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CONTROLLED GROUP LIABILITY UNDER THE MULTIEmployER PENSION PLAN AMENDMENTS ACT: LIABILITY WITHOUT LIMIT?

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I. INTRODUCTION

The Multiemployer Pension Plan Amendments Act of 1980 (MPPAA)\(^1\) revolutionized the rules applicable to employers who participate in multiemployer pension plans.\(^2\) The principal change wrought by MPPAA is the imposition of statutory withdrawal liability on any employer withdrawing in whole or in part\(^3\) from a plan with unfunded vested benefits.\(^4\) Withdrawal liability exists independently of any provision in the parties' labor agreement and, indeed, cannot be limited by the parties through collective bargaining.\(^5\)

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3. A complete withdrawal occurs when a participating employer ceases to have an obligation to contribute (e.g., ceases to be signatory to a labor agreement) or permanently ceases covered operations (e.g., goes out of business). 29 U.S.C. § 1383 (1985). A partial withdrawal can occur under several scenarios, most frequently when an employer suffers a 70 percent or greater decline in contribution base units (hours/tons) for three consecutive plan years. 29 U.S.C. § 1385 (1985).

4. A defined benefit plan has vested, unfunded liability when the assets of the plan are insufficient, on an actuarial basis, to provide the plan beneficiaries with promised pension benefits which are then vested.

5. The amount of a plan's unfunded liability can, of course, be affected in collective bargaining in the sense that an increase in benefit levels or per unit contribution amounts will alter the plan's liability. However, the parties cannot limit liability owed under MPPAA through the use of language such as that in Article XX(d)(3) of successive National Bituminous Coal Wage Agreements ("[t]he sole obligation under this Section of any Employer signatory hereto shall be to contribute the amounts specified in this Section"). As the Court noted in Connolly v. PBGC, "[p]arties cannot remove their transactions from the reach of dominant constitutional power making contracts about them." Connolly v. PBGC, 106 S. Ct. 1018, 1025 (1986) (citations omitted) (quoting Norman v. Baltimore & Ohio R.R. Co., 294 U.S. 240, 307-08 (1935)). See also DeBreceni v. Healthco-D.G. Stoughton, 579 F. Supp. 296 (D. Mass. 1984).
This article will review the salient provisions of MPPAA as they relate to coal industry employers and will examine the Act's controlled group rules in depth. Although the examples will draw on coal industry situations the controlled group rules discussed herein apply to any employer sponsoring or participating in any defined benefit pension plan.

MPPAA's impact on the coal industry has not been as broad-based as the Federal Mine Safety and Health Act or the Surface Mining Control and Reclamation Act because it applies only to employers signatory to a labor agreement requiring participation in a multiemployer pension plan such as the United Mine Workers of America (UMWA) 1950 and 1974 Pension Plans ("the UMWA Plans"). Even within this limited group of employers, only those who withdraw in whole or in part from the UMWA Plans will be affected by MPPAA. Unfortunately, the consequences for those employers caught up in the Act's ambit can be devastating. For example, an employer's MPPAA liability can actually exceed the cumulative total contributions paid to the plan, as many employers withdrawing from the UMWA Plans have learned. Even more surprising is that under MPPAA's controlled group concept, a plan may pursue related, non-participating corporations and, in some

6. ERISA § 4001(b), 29 U.S.C. § 131(b) (1985 & Supp. 1987). In essence, the controlled group rules provide that all corporations and unincorporated trades or businesses with at least 80 percent common ownership are treated as a single entity for purposes of assessing and collecting MPPAA liability. Under these rules related employers will be liable for each others' pension obligations.

7. A defined benefit plan is one that specifies the benefit payable to the participant for life, after retirement.


10. Withdrawal liability for an employer participating in the United Mine Workers of America (UMWA) Pension Plans is calculated in accordance with the formula set forth at 29 U.S.C. § 1391(c)(3) (1985), referred to as the "rolling-five" method. The greater a plan's unfunded liability, the greater the withdrawal liability. The unfunded liability of the UMWA Plans was so large for the plan year ending June 30, 1981, for example, that it was not uncommon for employers withdrawing between July 1, 1981 and June 30, 1982 to be assessed substantially more in withdrawal liability than they contributed. This possibility is now remote because the funding status of both UMWA Plans has improved significantly in recent years. Indeed, the 1950 Plan was fully funded as of the plan year ending June 30, 1987. However, events such as a benefit increase or a decline in the value of a plan's assets resulting from investment reversals can affect a plan's funding status.
cases, individual shareholders personally for the withdrawn corporation's MPPAA liability.

This article contends that a lack of critical analysis by those courts which have applied the controlled group rules in the multiemployer plan context has created the potential for limitless corporate and personal liability. This result is in contravention of Congressional intent, is in derogation of MPPAA's principal goal of encouraging employers to participate in multiemployer pension plans, and raises significant constitutional concerns.

II. BACKGROUND

In 1974 Congress passed the Employee Retirement Income Security Act (ERISA), the most comprehensive federal regulation of private pension plans ever enacted. One of ERISA's most important features is the requirement that plan sponsors fully fund the pension benefits promised to their employees. The Pension Benefit Guaranty Corporation, a federal corporation, was established to serve, among other things, as a guarantor of pensions benefits where a plan is unable to make the payments.

ERISA regulates both single employer and multiemployer pension plans. Prior to the enactment of MPPAA, an employer participating in a multiemployer pension plan could withdraw and pass to those employers remaining in the plan the financial burden of

11. Although the various legislative reports leading to the enactment of ERISA discussed the need for some degree of employer liability for terminated underfunded plans, they emphasize that "if the degree of liability was so absolute to the extent of the employer's assets, it might drive some employers to the brink of bankruptcy, impose substantial economic hardship, or discourage the establishment of plans or the reasonable liberalization of benefits." H.R. Rep. No. 533, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & AD. NEWS 4639, 4654 & S. Rep. No. 127, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & AD. NEWS 4838, 4862.


paying off the plan’s unfunded liability.\textsuperscript{16} Congress became concerned that this was a destabilizing loophole in ERISA which actually encouraged employers to withdraw from multiemployer plans.\textsuperscript{17} To address these perceived deficiencies, in 1980, Congress enacted the Multiemployer Pension Plan Amendments Act. The cornerstone of the changes imposed by MPPAA is the requirement that any participating employer which withdraws from a multiemployer plan after September 26, 1980, must pay to the plan a pro-rata share of any unfunded liability which existed as of the end of the preceding plan year.\textsuperscript{18}

With respect to the assessment and collection of liability, MPPAA is as avowedly pro-plaintiff as any statute ever enacted. Indeed, it would be difficult to construct a collection mechanism more favorable to plaintiffs or more disadvantageous to defendants. For example, the Act includes a statutory presumption that determinations of plan trustees are presumed to be correct unless shown by a preponderance of the evidence to be unreasonable or clearly erroneous.\textsuperscript{19} Furthermore, an employer must pay the amounts assessed by a plan even though the assessment is being challenged.\textsuperscript{20} The statute also provided for elaborate and costly administrative review proceedings.\textsuperscript{21} Any misstep in invoking or pursuing these procedures constitutes an absolute waiver of an employer’s right to present virtually any defense on the merits in subsequent court proceedings. Indeed, there appears to be an alarming trend in the case law that the courts will not even hear questions of pure statutory

\textsuperscript{16} Under the law as enacted in 1974, a withdrawn employer could be assessed liability for up to 30% of its assets, but only if the plan terminated within five years after the employer ceased to participate. See PBGC v. R.A. Grey Co., 467 U.S. 717, 721-22 n.2 (1984).

\textsuperscript{17} See R.A. Gray, 467 U.S. at 721-22, 730.


\textsuperscript{19} 29 U.S.C. § 1401(a)(3)(A) (1985). This presumption is difficult to square with due process concerns about impartial decision making in view of the fact the plan trustees are subject to statutory fiduciary obligations charging them with the obligation to protect the interest of plan beneficiaries. Nevertheless this presumption has been upheld by several courts. Robbins v. Pepsi-Cola Metropolitan Bottling Co., 636 F. Supp. 641, 672 (N.D. Ill. 1986) (citations omitted).


\textsuperscript{21} 29 U.S.C. §§ 1399 & 1401.
interpretation unless they were first submitted to an arbitrator.\textsuperscript{22} The statute also provides that in any action to enforce, vacate, or modify the arbitrator's award there shall be a presumption rebuttable only by a clear preponderance of the evidence that the arbitrator's findings of fact are correct.\textsuperscript{23} One commentator, concluding that these procedures raise serious due process issues, has observed that, "[t]he dispute resolution process prescribed by MPPAA is unprecedented because it compels arbitration of a dispute and requires the arbitrator to defer to the findings of one party, while denying either party the right to a trial de novo."\textsuperscript{24}

Employers may decline to arbitrate for many reasons. Small employers such as contract mining operators (the group most likely to be assessed in the coal industry) typically do not pursue administrative remedies because they have virtually no understanding of MPPAA, particularly of the controlled group rules. Furthermore, the statute's administrative review requirements are complicated, time-consuming, and, from the employer's perspective, have all the trappings of the proverbial kangaroo court. As a practical matter, however, this statutorily created procedural barrier is of great value to a plan. Since an employer may be precluded from raising any defense not presented in arbitration, no matter how meritorious, a federal court collection action by a plan against an employer who has failed to navigate the shoals of arbitration is tantamount to obtaining a default judgment.\textsuperscript{25}

\textsuperscript{22} The extreme to which some courts have gone is illustrated by I.A.M. Nat'l Pension Fund v. Clinton Engines Corp., 825 F.2d 415 (D.C. Cir. 1987). In this case the district court concluded that the plan had wrongly applied § 4204 of ERISA, 29 U.S.C. § 1384, pertaining to the sale of assets when it issued a liability assessment against Cooper Industries. \textit{Id.} at 421 n.13. On appeal, the Court held that, although no disputed facts were in issue, questions involving only statutory interpretation must first be presented to an arbitrator. \textit{Id.} at 422-23. Since the company had not complied with ERISA's arbitration provisions, the Court reversed the trial court and ordered judgment entered for the plan, even though the Court did not question the trial court's interpretation of § 4204. \textit{Accord} Robbins v. Chipman Trucking, 8 Employee Benefits Cas. (BNA) 1251 (1986). \textit{Contra} Central Transp. Inc. v. Central States, Southeast & Southwest Areas Pension Fund, 639 F. Supp. 788, 640 F.Supp. 56 (E.D. Tenn. 1986), \textit{aff'd}, 816 F.2d 678 (6th Cir.), \textit{cert. denied}, 108 S. Ct. 290 (1987); Central States Pension Fund v. 888 Corp., 813 F.2d 760, 764 (6th Cir. 1987).

\textsuperscript{23} 29 U.S.C. § 1401(b)(2) & (c) (1985).


\textsuperscript{25} These procedural barriers are particularly burdensome to coal industry employers. Most
The Act’s requirement that a court must award a plan mandatory attorney fees and liquidated damages is, perhaps, the coup de grace, providing a plan with a weapon of enormous consequence. An employer willing to absorb the litigation costs associated with challenging a questionable assessment will often reconsider when apprised that an adverse decision will automatically include the additional cost of the plan’s attorneys fees. Indeed, the one-sided attorney’s fees weapon is sufficiently intimidating that many employers will forgo challenging a plan’s assessment, unless the amount at stake is substantial.

Against this backdrop of adverse statutory barriers and presumptions, MPPAA does offer some ameliorative provisions. For example, section 4210 states that a plan may provide that no liability will be assessed against an employer who participated in the plan for six years or less (the “free-look” rule). In order to reduce the burden on small employers section 4209(a) provides that up to $50,000 in liability will be waived (the mandatory de minimus rule), and section 4209(b) states that a plan may provide that up to $100,000 can be forgiven under certain circumstances (the discretionary de minimus rule). Furthermore, section 4225(a) provides that where the withdrawal is occasioned by a bona fide sale of all or substan-

companies withdrawing from the UMWA Plans are small family owned contract mining companies. They exist on the margin and have minimal assets by the time they cease operation. They are also the ones least likely to have access to legal counsel or others knowledgeable about the intricacies of MPPAA. The significance of this is particularly relevant when, in a collection action, the Plan pursues personal liability under MPPAA’s controlled group rules.

26. ERISA, § 502(g)(2), 29 U.S.C. § 1132(g)(2) (1985). A plan is entitled to interest, costs, attorney’s fees and liquidated damages equal to 20 percent of the delinquent withdrawal liability payments, or double interest, whichever is greater. If the employer is unsuccessful the attorneys fees award is mandatory irrespective of the merits of the employer’s position. See also Central States Pension Fund v. 888 Corp., 813 F.2d 760 (6th Cir. 1987)(reversing trial court’s award of attorney’s fees to employer who prevailed in litigation).

27. Whereas an employer can exercise control over the costs and fees incurred by his own counsel, he has no such control over the plan’s litigation costs. Ironically, since the plans will automatically recoup their litigation costs only if they are successful, they have a positive incentive to engage in a “scorched earth” litigation policy. A defendant may, of course, challenge a plan’s attorney’s fee claim as being unreasonable, but again at the risk of incurring additional attorney’s fees. The fact that an attorney’s fee award is mandatory also gives a plan an incentive to be intransigent in accommodating an employer’s position in settlement discussions.


tially all of the employer’s assets, withdrawal liability is limited to 30% of the first $2 million of the employer’s liquidation or dissolution value.\(^{30}\) The Supreme Court relied on these moderating provisions in *Connolly v. PBGC*,\(^{31}\) rejecting a claim that MPPAA’s withdrawal liability provisions were violative of the Fifth Amendment. Unfortunately, section 4211(d)(2)\(^{32}\) specifies that none of these ameliorative provisions are available to employers participating in the UMWA Plans unless the Plan is amended to provide accordingly. The UMWA Plans have yet to adopt even one of these mitigating rules.

**III. THE CONTROLLED GROUP RULES: A LIABILITY NIGHTMARE COME TRUE**

In view of MPPAA’s undeniable pro-plan orientation, it is not surprising that many employers will elect not to contest a notice of withdrawal liability assessment. Typically, the recipient of an assessment letter has ceased to contribute because business reversals have created a situation where further operations would only exacerbate an already poor financial condition.\(^{33}\) For such employers, a challenge to the assessment, even if successful, would be of no material consequence to the company’s future viability. Thus, the decision to leave the corporation’s remaining assets to the creditors, including the multiemployer plan, may come easily.\(^{34}\)

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30. 29 U.S.C. § 1405(a) (1985). This liability limitation is on a sliding scale; 30% for the first $2 million, and an increasing percentage reaching 80% of the dissolution value in excess of $10 million.


32. 29 U.S.C. § 1391(d)(2)(1985). This section refers to plans covered under § 404(c) of the Internal Revenue Code. In fact, the UMWA Plans are the only § 404(c) plans in existence.

33. The assessment may be ignored for other reasons too. Frequently, contract mining companies think that any liability is the responsibility of the lessor/licensor who actually made contributions to the plans on behalf of the contractor. Also, such companies may view their cessation of contributions as temporary because they anticipate a resumption of operations. Neither is an adequate defense. See, e.g., Coal Drilling Serv. v. UMWA 1974 Pension Plans, 5 Employee Benefits Cas. (BNA) 1833 (1984) (Polak, Arb.); United Food & Commercial Workers Pension v. G. Bartusch Packing Co., 546 F. Supp. 852 (D. Minn. 1982).

34. This is especially true when the assessment is against a company which leases its mining equipment, or has used its equipment to secure bank loans to obtain operating capital. As a practical matter, the primary asset of such companies is their work force. Since they typically have minimal unencumbered assets, they have little incentive to contest a large assessment, even if viable defenses exist.
While this may appear to be a practical business judgment, it may also be a prescription for disaster for any employer falling within the scope of ERISA's controlled group regulations. Multiemployer plans have argued that these rules which were devised for a completely different purpose enable them to transcend the boundaries of limited corporate liability to reach affiliated corporations, and even the shareholders' personal assets in order to collect the withdrawn employer's MPPAA liability. Regrettably, many courts have applied these rules in a totally mechanical fashion leading to an extreme expansion of liability, unjustified in many situations because there is no rational connection between the underfunded plan and the secondarily liable party.

A. Scope of the Controlled Group Rules

Any analysis of MPPAA controlled group liability begins with section 4201(a) of ERISA, which imposes withdrawal liability on an "employer" who withdraws from a multiemployer plan. Moreover, section 4001(b)(1) provides in relevant part:

For purposes of this subchapter, under regulations prescribed by the [Pension Benefit Guaranty] corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and business as a single employer. The regulations prescribed under the preceding sentence shall be consistent and co-extensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of [the Internal Revenue Code of 1954].

The Pension Benefit Guaranty Corporation has never promulgated explanatory regulations tailored to MPPAA. Instead, the inter-

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35. Where the participating employer is a proprietorship or partnership, the prospect of unlimited personal liability for MPPAA assessments is consistent with well established legal doctrine. However, application of the controlled group rules to extend liability beyond the assets of a withdrawing corporation is a substantial change insofar as it is not premised on traditional exceptions to limited corporate liability such as piercing the corporate veil or alter ego.


38. 29 C.F.R. § 2612.2 (1985) provides in relevant part that: "[T]rades or businesses (whether
Interpretation of when a group of trades or businesses shall be treated as a single employer has been left to the courts, which must rely on section 414(c) of the Internal Revenue Code (the Code) and the regulations issued thereunder. The rules are quite extensive and a complete analysis is beyond the scope of this article. In essence they have been interpreted to mean that an individual or entity may be held jointly and severally liable for a related company's withdrawal obligation, no matter how independent or remote their commercial relationship.

Code section 1563(a) and its implementing regulations recognize three types of controlled groups: parent-subsidiary, brother-
sister, and a combination of the two.\textsuperscript{45} Under these tests, it is im-
material whether the stock of the member corporation is closely held,
or publicly traded.\textsuperscript{46} Consequently, if one member of a controlled
group of corporations withdraws from a multiemployer pension plan,
\textit{all} members, as determined under Code section 1563, may be jointly
and severally liable for the amount of the withdrawal obligation.\textsuperscript{47}

These rules, especially the brother-sister controlled group test,
have swept many unsuspecting coal industry employers into the con-
trolled group nightmare. A brother-sister controlled group exists
where the same five or fewer individuals own at least 80\% of two
or more corporations and, when taking into account the lowest com-
mon ownership percentage for each individual in the companies,
such individuals own more than 50\% of the total stock of all com-
panies.\textsuperscript{48} This principle is illustrated by the following example in
which L, M and N are members of a brother-sister controlled group:\textsuperscript{49}

\begin{itemize}
\item \textsuperscript{45} 26 U.S.C. § 1563(a)(3) (1982 & Supp. 1987). This is a catch-all which encompasses any
\item \textsuperscript{46} 26 U.S.C. § 1563(a)(3) (1982 & Supp. 1987). This is a catch-all which encompasses any
\item \textsuperscript{47} 26 U.S.C. § 1563(a)(3) (1982 & Supp. 1987). This is a catch-all which encompasses any
\item \textsuperscript{48} 26 U.S.C. § 1563(a)(3) (1982 & Supp. 1987). This is a catch-all which encompasses any
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\end{itemize}
Identical Percentage of Stock Ownership

<table>
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<th>B</th>
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<td>45</td>
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<td>M</td>
<td>25</td>
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<tr>
<td>N</td>
<td>20</td>
<td>30</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>85</td>
<td>96</td>
<td>91</td>
<td>52</td>
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For a more realistic example, consider Bad Luck Coal Corporation, owned 50% each by two individuals, Mr. Inby and Mr. Outby. Inby and Outby are also equal partners in the Good Luck Partnership, which owns a Dairy Queen franchise in Hawaii. Under the brother-sister controlled group rules, Bad Luck and Good Luck are treated as a single employer.

To tighten the controlled group net, the rules provide for attribution of ownership. Thus, to determine a person’s ownership percentage, stock will be deemed constructively owned by that person in certain situations. Stock ownership may be attributed to a person from partnerships, estates or trusts, corporations, spouses, and minor children. Application of these attribution rules could result in pulling an unwary spouse, who is part owner simply due to tax reasons, into the controlled group, thus making his or her assets available for the satisfaction of withdrawal liability. Moreover, if any person, including a corporation, has an option to acquire stock of a corporation, such stock will be considered owned by the option holder.

The implications of these rules for expanding the universe of those liable for the withdrawal obligations of a corporation are extraordinary. Literal application of the rules would make an individual, such as a farmer, engineer, grocer, consultant or other person

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50. The remaining stock in L, M and N is owned by unrelated third parties.
52. 26 U.S.C. § 1563(e)(1) (1982 & Supp. 1987); 26 C.F.R. § 11.414(c)-4(b)(1987). An option to acquire an option will also be considered an option to purchase stock. See IUE Pension Fund v. Barker & Williamson Co., 788 F.2d 118 (3rd Cir. 1986) for a vivid example of how the mere ownership of a stock option may create liability that would not otherwise exist.
conducting an unincorporated trade or business (even part-time) personally liable for all withdrawal liability assessed by a plan against a separate corporation which is at least 80% owned by the individual. For example, consider the case of Larry Litigator, a solo practitioner, who also is the sole shareholder of Bad Luck Coal Company, a corporation which contributes to the UMWA Plans. Assume Mr. Litigator purchased Bad Luck for $300,000 and has never taken any salary or dividends during the time he has owned the company. For reasons beyond anyone's control, Bad Luck goes out of business, and Mr. Litigator loses his entire investment. To compound Bad Luck's woes, the UMWA Plans issue Bad Luck a withdrawal liability assessment totaling $300,000. Under the controlled group rules, Mr. Litigator may be personally liable for Bad Luck's $300,000 withdrawal assessment, despite the fact that his only connection to the company is the loss of his $300,000 investment.

The foregoing example may appear extreme and unrealistic. Unfortunately, it is commonplace. It is not at all unusual for one or more individuals to incorporate a company which participates in a multiemployer plan and, at the same time, engage in other investment or commercial activity through an unincorporated entity. Ultimately, this may result in the individuals being held personally accountable for the liabilities of the corporation.

53. ERISA, § 4225(c), 29 U.S.C. § 1405(c) (1985), limits the liability of an individual obligated to contribute to a plan as a proprietor or partner to assets not subject to protection under bankruptcy law. See also Teamsters' Pension Trust Fund v. H. F. Johnson, 830 F.2d 1009 (9th Cir. 1987).

54. See, e.g., Connors v. Eskimo Coal Co., No. 85-3430 (D.D.C. June 26, 1986) (two 50% shareholders sued personally under § 4001(b) because they also had an equipment leasing partnership, even though the partnership did not conduct any business with the withdrawn employer); Connors v. Black Bolt Coal Co., No. 86-2749 (D.D.C. Oct. 6, 1987) (sole shareholder of withdrawn corporation also owned a music store and other unincorporated non-coal business interests); Connors v. B&M Coal Co. No. 84-514 (D.D.C. May 28, 1986) (shareholder sued personally because he had a leasing company which owned a parcel of land on which was located a fast food franchise); Connors v. Longwall Mining, No. 86-2478 (D.D.C. Nov. 6, 1987) (two 50% shareholders sued personally because they also had a partnership which invested primarily in oil and gas leases); Connors v. Calvert Dev. Co., 622 F. Supp. 877 (D.D.C. 1985) (no discussion concerning business engaged in by the partnership); Connors v. Peles Coal Co., 637 F. Supp. 321 (D.D.C. 1986) (no discussion concerning business engaged in by proprietorship); Connors v. Incoal, Inc., No. 86-3162 (D.D.C. Nov. 17, 1986) (See order of July 8, 1987, permitting filing of amended complaint against shareholders on the basis of their unincorporated ownership of farm).

55. For tax reasons, conducting investment or business activity in this manner may be desirable, especially where the unincorporated entity has no employees and does not intend to do business with the general public.
liable for the corporation's withdrawal liability. This application of the controlled group rules shocks the conscience and undermines MPPAA's stated goal of encouraging new employers to join multiemployer plans. Furthermore, in the multiemployer context, it cannot be harmonized with the underlying purpose of the controlled group concept, as discussed below.

B. Purpose of the Controlled Group Rules

The controlled group concept is quintessentially a device to insure fairness and uniformity in the implementation and administration of employee benefit plans and the nation's tax laws. Indeed, the controlled group concept actually pre-dates ERISA, and was first utilized, in the form adopted by ERISA, to address abuses in the use of multiple corporate surtax exemptions by related employers.\(^{56}\)

ERISA does not require an employer to offer pension plan coverage. However, it does set forth detailed substantive and procedural requirements which a plan, if made available, must satisfy. When ERISA was enacted in 1974, Congress was concerned that a sponsoring employer could split a business into smaller parts and provide a tax-qualified pension plan to only those parts of the enterprise in which the owners, officers or more highly paid employees were employed in violation of the Act's nondiscriminatory coverage and benefit rules.\(^{57}\) The controlled group concept provides the perfect antidote to this potential abuse because it requires that all employees of commonly controlled businesses be treated as if employed by one employer.

Consider a simple example. Assume a corporation with 100 employees splits into two companies with 50 employees each. Under


section 410(b)(1)(A) of the Internal Revenue Code\textsuperscript{58} a plan sponsored by only one company would not qualify for favorable tax treatment (i.e. contributions would not be deductible based on the applicable percentage test) because the plan does not cover 70\% of the 100 individuals employed by all trades or business under common control. However, even in the context of preventing discrimination in plan coverage, Congress acknowledged that if the abuse intended to be regulated was not present (i.e., if in fact there is no discrimination in favor of the owners, officers or the highly compensated), separate pension arrangements for different trades or business with the controlled group should nonetheless qualify, despite the failure to meet the group-wide percentage coverage test. Thus, in the example above, under the so-called nondiscriminatory classification test of Section 410(b)(1)(B),\textsuperscript{59} the plan would qualify if the 50 covered employees represent a "fair cross section" of the total employment of the "employer" (the controlled group).\textsuperscript{60}

This two-part analysis makes sense. A multi-faceted group of companies often contains entities totally independent of one another in their product, services or geographic location. ERISA acknowledges that where one individual unit (or subsidiary) establishes its own retirement plan, the controlled group rules will not operate to disqualify the plan or deny it preferential tax treatment where the group of highly compensated employees is not receiving a disproportionate share of benefits.

The legislative history of the controlled group rules focused almost exclusively on their importance in preventing discrimination in the establishment of plan coverage and benefits.\textsuperscript{61} Under section 4001(b) of ERISA, however, the rules also operate to assign liability to all members of a group where an underfunded single-employer

\begin{footnotesize}
\textsuperscript{60} These tests are discussed, for example, in Sutherland v. Commissioner, 78 T.C. 395 (1982) nonacq. 1986-1 C.B. 1. The controlled group rules also apply in determining whether several other tax-favored programs are offered on a nondiscriminatory basis. See 26 U.S.C. § 414(b) (1978 & Supp. 1987).
\textsuperscript{61} See supra note 57.
\end{footnotesize}
plan is terminated or where an employer withdraws from an underfunded multiemployer plan.

The application of the controlled group rules to expand liability for underfunded terminating pension plans similarly was grounded in an attempt to prevent an abuse. Congress was concerned that an employer could intentionally promise greater pension benefits than it could afford, with knowledge that an insurance system, through PBGC, would secure its obligations. Thus, as ERISA was originally enacted, an employer was liable to cover benefits to the extent of 30% of its net worth. The expansion of the concept of "employer" to include members of a controlled group was arguably an extension of this policy.

Unfortunately, with respect to the relevance of the rules to the collection function, the Act does not set forth a rule of reason parallel to the nondiscriminatory classification test of Code section 410(b)(1)(B), or even the general discrimination in fact test of section 401(a)(4) of the Code. There is no statutory fairness component that restricts the controlled group concept to situations where an employer has actually avoided responsibility for an underfunded plan by fragmentation of a business. As a result, in the collection area the controlled group rules are asymmetrical and are not necessarily applied in a manner consonant with the purpose of preventing a targeted abuse. Rather, there has been a tendency to automatically assign liability to each of the constituent trades and businesses, even though this might cause rather than prevent an abuse. This is an unfortunate consequence of using one set of rules for two quite disparate purposes.

This problem was noted in PBGC v. Anthony Company. In Anthony the PBGC sought to hold a parent corporation (Kaplan)
liable for the unfunded liability of a bankrupt subsidiary (Anthony),
even though the economic benefit realized by Kaplan through its
affiliation with the subsidiary was substantially less than the plan’s
unfunded liability. The court observed:

Indeed, in terms of the statute we are confronted with two provisions whose
principal focus was not exactly the same, but that are capable of interacting in
a totally arbitrary and unreasonable manner because of the flawed Regulations.
Anyone who has practiced in the ERISA field knows that the definition of “em-
ployer” in Section 1301(b)(1) was expressed in broad form primarily to prevent
the then-familiar practice of discriminating in pension plan coverage by creating
separate corporate entities—or put differently, to preclude companies from the
selective assignment of employees to different corporations, though the employees
were within the same economic entity in real-world terms, in an effort to avoid
the requirement that highly-paid employees not be favored by such plans. But
the termination provision aims primarily at a somewhat different problem: as
stated more extensively in the opinion, to prevent premature termination of a
plan by an employee’s reasonable expectations as to pension benefits.67

IV. SINGLE EMPLOYER PLANS AND MULTIEmployER PLANS:
DISTINCTIONS WITH A DIFFERENCE

A. Single-Employer Plans

The case law interpreting ERISA’s provision that “trades or bus-
inesses (whether or not incorporated) which are under common con-
trol shall be treated . . . as a single employer” has been analyzed
and applied primarily in the context of single-employer pension plans.
Single-employer plan coverage may apply to all employees, to man-
agement employees, or only to hourly employees whether unionized
or non-unionized.68 By definition, management has total responsi-
bility for establishing and funding a single-employer plan. Even where
the plan results from collective bargaining with a union, the spon-
soring employer is necessarily involved in every aspect of plan design
and funding, and unfunded liability attributable to benefit increases
can arise only with the consent of the employer. Furthermore, the

67. Id. at 45. (emphasis in original).
68. Assuming, of course, that the plan meets the non-discrimination tests of sections 401 and
410 of the Internal Revenue Code.

https://researchrepository.wvu.edu/wvlr/vol90/iss3/4
plan exists to provide benefits exclusively for the employer’s employees.

It was Congress’ expressed intent that the ERISA-imposed requirement to fully fund promised pension benefits not crush the employer. Thus, ERISA provides that where the PBGC must step in to provide the vested benefits, the Corporation’s indemnification from the employer is limited to 30% of the employer’s (i.e. controlled group’s) net assets.

The seminal case applying the controlled group rules to assign liability for an underfunded single-employer plan is Pension Benefit Guaranty Corp. v. Ouimet Corp. The facts in Ouimet Corp. are paradigmatic of the relationship between a corporation sponsoring an underfunded single-employer pension plan and the other trades and businesses in the controlled group.

Ouimet Corp. involved a family of corporations (plus an unincorporated entity known as the Wareham Trust) owned by Mr. Emil Ouimet. One of the companies, Ouimet Corporation, purchased Avon Sole Company in 1968, at a time when Avon’s collectively bargained plan covering its union-represented employees was underfunded by $92,000. Seven years later, when Avon filed a Chapter XI bankruptcy petition, the plan’s unfunded liability had increased to more than $550,000. After reviewing the controlled group regulations, the court found that the Ouimet Group was clearly under common control for purposes of section 1301(b). The court concluded that:

We are not persuaded that, because only one of a group of corporations under common control contributes to a plan, it is unjust to make the group responsible

69. See supra note 11.
72. Ouimet Corp., 630 F.2d at 6-7.
73. Id. at 7
74. Id. at 8.
for the plan’s deficit. The facts of this case illustrate why such a group should be treated as an integrated whole. Ouimet purchased Avon with full knowledge of the plan and its funding requirements. Ouimet participated in the labor negotiations resulting in greater pension benefits that contributed to the deficit. The Ouimet Group filed a consolidated tax return on which the Avon contributions were deducted. We see nothing unfair in treating the Ouimet Group as a single employer.75

Extending liability for an underfunded pension plan beyond the sponsoring corporation certainly constitutes a frontal assault on fundamental notions of limited liability for corporate obligations.76 Although the Supreme Court has never ruled on the constitutionality of controlled group liability, decisions in other cases suggest that the court would not find the rules to be *per se* violative of the protection afforded by the Fifth Amendment, particularly when balanced against the competing interest that employees have in their pensions.77

It is not unreasonable to balance the equities in favor of employees who stand to lose long-held expectations of retirement income, when the actions which led to a plan’s underfunding can fairly be imputed to others who participated directly or indirectly in the decisions leading to the underfunding, or who attained direct financial benefits by virtue of their association with the sponsoring employer. As the trial court noted in *Ouimet Corp.*, “[o]ne purpose of ERISA is . . . preventing employers from promising more than they can deliver by way of benefits when negotiating collective bargaining agreements. . . . The statute reflects Congress’ judgment that, without controlled group liability, businesses could juggle their activities to eviscerate the termination liability provisions of ERISA.”78 Not only was Avon’s funding deficiency not remedied dur-

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75. Id. at 12.
76. On appeal after remand, the *Ouimet* court noted that the “corporate form is a creature of state law and states may impose stringent limitations on attempts to disregard it. . . . [H]owever, [such limitations] do not constrict a federal statute regulating commerce for the purpose of effecting social policies.” 711 F.2d at 1093. See also Note, Extending ERISA Liability for Pension Plan Terminations to Controlled Group Members: Pension Benefit Guaranty Corp. v. Quimet Corp., 61 B.U.L. Rev. 477, 501 (1981) for additional justifications for the court’s conclusion that liability was properly applied to all controlled group members.
77. See Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976); See also Connolly, 106 S. Ct. 1018.
ing the time Mr. Ouimet controlled the company, it worsened substantially. In this regard, it cannot be gainsaid that Mr. Ouimet either knew or should have known that Avon’s acquiescence in labor negotiations to benefit increases without a commensurate funding commitment might leave Avon employees without their promised pensions.

Such considerations may provide a rational basis for application of the controlled group rules in many single-employer plan situations. However, some factual patterns have tested the willingness of the courts to apply the rules mechanically. In *PBGC v. Anthony Co.*, 79 Anthony filed a Chapter XI bankruptcy petition in February 1978 at a time its pension plan was underfunded by approximately $1.4 million. 80 The court observed that under the controlled group rules, Anthony and Kaplan were a single employer, 81 but the court questioned the constitutionality of the rules as applied to Kaplan. Kaplan had acquired a majority interest in Anthony prior to the effective date of ERISA, but after Anthony had already established its pension plan. The court noted that in this situation,

> so long as the subsidiary remains a ‘closed container’ in economic terms, the parent has derived no direct economic benefit from pension plan underfunding and of course it never promised the pension benefits. In such a situation there is no rational line between the congressional end of insuring the pension benefits and the means of assessing the acquiring parent corporation to pay those benefits. 82

The court concluded that since Anthony had been acquired pre-ERISA, to apply the control group rules rationally, in due process terms, Kaplan could be held liable for Anthony’s unfunded pension obligations only to the extent that Kaplan had realized direct financial benefits through its association with its subsidiary. 83

*PBGC v. Dickens* 84 illustrates another factual situation in which the court declined to apply the rules literally. In *Dickens*, a former

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80. *Id.* at 1050.
81. *Id.* at 1052.
82. *Id.* at 1055.
83. *Id.* at 1056.
employee of Puffer-Hubbard Products, Inc. purchased the stock of the parent company for $1 and then laid off all of Puffer-Hubbard’s employees a few days later and filed a Chapter XI bankruptcy petition.\textsuperscript{85} A second corporation, Heinicke Instruments Company, subsequently purchased the stock of Puffer-Hubbard’s parent from Mr. Dickens for $1.\textsuperscript{86} Ten days later, the bankruptcy court approved a sale of Puffer-Hubbard’s assets to a company unrelated to Heinicke.\textsuperscript{87} Nevertheless, the PBGC sought to hold Heinicke liable for Puffer-Hubbard’s unfunded pension liability on the theory that the two companies were trades or businesses under common control at the time Puffer-Hubbard’s plan was terminated.\textsuperscript{88} The court concluded that the legislative purpose for imposing liability under the rules would not be served by including Heinicke in the controlled group since Puffer-Hubbard was at all times under the control of the bankruptcy court, and Heinicke was never in a position to abuse the termination insurance program.\textsuperscript{89} Anthony and Dickens demonstrate that, even in the single-employer plan context, courts have on occasion refused to apply the controlled group rules mechanically.\textsuperscript{90}

B. Multiemployer Plans

No case applying the controlled group rules in the multiemployer plan context has ever carefully compared the distinct differences between the two types of plans.\textsuperscript{91} Rather, the cases have relied on Ouimet Corp. and its progeny and on a statement by Senator Harrison Williams in MPPAA’s legislative history affirming that MPPAA “does not modify the definition of ‘employer’ in any way, and the

\begin{footnotes}
\footnotetext[85]{Id. at 923.}
\footnotetext[86]{Id. at 924.}
\footnotetext[87]{Id. at 926.}
\footnotetext[90]{See also Sutherland v. Commissioner, 78 T.C. 395 (1982). But compare PBGC v. Center City Motors, 609 F. Supp. 409 (S.D. Cal. 1984).}
\footnotetext[91]{See, e.g., Progressive Supermarkets, 644 F. Supp. 633; H.F. Johnson, 830 F.2d 1009. But see Justice O’Connor’s observations in Connolly, 106 S. Ct. at 1030-32 (O’Connor, J., concurring). See also infra text accompanying notes 115-118.}
\end{footnotes}
"Ouimet Corp. decision remains good law." It is true, no doubt, that some of the reasons relied on by the courts to find a fair and rational basis for imposing controlled group liability in the single-employer plan context are equally applicable to many multiemployer plans. However, many are not. The UMWA Plans provide an excellent example of the crucial differences between the two types of plans.

Since 1950, unionized employers in the bituminous coal industry have been covered by a uniform labor agreement known as the National Bituminous Coal Wage Agreement (NBCWA). Bargaining is accomplished on an industry-wide basis between the UMWA and the Bituminous Coal Operators’ Association (BCOA). Although BCOA member companies have always accounted for the majority of UMWA-represented production, association members account for only a small fraction of those companies which are signatory to the NBCWA. For example, of the 2,000 or so employers signatory to the 1981 NBCWA only 130 were BCOA members. BCOA membership had declined to 52 companies by 1984.

Non-BCOA member companies have never had any role in negotiating the National Agreement. Rather, after national bargaining is complete, these independent producers traditionally were expected and, if necessary, compelled to follow the pattern set by the UMWA National Agreement to the point of becoming ‘non-member signatories’ to that agreement. . . . [T]he basic system of contractual relations, in which nonmember, unionized producers were expected to sign the union’s master work contract after it was reached with the BCOA remained largely intact under the watchful eye and powerful protection of the union.

92. 126 Cong. Rec. 23,287 (Aug. 26, 1980). Note that this comment probably refers to the district court decision, as the First Circuit did not enter its decision until August 29, 1980. This is the extent to which MPPAA’s legislative history dealt with the relationship of the controlled group rules to extending liability beyond the withdrawing corporation.
94. Id. at 57, 61, 78, 113, 163.
95. Id. at 113, 245.
97. C. Perry, supra note 93, at 161-63.
98. Id. at 162. See also id. at 57, 148, 165.
The primary reason the UMWA has been able to impose a national agreement (and an industry-wide pension plan) on the entire coal industry for more than 35 years is its well-documented willingness to resort to force.99 Historically, if the UMWA and the BCOA fail to reach agreement, all coal mines are shut down.100 Rarely has a contract strike been nonviolent, and virtually no union operator would consider attempting to operate during a strike.101

The coal industry multiemployer pension plans evolved against this backdrop. The UMWA Welfare and Retirement Fund was created in negotiations between the UMWA and the U.S. Department of Interior in 1946,102 It was continued as a result of UMWA-BCOA bargaining in 1950 and was continued in every NBCWA through 1974. It is the direct predecessor of the UMWA 1950 and 1974 Pension Plans which were established in 1974 collective bargaining.103

From 1950 through 1974 Plan Trustees made virtually all decisions including eligibility determinations and benefit levels.104 If plan assets were inadequate to maintain benefit levels set by the Trustees, eligibility standards were changed or benefits were cut. In response to the enactment of ERISA, national bargaining in 1974 resulted in two major changes.105 The first involved splitting the ex-


100. C. Perry, supra note 93, at 57, 62, 148. A. Thieblot & T. Haggard, supra note 99, at 40. The 1984 National Agreement was reached without a national strike. However, strike action against independent employers who resisted Union demands continued to be characterized by extreme violence. See, e.g., Joint UMWA/NLRB Settlement Agreement approved by National Labor Relations Board on March 4, 1987, settling multiple violence cases and prohibiting UMWA violence against any coal industry employers in West Virginia, Kentucky and Pennsylvania. International Union, UMWA v. NLRB, No. 9-CB-6146-1 (Dec. 24, 1986), effectuated in, NLRB v. UMWA, District 17, No. 80-1680 & 82-1998 (4th Cir. Apr. 24, 1987).

101. A. Thieblot & T. Haggard, supra note 99, at 79. See also id. at 40, 90, 95-97. As one commentator has noted, "the United Mine Workers of America (UMWA) still relies on bloodshed, dynamite, and intimidation to coerce acceptance of the Union's demands. Not only has violence continued to be characteristic of UMWA strikes and organizing efforts, its use has acquired the sanctity of tradition." Id. at 79.

102. C. Perry, supra note 93, at 138. This was the forerunner of all multiemployer pension plans.

103. Id. at 77. See also NBCWA of 1984, art. XX(a).


105. C. Perry, supra note 93, at 124, 245. See also Robinson, 455 U.S. at 566.
isting Welfare and Retirement Fund into separate plans;\textsuperscript{106} the 1950 Pension Plan (participation limited to miners who last worked for a signatory employer on or before December 31, 1975) and the 1974 Plan (participation limited to eligible miners who work(ed) for a signatory employer on or after January 1, 1976). Secondly, benefit levels were for the first time set by the bargainers, not the Trustees. This, in conjunction with ERISA, converted a defined contribution plan into two separate defined benefit plans. As noted above, all matters relating to the Plans are within the sole province of the UMWA and the BCOA. At no time have independent signatories had any voice in the creation, implementation or administration of the UMWA Pension Plans.

The situation that existed in the coal industry on the eve of the Multiemployer Pension Plan Amendments Act in 1980 can be summarized as follows. Through a series of collective bargaining agreements the UMWA and the BCOA had agreed to a level of pension benefits that resulted in pension plan underfunding of approximately $1.7 billion for the 1950 Plan and $1.8 billion for the 1974 Plan.\textsuperscript{107} Through its policy of imposing the national agreement on all companies, the Union insured that all non-BCOA companies also participated in the UMWA Plans, resorting to violence as necessary to accomplish this end.\textsuperscript{108}

\textbf{C. Distinctions With a Difference}

Even if the rules work reasonably well in the single-employer plan context, they do not in multiemployer plan arena. Indeed, they

\textsuperscript{106} Two multiemployer health benefit plans were also created at this time. See NBCWA of 1974, art. XX.


\textsuperscript{108} Reference is made to the methods employed by the Union to maintain a uniform national contract only to demonstrate that participation in a multiemployer plan may arise from motivations substantially different from the voluntary sponsorship of a single-employer plan. The Union's ability to impose the national agreement on all employers was so complete that even employers who first became signatory after 1975 (and who therefore could never employ anyone eligible to participate in the 1950 Plan) were nevertheless obligated to contribute to the 1950 Plan on the same basis as those signatories who had employed eligible miners. This is particularly remarkable because, under applicable labor law, it is an unfair labor practice for a union to insist to impasse on proposals relating to benefits for persons already retired. Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971).
lead to irrational and abusive results with such frequency that the basis for their imposition must be reexamined.

In single-employer plans, a nexus between the unfunded benefits promised by one member of a group of trades or businesses under common control and the other members is frequently direct and identifiable. The sponsoring business benefits from the services rendered on its behalf by the covered employees. Moreover, the company's shareholders also benefit insofar as the company has not set aside money to pay the promised pensions. Thus, the individuals who made or at least consented to the decisions resulting in the underfunding also benefit from their concurrent ownership of other businesses. The benefit is direct insofar as the companies file consolidated tax returns, do business with one another, or serve as collateral for loans. When the underfunded plan of a member company is terminated, the PBGC must step in and underwrite the deficiency using insurance premiums paid by all plan sponsors. In this context, it is not unreasonable to require that other businesses in the traditional "corporate family" reimburse the PBGC for 30% of their assets. In effect, the rules operate as a limited piercing of the sponsoring employer's corporate veil. This is consistent with the Congressional goal of shoring up the nation's pension system without crushing any individual employer.

However, this situation contrasts sharply with that which characterizes many multiemployer plans, particularly those in the coal industry. In the coal industry, the notion that each employer was a willing and equal partner in the collective bargaining that created the liability is pure fiction. Furthermore, with respect to any company which became a participant in either UMWA Plan after 1975,

109. See Connolly, 106 S. Ct. at 1030 (O'Connor, J., concurring):
Where a single employer has unilaterally adopted and maintained a pension plan for its employees, the employer's responsibility for the presence of a promise to pay defined benefits is direct and substantial. The employer can nominate all the plan's trustees and enjoys wide discretion in designing the plan and determining the level of benefits. Where such a plan holds out to employees a promise of definite benefits, and where employees have rendered the years of service required for benefits to accrue and vest, it seems entirely rational to hold the employer liable for any shortfall in the plan's assets, even if the plan's provisions purport to limit the employer's liability in the event of underfunding upon plan termination.
most if not all of the unfunded liability was already fixed.\textsuperscript{110}

Most of the other criteria offered as justification for extending liability beyond the sponsoring employer for a single-employer plan are equally suspect in the multiemployer plan context. Unlike a single-employer plan, a multiemployer plan does not actually terminate when a participating employer withdraws. Thus, payments by a withdrawn employer are made to the plan, not the PBGC, and operate to reduce the future contribution obligations of other employers, or to fund future benefit increases. Furthermore, the employer’s withdrawal liability may bear no relationship to accrued benefits attributable to its own employees. In the case of the UMWA Plans, for example, most of the liability assessed against any withdrawing employer is attributable to benefits accrued by beneficiaries for time worked for companies which went out of business before ERISA was enacted. In many cases the credited time was worked for companies which were never even signatory to a UMWA labor agreement.\textsuperscript{111} Indeed, with respect to any employer who first participated in either Plan after 1974, not one dollar of withdrawal liability is allocable to unfunded vested benefits assignable to the employer’s employees.\textsuperscript{112} Moreover, in the single-employer plan total controlled group liability to the PBGC is generally limited to 30% of the group’s net worth even though the employees’ services benefited only the sponsoring employer. In the multiemployer plan, each controlled group member is liable for 100% of its assets even though none of

\textsuperscript{110} The 1978, 1981 and 1984 NBCWA’s did provide for a benefit increase for pensioners in both plans. Such increases would create some unfunded liability. However, in view of the sizeable tonnage and hourly rates paid by employers under these contracts, such increase probably did not add significantly to the Plans’ net unfunded liability.

\textsuperscript{111} Both the 1950 and 1974 Plan and Trust documents recognize credited service for substantial amounts of time for which no contributions were made to the Plans. Additionally, a series of court decisions have required the Trustees to credit many miners for service which was not with a UMWA signatory, or for which no contributions were made. See, e.g., Roark v. Boyle, 439 F.2d 497 (D.C. Cir. 1970); Pete v. UMWA Fund of 1950, 517 F.2d 1275 (D.C. Cir. 1975) (en banc); Blankenship v. UMWA Fund of 1950, Nos. 2186-69 & 2350-69 (D.D.C. Feb. 26, 1973)(order approving settlement).

\textsuperscript{112} 29 U.S.C. § 1082(b) (1985) required that underfunded plans become fully funded within a specified period of years. Thus, since 1974 an employer’s tonnage and hourly contributions to the UMWA Plans have been sufficient to fund the benefits being earned by active employees, plus pay off the unfunded liability which was created in 1974 when the Plans were converted from defined contribution to defined benefit plans.
the unfunded benefits may be attributable to beneficiaries who worked for the employer.

In view of such considerations, the justification for imposing liability for unfunded benefits which existed before a withdrawing employer even joined the plan is subject to severe criticism.\textsuperscript{113} Such liability is particularly objectionable where it exceeds the employer’s net worth. Expanding the universe of those responsible for paying this liability to include affiliated trades and businesses clearly injects a constitutional dimension, particularly where the affiliated entity has had no connection to the withdrawn employer other than common ownership. And where a court enforces a plan’s claim that the controlled group rules authorize it to levy against a shareholder’s personal assets solely because the shareholder coincidentally maintained an unincorporated business, notions of fair play are violated beyond rationalization.

V. THE CONSTITUTIONAL DIMENSION

The controlled group concept is clearly applicable to multiemployer plans under section 4001(b). What is not clear is whether the purpose of the rules is to prevent abuses (e.g. creating two companies, one to hold the assets and the other to sign the labor agreement in order to avoid liability), or to provide a plan with secondary sources of recovery irrespective of any rational connection between the existence of the liability and the secondary source. While the former interpretation would likely pass constitutional scrutiny, the latter is suspect.

MPPAA is not without constitutional limits. Although the Supreme Court has upheld the Act against a number of facial challenges,\textsuperscript{114} in \textit{Connolly} Justice O’Connor stated:

I write separately to emphasize some of the issues the Court does not decide today. Specifically, the Court does not decide today, and has left open in previous

\textsuperscript{113} See Washington Star Co. v. International Typo. Union Negotiated Pension Plan, 729 F.2d 1502, 1510 (D.C. Cir. 1984) ("Congress could not have imposed liability for pre-MPPAA underfunding on employers who began contributing to a plan subsequent to the enactment of the MPPAA without discouraging new entrants to multiemployer plans and thus defeating the MPPAA’s purpose.")

\textsuperscript{114} PBGC v. R. A. Gray & Co., 467 U.S. 717 (1984); See also Connolly, 106 S. Ct. 1018.
cases, whether the imposition of withdrawal liability under the MPPAA and of plan termination liability under the Employee Retirement Income Security Act of 1974 (ERISA) may in some cases be so arbitrary and irrational as to violate the due process clause of the Fifth Amendment. [Citations omitted]. The Court also has no occasion to decide whether the MPPAA may violate the Taking Clause as applied in particular cases. . . . 115

In this regard, Justice O'Connor noted that “[o]ur recent cases leave open the possibility that the imposition of retroactive liability on employers for the benefit of employees may be arbitrary and irrational in the absence of any connection between the employer’s conduct and some detriment to the employee.” 116 Justice O’Connor identified a number of features of multiemployer plans that form the basis for questioning whether the imposition of retroactive liability under MPPAA may rest on suspect rationale. 117 These characteristics include: (1) prior to ERISA many multiemployer plans specified that an employer’s obligation was limited to the making of contributions, and that both employers and employees understood that the promise to pay pensions was conditioned on the availability of plan assets; (2) benefit levels were established by trustees rather than the negotiating parties; (3) promises in a collectively bargained plan may not always be rationally traceable to the employer’s conduct; (4) some employers may not begin participation in the plan until long after the benefit structure has been determined; (5) some employers may have had to say whatever in establishing critical features of the plan that determine the level of benefits; and (6) an employer may be assessed withdrawal liability even though that employer’s contributions exceed the present value of all benefits accrued by its employees.

Interestingly, since these observations were made in the context of imposing liability on a participating employer they would be magnified where a plan seeks to impose such liability not on the participating employer, but on a controlled group member with no connection to the withdrawn employer other than common ownership. Nevertheless, some courts have gone to extremes to expand

115. Connolly, 106 S. Ct. at 1028.
116. Id. (citations omitted).
117. Id. at 1029-32.
liability to non-participating controlled group members under the rules.118

The result reached in Teamsters' Pension Trust Fund v. H.F. Johnson,119 is particularly egregious. In H.F. Johnson, a Teamsters' pension plan obtained a default judgment for more than $440,000 against a withdrawn corporation.120 The plan discovered that two individuals who each owned 49.5% of Johnson's stock also were joint venturers in an entity known as Lockwood Leasing Company.121 Lockwood did not contest its controlled group status with H.F. Johnson. However, the plan also sought a judgment against the shareholders personally since Lockwood was not incorporated.122

The individuals defended on the basis that applying the controlled group rules to make them personally liable would be violative of Due Process, unless the plan could show that Lockwood derived some benefit from its presence in the H.F. Johnson controlled group.123 The court disagreed, concluding that since the shareholders had established Lockwood as an unincorporated entity, for business reasons and their personal benefit, they would be personally liable for H.F. Johnson's liability irrespective of any financial interdependence between Johnson and Lockwood Leasing, or any benefit to the individuals because of the relationship between the two companies.124 Decisions such as H.F. Johnson demonstrate that Justice

119. Teamsters' Pension Trust Fund v. H.F. Johnson, 830 F.2d 1009 (9th Cir. 1987).
121. H.F. Johnson, 830 F.2d at 1012. The decision does not discuss the nature of the business engaged in by Lockwood, or its connection to H.F. Johnson, if any.
122. Id. One of the shareholders was deceased, and the suit was against his estate.
123. Id. at 1013.
124. Id. at 1015. This decision appears to be seriously flawed for other reasons as well. The court apparently concluded that the controlled group concept at § 1301(b) imposes an obligation to contribute to the plan on all controlled group members, thereby bringing into play § 1405(c)—which allows a withdrawn sole proprietor or partnership to limit personal liability to that which would be protected in bankruptcy. It is beyond question that under basic labor law doctrine only a contract signatory is liable to make contributions. Apparently the court was seeking to find a way to avoid the perverse result that greater liability would adhere to a non-participating proprietorship than to a participating proprietorship. The court's implausible analysis is further evidence of how a mechanical use of the controlled group rules to allocate withdrawal liability necessarily leads to irrational results.
O'Connor's concerns have not been heeded, and that the Supreme Court clarification of the constitutional limits of ERISA's controlled group rules is urgently needed.

VI. AREAS OF CONTROVERSY

Interestingly, the controlled group rules do not compel the results reached in some of the more draconian decisions. Even as written, the rules are capable of an interpretation that would avoid much of the irrationality that results when they are applied literally in the multiemployer context. The two most important areas of flexibility involve the definition of what constitutes "a trade or business" and the extent of the liability to be imposed on particular group members.

A. What is a trade or business?

Often the determination of whether an entity may be brought into a controlled group hinges on a finding of its status as a "trade or business." Unfortunately, assigning a clear meaning to the phrase is greatly complicated because it is nowhere defined, although it appears in over 50 sections and 800 subsections of the Internal Revenue Code, as well as in hundreds of places in proposed and final regulations. Furthermore, the synonymous phrases "carrying on a trade or business" and "engaging in a trade or business" appear in the code no less than 60 times. A review of the available literature indicates that the term is given widely differing meanings depending on the context in which it is used.

The issue of what constitutes a "trade or business" in this context was brought to a head in a series of cases where individual

shareholders were pursued for corporate pension liability because they also maintained a rental proprietorship which leased property through a net lease.129

**PBGC v. Center City Motors**130 was the first reported decision to address this issue in the single-employer plan context. Center City Motors, an incorporated automobile dealership, maintained an underfunded single employer plan which was terminated in 1975. The PBGC eventually sued both Center City Leasing, a proprietorship, and its individual partners under the controlled group rules because they also owned Center City Motors.131 The property in question was leased to Center City Motors through a net lease.132

The leasing partnership (and the individual partners) sought summary judgment on the grounds that a net lease is not considered to be a trade or business under the tax code.133 The court refused to grant summary judgment, holding that tax code treatment of trade or business is not determinative for ERISA purses.134 Further, the court concluded that where the lease was between two related entities, the fact that it was a passive lease would not preclude the leasing company from being considered a trade or business under common control, because it was Congress' intent to prevent such fragmentation of business operation.135 The court specifically declined to express an opinion as to how it might rule had the net lease been with an entity not under common control.136

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129. A net lease refers generally to an arrangement where the lessor receives a fixed rental, performing few if any services or functions with respect to the property, and the lessee is responsible for most if not all expenses associated with the property. Holding commercial property in this manner through an unincorporated enterprise is not uncommon, because of favorable tax advantages.


131. Id. at 410-11.

132. Id. at 411.

133. Id.

134. Id.

135. Id. at 412. The court's characterization of the Congressional intent is too glib. It was Congress' intent to prevent abuses that might arise as a result of business fragmentation, not to prevent or penalize those who elect to conduct business through several distinct entities rather than on monolithic company. This is demonstrated by the use § 410(b)(1)(B) which allows for plan qualification under the rules where the targeted abuse does not exist, even though there is business fragmentation.

136. Id. The decision merely denied defendants' motion for summary judgment on the trade or business issue. Thus, the record does not reveal the extent of the relationship, whether it was in fact designed to avoid liabilities, or whether the court would have imposed a limit on the partners' personal liability.
The issue was revisited in *United Food & Commercial Workers Union v. Progressive Supermarkets*, a case involving more than $750,000 in withdrawal liability assessed by two multiemployer pension plans. Progressive Supermarkets' shareholders also maintained B.E.G.M. Associates, a general partnership which owned a parcel of land upon which one of Progressive's stores was located. B.E.G.M. leased the property to the corporation through a net lease. B.E.G.M. and its individual partners defended on the basis that the partnership was a passive investment trust and, therefore, was not a trade or business. The court reviewed the status of the case law interpreting a trade or business in the net lease context and concluded that interpretations under Code sections other than § 414(c) were not controlling. The court, without discussing whether any of the abuses intended to be addressed by the rules were present in the case, simply held that treating the companies as a single employer would insure that the realities of business organization would prevail over the formalities of corporate structure. However, this court also declined to speculate on whether the result might be different had the net lease been with a third party.

In *Connors v. B&M Coal Company*, the UMWA Plans sued Tazewell Leasing and its proprietor for withdrawal liability which had been assessed against a corporation which was also owned by the individual. Tazewell Leasing owned a parcel of real estate which it leased out, but it had no employees and was not engaged in the offering of goods and services. The court reviewed existing case law and authority with respect to the what constitutes a trade or

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138. *Id.* at 635.
139. *Id.*
140. *Id.*
141. *Id.* at 637.
142. *Id.* at 638.
143. *Id.* at 639.
144. *Id.*
146. Opinion of May 28, 1986 at p. 16. This opinion was subsequently withdrawn and reissued to reflect that the parties had previously stipulated to the dismissal of Tazewell Leasing as a defendant. In view of this it has precedential value only insofar as the reasoning employed by the court is compelling in its own right.
business under the Internal Revenue Code. In view of § 1301(b)’s express reference to § 414(c), the court felt that “the presumption that construals under the IRC of what does and does not constitute a trade or business should be controlling.” The court concluded that the lease arrangement maintained by Tazewell Leasing did not rise to the level of a trade or business.

To determine whether the activities of a taxpayer rise to the level of carrying on a business requires the examination of the facts in each case. In the absence of a uniform and functional definition of trade or business, and in light of the PBGC’s failure to develop regulations interpreting the phrase in the MPPAA withdrawal liability context, the courts should look to Code and tax authority for guidance. Moreover, the court should consider a variety of factors, such as the offering of goods and services, continuity, repetition and extensiveness of the activity, and the profit-making motive. For example, a sporadic activity, a hobby, or an amusement diversion clearly should not qualify as trade or business. Existing authority supports the basic concept that a “trade or business” must be an actively conducted enterprise having at least some of the usual characteristics of a typical business, such as employees, and the provision or sale of goods and/or services.

In numerous tax cases and rulings, the courts and the Internal Revenue Service construed the term “trade or business” under different code sections, drawing a distinction between passive enterprises and true trades or business. The courts have adhered to the

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147. Id. at 14.
148. Id. at 17.
150. Id. at 217.
151. This principle has enabled the Internal Revenue Service to successfully defeat attempts by taxpayers to take advantage of favorable business-oriented tax provisions when in fact their purported businesses were merely investments. Section 162 of the Internal Revenue Code permits deductions for actively conducted businesses only. Regulations under section 761 of the Code (Treas. Reg. § 1.761-1(a) (1987)) provide that a mere co-ownership of property and sharing expenses and collecting rents, does not constitute a “partnership” entitled to special tax treatment under subchapter K of the Internal Revenue Code, unless the co-owners actively carry on a business. Section 1231 of the Code provides favorable tax treatment for the sale of property used in a trade or business, but not for investment properties. Section 6166 of the Code permits an estate to amortize federal estate tax liabilities over several years to the extent attributable to interests in a closely held business.
general principle that truly passive investment enterprises, no matter how extensive, are not a trade or business.\(^{152}\) In *Commissioner v. Groetzinger*,\(^{153}\) for example, Justice Blackmun recognized that most trades or businesses must have some active component. Further, the Supreme Court held more than 40 years ago that the mere ownership of property and the collection of interests, dividends or rents does not constitute "carrying on a trade or business."\(^{154}\) It is equally clear that the mere holding of stocks, bonds, real estate or other investment property does not constitute a trade or business under the Code for any purpose. Moreover, Internal Revenue Service rulings under Section 6166 of the Code clearly illustrate the principle that the mere passive ownership of property does not constitute a "trade or business."\(^{155}\)

Such enterprises have no direct relevance to ferreting out the abuses intended to be prevented under the controlled group rules of ERISA. These endeavors normally do not involve setting up employee benefit plans which could, through fragmentation of a business, allow the establishment of plans benefiting exclusively owners, officers or the highly compensated, to the exclusion of others. Similarly, it is highly unlikely that they are established in the first instance to avoid imposition of MPPAA liability. Although it would be inappropriate to rely exclusively on such restrictive tax code authority to determine which entities will be treated as § 1301(b) trades or businesses for MPPAA liability purposes, the extensive broad-

\(^{152}\) See, e.g., Ninberg v. Commissioner, 26 T.C.M. (CCH) 512, 515 (1967); *Higgins*, 312 U.S. 212 (taxpayer denied deductions for expenses incurred in connection with investment in real estate, stocks and bonds, involving interpretation of predecessor to Code section 162 which allows deductions for expenses in connection with "carrying on a trade or business").

\(^{153}\) Commissioner v. Groetzinger, 107 S. Ct. 980 (1987). This case involved a claim that a full time gambler who made wages solely for his account was engaged in a "trade or business" for purposes of Code sections 162(a) and 62(1). The court concluded that basic concepts of fairness demanded that the gambler's activity be regarded as a trade or business since it involved all the indicia normally associated with that concept.

\(^{154}\) *Higgins*, 312 U.S. 212. See also Deputy v. DuPont, 308 U.S. 488, 499 (1940) (Frankfurter, J., concurring).

based authority which separates passive commercial endeavors from active businesses is highly relevant. Many tax advantages available to business owners are not available to investors or even those with a hobby which on occasion makes a profit. In fairness, individuals involved in such activities should not be saddled with the penal elements of the controlled group rules without demonstration of the targeted abuse simply based on definition of the phrase "trade or business."

Thus, while a court arguably has wide latitude in determining what constitutes a trade or business for purposes of determining the scope of liability for MPPAA obligations, it should construe the term narrowly when faced with commercial endeavors not traditionally entitled to the advantages afforded to true "trades or businesses." Unfortunately, most of the decisions to date reflect a tendency to simply disregard such substantial authority under the tax code and resort instead to pronouncements that broad construction of the term will provide maximum protection to workers covered by pension plans.

Even if such uncritical generalizations are arguably appropriate in the single-employer plan arena, they are of no relevance in the MPPAA collection context. Thoughtful treatment of the targeted abuses which concerned Congress in seeking to prevent the fragmentation of a trade or business offers the best opportunity to craft a MPPAA liability policy that harmonizes the controlled group concept with the goal of encouraging employer receptivity to participation in multiemployers plans.

In this regard, certain enterprises clearly should not constitute a trade or business for MPPAA liability purposes. A proprietorship involved in a net lease should not be characterized as a trade or business, unless it can fairly be said that it was an integrated part of the "business" of the withdrawn employer, or unless there is affirmative evidence that the arrangement was designed to avoid MPPAA liability. Moreover, all activities which lack clear indicia of trade or business status, such as leasing arrangements which have no employees and which do not conduct business with the general public,

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hobbies, tax shelters and investment devices, should be excluded from the term "trade or business", unless the plan can demonstrate a direct connection the withdrawn employer.

B. The extent of personal liability for corporate withdrawal obligations.

It is clear that Congress did not intend that MPPAA be interpreted to authorize a *per se* piercing of the corporate veil. Absent a controlled group situation, the personal exposure of shareholders for their withdrawn corporation's MPPAA liability will be adjudicated in accordance with traditional exceptions to the basic doctrine of limited liability for corporate obligations. Thus a shareholder's personal assets, even if accumulated as the result of years of successful operations by the withdrawn corporation, are not subject to collection by the plan.

This was made clear in *Connors v. P&M Coal Co.* In *P&M*, the trial court awarded the UMWA Plans judgment against the two 50% shareholders of the corporation because they had significant ownership and control over the operation of the corporation and were personally involved in matters pertaining to the Plans and to the decision to withdraw. On appeal, the court rejected the Plans' argument that an economic reality test was consistent with the purpose of MPPAA, concluding that

the principle of limited liability is so fundamental to our corporate law that we require more than an expansive interpretation of a definition in Title I to persuade us that Congress intended the word 'employer' in Title IV to encompass owner-officers acting within the legitimate scope of their corporate responsibilities.

Significantly, the court considered the interplay between the imposition of personal liability and the Congressional intent with respect to MPPAA, concluding that, "given MPPAA's stated policy to alleviate conditions 'which tend to discourage the maintenance and growth of multiemployer pension plans' [citations omitted], we find

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158. Id. at 1375.
159. Id. at 1377.
it doubtful that Congress would have required controlling shareholders to surrender the limited liability protection afforded by corporate law as a condition for allowing their companies to participate in such plans." \(^{160}\)

The First Circuit reached the same conclusion in *DeBreceni v. Graf Brothers Leasing*, \(^{161}\) a case very similar to *P&M* on its facts. The court observed that "the principle of limited liability is a cornerstone of corporate law" \(^{162}\) and "longstanding enough and important enough to be considered a background norm, against which Congress may act of course, but which is controlling in the absence of such action." \(^{163}\) As in *P&M* the court considered the legislative history and purposes of MPPAA, and concluded that the Act represents a balance between efforts to protect existing pension plan beneficiaries through a short term strategy of imposing burdens on current employer contributors and through a long term strategy of encouraging new employers to contribute to multiemployer pension funds [citations omitted]. Imposing personal liability for withdrawal payments would hurt that long term strategy by discouraging controlling individuals from directing their corporations to participate in multiemployer pension funds." \(^{164}\)

Applying the controlled group rules in a manner that makes shareholders personally liable because they maintained a separate trade or business as a proprietorship or partnership conveys to a plan, indirectly, a source of liability recovery which Congress proscribed directly. Yet, nothing in the statute or the legislative history compels this inconsistent result. Furthermore, this exceptionally harsh result finds support nowhere except in judicial decisions. It is ironic that some courts have discarded with relative ease the significant doctrine of limited liability for corporate obligations to give effect to the purported Congressional intent that controlled group liability should be expansive, while applying the corollary to this doctrine—unlimited personal liability where the corporate form does not exist—ruthlessly, without consideration as to whether the imposition of personal lia-

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160. *Id.* at 1378.
162. *Id.* at 879.
163. *Id.* at 880.
164. *Id.*
bility is likewise consonant with legislative intent and statutory goals. By parity of reasoning if "one of the evident purposes of Congress in enacting § 1301(b)(1) was to ensure that 'the realities of business organization' would prevail over 'the formalities of corporate structure' in imposing liability under ERISA," 165 then such realities are equally relevant in ascertaining whether unlimited personal liability is appropriate. That is, if the doctrine of limited liability for corporate obligations is not sacrosanct under the controlled group concept, then the doctrine of unlimited personal liability for the obligations of an unincorporated entity should likewise not be sacrosanct.

Decisions such as *H.F. Johnson, Progressive Supermarkets* and *Calvert Dev. Co.* permit plans to accomplish indirectly what they cannot accomplish directly—pursue individual shareholders personally for corporate withdrawal liability. Not only do the controlled group rules not mandate this result, but applying the rules in this manner also leads to such routinely arbitrary and irrational results that the boundary of constitutional protection are clearly breached.

The fact that application of the rules cannot pass a rational basis analysis can be demonstrated by a simple example. Two cousins, Larry Litigator and Peter Partner each inherited $400,000 from a relative. Larry, a struggling attorney practicing on his own, invested $300,000 of his inheritance to purchase Bad Luck Coal Company, putting the remaining $100,000 into a money market account. He lives frugally because he earns only $30,000 a year from his law practice, and Bad Luck has never shown a profit. Peter Partner invested $300,000 of his inheritance to purchase Good Luck Coal Company, also placing the remaining $100,000 in a money market account. Peter earns $200,000 a year in a large law firm where he is a partner, and he has also received $400,000 in salary and dividends from Good Luck. As a result of adverse business conditions in the industry, both companies have ceased operations, and each has been assessed $300,000 in MPPAA liability.

A mechanical application of the controlled group rules will enable the plan to obtain a personal judgment against Larry Litigator for

$300,000 because Bad Luck and Litigator's law proprietorship are trades or businesses under common control. The plan will levy against Litigator's $100,000 money market account, and he will be able to protect his assets and income only to the extent they are exempt under applicable bankruptcy law. Peter Partner on the other hand will have no personal liability to the plan because, under the controlled group rules, his multiple partner law practice is not in Good Luck's controlled group.

As this example illustrates, literal application of the rules cannot lead to a defensible allocation of liability unless they are premised on some rational connection between the withdrawn employer and the entity to be held secondarily liable. Although the Act does not authorize a *per se* piercing of the corporate veil to hold shareholders personally liable for corporate withdrawal liability, the controlled group rules are being used to accomplish this end against certain groups in a highly discriminatory manner. In effect, they operate to make one category of shareholders liable (owners of unincorporated businesses), in a manner that deprives this group of equal protection under law.

Furthermore, even assuming a connection between the entities can be demonstrated, the unincorporated enterprise should, for collection purposes, be treated as though it were incorporated, thereby limiting the plan's recovery to the net assets of the trade or business absent circumstances justifying application of traditional veil-piercing doctrines. This limitation is completely consistent with the often-cited purpose of the controlled group rules "to prevent a business from limiting its responsibilities under ERISA by the fractionalization of its business operations." Applying the rules in this manner addresses the realities of business organization by, in effect, ignoring the separate existence of the unincorporated entity and placing it back into the "business" of the withdrawn corporation. On the other hand, to seize on the existence of an unincorporated entity in the controlled

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166. In *Progressive Supermarkets*, for example, the facts might, when fully developed, demonstrate that the property in question was placed in B.E.G.M. Associates after the effective date of MPPAA, and for the purpose of minimizing assets should the corporation become unable to pay its obligations.

group as a basis for imposing unlimited personal liability on the cor-
porate shareholders emphasizes the formalities of corporate structure
in a punitive, even vindictive fashion. 168

VII. TOWARDS A RATIONAL THEORY OF CONTROLLED GROUP
LIABILITY FOR MULTIEMPLOYER PLANS

Congress intended that the federal courts develop a federal com-
mon law to fill in the interstices of ERISA. 169 The courts have relied
upon this directive frequently to implement the Act in a manner con-
sistent with its purposes. 170 In view of the lack of legislative history
concerning the role of the controlled group concept in assigning li-
ability for corporate withdrawal obligations, and the absence of reg-
ulations implementing the concept in a manner consistent with the
realities of both multiemployer plans and business structures, it is
certainly appropriate that the courts develop a thoughtful, consistent
application of the concept in specific cases. Indeed, in view of the
significance of the rules to those affected, and the arbitrary appli-
cations to date, development of federal common law in the multiem-
ployer plan area is critical. It is suggested that the outlines for a
common law doctrine of MPPAA controlled group liability should
include the following general principles.

First, contrary to the analysis in Center City Motors and Pro-
gressive Supermarkets, the concept of what constitutes a trade or
business should be viewed narrowly, not expansively. Substantial de-
ference should be given to the tax code treatment of “trade or busi-
ness.” Thus, net leases, commercial activities which are little more
than investment devices or legitimate passive tax shelters, part-time
activities, and “businesses” which are in reality hobbies, should not

168. The court imposed personal liability on the individual shareholder(s) for corporate with-
drawal obligations in the amount of $440,000 in H.F. Johnson, 830 F.2d 1009, more than $750,000
Supp. 877, without any consideration of the actual value of the unincorporated entity, or the existence
of the targeted abuse.

body of Federal substantive law will be developed by the courts to deal with issues involving rights
and obligations under private welfare and pension plans”).

170. See, e.g., Murphy v. Heppenstall Co., 635 F.2d 233, 237 (3d Cir. 1980); Van Orman v.
American Ins. Co. 680 F.2d 301, 311 (3d Cir. 1982).
be swept into the definition of a trade or business. In the situation where the unincorporated entity is involved in the business of the withdrawn employer, liability can be assigned under other doctrines.¹⁷¹

Secondly, a facts and circumstances test should be applied when considering the expansion of liability for any corporation withdrawing from a multiemployer plan. Where the plan cannot demonstrate any connection between its unfunded liability and the withdrawing employer, the rules should not be applied to make a non-participating controlled group member liable.¹⁷² Example: The sole shareholder of Bad Luck Coal Company also owns Fun Times, Inc., a tour guide company in Hawaii which has never had any relationship whatsoever to the coal company. Bad Luck can demonstrate that none of the plan’s unfunded liability is attributable to benefits accrued by Bad Luck’s employees. Although these two entities fall within the controlled group definition, liability should not be expanded to Fun Times, Inc. absent clear evidence that their corporate forms were utilized to avoid payment of the assessment.

Third, where the economic connection between the withdrawn employer and the non-participating controlled group member is sufficient to justify the imposition of liability, the amount of the liability should bear some rational relationship to the advantages gained. Where the two companies do business almost exclusively with one another, this test would result in holding the non-participating employer liable for up to the full amount of its net assets. Where the connection is at best indirect (such as filing a consolidated tax return), the liability of the non-participating employer should be limited to an amount

¹⁷¹. A restrictive reading of “trade or business” does not deprive a plan of the ability to pursue personal liability under traditional exceptions to limited corporate liability such as alter ego and piercing the corporate veil. See P&M Coal Co., 801 F.2d at 1378; Graf Bros. Leasing, 828 F.2d at 879. Furthermore, section 4212(c) of ERISA, provides that: “If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.” 29 U.S.C. § 1392(c). This provision serves as an additional source of authority for preventing corporate manipulation, independent of the controlled group concept.

¹⁷². Even the Tax Court, in the context of applying the rules in the plan discrimination context, cautioned against incautious application of the rules: “Respondent’s harsh position does nothing to advance the purpose Congress had in mind in enacting section 414(c), but does plenty to subvert the overriding purpose of Congress to encourage the establishment of pension plans for employees.”
reasonably related to the advantages conferred by virtue of the controlled group relationship, similar to the approach used by the court in Anthony Co.

Fourth, under no circumstances should an individual be held personally liable for the corporate obligation solely because of the existence of an unincorporated trade or business in the controlled group. Rather, the extent of liability should be limited to the net worth of the unincorporated trade or business. Any liability beyond this should be based not on the controlled group rules, but on the same considerations that always apply when considering whether individual shareholders should be personally liable for corporate obligations.

VIII. CONCLUSION

In cases to date, courts have demonstrated a willingness to apply the controlled group rules literally and broadly, without an in-depth analysis of their relevance in the multiemployer plan context. Moreover, liability has been imposed without regard to whether the members of the group have any economic or commercial relationship, or whether application of the rules is, in fact, redressing abusive or manipulative behavior. Furthermore, joint and several liability is being imposed on shareholders solely because an unincorporated business is in the group.

This mechanical use of the controlled group concept is not consistent with the purpose of MPPAA or the Congressional intent underlying the rules themselves. Indeed, literal application of the rules raises serious constitutional issues because the results are routinely irrational, have no connection whatsoever to the existence of the liability in question, and discriminate impermissible against the owners of small, unincorporated trades or businesses and individuals who engage in investment-type activities or tax sheltered arrangements. Such results are not compelled by the statute and could be avoided by interpreting and applying the rules in an analytical and thoughtful manner reflective of their true purpose.