (perm. ed. 1983).

91. *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957); *Cleary v. United States Lines, Inc.*, 555 F. Supp. 1251, 1257 (D.N.J. 1983), *aff’d*, 728 F.2d 607 (3d Cir. 1984).

First, ERISA's controlled group provision, through a series of cross-references, ultimately incorporates subsection (a) of Section 1563 of the Code.⁹² That subsection defines a controlled group of corporations to include a parent-subsidiary group. Although subsection (b) of Section 1563 generally excludes foreign corporations for tax purposes, Section 4001(b)(1) of ERISA incorporates not the whole of IRC § 1563 but only subsection (a).⁹³ Therefore, it may be argued, Congress did not intend to incorporate the exclusion for foreign corporations, and foreign parents, subsidiaries, or sister entities may thus be controlled group members for withdrawal liability purposes.⁹⁴

Second, ERISA applies to any plan maintained by an employer "engaged in commerce or in any industry or activity affecting commerce," and "commerce" is defined as commerce "between any state and any place outside thereof."⁹⁵ Apparently, that is shorthand for a definition contained in an earlier version of the bill that became ERISA, commerce "among the several States, *between any foreign country and any State*, or between any State and any place outside thereof."⁹⁶ Thus, it appears that Congress intended for ERISA to have extraterritorial effect, at least in some instances. In this regard, the only explicit mention of extraterritorial effect in ERISA is an exception for plans "maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens."⁹⁷ Therefore, it may be argued, Congress did not intend to exclude the converse — plans maintained in the United States by foreign entities and their United States affiliates for the benefit of United States citizens or residents.⁹⁸

92. *Barker & Williamson*, 788 F.2d at 125-26.

93. *Id.*

94. *Cf. Fujinon Optical, Inc., v. Commissioner*, 76 T.C. 499 (1981) (two U.S. corporations related only through a common foreign parent are a single employer for purposes of I.R.C. § 414(c), which incorporates § 1563(a)). We understand that on this basis PBGC has taken the position that foreign controlled group members are liable for plan termination. *See Matter of Ilco Corp.*, No. 80-022 (PBGC Appeals Bd. May 5, 1981).

95. 29 U.S.C. §§ 1002(11), 1003(a)(1) (1982).

96. H.R. 2, 93d Cong., 1st Sess. § 3(12), *reprinted in* 1 LEG. HIST. OF ERISA 9 (1976) (emphasis added).

97. 29 U.S.C. §§ 1003(b)(4), 1021(b)(7) (1982).

98. *Cf. Bryant v. International Schools Serv. Inc.*, 502 F. Supp. 482 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982) (provision in Civil Rights Act renouncing coverage of "aliens outside any State" implies that other extraterritorial effects were intended).

V. PROCEDURAL ISSUES

A. Plan's Right to Information

As noted, to determine the fact and date of withdrawal and the amount of liability therefor, a plan must determine the identities of all controlled group members with covered operations and an obligation to contribute.⁹⁹ Because an employer's statutory obligation to make agreed-upon contributions,¹⁰⁰ is not subject to the controlled group rule,¹⁰¹ a plan will not ordinarily have reliable information concerning whether a contributing entity was a member of a controlled group.

Presumably in recognition of this and similar information gaps, Section 4219(a) of ERISA provides:

An employer shall, within 30 days after a written request from the plan sponsor, furnish such information as the plan sponsor reasonably determines to be necessary to enable the plan sponsor to comply with the requirements of this part.¹⁰²

Plans routinely rely on Section 4219(a) to gather controlled group information, and, given its mandatory language, the courts should have little difficulty in concluding that this Section creates an enforceable obligation.¹⁰³ For example, in the *Superior Forwarding*¹⁰⁴ case, the plan asked Superior, which was in Chapter 11 bankruptcy, to complete a "Statement of Business Affairs" indicating whether it was a member of a controlled group. The bankruptcy court ordered Superior to comply, and the district court affirmed, noting that to determine whether there had been a withdrawal the plan had to "consider the employer as a whole."¹⁰⁵

Courts have also enforced Section 4219(a) after withdrawal liability has been assessed, in order to enable plans to preserve the ability to

99. See *infra* section II.

100. 29 U.S.C. § 1145.

101. *Rubinstein v. Tri-State Transp. Inc.*, 6 Employee Benefits Cas. (BNA) 2372 (1984).

102. 29 U.S.C. § 1399(a).

103. See 29 U.S.C. § 1451(a)(1) ("a plan fiduciary . . . who is adversely affected by the act or omission of any party under this subtitle . . . , may bring an action for appropriate legal or equitable relief . . .") *Id.*

104. *Superior Forwarding Co. v. Central States Pension Fund*, 6 Employee Benefits Cas. (BNA) 2694 (1985).

105. *Id.* at 2695.

collect. In the *Miss-Ala* case,¹⁰⁶ for example, the plan sought an order compelling Miss-Ala to make interim payments pending arbitration and to compel it to furnish financial statements and controlled group information to enable the plan to “preserve and collect the claims.”¹⁰⁷ The court held that such information was reasonably necessary to protect the plan and ordered that it be furnished.¹⁰⁸ This suggests that because Section 4219(a) gives a plan a substantive right to obtain information of this kind, the ordinary rule against pre-judgment asset discovery¹⁰⁹ should not apply in withdrawal liability cases, particularly to discovery of the identities of parties who may have joint and several liability.

B. Notice of Withdrawal Liability

As noted above, deadlines for payment, plan sponsor review, and arbitration are triggered by the issuance of a notice and demand to the employer.¹¹⁰ In the preamble to a regulation governing “Notice and Collection of Withdrawal Liability,”¹¹¹ the PBGC stated:

[U]nder ERISA there is a unity of interest in the case of a controlled group of corporations, since the entire group is considered to be a single employer for withdrawal liability and other purposes. Therefore, PBGC believes that a notice of default sent to the contributing entity which is a member of a controlled group of corporations, within the meaning of Section 4001(b)(1) [29 U.S.C. § 1301(b)(1)], constitutes constructive notice to the other members of the same controlled group. Thus, PBGC finds that Section 4219(c)(5)(A) [29 U.S.C. § 1399(c)(5)(A)] does not require notice to the other members of a controlled group.¹¹²

This discussion on its face pertains only to the notice required to accelerate the principal amount of an employer’s withdrawal liability in the event of default on installment payments. Nevertheless, the courts have applied this rule to the initial notice and demand for

106. *Combs v. Miss-Ala Elec. Contractors, Inc.*, 6 Employee Benefits Cas. (BNA) 2830 (1985).
107. *Id.* at 2831.

108. *Id.* at 2831-32.

109. 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2010 n.78 (1970).

110. See *infra* section III.

111. 49 Fed. Reg. 22,642 (1984).

112. 49 Fed. Reg. 22,644 (1984).

installment payments. As one court put it, “notice and demand to one is notice and demand to all.”¹¹³

The Third Circuit articulated a policy rationale for this rule in the *Barker & Williamson*¹¹⁴ case. According to the Third Circuit, ERISA’s notice provisions should be liberally construed in favor of plans to effectuate Congress’ goal of protecting employees.¹¹⁵ Moreover, “a fund can only be expected to provide notice to the corporation that is the ostensible employer;” it has “no way of knowing the ownership of a closely held corporation.”¹¹⁶ The stockholders and officers, by contrast, are aware of their holdings. If, upon receiving a withdrawal liability notice and demand, they choose to ignore the potential for controlled group liability, then a subsequent finding that there is a control group and that it has forfeited its defenses, by failing to initiate plan sponsor review and arbitration, is “but a self-inflicted wound.”¹¹⁷

C. Arbitrability of Controlled Group Questions

ERISA’s arbitration command is broad. Section 4221(a) provides that “[a]ny dispute . . . concerning a determination made under Sections 4201 through 4219 shall be resolved through arbitration.”¹¹⁸ Common control, however, is governed by Section 4001(b)(1) of ERISA, outside the range of Sections 4201 through 4219. Moreover, unless a business is under common control with the withdrawing business, it is arguably not part of the “employer” to which Section 4221(a)’s arbitration command applies.¹¹⁹ Nevertheless, employers and plans have

113. *Calvert Dev. Co.*, 622 F. Supp. at 881. *Accord* Local 807 Labor-Management Pension Fund v. ABC Fast Forwarding Freight Corp., No. 82-C-3356 slip op. at 8-9 (E.D.N.Y. Mar. 7, 1984); *Ryan’s Coal Co.*, slip op. at 2-3.

114. *Barker & Williamson*, 788 F.2d 118.

115. *Id.* at 127.

116. *Id.* at 128.

117. *Id.* at 129.

118. 29 U.S.C. § 1401(a).

119. Some courts would probably characterize “employer” or controlled group status as a jurisdictional prerequisite to arbitration. See *I.A.M. Nat’l Pension Fund v. Stockton Tri Indus.* 727 F.2d 1204 (D.C. Cir. 1984); see also *Refined Sugars, Inc. v. Local 807 Labor-Management Pension Fund*, 632 F. Supp. 630 (S.D.N.Y. 1986). The seminal Supreme Court case on the subject of prerequisites to agency jurisdiction makes clear, however, that a dispute as to a “jurisdictional” fact does not necessarily strip the agency of jurisdiction to consider that dispute in the first instance. *Crowell v. Benson*, 285 U.S. 22 (1932). Recent withdrawal liability cases are in accord with this principle. Cf. *Flying Tiger Line, Inc. v.*

not hesitated to submit common control questions to arbitration, and arbitrators have not hesitated to resolve those common control questions.¹²⁰ This is because substantive questions which are “quintessentially” arbitrable, such as whether and when a withdrawal occurred,¹²¹ are often bound up with the common control question. In the *Western Dominion Coal*¹²² case, for example, the employer argued before the arbitrator that it was under common control with a business that continued to perform covered operations under the plans and, therefore, that no withdrawal had occurred.¹²³ Similarly, in the *Manor Mines* case,¹²⁴ one business that ceased covered operations before MPPAA’s effective date maintained before the arbitrator that it should not be treated as under common control with a sister corporation that continued to perform operations beyond MPPAA’s effective date, and that because of its pre-effective date of withdrawal it incurred no liability.¹²⁵

Given the consequences of missing the arbitration deadline,¹²⁶ the putative controlled group member has every incentive to submit the controlled group question to arbitration. The *Barker & Williamson*¹²⁷ case illustrates this point. Barker & Williamson (“B&W”), the entity that participated in the plan and that received the plan’s notice and demand for withdrawal liability, failed to pursue plan sponsor review and arbitration of the plan’s claim.¹²⁸ Evidently, B&W thought itself judgment-proof. The court held that this failure to pursue mandatory review and arbitration foreclosed the “employer” from disputing the

Central States Pension Fund, 659 F. Supp. 13, (D. Del. 1986), *aff’d*, 830 F.2d 1241 (3d Cir. 1987) (whether group of corporations is part of withdrawn “employer” based on a transaction proscribed by ERISA § 4212(c) must be decided by arbitration); *accord* Banner Indus. Inc. v. Central States Pension Fund, 657 F. Supp. 875 (N.D. Ill. 1986), *cert. granted*, 663 F. Supp. 1290 (N.D. Ill. 1987); Tri-State Rubber v. Central States Pension Fund, 661 F. Supp. 46 (E.D. Mich. 1987).

120. *E.g.*, *Western Dominion*, 6 Employee Benefits Cas. (BNA) 2353; *Manor Mines*, 5 Employee Benefits Cas. (BNA) 1708; UMW 1974 Pension Plan v. Three States Energy Corp., AAA No. 16 621 0005 84T (February 20, 1985) (Clarke, Arb.), *enforcement denied*, No. 85-0941 (D.D.C. Aug. 29, 1985).

121. *Connors v. BMC Coal Co.*, 634 F. Supp. 74 (D.D.C. 1986).

122. *Western Dominion*, 6 Employee Benefits Cas. (BNA) at 2353.

123. *Id.* at 2360-61.

124. *Manor Mines*, 5 Employee Benefits Cas. (BNA) at 1708.

125. *Id.* at 1709.

126. *E.g.*, *Clinton Engines Corp.*, 825 F.2d 415.

127. *Barker & Williamson*, 788 F.2d 118.

128. *Id.* at 121.

fact or amount of its liability under well-settled law.¹²⁹ Thus, the only fact necessary for the plan to prove to establish the liability of the putative controlled group member, Sentinel Electronics, was an 80% common ownership interest.¹³⁰

The business in Sentinel's position may believe it is caught on the horns of a dilemma. It must request review and initiate arbitration of the plan's withdrawal liability claim to preserve its defenses, but arguably it can pursue plan-sponsor review and arbitration only if it is under common control with, *i.e.*, part of the same "employer" as the withdrawn business.

In this respect, *Barker & Williamson* is probably atypical. In most cases, the controlled group components should have no doubt as to their controlled group status.¹³¹ Sentinel's inclusion in the B&W control group hinged on whether an oral option agreement existed, an unusual fact pattern.¹³² In those few cases, like *Barker & Williamson*, where common control is open to genuine dispute, nothing prevents the putative controlled group member from challenging common control in the review and arbitration stage.¹³³

We believe that such issues should be submitted to arbitration. Arbitration will probably be quicker and less expensive than district court litigation. Moreover, fact issues underlying a control group dispute, such as whether an option existed, should be grist for the arbitrator's mill.¹³⁴ Additionally, though the employer may contend that common control is a question of law that should be decided by the courts, the PBGC's arbitration regulations and a growing body of

129. *Id.* at 122.

130. *Id.*; accord *Ryan's Coal Co.*, slip op. at 1.

131. A controlled group of corporations will frequently file a consolidated income tax return to take advantage of favorable tax treatment. See 26 U.S.C. § 1504 (1974). In addition, as the Supreme Court observed in *Vogel*, the controlling interest test ensures that the controlled group's shareholders will not be "caught by surprise." *Vogel*, 455 U.S. at 34-35.

132. *But see* *Central Trans. Inc.*, 640 F. Supp. at 56.

133. *Barker & Williamson*, 788 F.2d at 118. The Third Circuit's assumption that the putative controlled group member would have to concede common control to pursue arbitration is curious. The flexibility of ERISA's arbitration procedures should permit the employer and plan in the atypical case like *Barker & Williamson* to bifurcate their dispute, putting forward first only the controlled group issue.

134. *Republic Indus. Inc. v. Teamsters Joint Council*, 718 F.2d 628 (4th Cir. 1983), cert. denied, 567 U.S. 1259 (1984).

case law make it clear that MPPAA arbitrators are empowered to resolve any such "legal" questions, or mixed questions of law and fact, in the first instance.¹³⁵

Even in cases where the existence and timing of common control are not in dispute, arbitration may be in order for another reason. In a number of cases, plans have asserted that an ownership change that altered the controlled group configuration was designed to evade or avoid the plan's collection of withdrawal liability.¹³⁶ Section 4212(c) of ERISA provides that transactions intended to evade or avoid withdrawal liability shall be disregarded.¹³⁷ In the plan's view, a Section 4212(c) issue is not only literally within ERISA's mandatory arbitration range (a "dispute . . . under Sections 4201 through 4219"), but it also involves the sort of fact-centered questions that demand arbitration.¹³⁸

In the *Flying Tiger* case, for example, the parent set of organizations (collectively "Tiger") sold its controlling interest in a business that performed covered operations under several plans to a holding company that was established by the parent, but was not commonly-controlled.¹³⁹ The business that participated in the plans ceased covered operations only after the stock sale,¹⁴⁰ so Tiger viewed itself as insulated from the withdrawal liability claims incurred by its former subsidiary. The plans contended otherwise, apparently based on the fact that the "new" parent, like the subsidiary, had insufficient assets to pay withdrawal liability.¹⁴¹ Although the district court initially agreed with Tiger that the only issue was a simple "legal" issue of controlled

135. See *Robbins v. Chipman Trucking, Inc.*, 8 Employee Benefits Cas. (BNA) 125 (1986) and cases cited therein.

136. *Flying Tiger Lines*, 659 F. Supp. at 13; *Banner Indus.* 657 F. Supp. 875; *DeBreceni v. Graf Bros.*, No. 85-3386-MA (D.Mass. May 19, 1986), *aff'd*, 828 F.2d at 877 (1st Cir. 1987).

137. 29 U.S.C. § 1392(c).

138. *Republic Indus.* 718 F.2d at 628; *Connors v. Pelbro Fuel, Inc.*, No. 83-1524, *slip op.* at 14 (D.D.C. Nov. 15, 1984) (" . . . it is difficult for the court to envision any question of statutory interpretation without having to make some inquiry into relevant facts of the case"); *Williamson Shaft Contracting Co. v. UMWA 1974 Pension Plan*, 585 F. Supp. 633 (W.D.Pa. 1984) ("It is hard for [the court] to envision what is solely a matter of statutory interpretation without reference to facts. Philosophers may be able to do this, but not this court"). *Id.* at 634.

139. *Flying Tiger*, 659 F. Supp. at 13.

140. *Id.*

141. *Id.*

group timing, justiciable in the first instance, it ultimately reversed itself, agreeing that the plans had stated arbitrable claims against Tiger under ERISA § 4212(c).¹⁴² In this regard, *Flying Tiger* and its progeny¹⁴³ suggest that so long as a trade or business was under common control with the withdrawn employer at one time, not necessarily on the date of withdrawal, it may be part of the “employer” to which ERISA’s arbitration requirement applies.¹⁴⁴ Beyond this, little decisional law has developed as to what facts are necessary to establish that an ownership change is a transaction intended to evade or avoid withdrawal liability.¹⁴⁵

D. Controlled Group Rule May Establish Privity for Res Judicata Purposes

A final judgment on the merits bars relitigation of the same claim between the parties or those in privity with them.¹⁴⁶ Where a plan has obtained a judgment for withdrawal liability and learns of the existence of controlled group members only in post-judgment discovery, it may seek to bar them from relitigating the merits of the underlying claim on the grounds that they were in privity with the named defendant.

The *Danin*¹⁴⁷ case, which involved delinquent employer contributions, furnishes an instructive analogy. There, the plan obtained a judgment against Mohawk Manufacturing, and when it learned that Mohawk was without assets, it sued Mohawk’s shareholders and a related company, Vi-Mil, on theories of piercing the corporate veil.¹⁴⁸ The court held that these parties were in privity with Mohawk because they had controlled Mohawk’s defense and had a proprietary interest

142. *Id.* at 15.

143. *Id.* at 13; *Banner Indus.*, 657 F. Supp. at 875; *Tri-State Rubber*, 661 F. Supp. at 46.

144. *Flying Tiger*, 659 F. Supp. at 13; *Banner Indus.*, 657 F. Supp. at 875; *Tri State Rubber*, 661 F. Supp. at 46.

145. *But see* *Dorns Transp., Inc. v. Teamsters Pension Trust*, 787 F.2d at 902 (suggesting that “good faith” indicates no evasion or avoidance); *see also* *Cuyamaca Meats, Inc. v. Butchers’ and Food Employees’ Pension Fund*, 827 F.2d 491 (9th Cir. 1987).

146. *See generally* 1B J. MOORE, J. LUCAS, T. CURRIER, *MOORE’S FEDERAL PRACTICE* ¶ 0.422[1] (2d ed. 1985).

147. *Alman v. Danin*, 801 F.2d at 1 (1st Cir. 1986).

148. *Id.*

in the outcome,¹⁴⁹ citing the Supreme Court's decision in *Montana v. United States*.¹⁵⁰ Significantly, it appears that, rather than specifically finding control in fact, the court inferred control from the shareholders' awareness of the "questionable nature of Mohawk's corporate identity," which gave them an obvious stake in the outcome.¹⁵¹

Because there is a "unity of interest" among controlled group members,¹⁵² one member clearly would have a stake in the outcome of a withdrawal liability arbitration or suit involving another member. Further, a member should be aware that, despite observance of corporate formalities and the absence of fraud, the controlled group rule functions as a mandatory piercing of the corporate veil.¹⁵³ Therefore, as in the *Danin* case, a court may conclude, as matter of law, that controlled group members who are not named parties have a sufficient interest in the outcome and control of the defense of a withdrawal liability proceeding that they should be bound by the arbitration award or judgment.¹⁵⁴ In this regard, the Ninth Circuit recently held that there is no due process violation where a later-discovered controlled group member is held liable on a judgment for withdrawal liability.¹⁵⁵

E. Personal Liability Where Controlled Group Member is Unincorporated

Section 3(5) of ERISA provides that an "employer" includes "any person acting directly as an employer, or indirectly in the interest of an employer. . . ."¹⁵⁶ This language is identical to that of Section 3(d) of the Fair Labor Standards Act, which has been construed to impose

149. *Id.* at 3.

150. *Montana v. United States*, 440 U.S. 147 (1979).

151. *See Danin*, 801 F.2d at 3.

152. 49 Fed. Reg. 22,644.

153. *Ouimet II*, 711 F.2d at 1093 (1983).

154. A court may also conclude that such controlled group members are bound because they could have intervened. *See Penn Central Merger and N & W Inclusion Cases*, 389 U.S. 486 (1968). As the Third Circuit has noted, a putative controlled group member would probably have standing to initiate arbitration or to sue for a declaration as to its controlled group status, *Barker & Williamson*, 788 F.2d at 129, and by the same token it probably would have standing to intervene in an arbitration initiated by an affiliate or a collection suit brought against an affiliate. *See Manor Mines*, 5 Employee Benefits Cas. (BNA) at 1708.

155. *H.F. Johnson*, 830 F.2d at 1015. Privity was apparently not in issue.

156. 29 U.S.C. § 1002(5) (1982).

personal liability for unpaid wages on controlling shareholders.¹⁵⁷ Section 3(5), however, has been held not to impose personal liability for withdrawal on the owners of a closely-held corporation in the absence of facts supporting piercing of the corporate veil.¹⁵⁸

Nevertheless, if a controlled group member is a proprietorship, partnership, or other unincorporated business, it should be obvious that its owner or owners will be personally liable for withdrawal liability incurred by the unincorporated business as a controlled group member. In the *Johnson* case,¹⁵⁹ though the court characterized this as a question of first impression, it had no difficulty in reaching this conclusion under general partnership law.¹⁶⁰

There is no statutory exception to this rule.¹⁶¹ There is however, a limitation on the personal assets that are subject to execution on a judgment for withdrawal liability. Section 4225(c) of ERISA exempts from execution any property that would be exempt from a debtor's estate under Section 552 of the Bankruptcy Code "[t]o the extent that the withdrawal liability of an employer is attributable to his obligation to contribute to or under a plan as an individual (whether as a sole proprietor or as a member of a partnership). . . ." ¹⁶² In *Johnson*, the Ninth Circuit held that this limitation applied whether the unincorporated business was the business obligated to contribute under a collective bargaining agreement or was merely under common control with such a business.¹⁶³ The court reasoned that under the controlled group rule, all commonly controlled trades or businesses are jointly

157. 29 U.S.C. § 203(d) (1982). See *Donovan v. Agnew*, 712 F.2d 1509 (1st Cir. 1983).

158. *Connors v. P&M Coal Co.*, 801 F.2d 1373 (D.C. Cir. 1986); *DeBreceni v. Graf Brothers Leasing, Inc.*, 828 F.2d at 877. Courts are divided over whether a liberal federal piercing standard or state standards should be applied in ERISA cases. Compare *Laborers Clean-Up Contract Admin. Trust Fund v. Uriarte Clean-Up Service, Inc.*, 736 F.2d 516 (9th Cir. 1984), and *Solomon v. Klein*, 770 F.2d 352 (3d Cir. 1985). It should be noted that Congress intended that the courts develop "a body of federal substantive law" under ERISA. 120 CONG. REC. 29942 (1974) (statement of Sen. Javits).

159. *H.F. Johnson*, 830 F.2d at 1009.

160. *Id.* at 1014-16.

161. Where Congress has enacted a detailed statute, courts should not carve out equitable exceptions not found in the language of the statute. *Central States Pension Fund v. Belmont Trucking Co., Inc.*, 788 F.2d 428 (7th Cir. 1986).

162. 29 U.S.C. § 1405(c), 1391(d)(2). It should be noted that the relief provisions of Section 4225 do not apply to the UMWA 1950 and 1974 Plans, absent a plan amendment. See *Combs*, slip op. at 3.

163. *H.F. Johnson*, 830 F.2d at 1015.

obligated to contribute, so that the owner of an unincorporated controlled group member would always have an obligation "to contribute . . . as an individual" as meant by Section 4225(c).¹⁶⁴

We respectfully disagree with the Ninth Circuit on this point. Section 4001 of ERISA, by its terms, applies only "[f]or purposes of this title,"¹⁶⁵ *i.e.*, Title IV of ERISA. An employer's obligation to contribute, however, is governed by Section 515 of ERISA, which is contained in Title I.¹⁶⁶ Although Section 3(5) does define an "employer," for Title I purposes, to include any person acting "in the interest of an employer," Title I does not define an "employer" to include a controlled group.¹⁶⁷ Therefore, absent a piercing of the corporate veil, it has been held that controlled group members are not liable for contributions if they are not parties to the collective bargaining agreement.¹⁶⁸

In this regard, it is true that "in enacting a later chapter without express definitions," Congress is "free to rely on those already contained in the relevant title," despite a pro forma limitation of those definitions to the chapter in which they appear.¹⁶⁹ Though Section 515 was added to Title I in 1980 as part of MPPAA and Title IV's controlled group rule had been extant since 1974, Section 515 was not a "later" chapter, but an addition to an earlier chapter, which did not contain the controlled group rule. Moreover, Title I contains its own express definition of "employer."¹⁷⁰ Therefore, it seems highly unlikely that Congress would have intended for a Title IV definition to color the meaning of a new Title I obligation, when it took care

164. *Id.*

165. 29 U.S.C. § 1301.

166. That provision states that:

[e]very employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

29 U.S.C. § 1145.

167. 29 U.S.C. § 1002(5).

168. *Rubinstein*, 6 Employee Benefits Cas. (BNA) at 2372.

169. *T.I.M.E.-D.C. v. New York State Teamsters Conference Pension & Retirement Fund*, 580 F. Supp. 621, 627 (N.D.N.Y. 1984), *aff'd*, 735 F.2d 60 (2d Cir. 1984). *Accord* *Nachman Corp. v. PBGC*, 592 F.2d 947, 952 (7th Cir. 1979), *aff'd*, 446 U.S. 359 (1980).

to set forth different definitions of “employer” for Title I and Title IV purposes in 1974.

F. Preemption: State Law Limitation on Liability

Section 514(a) of ERISA states that the provisions of Titles I and IV of ERISA shall “supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . .”¹⁷¹ This provision expresses an extremely broad preemption principle, as illustrated by the leading case of *Delta Airlines*.¹⁷² There, the Supreme Court considered a state statute requiring pregnancy disability benefits in excess of those required by federal civil rights law, insofar as it required provision of such benefits by an ERISA-covered welfare plan.¹⁷³ The Court noted that, unlike the situation with pension plans, ERISA does not regulate the nature of benefits provided under welfare plans.¹⁷⁴ It held nevertheless that a state law “relate[s] to” an ERISA plan if it has a “connection with or reference to” such a plan, and that the statute in question “relate[d] to” the plan to the extent it required the plan to pay specific benefits.¹⁷⁵

Arguably, state laws governing debtor-creditor relations should not be considered preempted insofar as they affect a plan’s claim against an employer, because they do not relate to the core concern of ERISA, the provision of benefits to employees. Some pre- and even post-*Delta Airlines* cases have taken that view.¹⁷⁶ Some courts have even held that state laws specifically designed to supplement the collection remedies available to a plan under ERISA are not preempted.¹⁷⁷

Two recent Court of Appeals decisions, however, are to the contrary. In the *McMahon*¹⁷⁸ case, the Third Circuit held that the Penn-

171. 29 U.S.C. § 1144(a) (1982).

172. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

173. *Id.*

174. *Id.* at 91.

175. *Id.* at 91, 95-97.

176. *Deiches v. Carpenters Health & Welfare Fund*, 4 Employee Benefits Cas. (BNA) 2195 (1983) (state preferential transfer law); *see also* *Gould, Inc. v. PBGC*, 5 Employee Benefits Cas. (BNA) 1725 (1984) (state suretyship law).

177. *E.g.*, *Sasso v. Vachris*, 66 N.Y.2d 28, 484 N.E.2d 1359, 494 N.Y.S.2d 856 (1985) (state statute providing for shareholder liability for unpaid plan contributions).

178. *McMahon v. McDowell*, 794 F.2d 100 (3d Cir.), *cert. denied*, 107 S.Ct. 473 (1986).

sylvania Wage Payment and Collection Law ("WPCL"), which imposes personal liability on corporate officers and directors for unpaid wages and fringe benefits, was preempted insofar as it imposed liability for unpaid contributions to a ERISA plan.¹⁷⁹ The court held that the fact that WPCL merely "supplement[s]" ERISA did not save it, because it "competes with the mechanism that Congress carefully established in ERISA itself."¹⁸⁰

In the *Johnson* case,¹⁸¹ the Ninth Circuit was faced with perhaps the most difficult preemption question to date. Not only was the state statute one of general applicability to creditors, but it was in an area the court acknowledged was of "special concern to the states," the administration of decedents' estates.¹⁸² There, the plan obtained a judgment for withdrawal liability against a corporation, and subsequently discovered that there was a commonly-controlled partnership.¹⁸³ By that time, however, one of the partners had died and Montana's 4-month period for bringing claims against his estate had run.¹⁸⁴ Nevertheless, the court held that ERISA's six-year statute of limitations for withdrawal liability claims¹⁸⁵ preempted the Montana statute. The court concluded that, in the words of the *Delta Airlines* case, the Montana statute had "a connection with or reference" to the plan and therefore "relate[d] to" the plan, because its effect was to bar the plan's claim.¹⁸⁶ Moreover, it noted, the general rule is that a state statute of limitations applies to a federal claim only in the absence of a federal statute of limitations or, if none, in the absence of conflict with federal policy.¹⁸⁷

Under the rationale of the *Johnson* decision, state statutes providing that corporations can be sued only within a limited period after

179. *McMahon*, 794 F.2d at 108.

180. *Id.* at 106. See 29 U.S.C. § 1132(g)(2) (plan entitled to interest, liquidated damages, and attorney's fees when it prevails in suit for delinquent contributions).

181. *H.F. Johnson*, 830 F.2d at 1009.

182. *Id.* at 1016.

183. *Id.* at 1012.

184. *Id.* at 1016.

185. 29 U.S.C. § 1451(f)(1).

186. *H.F. Johnson*, 830 F.2d at 1016.

187. *Id.* at 1016-17.

dissolution, typically two years,¹⁸⁸ would also presumably be preempted with respect to a withdrawal liability claim. Though one could argue that such a statute actually deals with capacity to sue or be sued, not limitation of actions, it would nevertheless be inconsistent in its effect with an explicit federal statute of limitations, as well as federal policy of allowing plans a relatively long period — six years — in which to prosecute withdrawal liability claims against the common-law employer as well as its controlled group members.

VI. CONCLUSION

The controlled group rule affects all substantive and procedural aspects of the withdrawal liability provisions of ERISA. Therefore, an understanding of the rule is critical to an understanding of the withdrawal liability provisions themselves. The rule has been construed liberally to maximize the plans' ability to collect withdrawal liability, and properly so, given Congress' intent of assuring the solvency of multiemployer plans, so that employees will receive promised benefits when they retire.

188. See 16A W. FLETCHER, *supra* note 90, § 41.

