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AGC Labor & Employment Law Council

30th Annual Construction Law Symposium

Washington, D.C.

May 2, 2014

Multiemployer Plans: Withdrawal Liability – the Construction Industry Exemption & Controlled Group Issues

A CASE STUDY

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I. A REVIEW OF THE BASICS

A. What is a complete withdrawal? ERISA §4203 (29 U.S.C. §1383): An employer who permanently ceases to have an obligation to contribute to a multiemployer pension plan or permanently ceases all covered operations under that plan has completely withdrawn.

B. What is a partial withdrawal? ERISA §4205 (29 U.S.C. §1385): A partial withdrawal occurs when one of three things happens:

1. There is a 70% contribution base unit decline in each of three consecutive years (called the three-year testing period) when compared to its average base units in the two highest of the preceding five years (called the base period).

2. The employer permanently ceases to have an obligation to contribute under one or more, but fewer than all, collective bargaining agreements requiring contributions to the plan, but continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required or transfers such work to another location or to an entity or entities owned or controlled by the employer; or

3. The employer permanently ceases to have an obligation to contribute under the plan with respect to work performed at one or more, but fewer than all, of its facilities, but continues to perform work at the facility of the type for which the obligation to contribute ceased.

C. What are the construction industry provisos? Recognizing the fluid nature of the construction industry, Congress enacted special rules for determining whether a complete or partial withdrawal has occurred by a construction industry employer. The

legislative history is detailed further below, but for this basic review, the following points are sufficient:

1. The provisos only apply where (a) the plan in question is one that primarily covers employees in the building and construction industry (or is amended to adopt this exception), and (b) substantially all the employees for whom the withdrawing employer had an obligation to contribute to that plan must work in the building and construction industry, which has generally has been interpreted to mean 85% or more of their time is spent performing on-site work)—beware the Teamsters. *See Warner & Sons, Inc. v. Central States,* 2009 WL 5178376 (N.D. Ill. 2009). If both criteria are met, then—

2. ERISA §4203(b)(2): A complete withdrawal occurs only if the construction industry employer that permanently ceases to have an obligation to contribute (or ceases all covered operations) EITHER

    - continues to perform work in the jurisdiction of the underlying agreement of the type for which contributions were previously required, or

    - resumes performing such work in the jurisdiction of the underlying agreement within 5 years of withdrawing without renewing its obligation to contribute to the plan at the time of resumption.

    - Subcontracting and 4203(b)(2): Assuming that the subcontracting clause of the underlying (terminated) collective bargaining agreement is a typical "signatory contractor" clause, such that an employer would be responsible for contributions to the plan for

improper subcontracting, then the "continues" or "resumes" criteria are satisfied if the withdrawn employer, in lieu of self-performing covered work with its own [now nonunion or "other union"] employees, subcontracts that work to a subcontractor which is <u>not</u> obligated to the plan within the five-year post-withdrawal period *See H.C. Elliott, Inc. v. Carpenters Pension Trust Fund for Northern California,* 859 F.2d 808, 813 (9th Cir. 1988); *Oregon-Washington Carpenters-Employers Pension Trust Fund v. BQC Const., Inc. Hardware Service*, 485 F.Supp.2d 1206, 1215-1216 (D.Or. 2007); PBGC Opinion Letter 85-5 (1/30/85); PBGC Opinion Letter 84-8 (12/27/84).

3. <u>ERISA §4208(d)</u>: A <u>partial</u> withdrawal occurs "only if the employer's obligation to contribute under the plan is continued for no more than an insubstantial portion of its work in the craft and area jurisdiction of the collective bargaining agreement of the type for which contributions are required." This protects construction industry employers against sudden drop offs/fluctuations in business. *See Central States v. Robinson Cartage Co.,* 55 F.3d 1318, 1323 (7th Cir. 1995):

> Congress created the partial withdrawal liability section of ERISA because a 'major and sustained reduction in an employer's contribution base results in harm to the plan.' Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 14 (Comm. Print 1980); *see also* H.R.Rep. No. 869, 96th Cong., 2d Sess., pt.1, at 68 (1980). However, a special exemption was created for the construction industry because --
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> > . . . [i]n this industry, work is generally on a project-by-project basis, an employer's covered employment may fluctuate drastically, and when a project ends an employer's workers will normally remain in the labor pool available for employment by other contributing employers. Because of these factors, Congress established special rules for the construction industry.
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> Advance Notice of Proposed Rulemaking, 47 Fed. Reg. 42588 (1982).

In sum, a fluctuation in contributions by individual employers is the "norm" in construction, and that does not threaten a plan as long as contributions are made for whatever work is done in the area (or substantially all such work). So, an employer who contributes for 100% of its total work in an area does not violate 4208(d) even if the total contributions decline by more than 70% in each of three consecutive years--because whatever amount of work it has in that area, it still paid into the plan for all of it.

Do we know what = "insubstantial portion" under 4208(d)?—No. It can be plan specific and PBGC has declined to give a number. Logically, the 70% decline number seems like a good starting point, but there is no case law that we have found.

D. The Date of Withdrawal is Key to the Assessment: The PBGC and relevant case law recognize that the date of the withdrawal of a construction industry employer from a construction industry plan for assessment purposes "relates back" or "snaps back" to the date of the original termination notice or the last date of contributions. *See* PBGC Opinion Letter 88-8 (5/2/88); *Board of Trustees of Constr. Laborers v. Thibodo,* 34 F.3d 914, 915, 917 (9th Cir. 1994), *cert. denied,* 514 U.S. 1017 (1995) (construction industry); *see also MEPPAA Withdrawal Liability,* 2-54 Labor And Employment Arbitration §54.04[8], authored by Ira F. Jaffe and Robert E. Nagle (2011), Matthew Bender & Co., Inc. (a member of the LexisNexis Group) (hereinafter "Jaffe & Nagle"). Thus, as PBGC Opinion Letter 88-8, *supra,* declared, "[i]n the case of the withdrawal of a construction employer from a multiemployer plan in the construction industry, only the date of the cessation of the employer's obligation to contribute is relevant." (Emphasis added.)

An example: if an employer withdraws as of June 1, 2014, and subsequently *resumes* covered work in the relevant area four years later, on June 1, 2018, without again becoming obligated to the plan, that will violate the exemption and the assessment numbers will be calculated based on the withdrawal date of June 1, 2014, when that employer actually ceased/terminated its obligation to contribute to the plan.

II. COMMON CONTROL PRINCIPLES

A. ERISA §4001(b)(1): All trades or businesses "under common control" are treated as a single employer for withdrawal liability purposes. IRS tests apply. IRC §1563.

- Common control is significant in determining whether a withdrawal has, in fact, occurred (i.e., if there is more than one commonly controlled entity obligated to contribute to Plan X, the fact that one of those entities ceases its obligation to contribute to Plan X does NOT result in a complete withdrawal, although a partial may be triggered).

- PBGC Opinion 95-2 (8/18/95) reflects the application of common control principles to a potential partial withdrawal scenario in the construction industry under 4208(d), as follows:

  - One member of the controlled group terminates its agreement and obligation to contribute, and continues to work in the area without returning to the plan (works nonunion or "other union").

  - Even though another controlled group member remains obligated to contribute to the same plan, if that obligation is not for work performed in the same craft and geographic area in which the withdrawn employer continues to work, then there has been a partial withdrawal because the portion of work performed by the withdrawn employer for which contributions would be required "is necessarily for an 'insubstantial portion" of the work" (meaning it is for 0% of that work).

  - However, if the remaining signatory controlled group member also works in the same craft and area jurisdiction of the withdrawn employer, then "a determination must be made as to

whether the obligation to contribute is for more than an insubstantial portion of the employer's [meaning both controlled group members] work".

- No reported cases that we have found that deal with this issue.

- Common control is also significant in determining which entities may be liable for payment of the assessment and how much that payment will be. Notice to one common control group member is considered to be notice to all, and each common control group member is jointly and several liable for the assessed withdrawal liability. In addition, the contribution histories for all of the controlled group members must be considered in the calculation of withdrawal liability.

B. The Liability of Common Control Members: The law of common control has primarily (almost exclusively) been developed in non-construction industry cases. And because it is the date of the withdrawal that controls the assessment, the cases have clearly established that where a former controlled group member asserts that it exited that group "before withdrawal", that type of dispute must be arbitrated under MPPAA; but where the control group member was never part of the relevant commonly controlled group of businesses prior to withdrawal, that dispute can be determined by a court in the first instance. *See New York State Teamsters Conference Pension and Retirement Fund v. Express Services, Inc.,* 426 F. 3d 640, 646 (2nd Cir. 2005); *Central States, Southeast and Southwest Areas Pension Fund v. Slotky,* 956 F2d 1369, 137201373 (7th Cir. 1992); *Banner Industries, Inc. v. Central States, Southeast and Southwest Areas Pension Fund,* 875 F.2d 1285, 1291 (7th Cir. 1989); *Flying Tiger Line v. Teamsters Pension Trust Fund of Philadelphia,* 830 F.2d 1241, 1250-51 (3d Cir. 1987).

The result of this "must be under common control on the date of withdrawal" requirement is that even under the law as it has developed to date under §4001(b), **entities added to the controlled group after the date of the withdrawal** are not liable (at least not simply by virtue of the

application of §4001(b))[1] for any withdrawal liability assessment arising prior to their entry into the relevant controlled group. *See Teamsters Pension Trust Fund of Philadelphia v. Brigadier Leasing Associates,* 880 F.Supp. 388, 395-396 (E.D. Pa. 1995), where the court explained:

> Plaintiffs [the fund and its fiduciary] next argue that arbitration is appropriate for ECI and ETS because they formed a controlled group with Hall's after Bodford acquired full control of ECI in late May 1988—months after any possible withdrawal date. In support of this position, plaintiffs rely on the *Flying Tiger* and *Doherty* opinions which state that the defendants need be a MPPAA employer only "at some point in time." *Flying Tiger,* 830 F.2d at 1247; *Doherty,* 16 F.3d at 1390 ("at one time"). Defendants argue that *Doherty* and *Flying Tiger* logically must refer only to time prior to and encompassing the date of withdrawal, because liability attaches only to trades or businesses that are part of the controlled group at the time of withdrawal.
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> The Court agrees with defendants that a MPPAA employer's relationship with other trades or businesses following withdrawal is not relevant to withdrawal liability. Withdrawal liability is imposed only on those trades and businesses that are under common control with the withdrawing employer on the date of withdrawal. A trade or business that becomes part of a controlled group with the employer *after* the withdrawal has no obligation to contribute and is never a contributing MPPAA employer. Thus, *Doherty* requires arbitration only for trades or businesses under common control with a MPPAA employer prior to withdrawal.
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> This reading of *Doherty* is supported by an earlier Third Circuit case, *Board of Trustees of Trucking Employees of North Jersey Welfare Fund v. Centra,* 983 F.2d 495 (3d Cir.1992), which involved a defendant who acquired a MPPAA employer which at some point incurred withdrawal liability. The defendant argued that it had not acquired control of the withdrawing organization until after the date of withdrawal and thus was not itself liable under MPPAA. In other words, the question was whether a defendant that was part of a controlled group at some time, possibly before withdrawal and certainly after withdrawal, could be ordered into arbitration. In affirming the district court, the Third Circuit held that the issue whether the defendant had acquired control by the date of withdrawal was properly determined by the district court. "Whether a corporation has acquired control of a contributing employer by the date the contributing company withdraws from a multiemployer pension fund is a legal question for a district court to decide. We have distinguished this question from the question of whether a business, once a member of a control group, has relinquished its control prior to the withdrawal date." *Id.* at 501. Implicit in the *Centra* court's reasoning is the concept that "at some point in time" does not extend to the post-withdrawal period.

[1] As discussed later in this paper, there may be other circumstances where a post-withdrawal entity may have liability or under an MPPAA "evade or avoid" analysis , or by operation of labor law principles such as alter ego or single employer, but those theories do not rely on the common control/single employer proviso of §4001(b).

> For these reasons, the Court concludes that plaintiffs are not entitled to arbitrate their claims against ECI or ETS, because defendants have presented evidence that neither ECI nor ETS was a member of a group under common control with Hall's prior to withdrawal. Accordingly, the Court will deny plaintiffs' Motion as to ECI and ETS. (Emphasis added.)

Similarly, in *Central Transport, Inc. v. Central States, Southeast and Southwest Areas Pension Fund,* 639 F. Supp. 788, 791 and 640 F.Supp. 56, 59-60 (E.D. Tenn. 1986), *aff'd,* 1987 WL 36010 (6th Cir. 1987) (unpublished), *cert. denied,* 484 U.S. 926 (1987) the court concluded that the plaintiff companies were not liable as "controlled group" members under §4001(b) where they did not come under "common control" until after the date that the withdrawn employer had terminated its obligation to contribute to the defendant fund. *See also Jaspan v. Certified Industries, Inc.,* 658 F.Supp. 332, 334 (E.D.N.Y. 1986) (companies not under common control at time of withdrawn employer's sale of assets were not liable under ERISA §4001(b)). As the *Jaspan* court explained (658 F.Supp at 334), "[t]he definition of a 'single employer' under [§4001(b)(1)] as refined pursuant to Treas. Reg. §11.414(c)-2 imposing liability upon all members of a group exercising 'common control' must be read in light of the purpose for imposing such liability. It is to fix liability upon those who were responsible *at the time of withdrawal* for continued funding [citation omitted]" (emphasis added).

III. OTHER BACKGROUND

A. The Legislative History of the Construction Industry Exemption: The relevant legislative history of MPPAA's construction industry exemption appears in H.R. Rep. 96-869(I), 96th Congress, 2nd Sess., April 3, 1980, 1980 U.S.C.C.A.N. 2918, 2943, 1980 WL 13049 at 67. That Committee Report states that:

> In the construction industry, the funding base of the plan is the construction projects in the area covered by the collective bargaining agreements through which the plan is maintained. An individual employee will typically work for tens or even hundreds of different employers over his or her working career, and the volume of work for a given employer will often fluctuate greatly from year to year. These normal events do not pose an undue threat to a plan as long as contributions are made for whatever work is done in the area. Therefore, the construction industry exception is designed to impose liability only on former contributors that continue to work within the plan's area. (Emphasis added.)

In other words, the purpose of the construction industry exemption was "to <u>more narrowly define</u> the circumstances under which complete withdrawals occur from building and construction industry funds," Jaffe & Nagle, §54.04[9][a] (emphasis added). As the authors of that treatise go on to explain (*Id.* at §54.04[12]):

> The Act contains special definitions of withdrawal applicable to plans covering employers in the building and construction industry, as well as plans covering employers in the entertainment industry. These provisions are premised on the view that in those industries <u>an employer's</u> going out of business or leaving the jurisdiction will not ordinarily reduce the plan's contribution base, and that such a reduction will typically occur only if <u>the employer</u> continues to perform work that would have been covered but does so without having an obligation to contribute to the plan. (Emphasis added.)

The reference to "an employer's" and "the employer" in this excerpt would seem to <u>only</u> apply to <u>the signatory employer</u> (*i.e.*, the employer "with an obligation to contribute" to the Plan, as defined under ERISA §4212(a)) because it is <u>only</u> the signatory employer which can take action to "reduce the plan's contribution base." An argument can be made under this history that a "commonly controlled" entity (whether pre or post withdrawal) that <u>never contributed to the plan in the first place has no such ability</u>, and its performance of nonunion covered work in the same area where it worked on a nonunion basis before certainly has no such effect.

No reported case addresses this argument.

B. The Language of §4212(a): Section 4212(a) of ERISA defines the term "obligation to contribute" as follows:

> (a) "Obligation to contribute" defined
>
> For purpose of this part, the term "obligation to contribute" means an obligation to contribute arising –
>
> > (1) under one or more collective bargaining (or related) agreements, or
> >
> > (2) as a result of a duty under applicable labor-management relations law, <u>but</u>
>
> <u>does not include an obligation to pay withdrawal liability under this section</u> or to pay delinquent contributions. (Emphasis added.)

The construction industry exemption repeatedly incorporates that specific phrase ("obligation to contribute") when it defines how and to whom that statutory exemption language applies. Thus, §4203(b)(1)-(2) states that "in the case of an employer that has an **obligation to contribute**" to a construction industry plan a complete withdrawal occurs only where, *inter alia*, that employer "ceases to have an **obligation to contribute** under the plan" and subsequently continues to perform or resumes work within 5 years after "the **obligation to contribute** under the plan ceases." Applying the definition of that phrase set forth above in §4212(a) to this language of §4203(b) leads us to conclude that while a commonly controlled member may ultimately have "an obligation" to pay an assessment of withdrawal liability by virtue of its membership in a controlled group of companies, that statutorily imposed liability is not the same as having an **obligation to contribute** to a plan for any other purpose under MPPAA, including §4203(b) and a determination of whether the exemption provided therein has been violated.

Stated another way, because a "commonly controlled" company cannot (solely by virtue of its presence in that controlled group) be an employer with an "obligation to contribute" under MPPAA, and because the criteria for violating the construction industry exemption under §4203(b)(2) apply only to employers which formerly had an "obligation to contribute" to a plan, one can argue that no withdrawal can be assessed simply because a nonunion commonly controlled entity continues its nonunion work in the area after the union entity had ceased its "obligation to contribute" to the plan. There may be other facts that support such a liability (successorship, alter ego, single employer, evade or avoid) but, the argument goes, the exemption is not violated by the mere presence and actions of a nonunion commonly controlled member.

Again, no reported judicial cases have addressed this argument.

C. The *Custom Mechanical* Case: *Plumbers and Steamfitters Local No. 150 Pension Fund v. Custom Mechanical CSRA, LLC*, 2009 WL 3294793 (S.D.Ga. 2009) is the only case we have found (and the only one fund counsel have ever cited to us) that appears to address the "continuation of work" by a common control group member as a violation of the construction industry proviso. It is not a well reasoned or persuasive case in our view and is easily distinguished on its facts.

The relevant facts in *Custom Mechanical* were as follows:

- Custom Mechanical Partnership (the signatory employer) (hereinafter "CM Partnership") was formed in August 2001 to perform union mechanical work, signed a labor agreement with Steamfitters Local 150 in October 2001, and thus became obligated to make (and made) contributions to the Steamfitters Pension Plan.

- The owners of CM Partnership subsequently formed Custom Mechanical LLC (hereinafter CM LLC) to perform the same type of work done by CM Partnership in the same geographic area, but without union labor.

- On September 30, 2006, CM Partnership terminated its union contract. Thereafter, CM Partnership was dissolved and it made no payments to the Steamfitters Pension Plan after October 1, 2006.

- CM LLC occupied the same office space previously occupied by CM Partnership.

- CM LLC continued to do work of the type done by CM Partnership in the same area, including work "for previous clients of" CM Partnership.

- In April 2007 the Pension Fund sent an assessment of withdrawal liability to "Custom Mechanical" at the office address of CM LLC (where CM Partnership had formerly been housed), advising that "Custom Mechanical" had incurred a complete withdrawal and demanding payment of all withdrawal liability, calculated at $227,228.00, either in a lump sum or on a schedule of payments extending to June 18, 2008.

- Neither CM Partnership nor CM Mechanical made any payments to the Fund, and neither made a demand for arbitration under MPPAA.

- In October 2007 the Pension Fund sued CM LLC to collect the assessed liability.

Based on these facts, the ultimate outcome of the *Custom Mechanical* case was both predictable and not surprising, for it was clear that CM LLC had in fact been in common control with CM Partnership on the date of its withdrawal from the Pension Fund. The court thus easily (and correctly) concluded that CM LLC and CM Partnership were to be treated as a single employer and that, therefore, CM LLC was jointly and severally liable for the CM Partnership's withdrawal liability. *Custom Mechanical,* 2009 WL 3294793 at 4-5. Neither of those conclusions is surprising, and both were correct.

Those facts and conclusions were, alone, enough to grant judgment in favor of the Pension Fund because the two CM entities had failed to file for arbitration to either contest the amount or the

fact of the assessment, including the Fund's conclusion that the §4203(b) construction industry exemption did not apply because CM LLC had continued to perform covered work in the Fund's jurisdiction after CM Partnership's withdrawal.[2] Thus, CM LLC in the *Custom Mechanical* case (having failed to file for arbitration) had no ability to contest the Fund's lawsuit by asserting that it had never been an "employer" in common control with CM Partnership prior to the latter's withdrawal from the Fund, and so it had no defense to the collection action that was brought by the Fund. *See Custom Mechanical,* 2009 WL 3294793 at 7-8.

Nonetheless, the *Custom Mechanical* court proceeded to address the "construction industry exemption" issue—in what amounts to *dicta,* in a summary fashion. The entirety of that analysis and discussion follows (2009 WL 3294793 at 5):

> The Court finds that Custom Mechanical LLC "continued to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required." . . . Custom Mechanical LLC was created to perform, and did perform, building and construction work: specifically, it performed work covered by the CBA entered into by the commonly controlled Custom Mechanical Partnership. Custom Mechanical LLC performed this work in and around Richmond County, a county designated to be within the territorial jurisdiction of the CBA.
>
> Undisputed testimony established that Custom Mechanical LLC performed work for John J. Kirlin LLC, International Paper Co., and St. Joseph Hospital, in and around Richmond County. The work performed for these clients—former clients of Custom Mechanical Partnership—was the same type of work performed by Custom Mechanical Partnership and covered under the CBA.

As far as we can tell, *Custom Mechanical* has not been cited or relied upon by any other court for this (or any other) proposition relating to the construction industry exemption and common control issues. But Fund counsel know of it and will cite it *ad nauseum.*

D. Funds' Application of Common Control Principles to the Construction Proviso: Two initial examples come to mind –

[2] The facts surrounding the operations of CM LLC and CM Partnership would appear to have supported a single employer or alter ego claim as well—but that issue did not have to be addressed by the court because neither CM entity had filed for arbitration under §4221.

- In 2010 the Laborers Pension Fund in Chicago issued an assessment to an employer (Flaherty Construction) which had terminated its agreement with the Laborers and gone out of business. A separate company called Flaherty Builders (a nonunion home builder) continued to work (albeit sparingly) and the Fund asserted the two companies were in common control. It turns out they were not, so the assessment was dropped. No further action was required.

- In 2010 the Southwest Regional Council of Carpenters issued a withdrawal assessment on the following facts: Employer X "of Indiana" comes across the state line to do a project in Ohio and signs the union contract; within the next few years, Employer X establishes a separate but commonly controlled "Employer X "of Ohio" which performs work as a GC using only nonunion subs, including carpentry subs, and does some work in the same area. The Fund asserts that the proviso was violated when Employer X "of Ohio" subcontracted carpentry work in the same geographic area that Employer X "of Indiana" had done union carpentry work. This assessment raises the right questions, but the amount of liability made litigation unreasonable and so the assessment was paid.

IV. THE CASE STUDY

***Ceco Concrete Construction, LLC and Centennial State Carpenters Pension Trust,* AAA Case No. 77 621 00222 11 (Arbitrator Norman Brand), now pending before the United States District Court for the District of Colorado, Civil Action No. 13-CV-01749 on the Employer's Petition to Enforce the Award and the Plan's Counterclaim to Vacate**

This case has already "made law" at the arbitral level, and now we wait and see what happens in the courts. It will be precedent to be cited or distinguished in the future. Since the arbitrator's award is now part of the public court record a copy of both his interim award (on a common control theory of liability) and his final award after a hearing on single employer/alter ego/evade or avoid theories of liability are included with this paper.

The issue for the interim award, in a nutshell, was whether nonunion carpentry work performed by a nonunion contractor (CFA) that only came under common control with the withdrawn union

employer (Ceco) AFTER the date that it withdrew could be attributed to that withdrawn employer so as to constitute its resumption or continuation of covered work in the relevant area in violation of 4203(b). The arbitrator decided in favor of the company, and determined that because CFA was not in common control on the date that Ceco terminated its obligation to contribute to the plan, CFA's subsequent nonunion work in the same area that Ceco had operated could not be attributed to Ceco for purposes of 4203(b).

The stipulated facts upon which Arbitrator Brand reached his award in favor of Ceco on the common control theory and 4203(b) included the following:

- Prior to May 1, 2010, Ceco was an employer with an obligation to contribute to the Plan under a collective bargaining agreement ("CBA") with the Carpenters District Council for Kansas City and Vicinity ("Union") for covered work performed by Ceco's carpenter employees in the State of Colorado. For a number of years prior to May 1, 2010, and thereafter, Ceco and Heico Holdings, Inc. ("Heico") had been under "common control" within the meaning of Internal Revenue Code § 414(c) (26 U.S.C. § 414(c)).

- Effective as of May 1, 2010, Ceco terminated its CBA with the Union and permanently ceased to have an obligation to contribute to the Plan within the meaning of ERISA § 4203(a)(1) (29 U.S.C. § 1383(a)(1)).

- On and after May 1, 2010, Ceco did not continue to perform work in the jurisdiction of the CBA of the type for which contributions to the Plan were previously required and has not resumed such work, all within the meaning of ERISA § 4203(b)(2)(B) (29 U.S.C. § 1383(b)(2)(B)).

- Concrete Frame Associates, Inc. (CFA") was established in 1991, and performed work in direct competition with Ceco in Colorado as a non-union construction company, with operations in the State of Colorado both before and after May 1, 2010. CFA and Ceco did not have any owners in common, and were not under "common control" within the meaning of Internal Revenue Code § 414(c) (26 U.S.C. § 414(c)) before October 1, 2010.

- Effective October 1, 2010, CFA was acquired by Heico.

- CFA, Ceco and Heico have been under "common control" within the meaning of Internal Revenue Code § 414(c) (26 U.S.C. § 414(c)) since the acquisition of CFA by Heico on 10/1/10, but not prior to that time.

- After the acquisition of CFA by Heico, CFA employed carpenters to perform work in the State of Colorado that would have been of the type for which contributions to the Plan would previously have been required if that work had been performed by Ceco within the meaning of ERISA section 4203(b)(2)(B) (29 U.S.C. § 1383(b)(2)(B)).

Based on these facts, we can say with some certainty that the Plan thought it had a slam dunk winner of a case based on common control. It refused to consider any resolution short of capitulation. They were, as it turns out, wrong.

While the parties each made multiple arguments the arbitrator ended up deciding the issue submitted on the narrowest ground—namely, that because CFA was not in common control with Ceco on the date Ceco withdrew from the Fund, the work it performed after the date it was acquired by Heico could not be attributed to Ceco. As Arbitrator Brand explained (Interim Award, p.5):

> The Plan has not shown the work performed by CFA after October 1, 2010, triggers withdrawal liability for Ceco under ERISA §4203(b)—even though they are considered a single employer under ERISA §4201(b) as of that date. . . .
>
> . . . Ceco ceased to have an obligation to contribute to the Plan on May 1, 2010. That is the date for determining withdrawal liability under ERISA §4203(b)(2)(B)(ii). It is the only relevant date for withdrawal of a "construction employer from a multiemployer plan in the construction industry..." PBGC Op. Letter 88-8 That is the date for determining joint and several liability of entities in common control with Ceco. "Withdrawal liability is imposed only on those trades and businesses that are under common control with the withdrawing employer on the date of withdrawal." *Teamsters Pension Trust Fund v. Brigadier Leasing Assocs.,* 880 F. Supp. 388, 396 (E.D. Pa. 1995) Nothing in ERISA or PBGC opinions supports the Plan's argument that an entity acquired after a construction industry employer ceases to have an obligation to contribute is deemed to have been in common control with that employer at the time it ceased to have an obligation to contribute. In the absence of common control on May 1, 2010, CFA's work in the jurisdiction after October 1, 2010, cannot be attributed to Ceco in determining withdrawal liability under ERISA §4203(b). (Emphasis added.)

Arbitrator Brand, in reaching his conclusions, also had no trouble distinguishing and rejecting the Plan's reliance on the *Custom Mechanical* case (Interim Award, p.6):

> . . . the only case the Plan cites to support its argument does not. The Plan argues *Custom Mechanical* is a case in which the court found "work during a five-year

> construction industry exemption period by a business under "common control" with the employer that had ceased participation in the plan invalidated the exemption." (Brief, at 5) While that is the finding of the court, the underlying facts are critically different from the facts in this case. In *Custom Mechanical* the withdrawing employer and the entity that continued to do covered work were members of the same controlled group on the date the withdrawing employer ceased to have an obligation to contribute to the Plan. Here the employer that ceased to have an obligation to contribute and the entity that continued to do covered work were not in the same controlled group on the date the employer ceased to have an obligation to contribute. They did not become members of the same controlled group until five months later. The critical difference in facts makes any reasoning in *Custom Mechanical* inapplicable to this case. *Custom Mechanical* provides no support for the Plan's argument work CFA did after it became part of the Ceco controlled group affects Ceco's withdrawal liability under ERISA §4203(b).

The Plan made additional arguments, only one of which is worth any time here. Namely, the Plan argued that the exemption would effectively be nullified if the arbitrator ruled in favor of Ceco—that it would establish a blue print for future withdrawing entities to act similarly and to escape liability under 4203(b) by simply waiting to add a nonunion entity to the control group until after the withdrawal occurred. The arbitrator was not impressed, finding that sufficient protections already existed in the statute against such a scenario (Interim Award, p.8).

> . . . finding CFA's work cannot be attributed to Ceco because they were not members of a controlled group when Ceco ceased to have an obligation to contribute does not lead to absurd results. The potential ploy the Plan posits — an employer continuing work through a post-withdrawal commonly-controlled business—is adequately addressed in ERISA §4212(c), which allows plans to disregard transactions to evade or avoid liability when calculating withdrawal liability.

Of course, that "evade or avoid" theory did become a focus of the case after this interim award issued, and when you read the Final Award, you will see that.

Evade or avoid is beyond the scope of this paper but, briefly stated, we can say (and you can read in the Final Award) that Arbitrator Brand DID find that when Ceco "sold work back to a customer" rather than perform that work itself after having withdrawn (which would have violated the exemption) it HAD engaged in a transaction a principal purpose of which was to

"evade or avoid" withdrawal liability.[3] Nonetheless, because there was still no evidence presented that Ceco (not CFA) did any covered work in the area after that "sell back" transaction (and the Plan adduced no evidence as to who, if anyone, performed the "sold back' work) then the exemption still applied. The "evade or avoid" proviso allows a transaction to be ignored, but it does not permit the trier of fact to assume or infer other facts not in evidence. As Arbitrator Brand stated in the Final Award:

> Ceco asserts that even if the "sell-back" transaction is ignored, no event triggering liability occurred. In the absence of such an event, no authority allows the arbitrator to assume such an event occurred simply because he must disregard the transaction to "evade or avoid" liability. The argument is meritorious. Ceco performed no covered work in the jurisdiction after it ceased to have an obligation to contribute to the Plan. Disregarding its sale of work back to the contractor, the evidence still shows Ceco performed no covered work in the jurisdiction after April 30, 2010. Because Ceco performed no covered work in the jurisdiction after ceasing to have an obligation to contribute to the Plan, Ceco did not have a withdrawal under ERISA §4203(b)(2)(B).

V. <u>CONCLUSION</u>

If the Ceco award is enforced it will provide useful precedent where similar facts are present (i.e., a post-withdrawal addition of a nonunion controlled group member contractor under 4203(b)), but it does not (because it did not have to) answer questions such as:

- What if Ceco and CFA had been in common control when Ceco withdrew, what would change?
  - The simple answer to the above is that they would have been a statutory "single employer" under 4201(b), but would that alone be sufficient to result in an automatic violation of 4203(b)(2) if there was

[3] Because the Plan has counterclaimed to vacate the award in Civil Action No. 13-CV-01749 we are contesting this finding by the arbitrator. Cross motions for summary judgment have been filed and all the briefing has been completed.

no impact on the contribution base of the Plan (CFA continued to do the same work it had done and did not assume Ceco work.)?

- Even if Ceco and CFA were a statutory “single employer” on the date of withdrawal by application of 4201(b), does 4212(a)’s definition of the phrase “obligation to contribute” impact the analysis under 4203(b), such that in the absence of any alter ego/successor/single employer evidence the exemption is not violated because the entity that had the “obligation to contribute” (Ceco) still did not resume or continue work in the area?

- What type of “evade or avoid” evidence will be sufficient in such cases to result in a liability finding under 4203(b)—and how will that evidence differ if common control existed as of the date of withdrawal?

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