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Managing Editor, Norton Journal of Bankruptcy Law and Practice, Thomson Reuters, 50 Broad Street East, Rochester, NY 14694, (800) 327-2665, ext. 2586, fax (585) 258-3774, clay.mattson@thomsonreuters.com.

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The Benefit of Whose Bargain? Courts Grapple with Administrative Expense Priority For Postpetition Withdrawal Liability Claims

By Lawrence V. Gelber, Ronald E. Richman, and James T. Bentley

Two circuit level court decisions have directly addressed whether the postpetition portion of the liability incurred by a debtor for withdrawing from a multi employer benefit plan (i.e., withdrawal liability) is entitled in a bankruptcy case to payment as an administrative expense with priority over other general unsecured creditors.[1] In *United Mine Workers of America 1974 Plan and Trust v. Lexington Coal Co., LLC (In re HNRC Dissolution Co.)*,[2] ("HNRC"), the Sixth Circuit Bankruptcy Appellate Panel ("Sixth Circuit BAP") held that the postpetition portion of the debtors' withdrawal liability was not entitled to administrative expense priority because it did not provide a direct and substantial benefit to the debtors' estates. More recently, however, in *In re Marcal Paper Mills, Inc.*,[3] ("Marcal"), the Third Circuit Court of Appeals held that the postpetition portion of withdrawal liability is entitled to payment as an administrative expense

Lawrence V. Gelber is a Partner in the Business Reorganization Group at Schulte Roth & Zabel LLP. Mr. Gelber concentrates his practice in corporate restructuring, creditors' rights, distressed mergers & acquisitions, debtor-in-possession financing, and prime broker and counterparty insolvency matters.

Ronald E. Richman is a Partner in the New York office of Schulte Roth & Zabel LLP, co-head of the Employment & Employee Benefits Group and a member of the firm's Executive Committee. His practice concentrates on the litigation of employment and employee benefits cases in federal and state courts throughout the United States involving trade secrets, noncompetition, nonsolicit, and breach of confidentiality and breach of loyalty issues.

James T. Bentley is Special Counsel in the Business Reorganization Group at Schulte Roth & Zabel LLP. Mr. Bentley's practice is focused on corporate restructuring, creditors' rights, financings, and distressed mergers and acquisitions.

of the bankruptcy estate because the liability was incurred in return for and on account of the employee's postpetition services.

These decisions are important because bankruptcy courts typically will not permit a sale of a debtor's assets under section 363 of the Bankruptcy Code, and cannot confirm a debtor's plan of reorganization, unless all administrative expense claims are to be paid in full. Withdrawal liability, however, can be one of the largest claims in a bankruptcy case, and may even exceed the asset sale price.[4] It can also be one of the most difficult to calculate, as it is hard to measure and may change dramatically during the course of a Chapter 11 case. Accordingly, if even a portion of a withdrawal liability claim is, or may be, entitled to administrative expense priority, a debtor may be precluded from availing itself of the bankruptcy process. This article first discusses withdrawal liability generally, then analyzes how the two courts arrived at opposite results.

What is Withdrawal Liability?

The Employee Retirement Income Security Act of 1974 (ERISA), was enacted to provide oversight for the management of monies in defined benefit plans and to protect the interests of plan beneficiaries.[5] Under ERISA, participating employers make tax-deductible contributions that are held in trust by plan administrators to later provide pension benefits to the employer's employees.[6] Employers are required, at a minimum, to contribute annually an amount equal to the normal cost of the plan (i.e., funding the plan benefits to be paid during that year), plus the amount necessary to amortize past service liability (i.e., the cost of funding benefits attributable to employees' service before the employer began to participate in the plan).[7] The timing of the employer's contributions to a multi employer benefit plan is governed by the underlying collective bargaining agreement.

Prior to 1980, an employer that participated in a multi employer benefit plan could withdraw from the plan without penalty, provided that the plan did not become insolvent during the five years following the employer's withdrawal.[8] Employer withdrawals often resulted in increased funding obligations for the other employers who remained in the plan.[9] This, in turn, created instability within plans, as other employers would then withdraw also, rather than "risk having to bear alone the entire cost of keeping the shaky plan afloat."[10]

In an effort to ensure that participating employers funded their fair share of the future obligations of plans in which they participate, Congress enacted the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). Enactment of the MPPAA had the further effect of discouraging employer withdrawals.[11] The MPPAA "'imposed a withdrawal charge on all employers withdrawing from an underfunded plan' regardless of whether or not the plan later became insolvent."[12] A goal of the MPPAA is to ensure that each participating employer funded its fair share of the plan's future obligations.

Under the MPPAA, if an employer withdraws from a multi employer plan, whether completely or partially,[13] the employer is required to pay to the plan its proportionate share of "unfunded vested benefits" and future liabilities, i.e., withdrawal liability.[14] Unfunded vested benefits are "calculated as the difference between the present value of vested benefits and the current value of the plan's assets."[15] Arriving at the proper calculation of those unfunded vested benefits, however, is often a challenge.

To determine an employer's withdrawal liability, a plan actuary first must determine the plan's unfunded vested benefits, and then determine the employer's share of those benefits.[16] The MPPAA contains four methods of attribution for determining an employer's withdrawal liability: (i) presumptive, (ii) modified presumptive, (iii) rolling-5, and (iv) direct attribution.[17] The first three methods "base the determination [of the withdrawing employer's share of unfunded vested benefits] on the employer's share of the plan's contribution base over five-year periods ending with the year before the employer's withdrawal."[18] The fourth method, direct attribution, bases withdrawal liability solely on the unfunded vested benefits attributable to the withdrawing employer.[19] The plan trustee is entitled to choose which of the four methods of calculating withdrawal liability the plan will use.[20] Most often, plan trustee's select one of the first three methods rather than the fourth.[21]

Courts have rightly noted that the "existence and amount" of unfunded vested benefits at the time of withdrawal from a plan may be affected by a number of factors.[22] For example, the "level of [a] plan's liability for pension benefits… may vary over time as a result of changes in contractual promises (such as a negotiated increase in benefit levels), in actuarial assumptions (as to employee longevity, for example), and in other factors."[23] Actuaries calculating unfunded vested benefits also must discount the future stream of benefit payments using an appropriate interest rate.[24] A plan's collection history and its investment strategy also will affect the amount, or even the existence, of its unfunded vested benefits.[25] If a dispute over the amount of withdrawal liability arises, the plan's actuarial assumptions and calculations are presumed correct unless they are proven by the employer to be unreasonable or determined by an arbitrator to be clearly erroneous.[26]

Further complicating matters for bankruptcy attorneys, withdrawal liability is calculated as of the end of the benefit plan's last plan year, and not as of the date of withdrawal (such as the closing of a bankruptcy sale of a going-concern business).[27] In other words, if a debtor withdraws from a multi employer plan in 2012, but the current plan year had not yet ended, then the withdrawal liability would be calculated only through the end of the 2011 plan year.

The Cases

Horizon Natural Resources Company

Horizon Natural Resources Company and several of its affiliates (collectively, the "Horizon Debtors") filed Chapter 11 petitions in November 2002.[28] The Horizon Debtors were parties to a collective bargaining agreement with the United Mine Workers of America ("UMWA"), and continued their operations for two years in Chapter 11 before they sold their assets and liquidated.[29] Prior to sale of the Horizon Debtors' assets (but during the pendency of the case), the UMWA members worked almost three million hours, for which the Horizon Debtors made all necessary wages and benefit contributions due under the collective bargaining agreements.[30]

After unsuccessfully trying to reorganize, the Horizon Debtors determined to sell their assets pursuant to a plan of liquidation.[31] In accordance with this plan, the Horizon Debtors held an auction. Lexington Coal Company ("Lexington Coal") was one of the successful purchasers of their assets.[32] The Horizon Debtors subsequently rejected the UMWA collective bargaining agreements.[33] The rejection of the collective bargaining agreements constituted a complete withdrawal from the multi employer defined benefit plan (the "1974 Plan") to which the Horizon Debtors belonged.[34]

Two months after the withdrawal, the 1974 Plan filed an administrative expense priority claim for the postpetition portion of the Horizon Debtors' withdrawal liability.[35] The 1974 Plan used the "Rolling-5" method, calculating the postpetition portion of the withdrawal liability by dividing the postpetition employee hours worked by the total hours worked by the Horizon Debtors' employees both pre and postpetition.[36] The 1974 Plan then multiplied this fraction by the aggregate assessed withdrawal liability.[37]

Lexington Coal objected, asserting that the withdrawal liability claim did not qualify for administrative expense priority because the withdrawal did not directly and substantially benefit the HNRC Debtors' estate.[38] Lexington Coal argued that the Bankruptcy Code provides administrative expense status to claims only for "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case…" and that administrative expense claims are strictly construed by courts because they "reduce the funds available for creditors and other claimants,"[39] For this reason, the claimant (here, the 1974 Plan) had the burden of proving "by a preponderance of the evidence that it is entitled to an administrative expense claim."[40]

Courts in the Sixth Circuit employ a "benefit to the estate" analysis in determining whether a claim qualifies as an "actual and necessary" cost or expense to the estate.[41] According to Lexington Coal, the 1974 Plan's withdrawal liability claim did not satisfy the second prong of this test because there was no direct connection between the work performed by the employees and the amount of the withdrawal liability claim.[42] Rather, the withdrawal liability claim was based on subjective factors that bore no relation to the work performed by the Horizon Debtors' employees. The 1974 Plan disagreed, asserting that, in addition to the wages earned and paid to the employees, the employees' postpetition compensation included the accrual of pension credits for the hours worked during the postpetition period.[43]

The bankruptcy court agreed with Lexington Coal and denied the 1974 Plan's administrative claim request, concluding that it had failed to establish that any portion of the withdrawal liability claim represented a "direct and substantial" benefit to the Horizon Debtors' bankruptcy estate.[44] While the bankruptcy court acknowledged the possibility of pro-rating withdrawal liability across pre and postpetition periods, it was troubled by the 1974 Plan's use of the Rolling-5 method, which used past contribution experience to determine withdrawal liability.[45] In particular, the bankruptcy court expressed concern that the amount of the liability was "clearly dependent, among other things, upon the success of the [1974 Plan's] investments as administered by the trustees of the fund, and contributions by other employers."[46] Because the Horizon Debtors made all of their plan contributions during the bankruptcy case, the bankruptcy court concluded, the 1974 Plan had failed to demonstrate that the withdrawal liability claim directly and substantially benefited the Horizon Debtors' estates.[47]

On appeal, the 1974 Plan argued that the employees provided a benefit to the Horizon Debtors' estates by continuing to work after the filing of their cases. The employees' work for the Horizon Debtors' during the postpetition period "facilitated the continued operation of the [Horizon] Debtors during the chapter 11 proceeding, preserved the business' going concern value, and eventually led to the sale of the Horizon Debtors' assets at a favorable price."[48] Because, the [Horizon] Debtors' employees continued work, they continued to accrue pension credits.[49] Those pension credits were part and parcel of the employee's wages and thus, the postpetition portion of the withdrawal liability claim was entitled to administrative expense priority under the Sixth Circuit's "benefit to the estate" test.[50]

The Sixth Circuit BAP agreed with the 1974 Plan that the employees had provided a benefit to the Horizon Debtors' estates and that claims directly related to the postpetition work of the Horizon Debtors' employees may be entitled to administrative expense priority.[51] Nevertheless, the Sixth Circuit BAP held that the 1974 Plan did not establish that its withdrawal liability claim related directly to the postpetition work performed by the Horizon Debtors' employees.[52]

According to the Sixth Circuit BAP, while earlier Sixth Circuit case law had held, as the 1974 Plan argued, that a withdrawal liability claim arises from the accrual of employees' vested rights, the Sixth Circuit subsequently held that withdrawal liability claims were statutory claims that arose upon the withdrawal of the employer from the multi employer plan.[53] Thus, there could be no direct relationship between the accrual of postpetition pension credits and the withdrawal liability claim itself.[54]

While the periodic contributions made by an employer plainly are related to the number of workers, the workers' seniority, and the time worked during a specified period, the Sixth Circuit BAP could not discern a direct connection between the postpetition work performed by the employees prior to withdrawal and the nature and amount of the withdrawal liability claim.[55] The panel noted too that the existence of unfunded vested benefits is linked to a variety of factors, including interest rate assumptions, the performance of the plan's investments, and other actuarial methods utilized by a plan's sponsors.[56] The impact of these extrinsic factors on a withdrawal liability claim thus distinguishes it from other forms of consideration provided in exchange for postpetition work by a debtor's employees.[57] While wages have a direct causal link to an employee's postpetition work and are generally allowed as administrative expenses, withdrawal liability claims do not have the same causal connection.[58] Thus, the Sixth Circuit BAP concluded that, as a matter of law, withdrawal liability claims lack the requisite causal relationship to the work performed by a debtors' employees to be afforded administrative expense priority.[59]

Marcal

Marcal Paper Mills, Inc. ("Marcal"), a paper products manufacturer, filed a Chapter 11 petition on November 30, 2006, and continued to operate as a debtor in possession.[60] Truck drivers from Teamsters Local 560 ("Local 560") worked for Marcal, distributing its products and operating its fleet of trucks.[61] Marcal and Local 560 were party to a series of collective bargaining agreements (the "Marcal CBAs").[62] Under the Marcal CBAs, Marcal was required to participate in the Trucking Employees of North Jersey Welfare/Pension Fund (the "TENJ Fund"), a multiemployer defined benefit plan.[63] During its bankruptcy case, Marcal continued, for approximately 18 months, to employ the Local 560 drivers and to make payments to the TENJ Fund on behalf of all covered employees. This practice continued until Marcal's assets were sold to Marcal Paper Mills, LLC ("Purchaser").[64] The Purchaser did not assume the Marcal CBAs, nor employ any of the Local 560 truck drivers. As a result, the asset sale resulted in a complete withdrawal from the TENJ Fund.[65] Under the terms of the asset purchase agreement with Marcal, however, the Purchaser agreed to assume "any withdrawal liability with respect to the 'Multiemployer Pension Plan for Local Union No. 560… *that is determined to be a post-petition administrative expense*.'"[66]

Two months after the closing of the sale to the Purchaser, the TENJ Fund filed a $5.89 million administrative expense claim for Marcal's withdrawal liability.[67] The Purchaser objected, disputing that the claim was entitled to administrative expense priority and requesting it be classified a general unsecured claim.[68] In response, the TENJ Fund amended its claim, seeking administrative priority for only that portion of the withdrawal liability attributable to postpetition services provided to Marcal by Local 560 employees, roughly one-fifth of the originally amount.[69] The bankruptcy court, relying on *HNRC*, sided with the Purchaser and reclassified the TENJ Fund's claim as a general unsecured claim.[70]

On appeal, the district court reversed, holding that the portion of the withdrawal liability attributable to the postpetition period was entitled to administrative expense priority.[71] It remanded the matter to the bankruptcy court to calculate how the claim should be apportioned between pre and postpetition periods.[72]

The Purchaser appealed the district court's decision, setting out three arguments.[73] First, the amount of withdrawal liability is based upon a variety of factors, some of which have nothing to do with the work performed by the covered employees, thus, withdrawal liability does not represent a benefit to the estate.[74] econd, withdrawal liability is not designed to benefit the employees who provide the postpetition service.[75] Instead, it is intended to benefit (i) the other employer members of the multi employer plan, (ii) the PBGC insurance scheme, which may have to make up any shortfall, and (iii) all of the employee-beneficiaries of the plan, not just those who worked for debtor.[76] Finally, the Purchaser argued that all postpetition periodic contribution payments had been made during the bankruptcy case, and that nothing more was entitled to administrative expense treatment.[77]

The Third Circuit disagreed, affirming the district court and holding that the portion of the withdrawal liability claim that corresponded to the postpetition work performed by the debtor's employees was "owed by [the Purchaser] in fulfillment of the promise it assumed as part of its purchase of Marcal's assets to provide pension benefits in consideration for the necessary post-petition work."[78] The Third Circuit acknowledged that the existence and size of a withdrawal liability claim may depend on factors unrelated to the work performed by the covered employees (e.g., how the fund's assets have fared in the market, how much money has been withdrawn by retired employees, etc.); however, the Court held that this did not alter the fact that the amount owed to the TENJ Fund was based on the Purchaser's decision to take advantage of work provided by covered employees.[79] The requirement that the withdrawing employer make a lump sum withdrawal liability payment to the fund does not alter the basic character of the withdrawing employer's debt—a debt incurred in return for and on account of the employee's services.[80]

The Court first found that the Purchaser's argument that the amount of the withdrawal liability claim was subject to "the whims of the market and actuarial assumptions" missed the point because it ignored the fact the Purchaser had assumed the withdrawal liability obligation under its purchase agreement with Marcal.[81] Moreover, the Court held that the Purchaser's argument that the claim was not entitled to administrative expense priority because Marcal made all of its periodic plan contributions during the case was a "red herring."[82] The Court held that "[u]nfunded vested benefits…are benefits which are 'promised and earned but not yet funded' as of the calculation day. The liability for [unfunded vested benefits] represents a pre-existing obligation on the employer's part, and is not simply 'incurred' as of the date of withdrawal. In other words, the unfunded vested benefit calculation represents an employer's share of the amount needed for a fund to break even as of the calculation date."[83] According to the Third Circuit, "withdrawal liability is intended to make up for any deficiency in the fund's assets…[that] would prevent the employer from fulfilling its promise to provide a specific retirement benefit, a promise which is made in exchange for the employees' work."[84]

The Third Circuit then dispensed with the Purchaser's second argument, i.e., that withdrawal liability is not designed to benefit only the employees who provide the postpetition service.[85] The Court stated that the "simple fact is that the [MPPAA] exists for the benefit of the employees." [86] Because withdrawal liability ensures that there are enough plan assets to provide the promised benefits to employees under the plan in exchange for the employees' willingness to work, the Court found it inconsequential that other employees may benefit too.[87]

Finally, the Third Circuit saw no reason why withdrawal liability could not be apportioned between pre and postpetition periods, but left it to the bankruptcy court to determine how that apportionment should be accomplished.[88]

Analysis

The *HNRC* and *Marcal* decisions both are well-reasoned. Although similar, however, they are somewhat fact specific; accordingly, neither may have general applicability. For example, in *Marcal*, the Purchaser had agreed in its purchase and sale agreement to assume the debtors' withdrawal liability to the extent it was entitled to administrative expense priority. This point was important for the Third Circuit, which noted that the Purchaser obtained a benefit from the work performed by the Marcal's employees between the time Marcal filed and the time the sale closed.[89] The Third Circuit focused on the "[Purchaser's] decision to take advantage of work provided by covered employees" pursuant to the terms of a collective bargaining agreement, rather than the actuarial assumptions and market fluctuations that are inherent in determining the amount of a withdrawal liability claim.[90] Under the Third Circuit's reasoning, however, it does not appear that assumption by a purchaser of a withdrawal liability claim need be a prerequisite for the postpetition component of that claim to be entitled to administrative expense priority. The Court described the "basic character" of a withdrawing employer's debt as being "'incurred in return for the employees' services to the employer post-petition.'"[91] The Court also held that the withdrawal liability is not "incurred" as of the withdrawal date, but "represents a pre-existing obligation on the employer's part."[92] Thus, the postpetition portion of the withdrawal liability claim should in any event be accorded administrative expense priority in the Third Circuit.

The Sixth Circuit BAP, on the other hand, viewed the character of a withdrawal liability claim as akin to a statutory fee for early withdrawal, a liability unrelated to the postpetition work performed by the debtors' employees. According to the Sixth Circuit BAP, a debtors' employees are entitled to their wages and the "normal" periodic contributions that an employer must make under its collective bargaining agreement. Withdrawal liability, however, is a statutory remedy that was not designed with bankruptcy specifically in mind (though the statute does contain certain bankruptcy-related provisions). The Sixth Circuit BAP thus found that the withdrawal liability claim itself does not arise from the accrual of pension credits during bankruptcy, but rather as a statutory right to payment that arises upon withdrawal (i.e., the sale of the employer's assets) from the plan.[93] While the periodic contributions required to be made under the collective bargaining agreement are related to the number of employees who work postpetition, the amount of withdrawal liability is dependent upon outside factors, such as market conditions that affect a funds' investments, that are not directly related to the employees' postpetition work.[94]

This fundamental difference in the courts' approaches to withdrawal liability, i.e., statutory fee or negotiated right to payment, likely will exist until either Congress or the Supreme Court provides a definitive interpretation of withdrawal liability claims that arise in the bankruptcy context. Further, both decisions leave open certain issues, such as the proper mechanics for apportioning a withdrawal liability claim into pre and postpetition components. In *HNRC*, the court merely assumed that apportionment is possible but never addresses the mechanics.[95] In *Marcal*, the Third Circuit sent the apportionment issue back to the bankruptcy court.[96]

While asset sales, such as those in *HNRC* and *Marcal*, often trigger withdrawal liability,[97] employers may reduce, or even eliminate, withdrawal liability obligations under section 4204 of ERISA if the withdrawal occurs in conjunction with a transaction that is a "bona fide sale."[98] his safe harbor applies to sales only if: (1) the employer ceases covered operations or ceases to have an obligation to contribute for such operations solely as a result of a bona fide sale of assets to an unrelated party; (2) the purchaser assumes a contribution obligation for substantially the same number of contribution base units for which the seller had an obligation to contribute; (3) the purchaser provides a bond or establishes an escrow account payable to the plan if the purchaser withdraws from the plan or fails to make a contribution when due at any time within the five plan years following the sale; and (4) the contract of sale provides that, if the purchaser withdraws from the plan within five plan years after the sale and does not pay its withdrawal liability, the seller will pay to the plan the withdrawal liability it would have been required to pay but for application of ERISA section 4204. Finally, the sale must be between "unrelated parties" as defined in Internal Revenue Code section 267(b).

Purchasers in section 363 bankruptcy sales, however, often are not interested in assuming withdrawal liability or providing a five-year bond or an escrow to cover a hypothetical future withdrawal from the plan. Further, debtors that sell substantially all of their assets in bankruptcy typically cease to exist for all practical purposes shortly after the transaction closes, so they are not available to pay the withdrawal liability should the purchaser fail to do so during the five plan years following the sale. Nevertheless, section 4204 may, in some circumstances, be a means by which a debtor/employer may avoid withdrawal liability when it sells all or substantially all of its assets.

Notes

1. "Post-petition withdrawal liability" is that portion of the withdrawal liability claim attributable to pension credits earned after the petition date and before the debtor's withdrawal from its multi employer benefit plan.

2. In re HNRC Dissolution Co., 396 B.R. 461, 465, 50 Bankr. Ct. Dec. (CRR) 224, 60 Collier Bankr. Cas. 2d (MB) 1215, 45 Employee Benefits Cas. (BNA) 1656, Bankr. L. Rep. (CCH) P 81354 (B.A.P. 6th Cir. 2008).

3. In re Marcal Paper Mills, Inc., 650 F.3d 311, 54 Bankr. Ct. Dec. (CRR) 232, 51 Employee Benefits Cas. (BNA) 1967, 191 L.R.R.M. (BNA) 2373, Bankr. L. Rep. (CCH) P 82025 (3d Cir. 2011).

4. See Kladder, Asset Sales After MPPAA—An Analysis of ERISA Section 4204, 39 Bus. Law. 101 (Nov. 1983) (citing, Terson Co., Inc. and Bakery Drivers Local 734 Pension Funds, 4 EBC (BNA) 1009 (1983) (Graham, Arb.) (withdrawal liability equaled approximately $3.5 million as compared to a sales price of approximately $1.5 million).

5. The pension plans at issue in the *HNRC* and *Marcal* cases were multiemployer defined benefit plans. A "defined benefit plan is a pension plan under which an employee receives a set monthly amount upon retirement for his or her life, with the benefit amount typically based upon the participant's wages and length of service." Marcal,650 F.3d at 315 (citing In re Schering Plough Corp. ERISA Litigation, 589 F.3d 585, 595 n.8, 48 Employee Benefits Cas. (BNA) 1385 (3d Cir. 2009)). See e.g., 29 U.S.C.A. §1001 et seq.

6. 29 U.S.C.A. §1103, I.R.C. §401.

7. 29 U.S.C. A. §1082, I.R.C. §412.

8. HNRC, 396 B.R. at 471 (citations omitted).

9. HNRC, 396 B.R. at 471.

10. HNRC, 396 B.R. at 471 (citing Milwaukee Brewery Workers' Pension Plan v. Joseph Schlitz Brewing Co., 513 U.S. 414, 417–18 , 115 S. Ct. 981, 130 L. Ed. 2d 932, 18 Employee Benefits Cas. (BNA) 2777, 75 A.F.T.R.2d 95-1110 (1995).

11. HNRC, 396 B.R. 471 ; Marcal,650 F.3d at 316; see also Local Union 1158 I.B.E.W. Pension Fund-PA v. H.H. Fluorescent Parts, Inc., 43 Employee Benefits Cas. (BNA) 2349, 2008 WL 544675 at * 4 (E.D. Pa. 2008), citing Galgay v. Beaverbrook Coal Co., 105 F.3d 137, 139, 20 Employee Benefits Cas. (BNA) 2752 (3d Cir. 1997) (citations omitted) ("Congress enacted the… MPPAA 'out of concern that multiemployer pension plans would collapse as employers withdrew if the remaining contributors became too few in number to pay the unfunded vested benefits.'"); H.R. Rep. No. 869, 53 reprinted in 1980 U.S. Code Conf. & Ad. News at 2921 ("The essence of withdrawal liability is to ensure that employees receive the benefits which they have bargained for and earned.").

12. HNRC, 396 B.R. at 471 (quoting Board of Trustees, Michigan United Food and Commercial Workers Union v. Eberhard Foods, Inc., 831 F.2d 1258, 1261, 8 Employee Benefits Cas. (BNA) 2633 (6th Cir. 1987); see also Marcal, 650 F.3d at 316 ("Withdrawal liability was implemented to alleviate [the impact on underfunded plans as the result of an employer's withdrawal] and ensure that employers could not avoid their obligation to provide a promised benefit by withdrawing, thereby hurting their employees and the entire pension fund's health.").

13. An employer withdraws completely from a plan when the employer (a) ceases to have an obligation to contribute under the plan, or (b) permanently ceases all covered operations under the plan. ERISA §4203(a), 29 U.S.C.A. § 1383(a). A partial withdrawal occurs if, on the last day of a plan year, there is either (i) a 70% decline in contribution "base units," or (ii) a partial cessation of the employer's contribution obligations. (There is an exception for the building and construction industry that narrows the circumstances in which a withdrawal may

occur, on the theory that the plan's contributions are unaffected because the employees go to work for another employer covered under the plan.)

14. See 29 U.S.C.A. §§ 1381, 1391; Chicago Truck Drivers v. El Paso Co., 525 F.3d 591, 595, 43 Employee Benefits Cas. (BNA) 2741, 184 L.R.R.M. (BNA) 2157 (7th Cir. 2008); CPT Holdings, Inc. v. Industrial & Allied Employees Union Pension Plan, Local 73, 162 F.3d 405, 407, 33 Bankr. Ct. Dec. (CRR) 711, 22 Employee Benefits Cas. (BNA) 2073, Bankr. L. Rep. (CCH) P 77868, 1998 FED App. 0355P (6th Cir. 1998) (withdrawal liability represents an employer's proportional share of the plan's unfunded vested benefits.); H.H. Fluorescent Parts, Inc., 2008 WL 544675.

15. Marcal, 650 F.3d at 316 (citing Pension Ben. Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 725, 104 S. Ct. 2709, 81 L. Ed. 2d 601, 5 Employee Benefits Cas. (BNA) 1545 (1984)).

16. ERISA permits a benefit fund to hold parties other than the employer of record liable for withdrawal liability. "Under ERISA, the term 'employer' encompasses any trade or business under common control with the organization whose withdrawal triggers the liability. A pension plan may demand and collect withdrawal payments from any such trade or business." H.H. Fluorescent Parts, Inc., 2008 WL 544675 *5 (citing Teamsters Pension Trust Fund of Philadelphia v. Brigadier Leasing Associates, 880 F. Supp. 388, 392 (E.D. Pa. 1995) (citing 29 U.S.C.A. § 1301(b)(1)). The term "trades or businesses… under common control" is defined by regulations promulgated by the Internal Revenue Service. 29 U.S.C. A.§ 1301(b)(1). H.H. Fluorescent Parts, Inc., 2008 WL 544675 *5. One such definition provides that trades or businesses are under common control if they constitute a "brother-sister group." H.H. Fluorescent Parts, Inc., 2008 WL 544675 *5 (citing 26 C.F.R. § 1.414(c)-2(c)). "[A] brother-sister group is formed by two or more organizations where five or fewer persons own a controlling interest in each organization and such persons are in effective control of each organization. H.H. Fluorescent Parts, Inc., 2008 WL 544675 *5. Effective control is found where the sum of the lowest percentage interest of each person in each organization is 50% or more." H.H. Fluorescent Parts, Inc., 2008 WL 544675 *5 (citing Teamsters Pension Trust Fund, 880 F. Supp. at 392 (citing 26 C.F.R. § 1.414(c)-2(c)). HNRC, 396 B.R. at 471 (citation omitted).

17. HNRC, 396 B.R. at 471.

18. HNRC, 396 B.R. at 472 n. 11 (citing Zanglein & Stabile, ERISA Litigation 1238 (2d ed. 2005)); see also 29 U.S.C.A. §1391(c). Over the years, many alternative methods have been developed and used by parties to determine an employer's withdrawal liability. All such methods are subject to PBGC approval and notice to participating employers.

19. HNRC, 396 B.R. at 472 n. 11 (citation omitted).

20. Marcal, 650 F.3d at 316 (noting that the plan's final actuarial calculation may be challenged by employers) (citations omitted).

21. HNRC, 396 B.R. at 472 ("These [three] statutory methods generally base the allocation on the 'comparative number of [the] employer's covered workers in each earlier year and the related level of [the] employers' contributions.").

22. HNRC, 396 B.R. at 472 (citations omitted).

23. HNRC, 396 B.R. at 472 (citing In re CD Realty Partners, 205 B.R. 651, 658, 30 Bankr. Ct. Dec. (CRR) 463 (Bankr. D. Mass. 1997); Zanglein & Stabile, ERISA Litigation 1238 (2d ed. 2005) ("explaining that the valuation of vested benefits under the plan may also require consideration of demographic factors, such as the plan participant's retirement ages and mortality rates.").

24. HNRC, 396 B.R. at 472 (citing Eberhard Foods, 831 F.2d at 1259-60 ("Increasing the interest rate assumption decreases the employer's withdrawal liability…Even a small adjustment can lead to a major change in the withdrawal liability calculation.").

25. HNRC, 396 B.R. at 472.

26. If an employer wishes to contest the fact of its liability or the calculated amount of liability, the employer must initiate arbitration against the fund within sixty days of receipt of the initial demand. H.H. Fluorescent Parts, Inc., 2008 WL 544675 *5; 29 U.S.C. § 1399. If the employer fails to initiate arbitration on a timely basis, the right to contest the assessment on the

merits is permanently waived. H.H. Fluorescent Parts, Inc., 2008 WL 544675 *5; § 1401(b)(1); see IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc., 788 F.2d 118, 126, 1 U.C.C. Rep. Serv. 2d 205 (3d Cir. 1986). HNRC, 396 B.R. at 471 (quoting Masters, Mates & Pilots Pension Plan v. USX Corp., 900 F.2d 727, 730, 12 Employee Benefits Cas. (BNA) 1249 (4th Cir. 1990); see 29 U.S.C.A. §1401(a)(3)(A), (B)).

27. HNRC, 396 B.R. at 466 n. 6 (citing Milwaukee Brewery Workers' Pension Plan, 513 U.S. at 417–18 ("Under 29 U.S.C. § 1391, the "charge-determination" section of ERISA, the withdrawal liability calculation is to be made, "not *as of the day of withdrawal, but as of the last day of the plan year preceding the year during which the employer withdrew*.") (emphasis in original) (citations omitted).

28. HNRC, 396 B.R. at 466.

29. HNRC, 396 B.R. at 466.

30. HNRC, 396 B.R. at 466.

31. HNRC, 396 B.R. at 466.

32. HNRC, 396 B.R. at 466-467.

33. HNRC, 396 B.R. at 467 n.5 ("In August 2004, the bankruptcy court granted the [Horizon] Debtors' motion requesting authority to reject all of their collective bargaining agreements.")

34. HNRC, 396 B.R. at 467.

35. HNRC, 396 B.R. at 467.

36. HNRC, 396 B.R. at 479.

37. HNRC, 396 B.R. at 479.

38. HNRC, 396 B.R. at 479. Pursuant to the bankruptcy court's orders confirming the liquidating plan, Lexington Coal had standing to object to administrative expense claims. HNRC, 396 B.R. at 467 n.7.

39. HNRC, 396 B.R. at 474-475 (citing 11 U.S.C.A. § 503(b)(1)(A); 11 U.S.C.A. § 507(a)(1); In re Federated Dept. Stores, Inc., 270 F.3d 994, 1000, 38 Bankr. Ct. Dec. (CRR) 179, 47 Collier Bankr. Cas. 2d (MB) 397, Bankr. L. Rep. (CCH) P 78528, 2001 FED App. 0391P (6th Cir. 2001)).

40. HNRC, 396 B.R. at 475 (citing In re Liberty Fibers Corp., 383 B.R. 713, 717, 59 Collier Bankr. Cas. 2d (MB) 403 (Bankr. E.D. Tenn. 2008)).

41. HNRC, 396 B.R. at 475 (citing In re Sunarhauserman, Inc., 126 F.3d 811, 816, 38 Collier Bankr. Cas. 2d (MB) 1300, 21 Employee Benefits Cas. (BNA) 1777, 1997 FED App. 0287P (6th Cir. 1997). "Under this test, a debt qualifies as an administrative expense 'only if (1) it arose from a transaction with the bankruptcy estate and (2) directly and substantially benefited the estate.'" HNRC, 396 B.R. at 475 (citing In re White Motor Corp., 831 F.2d 106, 110, 17 Collier Bankr. Cas. 2d (MB) 1077, Bankr. L. Rep. (CCH) P 72026 (6th Cir. 1987) (additional citations omitted)).

42. HNRC, 396 B.R. at 467-468.

43. HNRC, 396 B.R. at 476.

44. HNRC, 396 B.R. at 468. The 1974 Plan further argued that it should have been entitled to present evidence to the bankruptcy court demonstrating a direct causal link between the alleged benefit to the Horizon Debtors' estates and the postpetition withdrawal liability. HNRC, 396 B.R. at 471. Alternatively, the 1974 Plan alleged that the postpetition portion of its withdrawal liability claim was entitled to administrative priority under the Supreme Court's decision in Reading Co. v. Brown, 391 U.S. 471, 88 S. Ct. 1759, 20 L. Ed. 2d 751 (1968) (claim may be afforded administrative expense priority even if it does not benefit or help preserve a debtor's estate provided the claim relates to certain aspects of the estate's postpetition operation) (pre-Code). HNRC, 396 B.R. at 471. Specifically, the 1974 Plan characterized its withdrawal liability claim as a statutory obligation that was incidental to the operation of the Horizon Debtors' businesses. These alternate arguments did not persuade the BAP, and are not relevant to the analysis in this article.

45. HNRC, 396 B.R. at 468.

46. HNRC, 396 B.R. at 468.

47. HNRC, 396 B.R. at 468. The 1974 Plan subsequently requested that the bankruptcy court reconsider its decision. The court held a hearing and, over Lexington Coal's objection, allowed the 1974 Plan to provide additional evidence. HNRC, 396 B.R. at 470. The 1974 Plan suggested alternative means of calculating the withdrawal liability, including evaluating how much pension credit the Horizon Debtors' employees earned during the two years the Horizon Debtors operated postpetition. HNRC, 396 B.R. at 470. The bankruptcy court issued a second opinion denying the administrative claim, again holding that the 1974 Plan had failed to show that the withdrawal liability arose because of a direct and substantial benefit to the estate. HNRC, 396 B.R. at 470.

48. HNRC, 396 B.R. at 476.

49. HNRC, 396 B.R. at 476.

50. HNRC, 396 B.R. at 476 (citation omitted).

51. HNRC, 396 B.R. at 477 ("it seems appropriate to assert that claims for withdrawal liability relating to postpetition work by a debtor's employees should also be entitled to priority status.")

52. HNRC, 396 B.R. at 476

53. HNRC, 396 B.R. at 478-479 (citing CPT Holdings, Inc.,162 F.3d at 409).

54. HNRC, 396 B.R. at 479.

55. HNRC, 396 B.R. at 478 ("the amount of withdrawal liability to be assessed against a withdrawing employer is *always* dependent upon factors that are not directly related to the post-petition work of a debtor's employees.") (emphasis in original).

56. HNRC, 396 B.R. at 479 (citing CD Realty Partners, 205 B.R. at 658 & n. 9 (the existence and amount of an underfunding, which will lead to withdrawal liability, is related to many factors which "can be quantified only by sophisticated guessing and estimatin.").

57. HNRC, 396 B.R. at 479.

58. HNRC, 396 B.R. at 480.

59. HNRC, 396 B.R. at 480-481.

60. Marcal, 650 F.3d at 313.

61. Marcal, 650 F.3d at 313.

62. Marcal, 650 F.3d at 313.

63. Marcal, 650 F.3d at 313.

64. Marcal, 650 F.3d at 313.

65. Marcal, 650 F.3d at 313.

66. Marcal, 650 F.3d at 313 (emphasis added).

67. Marcal, 650 F.3d at 313.

68. Marcal, 650 F.3d at 313.

69. Marcal, 650 F.3d at 313.

70. Marcal, 650 F.3d at 313.

71. Marcal, 650 F.3d at 314 (citing Trucking Employees Of North Jersey Welfare Fund, Inc.-Pension Fund v. Marcal Paper Mills, Inc., 48 Employee Benefits Cas. (BNA) 2002, 2009 WL 3681897 *8 (D.N.J. 2009)).

72. Marcal, 650 F.3d at 314.

73. Marcal, 650 F.3d at 317.

74. Marcal, 650 F.3d at 317.

75. Marcal, 650 F.3d at 317.

76. Marcal, 650 F.3d at 317.

77. Marcal, 650 F.3d at 317.

78. Marcal, 650 F.3d at 317.

79. Marcal, 650 F.3d at 317 ("[T]he portion of that employee work that occurred post-petition was wholly dependent upon [the debtor's] decision to employ covered teamsters while operating as a debtor-in-possession.").

80. Marcal, 650 F.3d at 317 (citing Trustees of Amalgamated Ins. Fund v. McFarlin's, Inc., 789 F.2d 98, 103-104, 14 Collier Bankr. Cas. 2d (MB) 1075, 7 Employee Benefits Cas. (BNA) 1426, Bankr. L. Rep. (CCH) P 71096 (2d Cir. 1986) ("employer's withdrawal liability payment… is the means by which the employer funds benefits that his employees have 'earned' by their past service and that he would normally finance through continuing contributions to his employees' pension plan."); Howard Delivery Service, Inc. v. Zurich American Ins. Co., 547 U.S. 651, 659, 126 S. Ct. 2105, 165 L. Ed. 2d 110, 46 Bankr. Ct. Dec. (CRR) 177, 55 Collier Bankr. Cas. 2d (MB) 775, 37 Employee Benefits Cas. (BNA) 2743, Bankr. L. Rep. (CCH) P 80624 (2006) (noting employee benefits compliment and/or substitute hourly wage compensation)).

81. Marcal, 650 F.3d at 317.

82. Marcal, 650 F.3d at 317.

83. Marcal, 650 F.3d at 317 (citing Huber v. Casablanca Industries, Inc., 916 F.2d 85, 96, 12 Employee Benefits Cas. (BNA) 2393 (3d Cir. 1990) (disapproved of on other grounds by, Joseph Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan, 3 F.3d 994, 16 Employee Benefits Cas. (BNA) 2841 (7th Cir. 1993)) and (abrogated on other grounds by, Milwaukee Brewery Workers' Pension Plan v. Joseph Schlitz Brewing Co., 513 U.S. 414, 115 S. Ct. 981, 130 L. Ed. 2d 932, 18 Employee Benefits Cas. (BNA) 2777, 75 A.F.T.R.2d 95-1110 (1995)).

84. Marcal, 650 F.3d at 317.

85. Marcal, 650 F.3d at 318-319.

86. Marcal, 650 F.3d at 318-319.

87. In Marcal, the Purchaser also argued that withdrawal liability is not based on "services rendered" to the estate. The Third Circuit dismissed the argument in a footnote, stating: "As explained, because withdrawal liability is based on the proportional amount of contributions the employer owed over the prior five years which in turn was based on the amount of the work the employees provided, withdrawal liability does bear a casual connection to services rendered." Marcal, 650 F.3d at fn. 3.

88. Marcal, 650 F.3d at 319.

89. Marcal, 650 F.3d at 317 ("The portion of the withdrawal liability which corresponds to that post-petition work is owed by [the Purchaser] in fulfillment of the promise it assumed as part of its purchase of Marcal's assets to provide pension benefits in consideration for that necessary post-petition work.").

90. Marcal, 650 F.3d at 317 ("[I]t is simply not seemly for [the Purchaser] to disclaim responsibility for the vested benefits Marcel created by choosing to use covered employees to perform post-petition work.").

91. Marcal, 650 F.3d at 318 (quoting Marcal Paper Mills, Inc., 2009 WL 3681897 *7.

92. Marcal, 650 F.3d at 318.

93. HNRC, 396 B.R. at 479.

94. HNRC, 396 B.R. at 479 ("The impact of these outside factors on the assessment of withdrawal liability is the essential element that distinguishes withdrawal liability from other consideration for the postpetition work of a debtor's employees.").

95. HNRC, 396 B.R. at 478 ("it seems appropriate to assert that claims for withdrawal liability relating to postpetition work by a debtor's employees should also be entitled to priority status.")

96. Marcal, 650 F.3d at 319.

97. Stock sales typically do not result in withdrawal liability because there normally is no change in the identity of the contributing employer. Kladder, Asset Sales After MPPAA—An Analysis of ERISA Section 4204, 39 Bus. Law. 101 (Nov. 1983) (citing Joint Explanation of S. 1076, 126 Cong. Rex. S10115 (daily ed. July 29, 1980) and PBGC Advisory Op. 820017 (May 26, 1982)).

98. 29 U.S.C.A. § 1384.

Schulte Roth & Zabel

Schulte Roth & Zabel LLP
919 Third Avenue, New York, NY 10022
212.756.2000 tel | 212.593.5955 fax | www.srz.com
New York | Washington DC | London