BOBROFF, HESSE,
LINDMARK & MARTONE, P.C.

Attorneys & Counselors

Withdrawal Liability and Central States

Associated General Contractors

Annual Convention

December 8, 2009 – Springfield, Illinois

Presented by

ANDREW J. MARTONE, ESQ.
BOBROFF, HESSE, LINDMARK & MARTONE, P.C.
1650 Des Peres Road, Suite 200, St. Louis, MO 63105
Phone: (314) 862-0300 ♦ Fax: (314) 862-7010
andymartone@bobroffhesse.com

Table of Contents

I. Central States Pension Fund

A. Historical Perspective

1. Failure to Meet ERISA Funding Requirements in about 2002:

    a. Mature fund; increasing retirees, decreasing active employees;

    b. No new employers joining Fund;

    c. Deregulation of trucking industry;

    d. Amount of benefits paid out exceeding amount of contributions;

    e. 2000 – 2002: Fund experienced three consecutive years of losses.

2. Trustees Promptly Implemented Plan of Action:

    a. More aggressive investment strategy;

    b. Reduce future benefit accruals;

    c. Obtain relief from the mandatory excise taxes; obtain 10-year amortization extension from the IRS; and,

    d. Increase employer contributions.

3. Results of the Fund's plan of action.

    a. Returns have been good; some of lost asset base recovered.

    b. Benefit reductions slowed growth of benefit obligations, Fund's retirement age is increasing.

    c. Amortization agreement with IRS, avoiding excise tax assessment.

    d. Fund mandating contribution increases of 7 or 8 percent for collective bargaining agreements as they come up for negotiations.

B. Complications caused by passage of the Pension Protection Act of 2006 ("PPA"), which became effective on January 1, 2008.

1. Fund certified in "critical status" for 2008 and 2009 plan years.

2. Fund adopts "Rehabilitation Plan" as required by PPA.

    a. Primary Schedule - Requires contributing employers to agree to 5 years of 8% annual contribution increase (7% if began in 2006).

b. Default Schedule - Required by PPA; provides for 4% annual contribution rate increases and loss or reduction of adjustable benefits for bargaining units using this Schedule.

- If bargaining parties have not chosen a schedule within 180 days of expiration of last labor agreement, Default Schedule is imposed as matter of law. (See most recent letter from Central States to an Employer regarding this, attached hereto as **Exhibit 1**.)

3. Vast majority of Fund's active members covered by CBAs that are in compliance with Rehabilitation Plan.

a. Most agreed to adopt Primary Schedule

b. Only 5 bargaining units chose to adopt Default Schedule

c. 25 bargaining units have had Default Schedule imposed on them.

- Employers not agreeing to be bound by one of Schedules required by PPA to pay surcharge on contractual pension contribution obligation (5% during 2008; 10% in 2009).
- Most Employer voluntarily paying surcharge.

C. Serious Investment Losses in 2008

1. Fund unable to satisfy funding ration targets that are part of amortization agreement with IRS in 2005.

2. Fund has requested waiver from IRS for funding ratio targets for 2008.

D. YRC, Inc.

1. Single largest contributing Employer to Pension Fund.

2. Contribution Deferral Agreement with Fund as result of cash flow issues.

a. Without Deferral Agreement, YRC could default on loans with banks, triggering insolvency and liquidation.

3. Fund considered terminating YRC's participation in pension fund.

4. Amendment of YRC Agreement with Teamsters (which calls for resumption of contributions in 2011, led Trustees to decide that termination of participation should not be treated as complete and permanent cessation of YRC's obligation to contribute, which would trigger withdrawal liability.

E. Proposed “Preserve Benefits and Jobs Act” (“PB&J Act”)

1. Purpose - Relief legislation for multiemployer Pension Plans

2. Proposals in PB&J Act

a. Adjustments to Funding Rules

- The options available would only be available to plans projected to be solvent throughout extended amortization period.

i. Restart amortization of all charges and credits in the funding standard account over a new 30-year period (this relief would be available for either of first two plan years beginning after August 31, 2008), *or*

ii. Separately amortize net investment losses incurred in 2008 or 2009 over 30 years.

b. Strengthening the Safety Net

i. Making it easier for multiemployer pension plans to merge;

ii. Allowing weak plans to merge with strong plans;

iii. Direct PBGC to facilitate mergers, including contributing cash if necessary;

iv. PBGC partition to relieve plans of “orphaned” benefits.

c. Multiemployer Benefit Guarantees

i. Increase PBGC guaranteed benefits for insolvent plan

3. Final Action Predicted No Earlier Than End of December

II. State of Other Pension Funds

A. Central Pension Fund of the IUOE & Participating Employers

Status:	Yellow Zone
CUL:[1]	$4,807,620,996.00 (2007)
Percentage:[2]	67.05%
Status Update:[3]	2007 (Fiscal Year ends Jan. 31)

B. Midwest Operating Engineers Pension Fund

Status:	Yellow Zone
CUL:	$1,218,141,181.00
Percentage:	71.64%
Status Update:	2007 (Fiscal Year ends March 31)

C. Central States SE & SW Areas Pension Fund (Teamsters)

Status:	Red Zone	(Red Zone)[4]
CUL:	$23,741,411,614.00	($24,657,825,000.00)
Percentage:	46.55%	(41.29%)
Status Update:	2007 (Fiscal Year ends Dec. 31)	(2008)

D. Ironworkers District Council of Southern Ohio & Vicinity Benefit Trust

Status:	Red Zone
CUL:	$490,691,628.00
Percentage:	56.82%
Status Update:	2007 (Fiscal Year ends June 30)

E. Carpenters Pension Fund of Illinois (Geneva)

Status:	Yellow Zone	(Green Zone)
CUL:	$502,409,047.00	($40,417,200.00)
Percentage:	75.36%	(97.57%)
Status Update:	2007 (Fiscal Year ends Dec. 31)	(2008)

[1] Total Current Unfunded Liability
[2] Percentage Funded Current Liability
[3] Last Status Update
[4] Items in parentheses on right indicate estimates for the following year.

F. Fox Valley Construction Workers Pension Fund

Status:	Yellow Zone	(Green Zone)
CUL:	$41,096,212.00	(-$2,017,940.00)
Percentage:	79.70%	(101.23%)
Status Update:	2007 (Fiscal Year ends May 31)	(2008)

G. Iron Workers Mid-America Pension Plan

Status:	Red Zone	
CUL:	$279,189,638.00	
Percentage:	61.18%	(82.51%)
Status Update:	2007 (Fiscal Year ends Dec. 31)	(2008)

H. Cement Masons Local #12 Pension Fund

Status:	Green Zone
CUL:	$2,972,648.00
Percentage:	81.27%
Status Update:	2006 (Fiscal Year ends Nov. 30)

I. Laborers' Local 231 Pension Fund

Status:	Red Zone	(Green Zone)
CUL:	$21,621,823.00	($6,786,077.00)
Percentage:	62.27%	(85.39%)
Status Update:	2007 (Fiscal Year ends Dec. 31)	(2008)

J. Employers and Operating Engineers, Local 520 Pension Fund

Status:	Red Zone	(Red Zone)
CUL:	$53,662,108.00	($32,334,456.00)
Percentage:	61.86%	(74.35%)
Status Update:	2007 (Fiscal Year ends Dec. 31)	(2008)

K. Employers and Illinois Operative Plasterers' and Cement Masons' Pension Fund

Status:	Red Zone
CUL:	$6,058,113.00
Percentage:	50.11%
Status Update:	2007 (Fiscal Year ends Dec. 31)

L. Central Laborers' Pension Fund

Status:	Red Zone	(Red Zone)
CUL:	$589,180,182.00	($616,109,588.00)
Percentage:	60.64%	(61.59%)
Status Update:	2006 (Fiscal Year ends Sept. 30)	(2007)

M. Pension Plan of Carpenters' Pension Trust Fund of St. Louis

Status:	Yellow Zone
CUL:	$715,545,891.00
Percentage:	68.96%
Status Update:	2007 (Fiscal Year ends April 30)

N. Ironworkers St. Louis District Council Pension Fund

Status:	Red Zone	(Red Zone)
CUL:	$241,058,973.00	($292,387,682.00)
Percentage:	62.03%	(60.19%)
Status Update:	2006 (Fiscal Year ends Oct. 31)	(2007)

O. International Trowel Trades Pension Fund

Status:	Red Zone
CUL:	$848,330,205.00
Percentage:	64.39%
Status Update:	2007 (Fiscal Year ends Dec. 31)

III. Withdrawal Liability

A. Background Information

1. MPPAA

a. Congress passed the Multi-employer Pension Plan Amendments Act of 1980 ("MPPAA"), adding the withdrawal liability provisions to ERISA (the Employee Retirement Income Security Act of 1974).

b. Purpose of MPPAA was to bolster the viability of under funded multi-employer pension funds against the threat of voluntary employer withdrawals from the plans by imposing on withdrawing employers liability for a share of the pension plan's unfunded vested benefits.

c. Most recently the law was amended by the Pension Protection Act of 2006 ("PPA of 2006").

B. The Basis for Withdrawal Liability

1. Simplest Form

a. Withdrawal liability represents an employer's proportional share of the difference between the level of a fund's assets and the level of the funding necessary to pay for vested pensions;

b. Base amount of withdrawal liability is calculated by multiplying the amount that the fund is in the red (its level of "unfunded vested benefits") by the employer's proportional share of all contributions made over a defined period of time (normally 10 years)

2. Recent Court Expansion of Withdrawal Liability

a. Central States v. International Comfort Products, 2009 U.S. App. LEXIS 23424 (6th Cir. Oct. 23, 2009)

- Sixth Circuit expands reach of pension funds to include employers who were not themselves signatory to contracts requiring them to contribute to the Funds;
- FACTS: ICP was manufacturer of heating and cooling products that contracted with independent company (Top Transportation Services ("Top")) under which Top provided ICP with truck drivers. Under the agreement, Top paid the drivers' salaries and benefits and then was reimbursed for those costs by ICP. Top was signatory to a collective bargaining agreement with Teamsters local that required Top to make contributions to Central States on behalf of the

drivers. ICP was not signatory to any agreement with the Teamsters or Central States. However, as part of its "cost plus" contract, Top would invoice ICP for its costs (including Top's contributions to the Fund). In 2002, ICP terminated its contract with Top. Top subsequently went out of business and was assessed withdrawal liability by Central States in excess of $500,000. Top invoiced ICP for the amount of the withdrawal liability, which invoice was never paid;

- Central States sued and obtained a judgment against Top, and then pursued ICP to collect on the judgment;
- Sixth Circuit held that a company could be liable for withdrawal liability to a pension fund <u>even if it never signed a contract with a union requiring contributions to that Fund</u>. In reaching this decision, the Sixth Circuit decided that ICP's contract with Top could make ICP liable to Central States for Top's withdrawal liability;
- Sixth Circuit decision contrary to earlier decisions in Seventh and Eighth Circuits;
- Although this expanded reach is not yet available in the Seventh or Eighth Circuit, given the courts' increasing willingness to expand the pool of parties liable for withdrawal liability (to help pension funds remain solvent), it is likely that Central States will use this decision to attempt to change the law in the Seventh and Eighth Circuits.

C. Common Control Under ERISA

1. Who is the "Employer" Under the Act?

a. MPPAA

i. Parent-subsidiary entities
ii. Brother-sister entities

b. Determining Ownership or Constructive Ownership with Regard to Trusts and Estates, Corporations, Spouses, and Children

i. Options
ii. Trusts and Estates
iii. Corporations
iv. Spouses
v. Parents, Grandparents, and Children

c. Federal Court Theories for Extending Liability

i. Joint Employer Liability
ii. Single Employer Liability
iii. Alter-ego Liability
iv. Successor Liability

D. Complete Withdrawal vs. Partial Withdrawal

1. Complete Withdrawal

a. General Rule

i. Generally, a complete withdrawal occurs when an employer either (a) permanently ceases to have an obligation to contribute under the plan or (b) permanently ceases all covered operations under the plan. The date of a complete withdrawal is the date when the obligation to contribute ceases or when covered operations cease**.** 29 U.S.C. §1383(a);

ii. <u>Where businesses are under common control, for a complete withdrawal to occur all businesses with an obligation to contribute to the pension fund must either cease operating or their obligations to contribute must end</u>. Otherwise, viewing the Companies as one "employer" as required by the common control principle, the obligation to contribute will not have ceased completely.

b. The Construction Industry Exemption

i. *Complete Withdrawal*: A complete withdrawal only occurs if such an employer both ceases to have an obligation to contribute under the plan, <u>and either</u>:

1) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, *or*

2) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

29 U.S.C. §1383(b)(2). Thus, if such an employer ceases business, that fact alone would not result in a "withdrawal".

ii. *Partial Withdrawal*: A partial 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." 29 U.S.C. §1388(d)(1). Unfortunately, there is little guidance on interpreting this vague language.

iii. *Application of Construction Industry Exemption*: The Company must meet the following requirements:

1) The pension plan must either primarily cover employees in the building and construction industry or must be amended to provide for this exception for employees in the building and construction industry;

- Central States Pension Plan satisfies this requirement.

2) The employer must have an obligation to contribute under a plan for work performed in the building and construction industry; *and*,

→ The phrase "building and construction industry" is not defined in ERISA, but courts generally rely on the National Labor Relations Board cases to determine whether an employer is in the building and construction industry. The Board has consistently applied the following definition of "building and construction industry" in its decisions -- "the provision of labor whereby materials and constituent parts may be combined on the building site to make or build a structure." Painters, Local 1247 (Indio Paint & Rug Center), 156 NLRB 951, 959 (1966); Union Asphalts, 857 F.2d at 123o, 1234 (8th Cir. 1988). Generally, the "building and construction industry" concept applies to employers who can establish that *on-site installation* was a substantial part of both the employees' work and of the employer's business;

→ Ready mix drivers and hauling operations moving between or among jobsites are generally not within the building and construction industry. J.P. Sturrus Corp., 288 NLRB 668, 128 LRRM 1067 (1988); see also, St. John Trucking, 303 NLRB 723, 139 LRRM 1020 (1991) (delivery of sand and stone); Union Asphalts, 857 F.2d 1230 (sale and delivery of asphalt and road oil materials). Purely on-site truck driving has been held to be within the building and construction industry. See Techno Construction Corp., 333 NLRB No. 5 (2001)(ALJ decision).

3) Substantially all of the employees for whom the employer has an obligation to contribute under the plan perform(ed) work in the building and construction industry.

→ Courts generally hold that "substantially all" means 85% or more. Robinson Cartage Co., 55 F.3d at 1321; Continental Can Co., 916 F.2d at 1160. The law is far from settled on how this percentage is determined, and there are cases supporting the approach of counting employees, not CBUs. Raytheon Co. v. Central States, Southeast and Southwest Areas Pension Fund, 1989 U.S. Dist. LEXIS 11503 (N.D. Ill. 1989). In the context of a partial withdrawal, courts have held that this percentage must be examined over the period of time necessary to determine if a withdrawal has occurred – 8 years in the case of a partial withdrawal due to 70% contribution decline. Id.; Robinson Cartage Co., 55 F.3d at 1323-24.

29 U.S.C. §1383(b)(1).

2. Partial Withdrawal

a. 70% Decline in Contributions

i. The Contribution Decline Test:

1) Determine the Company's contribution base units (CBUs) for the "3-year testing period", which is the current plan year and the immediately preceding two plan years. (A "Contribution base unit" is the basic unit for which an employer makes a contribution to a pension plan – e.g., an hour, day, week or month. 29 U.S.C. § 1301(11).);

2) Compute the number of CBUs for the "high base year", which is the average of the two highest years within the 5-year period prior to the 3-year testing period;

3) Compare the figures for each of the years during the 3-year base period to the "high base year" figure. If the CBUs for each of the years during the 3-year testing period are 30% or less of the high base year CBU figure, a partial withdrawal has occurred. Thus, for a partial withdrawal liability in 2008, the 3-year

testing period would be 2006, 2007 and 2008, and the 5-year period for calculating the "high base year" would be 2002 through 2005.

b. Change in Operations

i. The Change in Operations Test:

1) There is a partial cessation of the employer's contribution obligation for the plan year if, during such year –

a) the employer permanently ceases to have an obligation to contribute under one or more but fewer than all collective bargaining agreements under which the employer has been obligated to contribute under 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*

b) an 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.

29 U.S.C. §1385(b)(2).

c. Construction Industry Exemption

- An employer must meet the same requirements discussed above under the exemption from a complete withdrawal. If the employer qualifies, the exemption provides as follows:

1) An employer to whom section 1383(b) of this title (relating to the building and construction industry) applies is liable for a partial withdrawal 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. 29 U.S.C.§1388(d)(1).

→ There is little guidance on interpreting this vague language. The exemption supposedly addresses the frequent fluctuation in contributions by construction employers because of the project-to-project nature of the work. As long as employees remain in the work force, available for employers who also contribute to the pension fund, such fluctuations should not cause problems for the pension fund. Central States, Southeast and Southwest Areas Pension Fund v. Robinson Cartage Co., 55 F.3d 1318, 1323 (7th Cir. 1995).

3. Sale-of-Assets Safe Harbor

- ERISA also provides a safe harbor from liability for those employers who would otherwise incur a complete or partial withdrawal due to a bona fide, arm's-length sale of assets to an unrelated party. 29 U.S.C. §1384(a); Brentwood Financial Corp. v. Western Conf. of Teamsters Pension Fund, 902 F.2d 1456 (9th Cir. 1990). Essentially, this safe harbor requires that the purchaser "step into the shoes" of the seller and assume the seller's duties with regard to the continuation of contributions;
- Even with the safe harbor, the seller remains liable in similar nature to a "guarantor" if the purchaser fails to meet its pension contribution obligations;
- In order for a party to be considered "unrelated" under the safe harbor, it must meet the standards in §267(b) of the Internal Revenue Code for being unrelated. 29 U.S.C. §1384(d); 26 U.S.C. §267(b). By way of example, ownership of more than 50% of the stock of a company makes that company related and thus not qualified as an unrelated party for purposes of this safe harbor.

E. Computing Withdrawal Liability

1. Central State's Formula

a. Sum of the Following Amounts:

i. The employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after September 25, 1980;

ii. The employer's proportional share, if any, of the unamortized amount of the plan's unfunded vested benefits at the end of the plan year ending before September 25, 1980; and,

iii. The employer's proportional share of the unamortized amounts of the reallocated unfunded vested benefits (if any).

2. Calculation of Partial Withdrawal Liability

a. 70% Decline:

b. Change in Operations Decline:

F. Payment of Withdrawal Liability

1. Payment Schedule Calculation

2. Payment Default

G. Allocation of Withdrawal Liability

1. One Business

2. Control Group

a. The CenTra Case

- In CenTra, Inc. v. Central States, Southeast and Southwest Areas Pension Fund, No. 08-4041 (7th Cir. Aug. 20, 2009), the CenTra control group owned four subsidiaries (three of which contributed to Central States, and one of which did not), and a sister company, U.S. Truck (which contributed to Central States). In 1995, CenTra began reorganizing and shedding its union trucking operations, which were no longer profitable. To accomplish the reorganization, CenTra took the following steps: (1) it created three new subsidiaries; (2) it merged the *existing* two trucking companies into CenTra; (3) it "dropped down" the union operations of the existing two trucking companies, but not all the assets, into two of three new subsidiaries; (4) it dropped down the other trucking operations and assets of the existing two trucking companies into the third new subsidiary, which became a "non-union" trucking subsidiary; (5) it transferred the two new union subsidiaries to its sister company, U.S. Truck, and (6) it severed the "common control" connection between CenTra and U.S. Truck;
- U.S. Truck failed and was liquidated in bankruptcy and Central States filed claims for withdrawal liability in the bankruptcy. In November 1997 the last remaining "union" subsidiary of CenTra withdrew from Central States and Central States assessed CenTra with $14 million in withdrawal liability based on the entire control group contribution history, including the contribution history of the two trucking subsidiaries (up to the separation of U.S. Truck) and the new trucking subsidiaries from the CenTra control group in 1996;

- CenTra argued that the reorganization should be viewed in its entirety, that entire contribution histories of the two trucking subsidiaries were transferred to U.S. Truck and that those histories should not be held against the parent company;
- The parties arbitrated the dispute (as required by the MPPAA) and the arbitrator ruled in favor of CenTra and reduced the withdrawal assessment from over $14 million to just under $1 million, based only on the contribution history of the bridge subsidiary;
- The Court of Appeals reversed the arbitrator, finding that while the Act did not expressly envision any allocation of withdrawal liability, the Court of Appeals agreed with the position taken by the PBGC, which concluded that while an exempt transaction (such as a merger under §1398) does not give rise to a withdrawal, the successor becomes the employer liable for any and all withdrawal liability of the predecessor. In such cases, the predecessor's contribution history becomes the responsibility of the successor;
- The Court of Appeals also found that the "drop down" of assets from CenTra into the newly formed trucking subsidiaries (which occurred after the merger of the old subsidiaries into CenTra) was not an exempt transaction under the Act and was in the nature of an asset sale rather than a merger, spin off, or other exempt corporate transaction and concluded that the contribution history broke at that point, with CenTra retaining all the contribution history.

H. Limitations on or Deductions from Withdrawal Liability

1. The *de minimis* deduction

2. The Liability Limitations of §4225 of the MPPA

a. §4225 Limitations on Seller's Liability

i. *§4225(a): Bona Fide Sale of Assets in Arm's-Length Transaction to Unrelated Party*

ii. *§4225(b): Employer Liquidating or Dissolving*

3. Applying Statutory Limitations or Reductions to a Control Group

a. In a Control Group is the Limitation or Reduction Applied to the Group in the Aggregate or to Specific Businesses in the Group?

i. *Conflicting Law*:
- PBGC Position
- <u>Robbins v. Pepsi-Cola Metropolitan Bottling Co.</u>

I. Transactions to Evade Withdrawal Liability

1. §4212 of MPPAA
    - Dorn's Transp., Inc. v. Teamsters Pension Trust Fund of Philadelphia and Vicinity
    - Santa Fe Pacific Corp. v. Central States
    - IUE AFL-CIO Pension Fund v. Herman

J. Challenging a Withdrawal Liability Assessment

1. Review/Arbitration Process
    - Statute provides a review/ arbitration process for disputes over withdrawal liability, but the time limits for requesting review and demanding arbitration are short. The employer must request that the trustees of the pension fund review the determination of withdrawal liability within 90 days of receiving the notice of withdrawal liability from the plan;
    - Regardless of whether the trustees respond, the employer must demand arbitration in a timely manner. The deadline to demand arbitration depends on whether the pension fund responds to the employer's request for review, but the latest possible time limit is six months from the date the employer's request for review is filed. If the employer does not act in timely manner, it waives its defenses to the withdrawal liability assessment;
    - The deck is stacked against the employer in the review/ arbitration process: the plan's determinations are presumed correct, and the burden is on the employer to overcome that presumption by a preponderance of the evidence.

2. Arbitration Enforcement in Federal Court
    - Arbitration decisions are enforceable in federal court, and the factual findings of the arbitrator are presumed correct.

3. Payments During Review/Arbitration Process
    - Generally, an employer must continue to make withdrawal liability payments while the review and arbitration process is pending.

4. Costs and Attorneys' Fees
    - The court will also award the pension fund its costs and attorneys' fees in the enforcement action if the pension fund prevails.

K. Individual Liability

1. Piercing the Corporate Veil

2. The Lay Com Case

- Laborers Pension Fund v. Lay-Com, Inc., case nos. 06-3711, 06-3821, 07-1071 (7th Cir. Sept. 2, 2009)(Court pierces corporate veil and holds that two completely separate corporations are liable for delinquent fringe benefit contributions of a construction contractor;
- FACTS: Contractor King & Larsen performed excavation and concrete work primarily for one home builder, Lord & Essex. When the contractor got into financial trouble and became delinquent in paying fringe benefit contributions, the home builder and Lay-Com (a sister company of the home builder that developed real estate), loaned the contractor money and paid some of its debts. To help the contractor with its tax and fringe benefit contribution debts, the owners of these businesses developed a plan: the assets of the contractor were transferred through Lord & Essex and Lay-Com and then transferred and/or leased to a new contracting company, M.A. King. The principals of the Lord & Essex and Lay-Com became directors of the new corporation along with Mike King, a principal of King & Larsen. The new company had no start-up equity whatsoever, and its sole shareholder (the GAK Trust) never contributed any money or value to M. A. King. In fact, no shares were ever issued, and the new company's only financing came from loans from Lay-Com, which took the first lien on the contractor's assets;
- The Funds sued both the old and new contractor (as a successor), and owner Mike King for unpaid contributions and got a judgment against all three. However, after the new contractor went out of business, the judgment was uncollectible. At this point, the Funds sued the home builder and the real estate development company and asked that the Court "pierce the corporate veil" and find that all of the companies were liable for the judgment;
- The Court dismissed claims against the individual owners of Lay-Com and Lord & Essex, it pierced the corporate veil and held that Lay-Com and Lord & Essex were liable for the debts of M.A. King, noting that M.A. King had no traditional start-up capital and that Lay-Com and King & Essex used their corporate, financial and contractual power to control M.A. King (for example, by obtaining a first lien on the assets of King & Larsen);
- Bad facts led to bad law and the Funds were able to convince the Court that the home builder and real estate developer essentially "laundered" the assets of the contractor to avoid the Funds' claims for unpaid benefits.

3. "Common Control" Concept and Controlling Shareholders

L. Adverse Selection Doctrine

1. Special Bulletin 90-7
    - Authorizes Trustees to reject any collective bargaining agreement and/or terminate participation of an Employer whenever they determine either that: (1) the agreement is unlawful and/or inconsistent with any rule or requirement for participation, or (2) that the Employer is engaged in practices that threaten economic harm to the Fund. Any such rejection of a collective bargaining agreement shall be effective as of the date determined by the Trustees (and may be retroactive) and shall bar the Employer and all Employees from further participation in the Fund.

2. Goal of Adverse Selection Policy
    - The policy is aimed primarily at agreements where an employer makes contributions for only part of the bargaining unit or where an employer makes contributions at different contribution rates for different groups of bargaining unit employees

3. Lenient Standards Applied By Courts
    - Arbitrary and Capricious;
    - Fort Transfer Co., Inc. v. Central States, Southeast and Southwest Areas Pension Fund, 2007 WL 707545, slip op. at 5-6, 40 EBC 1716 (N.D. Ill. 2007)("Although it is an overstatement to say that a decision is not arbitrary or capricious whenever a court can review the reasons stated for the decision without a loud guffaw, it is not much of an overstatement.")

M. Mass Withdrawal

1. Definition of Mass Withdrawal
    - A "mass withdrawal" is

      (1) The withdrawal of every employer from the plan,

      (2) The cessation of the obligation of all employers to contribute under the plan, or

      (3) The withdrawal of substantially all employers pursuant to an agreement or arrangement to withdraw.

    29 U.S.C. §1341a(a)(2); 29 C.F.R. §4001.2.

2. Presumption of Mass Withdrawal
    - Employers who withdraw within three years of a mass withdrawal are presumed to have withdrawn pursuant to an agreement or arrangement to withdraw and may be liable for

reallocation liability. This presumption may be rebutted by a preponderance of the evidence.

29 U.S.C. §§1389(d), 1399(c)(1)(D); 29 C.F.R. §4219.12(g).

3. “Initial Withdrawal Liability

- Employers involved in a mass withdrawal not only have to pay “initial” withdrawal liability discussed above, but they also must pay any redetermination liability amounts and reallocation liability amounts. 29 U.S.C. §§1389(c), 1399(c)(1)(D); 29 C.F.R. §§4219.11, 4219.12;
- Essentially, the mass withdrawal rules attempt to allocate all of the unfunded vested benefit liability of the pension plan to the employers, without the reductions and limitations which would ordinarily apply to a single employer’s withdrawal.

4. Redetermination Liability

- Redetermination liability involves recovering (or assessing, if withdrawal liability and redetermination liability are combined) any amounts the employer would otherwise not pay under the *de minimis* deduction and under the 20-year payment limitation in a normal withdrawal situation. 29 C.F.R. §§4219.2, 4219.12(a), (b);
- Under the statute, “in any case in which a multiemployer plan terminates by the withdrawal of every employer from the plan, or in which substantially all the employers withdraw from a plan pursuant to an agreement or arrangement to withdraw from the plan” the employer is liable for these amounts. 29 U.S.C. §§1389(c), 1399(c)(1)(D).

5. Reallocation Liability

- Reallocation liability basically involves allocating to employers any additional unfunded vested liability of the pension plan. The statute provides for an initial reallocation formula for prorating an employer’s liability, plus a portion of any amounts not assessed against other employers under the statute, such as amounts not assessed because of insolvency, the limitation on pursuing the exempt property of individuals under bankruptcy law, and the limitations due to sales of assets to unrelated parties. 29 C.F.R. §4219.15.

N. Minimum Funding Assessments

1. Pre-PPA Law

2. Post-PPA Law

a. Yellow Zone
   i. Endangered
   ii. Seriously Endangered

b. Red Zone
   i. Critical Status

c. Failure to Meet Requirements for Plans in Endangered and Critical Status

IV. Trustees' Fiduciary Responsibility

A. Who is a fiduciary?

1. Title unimportant. ERISA states that a fiduciary is someone who:

    a. Manages or invests plan assets;

    b. Provides investment advice; *or*

    c. Administers the plan.

29 U.S.C. §1002(21)(A).

- It should be assumed that trustees and administrators of a plan are fiduciaries for matters involving the plan. 29 C.F.R. §2509.75-8, Q&A D-3; see Yeseta v. Baima, 837 F.2d 380, 384 (9th Cir. 1998).

2. Application of the Functional Definition of Fiduciary

    a. Plan sponsors – Settlor functions. Although courts have made distinctions between actions of the Plan Sponsor acting as "settlor" of the trust and actions of the Plan Sponsor acting as fiduciary, by amendment to Section 1.17 of the Trust Agreement, all "settlor type" decisions of the Board of Trustees, the Board's delegee, or the Administrative Manager are deemed covered by ERISA's fiduciary duty obligations;

    b. Investment advisors are generally fiduciaries unless no discretion.

    c. Insurance companies managing plan assets or holdomg funds in a "separate account" likely will be deemed fiduciaries.

    d. Insurance companies, TPAs, or claims processors with discretionary authority to decide claims.

    e. Banks, attorneys, and actuaries acting in traditional roles often are not considered fiduciaries.

3. Identifying Plan Assets is Critical Inquiry because the definition of "fiduciary" is largely tied to control or management of plan assets.

    a. Regulations govern when law will "look through" an equity I investment by a Plan in another entity to the underlying assets of t that entity. 29 C.F.R. §2510.3-101.

    b. DOL regulations issued governing when participant contributions and amounts withheld from employee wages may constitute plan assets. 29 C.F.R. §2510.3-102.

4. Starting or Stopping as a Fiduciary

    a. Starting – Person assumes the requisite discretionary authority or control that is defined as fiduciary conduct.

b. Stopping – Person ceases serving in the fiduciary role, although may be liable for a breach which they set in motion or a co-fiduciary's known breach prior to resignation.

B. Plan and Trust Requirements

1. Formal Requirements – Written instrument, named fiduciary, mandatory and optional provisions. Section 402 of ERISA, 29 U.S.C. §1102.

2. Trust Requirement - Plan assets generally must be held in trust, administered by trustees.

a. Exceptions – i.e., insurance company separate accounts. Trustees can delegate authority to manage assets to properly named fiduciary or investment manager, but remain obligated for selection.

C. Fiduciary Standards – Section 404 of ERISA: All duties to the plan must be discharged solely in the interest of the plan's participants and beneficiaries.

1. The Four General Rules:

a. The "exclusive purpose" rule;

b. The "prudence" rule;

c. The diversification rule;

d. Act in accordance with plan documents, unless inconsistent with provisions of ERISA.

2. The Exclusive Purpose Rule: Duty of loyalty to the plan; no self-dealing.

a. No breach where action intended to benefit plan but also incidentally benefits the plan sponsor or the fiduciary.

b. No breach where fiduciary takes appropriate steps to ensure decision not tainted by the conflict.

c. DOL guidance on payment by plan of expenses of trustees. DOL Field Assistance Bull. 2002-2 (Nov. 14, 2002).

d. Examples of breaches:

i) Causing plan to purchase insurance products to maximize commissions of selling agent, who was fiduciary or to benefit entities controlled by fiduciaries.
ii) Causing plan to extend coverage to themselves and plan counsel on favorable terms.
iii) Loaning funds to a poorly funded sister welfare fund to bolster that fund.

3. The Prudence Standard

a. Procedural prudence. Decision-making process reviewed objectively for how the decision was reached.

i) Consult appropriate experts to guide decisions.

ii) Prudent selection, direction, and retention of experts.
iii) Decision may be imprudent even if plan suffers no loss.
iv) Substantive prudence also relevant. Objectively prudent? Did plan comply with applicable non-ERISA law?

b. DOL's Safe Harbor Rule: Prudence of investment judged with regard to role that investment plays in overall plan portfolio.

4. Diversification.

a. Fiduciary must consider facts and circumstances of each case.

b. Congress outlined seven factors to be considered:

i) Purpose of the plan,
ii) Amount of the plan assets,
iii) Financial and industrial conditions,
iv) Type of investment,
v) Geographical distribution of the location,
vi) Distribution of the investment among industrial sectors, and
vii) Date of maturity.

1974 U.S.C.C.A.N. at 5084.

c. Courts follow two step analysis: (1) party claiming violation must show plan investments nondiverse; (2) burden shifts to Plan to show its conduct was clearly prudent.

5. Act in Accordance with Plan Documents.

D. Topics of Note in Applying Fiduciary Standards

1. Fiduciary communications.

a. Duty to not make affirmative misrepresentations.

b. Duty to disclose truthful information; some courts have found that fiduciary has affirmative duty even without participant inquiry.

c. Courts have held that SPDs must be up to date, clear, and correct.

d. Communications regarding future benefits, early retirement packages, and retiree health care are fertile area of litigation.

2. Selection and Monitoring of Service Providers.

3. Collections

a. Duty to take effective action ensuring that Fund receives contributions.

b. Right to conduct audits. However, failure to do so not necessarily violation of ERISA or its fiduciary duties.

c. Take reasonable measures to ensure the contributions owed under reciprocity agreements are accurately determined and collected.

4. Benefit Administration

a. Failure to carry out administrative responsibilities may be breach.

b. Inconsistency and failing to follow the plan documents.

c. Elimination of non-core benefits, benefit freezes and reductions mandated by law.

d. Voluntary benefit reductions.

e. Investment policy.

i) Lack of written investment policy not *per se* violation of duties.
ii) Non-financial considerations secondary in making investments.

E. Violations by Other Fiduciaries. Co-fiduciary liability if:

1. Fiduciary knowingly participates or knowingly conceals act or omission knowing that it is a breach of that fiduciary's duty;

2. Fiduciary's failure to comply with fiduciary duties enables another fiduciary to commit a breach of duty; and

3. Fiduciary fails to make reasonable efforts to remedy a breach by another fiduciary if he/she has knowledge of that breach.

F. Liability for Breach of Fiduciary Duty

1. ERISA Remedies:

a. Personal liability to plan for any losses suffered;

b. Restore to plan any profits made as result of misuse of plan assets;

c. Equitable relief, including removal of the trustee.

2. Restoring plan to position it would have been in but for the breach of duty.

3. Attorneys' fees and court costs.

4. DOL seeking civil penalties against fiduciaries who breach their duties.

5. Statute of Limitations - The earlier of:

a. 6 years after the date of the last action that constituted a part of the breach (or the latest date on which the fiduciary could have cured the breach in the case of an omission) *or*

b. 3 years after earliest date that plaintiff obtains actual knowledge of the breach.

c. In cases of fraud or concealment, 6 years after date of discovery.

d. Courts split on what constitutes "actual knowledge." Seventh Circuit holds that actual knowledge requires that plaintiff know essential facts of transaction or conduct constituting violation even if plaintiff does not understand that facts give rise to ERISA claim.

6. Non-fiduciaries liable for "appropriate equitable relief" if had actual or constructive knowledge that transaction was prohibited or violated ERISA.

7. Agreements relieving fiduciary of responsibility for breach are void.

G. Prohibited Transactions

1. Statutory Provisions

   a. Transactions involving fiduciaries and "parties in interest."

   b. Definition of "party in interest" includes employers whose employees are covered by plan, unions whose members covered by plan, and persons providing services to plan.

2. Knowledge and proof of harm usually not necessary to establish violation.

3. Penalties for violations

   a. IRS excise taxes can be imposed on any "disqualified person" who participates in a prohibited transaction under the tax code.

   b. ERISA Civil Penalties: 5 percent of the amount involved for each year or part of a year the transaction continues or 100 percent if the transaction is not corrected within 90 days of notice from the DOL.

4. Exemptions

   a. DOL Statutory Exemptions.

   b. PPA Exemption permitting correction of honest mistakes.

   c. Specific areas of concern for trustees:

      i) Conflicts due to holding position other than plan trustee.
      ii) Participating in decisions setting compensation for fiduciary or for party in interest.
      iii) Tinancial transactions with an employer.

H. Bonding

1. ERISA requires every fiduciary to be bonded to protect the plan.

2. Bond must be at least 10 percent of money or property of plan handled during the preceding plan year by the person or group covered.

3. Exemptions for domestic insurance companies, banks, and others.

I. Comments for Trustees of a Pension Fund in Financial Peril

1. Assume all decisions of trustees will be scrutinized.

2. Collection procedures and practices should be reviewed carefully.

3. Withdrawal liability claims should be pursued and collected vigorously.

4. Pension fund in failing financial health may fall within a number of complex areas of the law, including withdrawal liability, mass withdrawal, the PPA, minimum funding requirements, plan reorganization, plan insolvency, and plan termination.