REPORT OF THE SUBCOMMITTEE ON
MULTIEMPLOYER PLAN WITHDRAWAL LIABILITY

Prepared By:

Linda Baldwin Jones
Anthony Cacace
Jon Chatalian*
Tim Eicher
Eric Field
Lars Golumbic
James Hlawek
Dinah Leventhal
Bruce Perlin*
Barry Slevin
Louisa Soulard*

*DISCLAIMER: The opinions of Mr. Perlin, Mr. Chatalian, and Ms. Soulard are theirs alone and do not reflect the views of the PBGC.
II. Determination and Assessment of Withdrawal Liability

B. Computation of Liability

In *GCIU-Employer Retirement Fund v. Quad/Graphics, Inc.*, 909 F.3d 1214, (9th Cir. 2018), the Ninth Circuit, in affirming the decision of the district court, found the fund had properly applied the crediting and limitations of ERISA §§ 4206(b) and 4219(c)(1)(B) in determining Quad’s liability.

Following partial withdrawals in 2009 and 2010, Quad completely withdrew from the fund in 2011, and the fund assessed withdrawal liability and credited Quad for its partial withdrawal pursuant to ERISA § 4206(b). The employer challenged the sequence in which the fund applied ERISA § 4206(b)’s reduction, however, arguing that the fund was required to first apply ERISA § 4219(c)(1)(B)’s twenty-year cap.

In affirming the district court, the Ninth Circuit found that ERISA § 4201 “unambiguously” specifies the order in which an employer’s liability determined under ERISA § 4211 is adjusted: first, by application of the de minimis rule; next, by any adjustment under ERISA § 4206(b) for a partial withdrawal; and only then does the “debt forgiveness” of the twenty-year cap apply. The court further reasoned that Quad’s proffered sequence was flawed from a practical standpoint because the partial withdrawal credit reduces the employer’s complete withdrawal liability, and the twenty-year cap can only be applied after the employer’s actual liability is known.

1. Allocation Formulas

In *Trap Rock Industries, Inc. v. Teamsters Local 469 Pension Fund*, 2018 WL 3054685, 2018 EB Cases 219045 (D.N.J. June 20, 2018), the court addressed whether an employer’s annual withdrawal liability payments should be based on the highest contribution rate that the employer was obligated to pay to the fund under the CBA or the highest contribution rate for prevailing wage work under the New Jersey Prevailing Wage Act (“NJPWA”).

Under ERISA, annual withdrawal liability payments are based on a product of two numbers, one of which is the highest contribution rate at which the employer had an obligation to contribute under the plan during the 10 plan years preceding the year in which the withdrawal occurred. The highest contribution rate that the employer was obligated to pay to the fund under the CBA over that time was $5.75. The employer also performed work that was subject to the NJPWA, which required the employer to compensate employees who performed prevailing wage work at specified minimum rates. The pension rate for the work that was subject to the NJPWA was higher than the contribution rate under the CBA. While the pension rate for work subject to the NJPWA was higher than the contribution rate for work under the CBA, the employer was not required to pay that difference to the fund. Rather, the employer could have paid the difference directly to the employees performing prevailing wage work. However, in this instance, the employer paid the difference to the fund rather than directly to the employees.

The fund calculated the employer’s annual withdrawal liability payments based on the higher pension rate for prevailing wage work that was subject to the NJPWA. The employer demanded arbitration, arguing that it was not obligated to pay to the fund the difference between
the pension rate for work subject to the NJPWA and the contribution rate for work under the CBA. The arbitrator disagreed, finding that while the employer was not originally required to pay the difference to the fund, once it did it assumed an obligation to continue to contribute to the fund at that rate. Thus, the arbitrator found that employer’s annual withdrawal liability payments should be based on the highest contribution rate for prevailing wage work under the NJPWA. The court affirmed that decision for the same reason.

2. Actuarial Assumptions and Methods

In The New York Times Company v. Newspaper and Mail Deliverers’—Publishers’ Pension Fund, 303 F. Supp. 3d 236, 2018 EB Cases 103166 (S.D.N.Y. 2018), on appeal to 2d Cir: (Case Nos. 18-1140, 18-1408), a district court enforced an arbitrator’s determinations with regard to whether the employer partially withdrew from the multiemployer fund and how the fund was required to credit the employer for a prior partial withdrawal. Significantly, however, the court vacated the arbitrator’s affirmation of the Fund’s use of the “Segal Blend” as the interest rate assumption in the withdrawal liability calculation.

The question as to whether the employer incurred a “70% decline” partial withdrawal rested on the interpretation of contribution base units (“CBUs”) under the CBA. The CBA required the employer to contribute to the fund “per shift for each shift worked” with a maximum of five shifts per week. But the contribution rate was 8% of the wages paid per “shift” and also required contributions at the 8% rate for paid leave. Recognizing the ambiguity that existed in the CBA, the arbitrator considered extrinsic evidence to interpret the CBA. The fund’s auditor and actuary testified that they always understood the CBUs to be “shifts.” But the employer testified that it had always contributed based on 8% of total wages. After considering the extrinsic evidence presented by both sides, the arbitrator sided with the fund and determined that “shifts” were the correct CBUs, and therefore, a 70% decline in CBUs had occurred. The court upheld the arbitrator’s decision finding that, because an ambiguity existed, the interpretation of the CBA was a mixed question of fact and law, and that the arbitrator’s decision was not in “clear error.”

The issue in calculating the amount of the employer’s second partial withdrawal involved the correct order in applying the prior credit in the partial withdrawal liability calculation. The fund argued that the plain language of ERISA required the plan to first calculate the employer’s complete withdrawal, then subtract the credit for the prior partial withdrawal, and then multiply that amount by the proration fraction based on the employer’s contributions in the year after the partial withdrawal. The plan asserted that calculating the liability as though there was a complete withdrawal—which is the first step in calculating an employer’s partial withdrawal liability under ERISA § 4206(a)(1)—required the plan to first apply the credit for the prior partial withdrawal before multiplying by the proration fraction. According to the plan, to do otherwise would be rendering the requirement to determine first the complete withdrawal amount superfluous (as crediting for a prior partial is a step in determining the complete withdrawal). The employer argued that the plan needed to apply the credit for the prior partial withdrawal after it multiplied the complete withdrawal calculation by the proration fraction because that is the order of the steps under ERISA § 4206, and that order was supported by PBGC Op. Letter 85-4. The arbitrator found the employer and PBGC’s interpretation a more faithful reading of the statute, and the court found no clear error in the arbitrator’s determination.
With regard to the interest rate assumption, the court rejected the employer’s argument that funds must use the same interest rate in calculating an employer’s withdrawal liability as they use for determining liabilities in their annual funding calculations. However, the court found that the fund actuary’s use of the Segal Blend did not comply with the requirement under ERISA § 4213 that, absent PBGC regulation, the assumptions in the aggregate result in the actuary’s best estimate of anticipated plan experience. The fund actuary testified that, although 7.5% returns was her anticipated expectations for how the plan’s assets will perform in the future, the Segal Blend (with an effective rate of 6.5% for this fund) was the proper rate for withdrawn employers who do not share in the risk of the fund’s assets underperforming after the employer’s withdrawal. The employer argued that withdrawn employers also do not share in the gains when the fund’s assets over-perform after the employer’s withdrawal. Notwithstanding these arguments, the court focused on the issue was whether the rate used by the plan was the actuary’s best estimate of anticipated plan experience. Because the only evidence presented on the question of anticipated experience was the fund actuary’s testimony that, for purposes of determining the fund’s annual funding requirements, she anticipated 7.5% returns on assets, the court concluded that the fund had to use 7.5% in determining liabilities for calculating the employer’s withdrawal liability.

Due to the above, the employer’s withdrawal liability payments made through the arbitration decision were in excess of the total amount of the withdrawal liability assessment (even before the court vacated the arbitrator’s determination of the Segal Blend). The fund argued that it owed no interest on the refunded overpayments because of ERISA’s anti-inurement provision. The fund also argued that PBGC regulations requiring interest on overpayments violated ERISA. The employer argued that PBGC regulations required interest on the refunded payments. The arbitrator agreed with the employer following the Third Circuit’s Huber decision. The court, disagreeing with Huber that interest payments were not plan assets, nonetheless concluded that the preponderance of the evidence supported the arbitrator’s decision. And although it was well-settled that ERISA’s withdrawal liability “pay now, dispute later” procedures did not violate due process, the cases do not require that employers provide in effect interest-free loans when they have overpaid withdrawal liability during the resolution of the arbitration. Because ERISA was silent on the question of interest, the issue was whether PBGC’s regulation requiring interest on overpaid withdrawal liability payments was entitled to Chevron deference. The court determined that PBGC’s regulation was entitled to such deference, and affirmed the arbitrator’s determination. As to the appropriate rate, the court agreed that the fund did not have a settled rate for refunds of withdrawal liability payments, so the rate set forth in PBGC regulations was appropriate.

In Manhattan Ford Lincoln, Inc. v. UAW Local 259 Pension Fund, 331 F. Supp. 3d 365 (D.N.J. 2018), the court also found that a fund actuary can use different discount rates to calculate the fund’s minimum funding requirements and its unfunded vested benefits for purposes of withdrawal liability. Here, however, the court affirmed the arbitrator’s finding that use of the Segal Blend was permitted.

After the employer ceased contributing to the fund, the fund assessed withdrawal liability of over $2.5 million for a complete withdrawal. The fund actuary used a lower discount rate for calculating unfunded vested benefits – namely, the so-called “Segal Blend” rate -- than the rate that the actuary used to calculate the fund’s minimum funding requirements. If the actuary had
used the funding rate of 7.5% to calculate unfunded vested benefits for purposes of withdrawal liability, the employer would not have owed withdrawal liability. The employer challenged the withdrawal liability assessment through arbitration, arguing that it was unreasonable for the actuary to use different discount rates. But the arbitrator rejected the employer’s challenge, finding that it was reasonable for the actuary to have used different discount rates.

On review, the court, found that the actuary was not required to use the same rate or minimum funding and withdrawal liability purposes because (1) the ERISA language regarding actuarial assumptions in the context of minimum funding is not identical to the ERISA language regarding actuarial assumptions in the context of withdrawal liability, suggesting that Congress contemplated that different discount rates could be used; and (2) the context of minimum funding is different from the context of withdrawal liability—withdrawal liability is more of a snapshot calculation that cannot be adjusted year after year, and therefore may require a more conservative discount rate. The court also found that it was not clearly erroneous for the actuary to have used different discount rates under the facts present in this case. Thus, the court denied the employer’s motion to vacate the arbitrator’s award.

E. Notice of Withdrawal Liability

In Division 1181 Amalgamated Transit Union-New York Employees Pension Fund v. Logan Transportation Systems, Inc., 293 F. Supp. 3d 336, 2018 EB Cases 115879 (E.D.N.Y. 2018), the court rejected the well-established principal that notice to one member of the controlled group is notice to all members, because the multiemployer plan’s notice and demand to the non-contributing member of the controlled group was not in compliance with ERISA § 4219(b)(1). The court also found that the defendant’s demand for arbitration was timely based on the date of the complaint notice. Logan Transportation Systems, Inc. (“LTSI”) was a contributor to the fund until the City of New York terminated LTSI’s contract to provide bus services. Once the fund determined that LTSI had permanently ceased contributions to the fund, the fund sent a withdrawal liability notice and demand to Logan Bus Services, Inc., (“Logan”), a non-contributing member of the LTSI controlled group. The notice failed to identify LTSI as the contributing employer, and stated that Logan was liable for the withdrawal liability because of the termination of Logan’s contribution obligation, even though Logan was never a contributing employer to the plan. The fund repeated the same error in a subsequent notice and related communications. It was not until the fund notified Logan of its intent to file suit for the full amount of the withdrawal liability, because of Logan’s failure to timely request review and demand arbitration, that the fund correctly identified LTSI as the contributing employer.

The court also rejected the fund’s argument that because the statute treats all trades or businesses in the same controlled group as a “single employer”, notice to Logan was the same as notice to LTSI. The court found that this argument “went one step too far because a non-contributing member of a controlled group cannot unilaterally withdraw from a plan that it does not contribute to and cause withdrawal liability for the whole controlled group.” In granting defendant’s summary judgment motion, the court found that the defendant had timely demanded arbitration because it requested review within the prescribed period once it received a correct notice, and because the defendant timely demanded arbitration both in its counter-claim seeking arbitration and by simultaneously demanding arbitration with the American Arbitration Association.
III. Definition of Withdrawal

A. Complete Withdrawal

In Gramercy Wrecking & Environmental Contractors v. Trucking Employees of North Jersey Welfare Fund, Inc., 2018 WL 2709202, 2018 EB Cases 197785 (E.D.N.Y. June 5, 2018), appeal docketed, No. 18-2001 (2d Cir. July 5, 2018), a subcontractor was hired to do a specific demolition job in a neighboring jurisdiction. The subcontractor was told by the general contractor that it needed to use local union workers to perform the job. When the subcontractor refused to sign a collective bargaining agreement (“CBA”) (because the subcontractor did not normally undertake work in that jurisdiction), the local union president told the subcontractor to instead sign a simpler job site agreement (“JSA”). The union president assured the subcontractor that the JSA would only be for the current project, and only would apply for the limited period of the project. The subcontractor signed the JSA, which incorporated the relevant CBA by reference. Pursuant to the JSA, the subcontractor made contributions for retirement benefits to the applicable fund over the course of the job, and was assessed withdrawal liability when the job was completed.

The subcontractor disputed the withdrawal assessment, arguing it was not subject to withdrawal liability because it was not an employer as defined in ERISA. The court found that the relevant dispute in this case was whether the JSA made the subcontractor subject to withdrawal liability, and, as a preliminary matter, the scope of the JSA was a dispute between the subcontractor and the union. Based upon the language of the JSA and CBA, the court found that the JSA incorporated the arbitration requirement in the CBA for this dispute, but the incorporation did not necessarily require the subcontractor to pay withdrawal liability. Based upon those findings, the court ruled that the dispute must be initially arbitrated under the CBA’s arbitration requirement to determine whether withdrawal liability was incorporated in the JSA.

In Delanni v. Progress Printing Corp., 2018 WL 4680336, 2018 EB Cases 354938 (D. Colo. Sept. 28, 2018), the fund filed a motion for summary judgment on its claims against a former contributing employer for unpaid delinquent contributions and withdrawal liability, where the riders extending the underlying collective bargaining agreement had expired. With respect to the withdrawal liability claim, the court noted that jurisdiction was explicitly conferred on the federal courts. The employer argued that it was not subject to withdrawal liability, either because it had not voluntarily withdrawn (because the plan did not empower the trustees to involuntarily terminate an employer’s participation), or because the CBA had expired before the purported date of withdrawal. The court rejected these arguments, noting that the statute does not require that a withdrawal be voluntary, and other courts have regularly held that withdrawal liability was properly assessed in cases where the employer did not voluntarily withdraw, most notably in cases of union decertification. The court also disposed of the employer’s other arguments, asserting that withdrawal liability is a statutory remedy that need not be affirmatively authorized in a plan document, and that the earlier expiration of the CBA would only modify the date of the withdrawal—not the determination whether a withdrawal had occurred. In any case, the court found that the employer had waived each of these defenses by failing to arbitrate.
B. Partial Withdrawal

In GCIU-Employer Retirement Fund v. Quad/Graphics, Inc., 2018 WL 6438750 (9th Cir. Dec. 7, 2018), the Ninth Circuit affirmed the district court’s decision reversing the conclusion of the arbitrator. The Ninth Circuit found that the district court correctly held that Quad partially withdrew from the fund in 2010 as a result of the union’s decertification, reasoning that the applicable collective bargaining agreement “became void prospectively as of the decertification” of the union, which likewise terminated Quad’s obligation to contribute to the fund under that agreement. The court explained further that Quad’s payment of contributions in January 2011 for work performed in December 2010 did not mean that Quad had ongoing obligations under the CBA after the decertification.

In Caesars Entertainment Corp. v. IUOE Local 68 Pension Fund, 2018 WL 3000176 (D.N.J. June 15, 2018), the court reversed an arbitrator’s decision that the plaintiff was liable for partial withdrawal liability. The plaintiff owned a group of companies that operated casinos. The companies had separate CBAs with the union. The parties did not dispute that the plaintiff and the companies constituted the same control group and were considered a single employer under ERISA. When one of the companies closed the casino it was operating and stopped making contributions to the fund, the remaining companies continued to operate their casinos and continued to contribute to the fund.

The fund assessed the plaintiff for partial withdrawal liability. The plaintiff submitted a demand for arbitration, and the parties arbitrated the dispute. The arbitrator upheld the partial withdrawal liability assessment against the plaintiff because the plaintiff permanently ceased to have an obligation to contribute to the fund and because the plaintiff continued to perform work in the jurisdiction of the CBA of the type for which contributions were previously required.

The court vacated the arbitrator’s award, finding that the arbitrator’s award was incorrect. The court noted that where a partial cessation did not result in a 70% contribution decline, as was the case here, an employer does not incur partial withdrawal liability by merely terminating one operation while continuing others if the employer continues to make contributions to the fund for the similar work that continues to be performed. Since the other operating companies that were part of the same controlled group all continued to contribute to the fund, the court found that the assessment of partial withdrawal liability was improper.

G. Transactions to Evade or Avoid Liability

In Penske Logistics LLC v. Freight Drivers and Helpers Local Union No. 557 Pension Fund, 721 F. App’x 240, 2018 EB Cases 1575 (4th Cir. 2018), the Fourth Circuit reversed the district court’s enforcement of an arbitrator’s award. The arbitrator determined that the fund failed to establish by a preponderance of the evidence that the employer engaged in a transaction with a principal purpose of evading or avoiding withdrawal liability. The Fourth Circuit found that the arbitrator applied the wrong burden of proof by failing to presume the fund’s determination to be correct.

In Central States, Se. & Sw. Areas Pension Fund v. Stephens, 2018 WL 1586242, 2018 EB Cases 115894 (N.D. Ill. Apr. 2, 2018), the fund argued that summary judgment was
appropriate when certain transactions were allegedly conducted for the principal purpose of evading or avoiding withdrawal liability. The fund claimed that (1) an employer’s decision to delay withdrawal from the fund until a later year, (2) an employer’s payments to its creditors, and (3) an employer’s payments to a majority shareholder, should all be disregarded as impermissible transactions undertaken with a principal purpose to evade or avoid withdrawal liability. The court held that there were genuine factual disputes as to whether the employer acted with a principal purpose to evade or avoid withdrawal liability and therefore denied the fund’s motion.

In *Members of Bd. of Admin. of Toledo Area Indus. UAW Ret. Income Plan v. Obz, Inc.*, 2018 BL 477502 (N.D. Ohio Dec. 26, 2018), the court granted partial summary judgment in favor of a multiemployer plan against a participating employer’s owners who sold the operating assets to another entity, for evading or avoiding the employer’s withdrawal liability. The court noted that the undisputed facts showed that the owners had used the sale proceeds and the proceeds from the sale of the employer’s remaining scrap metal for personal use, and transferred to themselves title to two of the employer’s vehicles. At the time of these “shenanigans,” the owners caused the employer to withdraw from the plan and, following assessment, to cease making withdrawal liability payments. The court therefore concluded that the evidence clearly showed that the owners’ principal purpose in using these employer assets was to avoid applying those assets to pay down partially the indebtedness to the plan.

**IV. Special Industry Provisions**

**A. Construction Industry**

In *Structure Tone, Inc. v. New York City District Council Carpenters Pension Fund*, 2018 WL 1633768 (S.D.N.Y. Mar. 30, 2018), the court determined that an employer, a general contractor, withdrew from a fund notwithstanding the “construction industry exemption.” The employer permanently ceased performing work in the jurisdiction of the relevant CBA of the type that previously required contributions, and instead the employer employed subcontractors to perform such work. Notwithstanding the CBA’s requirement that all subcontracted work had to be subcontracted to a union employer that had an obligation to contribute to the fund, the employer had retained non-union subcontractors for some of the work.

The court applied *Skidmore* deference, and found PBGC opinion letters 84-8 and 85-5 unpersuasive on the proposition that a general contractor hiring subcontractors to perform work only continues performing work in the jurisdiction of the CBA if the general contractor had an obligation under the prior CBA to contribute for its subcontractor’s work. The court reasoned that the “construction industry exemption” never applies when a formerly contributing general contractor uses non-contributing subcontractors—whether or not the prior CBA required the general contractor to contribute for its subcontractors. According to the court, under the plain language of ERISA § 4203(b)(1)(B)(i), it is enough that a general contractor that previously contributed to the fund now uses a subcontractor to perform the same work for which the general contractor previously performed, with no one contributing to the fund for such work. The court also reasoned that the general contractor did continue to perform work in the jurisdiction of the CBA for which it previously had an obligation to contribute, because it hired non-union subcontractors contrary to the CBA’s terms. The court inferred that the remedy under the prior
CBA for such a breach was that the general contractor would have to make the non-union subcontractor’s contributions. Therefore, the general contractor, by using non-union subcontractors, was performing the same type of work in the jurisdiction of the CBA without contributing, and thus, the construction exemption did not apply.

VI. Special Definitions and Relief Provisions

B. Sale of Assets, Net Worth Limitation, and Insolvency

In *Sheet Metal Workers’ National Pension Fund v. Lane & Roderick, Inc.*, 736 F. App’x 400, 2018 EB Cases 317978 (4th Cir. 2018), the Fourth Circuit affirmed findings of the district court and the arbitrator that rent accrued by the defendant as a liability was a bona fide debt and not an equity contribution for purposes of limiting the employer’s withdrawal liability under ERISA § 4225. The court noted that an arbitrator’s factual findings under MPPAA are reviewed for clear error, or a “definite and firm conviction that a mistake has been committed.” Reviewing the eleven-factor test for distinguishing a bona fide debt from an equity contribution, the Fourth Circuit concluded that the arbitrator did not clearly err in finding the rent a bona fide debt, and the district court did not clearly err in affirming this decision, so the district court’s decision was affirmed.

F. Free Look

In *South City Motors, Inc. v. Automotive Industries Pension Trust Fund*, 2018 WL 2387854, 2018 EB Cases 187402 (N.D. Cal. May 25, 2018), appeal docketed, No. 18-16173 (9th Cir. June 25, 2018), three employers contributed to the same fund, and all three were part of the same controlled group. The fund’s trust agreement included a free look provision pursuant to which an employer would not incur withdrawal liability if the employer withdrew after participating in the fund for less than five years. Two of the controlled group entities withdrew within the five-year window, but the third remained in the fund longer than five years. The parent entity of the two withdrawn entities argued that the free look provision should exempt them from incurring withdrawal liability.

The court rejected this argument, noting that ERISA defines an “employer” for purposes of withdrawal liability to include all members of an entity’s controlled group. Although two members of the controlled group had withdrawn within the free look period, another member of the controlled group remained in the fund. Accordingly, because the entire controlled group had not withdrawn within the applicable time period, the free look rule did not apply.

VIII. Enforcement and Collection Disputes

A. Standing, Jurisdiction and Venue

In *Central States, Se. & Sw. Areas Pension Fund v. Bergquist*, 2018 WL 1014511, 2018 EB Cases 59052 (N.D. Ill. Feb. 22, 2018), the court denied the defendant’s motion to transfer venue. The court found that no “grave imbalance of convenience” existed to overcome the statute’s intent to permit funds to save pension resources by litigating in their home forum. The court also rejected the defendant’s assertion that, because the fund was seeking recovery based on an alleged fraudulent transfer, it was not an ERISA claim. The court relied on the litany of
cases that have found that claims based on an evade-and-avoid theory are actions under ERISA, and are subject to ERISA’s jurisdiction and venue provisions.

In *Central States, Se. & Sw. Areas Pension Fund v. Sun Marsh, LLC*, 2018 WL 4489527, 2018 EB Cases 337659 (N.D. Ill. Sept. 18, 2018), the court denied a motion by the defendants, alleged to be under common control with a withdrawn employer, to transfer the case from the Northern District of Illinois to the District of Delaware, where related litigation was pending, including the defendants’ suit seeking declaratory judgment that they were not liable for withdrawal liability. The court noted that under 28 U.S.C. § 1404(a), a civil suit may be transferred from one district to any other district where the suit could have been brought if the moving party shows the proposed forum is clearly more convenient. The defendants argued that Delaware was a more convenient forum because (1) Delaware had a lighter caseload, and (2) the Delaware court might consolidate the case. The court rejected these arguments, finding that Delaware did not have a lighter caseload and that a related withdrawal liability case would nevertheless remain in the Northern District of Illinois. Therefore, the court held there was no evidence a transfer would reduce the overall amount of judicial time devoted to the case.

C. Arbitration of Withdrawal Liability Claims

In *Einhorn v. Penn Jersey Building Materials, Inc.*, 739 F. App’x 97 (3d Cir. 2018), the Third Circuit affirmed a district court ruling that a provision in a CBA giving protection to an employer from withdrawal liability did not survive the expiration of the CBA.

The employer and the union entered a CBA that was in effect from April 2005 to April 2008. The CBA included a provision stating that “should the Employer withdraw from the Agreement in the future, there will be no withdrawal liability.” The provision did not state whether its obligations continued beyond the life of the CBA, and the CBA did not contain a survival clause. The employer withdrew from the fund after the CBA expired, and the fund assessed withdrawal liability.

The fund sued the employer in district court, claiming that the employer was responsible for withdrawal liability. The district court granted summary judgment to the fund on the basis that the withdrawal liability provision in the CBA did not survive the expiration of the CBA. The Third Circuit affirmed, finding that despite language stating that there would be no withdrawal liability if the employer withdrew “in the future,” the district court properly found that the provision did not survive the expiration of the CBA where there was no express language stating that the withdrawal liability provision continued beyond the life of the CBA, and no survival clause.

In *Wisconsin Laborers Pension Fund v. GMS Excavators, Inc.*, 2018 WL 4496310, 2018 EB Cases 338864 (W.D. Wis. Sept. 19, 2018), the defendant, a withdrawn employer, submitted a notice of withdrawal from the relevant CBA in 2001, but allegedly continued several practices that indicated an intent to continue to be bound by the CBA, including notifying the union of new hires and paying employees at union rates. When the employer again terminated the CBA in 2014 and was notified of its withdrawal liability by the fund, it contended that it had not been an “employer” under MPPAA since 2001, and did not make quarterly withdrawal liability payments.
The court granted summary judgment to the fund on its withdrawal liability claim, noting that “pay now, dispute later” under MPPAA required the employer to begin making interim payments, notwithstanding its dispute regarding its status. The court rejected the employer’s argument that the determination of its continuing employer status after 2001 was not an arbitrable issue, distinguishing cases where employers disputed having ever been covered under MPPAA and therefore were not required to arbitrate this threshold question, from the instant case, where the dispute concerned the employer’s continuing coverage under the CBA and MPPAA. The court granted attorneys’ fees and costs to the fund as a sanction against the employer because it found the employer’s argument that the employer need not arbitrate its covered employer status frivolous, and the employer continued to press the argument even in its reply to the plaintiff’s sanction motion.

3. Consequences of a Failure to Initiate Arbitration in Timely Manner

In Durso v. Store 173 Food Corp., 2018 WL 6268218, 2018 EB Cases 442155 (S.D.N.Y. Nov. 30, 2018), the court granted summary judgment in favor of the fund, rejecting Store 173’s argument that it did not effect a complete withdrawal because other members of its controlled group continued contributing to the fund. The court concluded that this argument was waived because Store 173 failed to timely demand arbitration. The court reasoned that withdrawal liability disputes are resolved through arbitration, unless: 1) there are no unresolved questions of fact or contract interpretation at issue; (2) review is judiciously economical; and (3) the issue falls outside the scope of 29 U.S.C §§1381-99. Because the court concluded that whether a complete withdrawal had occurred was a dispute that was within the scope of Section 1382, the court deemed the employer to have waived its right to challenge the determination made by the fund.

In UFCW Local 50 Pension Fund v. Food Depot, Inc., 2018 WL 1135626 (E.D.N.Y. Feb. 7, 2018), the magistrate judge recommended that a default judgment be entered in favor of the fund. The employer withdrew from the fund and, after the fund assessed withdrawal liability, the employer failed to request review and demand arbitration. When the fund incurred a mass withdrawal termination, and assessed the employer with redetermination liability and later reallocation liability, the employer again failed to request review and demand arbitration. The employer was making its withdrawal liability payments, but eventually ceased payments, and despite receiving a default notice from the plan, failed to cure the default within 60 days of receiving notice. The magistrate found that the employer’s failure to request review and demand arbitration prevented the employer from challenging the amount of the assessments or payment schedules and justified the entry of a default judgment. The magistrate also recommended that the judgment include interest, liquidated damages, and costs and attorney’s fees.

In Am. Fed'n of Musicians & Employers' Pension Fund v. Neshoma Orchestra & Singers, Inc., 2018 WL 2338764 (S.D.N.Y. May 23, 2018), the fund sent a notice and demand letter after an employer’s complete withdrawal. The employer timely disputed the withdrawal liability assessment and noted in its response that if the fund did not withdraw its demand for payment, the fund should consider that response letter as a demand for arbitration. The fund treated the response as a request for review and rejected the employer’s arguments against the withdrawal liability assessment (and notified the employer of the procedure to initiate arbitration). Following the fund’s response, the employer submitted a demand for arbitration, but the demand
was not timely. Because it was not timely, the fund argued the arbitration demand was ineffective.

The court agreed that the arbitration was not submitted timely, and therefore the employer had forfeited its right to challenge the fund’s claim for withdrawal liability. Although the initial withdrawal assessment did not identify the full legal name of the employer, the employer still actually received the letter. Accordingly, the court ruled that the notice was sufficient under ERISA. The court further ruled that the fund’s withdrawal liability rules specifically required a demand for arbitration to be timely filed with the American Arbitration Association. Because the employer did not timely follow these rules, the employer was deemed to forfeit its right to challenge the withdrawal liability assessment.

In *Northwest Administrators, Inc. v. Santa Clarita Convalescent Corp.*, 2018 WL 1899359, 2018 EB Cases 140671 (W.D. Wash. Apr. 20, 2018), an employer withdrew from a fund in January 2015. The fund sent a certified letter in August 2016 assessing withdrawal liability against the employer. When the employer did not respond, the fund sent three additional notice and demand letters to other related addresses. When no response was provided, the fund filed suit to collect withdrawal liability, and the complaint was served upon the withdrawn employer. In its defense, the employer argued that the fund failed to provide adequate notice of withdrawal liability.

The court rejected the employer’s argument. The court noted that even if all of the notice and demand letters sent by the fund were not received by the employer, the service of the complaint was sufficient notice under ERISA. Because the employer did not respond to any of these notices in a timely manner, the court ruled the employer was liable for the fund’s assessed withdrawal liability.

The court faced a similar issue in *Trustees of the Nat'l Ret. Fund v. LE Perigord, Inc.*, 2018 WL 1747257, 2018 EB Cases 125390 (S.D.N.Y. Apr. 9, 2018). In that case, an employer withdrew from the fund and did not respond to the fund’s withdrawal liability assessment letter. The employer did not submit a request for review or attempt to initiate arbitration on the issue. Accordingly, the court entered summary judgment for the fund, and the employer was liable for the assessed withdrawal liability.

In *Division 1181 Amalgamated Transit Union-New York Employees Pension Fund v. B & M Escorts, Inc.*, 2018 WL 2417842 (E.D.N.Y. May 29, 2018), *appeals docketed*, Nos. 18-1874, 18-1877 (2d Cir. June 21, 2018), the fund sent a withdrawal liability assessment by certified mail to a withdrawn employer, but was not able to produce a receipt that confirmed the employer’s receipt. When the employer did not respond to the withdrawal assessment, and did not pay the first required withdrawal payment, the fund issued a letter stating the employer had defaulted. The employer did not cure the default, respond to the withdrawal assessment, or initiate arbitration. The fund filed a lawsuit to collect withdrawal liability and served the employer’s attorney with the complaint.

The employer argued that it never received any notice of the withdrawal liability assessment, and therefore the assessment did not comply with ERISA. The court rejected that argument, noting that service of a complaint is sufficient to provide notice of a withdrawal
liability assessment under ERISA. Because the employer was adequately notified of the assessment, and failed to timely initiate arbitration, the employer waived its right to dispute the imposition of the withdrawal liability.

D. Arbitration Procedures

In RLJ Lodging Trust v. The National Retirement Fund, 2018 WL 4052171, 2018 EB Cases 305277 (N.D. Ill. Aug. 24, 2018), the plaintiff, a real estate investment trust some of whose hotel properties were managed by the withdrawn manager, sought to vacate an arbitration decision denying its right to intervene in an arbitration between the manager and the fund. The plaintiff had indemnified the manager and had been paying the interim withdrawal liability on the manager’s behalf while the arbitration was pending. The arbitrator denied the motion to intervene because the plaintiff failed to demonstrate that the manager could not adequately represent the plaintiff’s interest in the arbitration, and the plaintiff failed to demonstrate it was an “employer” because it had disclaimed its status as an employer except in the context of withdrawal liability.

The court first held that the plaintiff lacked standing as a non-party to vacate or modify the arbitration decision, noting that while case law recognizes that the determination whether a party is an employer under MPPAA is appropriately decided by the court, those cases did not support the plaintiff’s ability to vacate the decision in an arbitration to which it is not a party. The court similarly rejected the argument that the plaintiff was entitled to intervene in the arbitration because it had an interest in the outcome of the proceedings. Further, the court found that, because the arbitration was not complete, the plaintiff could not challenge the award, as ERISA § 4221 provides that arbitration may be challenged only “upon completion.” Finally, the court dismissed the plaintiff’s motion for declaratory judgment that it was the employer for purposes of MPPAA and that therefore no withdrawal had occurred, noting that in light of the dismissal of the plaintiff’s motion to intervene in the arbitration, there was no basis for the declaratory relief under ERISA and no subject matter jurisdiction.

E. Default

In UFCW Local 174 Pension Fund v. International Glatt Kosher Meat Processing Corp., 2018 WL 3435059 (E.D.N.Y. July 13, 2018), the court granted the fund’s motion for a default judgment against a defendant employer that stopped making withdrawal liability payments, but denied the fund’s motion for a default judgment against two other defendant corporations that allegedly were the employer’s “brother-sister corporations.”

In 2007, the fund experienced a mass withdrawal of all contributing employers, including the defendant employer. The fund assessed withdrawal liability against the employer, and the employer did not contest the assessment through arbitration. The employer made withdrawal liability payments for seven years, but then stopped, though additional payments were owed. The fund brought suit to recover the withdrawal liability from the employer (along with the alleged brother-sister corporations), and the employer did not respond. The fund moved for a default judgment against the employer. The court granted the motion, finding that the fund had established the employer’s withdrawal liability. In addition to awarding the withdrawal liability,
the court awarded prejudgment interest, interest for each future day that the employer did not pay the withdrawal liability, liquidated damages, attorneys’ fees, and costs.

The fund also moved for a default judgment against the two alleged brother-sister corporations, which also did not respond to the lawsuit. However, the court found that the fund could not establish the requisite “common control” to implicate the other two corporations. While the fund alleged that the three corporations had a common owner, the fund did not allege that the common owner owned at least 80% of the shares of each corporation or that at least 50% ownership of the three corporations was identical as was required to show common control. The court, therefore, found that the two corporations could not be found jointly and severally liable for the defendant employer’s withdrawal liability.

In Board of Trs. of the California Winery Workers’ Pension Trust Fund v. Giumarra Vineyards, 2018 WL 1155988, 2018 EB Cases 72313 (E.D. Cal. Mar. 2, 2018), the court denied the employer’s motion for summary judgment in a lawsuit by which the fund sought to default the employer and accelerate its withdrawal liability payments. The fund claimed that it mailed the employer a default notice that required the employer to cure its missed quarterly withdrawal liability payment. When the employer failed to cure the default, the fund filed a collection action for the full amount of the outstanding withdrawal liability. The employer filed a motion for summary judgment claiming that there was no question of material fact as to the fund’s failure to notify the employer of the default. The fund disagreed, arguing that a genuine issue remained as to whether and when the employer received notice of the default. The court agreed with the fund based on the conflicting depositions of the parties’ witnesses and determined that a trial was necessary to judge the credibility of the witnesses on the issue of notice.

In Giumarra Vineyards, 2018 WL 4242068, 2018 EB Cases 322182 (E.D. Cal. Sept. 6, 2018), the court granted the fund’s motion in limine to exclude several pieces of evidence that the withdrawn employer sought to introduce at the trial. The employer had sought to introduce evidence that the fund had permitted other withdrawn employers to settle their withdrawal liability and had not pursued other employers for default after their failure to make quarterly payments. The court rejected the arguments that the fund’s willingness to settle in other cases was relevant to its credibility, and it excluded evidence of other withdrawn employers’ defaults as irrelevant. The employer also sought to introduce expert testimony critical of the actuarial methods used by the fund’s actuary in its determination of the present value of withdrawal liability payments. The court excluded the expert testimony on the grounds that the issue before the court was whether the employer was in default, not the underlying amount of the withdrawal liability, which the employer would have been required to challenge in arbitration.

The result of bench trial was reported in Giumarra Vineyards, 2018 WL 4510721, 2018 EB Cases 339450 (E.D. Cal. Sept. 19, 2018). In the bench trial, the court was required to review whether the mailbox rule—the common law rule under which the mailing of correspondence creates a rebuttable presumption that it was timely received by the addressee—applied and, if so, whether the employer could rebut the presumption that it had received the notice of default. The court first noted Ninth Circuit precedent that the mailbox rule does apply in ERISA cases where receipt of a notice is a factual issue in dispute. Applying the rule to this case, the court found that while the testimony of the fund’s staff regarding its mailing procedures was sufficient to establish a presumption of receipt, the presumption was weak because the notice was sent by
regular mail, not certified mail, and the presumption was overcome because the addressee, whose “professionalism” and “demeanor” at trial indicated to the court that his testimony was credible, testified that he would have forwarded the notice and corrected the late payment if he had received it, especially given the consequences of default. In this regard, the court noted the dramatic discrepancy between the employer’s statutory quarterly payment of $4,930.25 and its total mass withdrawal liability of nearly $34 million. Consequently, the court ruled the employer had effectively cured its nonpayment by making payment within 60 days after receiving notice from its counsel, and, therefore, the employer was not subject to default.

**F. Collection of Payments Pending Arbitration**

In *Trustees of the Laundry Dry Cleaning Workers and Allied Retirement Fund, Workers United v. Oceanside International Industries, Inc.*, 2018 WL 1517207, 2018 EB Cases 105033 (S.D.N.Y. Mar. 27, 2018), the court rejected the employer’s motion to stay interim withdrawal liability payments pending resolution of the arbitration despite the employer’s claim of financial hardship caused by such payments. While first stating that the Second Circuit had yet to adopt any equitable exception to the interim payment requirement (“pay now, dispute later”), the court further found that the employer did not adequately argue for an exception—recognized in other circuits—by failing to assert that the plan’s determinations were frivolous.

**G. Collection Actions, Enforcement of Award, Interest, Liquidated Damages, and Attorney’s Fees**

In *Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund*, 2018 WL 6169366, 2018 EB Cases 433105 (D. Mass. Nov. 26, 2018), the court held that a previously entered judgment in favor of the fund, awarding only the principal amount of withdrawal liability due to the fund, was in plain error and inconsistent with the mandatory remedies under ERISA Section 502(g)(2)(B)-(D). Sun Capital argued that attorney fees and costs should have been addressed under a Rule 54(d) motion for fees instead of a Rule 59 motion to amend the judgment, and that the Rule 54 motion was not timely and should be denied. The court disagreed with Sun Capital and held that the Rule 59 motion was appropriate. Thus, the court amended its judgment and awarded interest and liquidated damages. The court also granted the fund’s Rule 54 motion for attorneys’ fees and costs as timely given the amended judgment under Rule 59.

In *Trustees of the Hollow Metal Pension Fund v. Morris Fine Furniture Work Shop, Inc.*, 2018 BL 106049, 2018 EB Cases 106049 (S.D.N.Y. Mar. 26, 2018), a magistrate judge recommended summary judgment be entered in favor of the fund in an amount equal to the full withdrawal liability assessment, accrued interest, and liquidated damages. The employer, and its controlled group members, failed to request review or initiate arbitration notwithstanding receipt of two separate notices and demand from the fund. Although the magistrate upheld the well-established principal that notice to one controlled group member is notice to all, it ultimately determined that it was not relevant because the employer did not dispute that all members of the controlled group received the second notice. Accordingly, the court found that by failing to request review and demand arbitration after receiving notice, the employer waived its right to contest the plan administrator’s determination as to the withdrawal date.
In *South City Motors, Inc. v. Automotive Industries Pension Trust Fund*, 2018 WL 2387854, 2018 EB Cases 187402 (N.D. Cal. May 25, 2018), *appeal docketed*, No. 18-16173 (9th Cir. June 25, 2018), an arbitrator, when deciding a withdrawal liability dispute, awarded attorney’s fees to be paid to the fund. That arbitration lasted for over four years, which the arbitrator noted was due to the employer making baseless challenges and engaging in overbroad and harassing discovery. The employer argued that the arbitrator abused his discretion, because the employer’s legal positions were not baseless and they did not extend the arbitration because they needed to preserve their equitable arguments for appeal. On review, the court held that the MPPAA rules allow an arbitrator to grant any remedy or relief within the scope of ERISA, which includes reasonable attorney’s fees to the prevailing party, and that the arbitrator did not abuse his discretion in this instance.

In *JLNW, Inc. v. National Retirement Fund*, 2018 WL 4757953 (S.D.N.Y. Sept. 28, 2018), the plaintiff, a withdrawn employer, sought review of an arbitrator’s decision that its liability for previous partial withdrawals was not limited under ERISA § 4225, concerning sales of assets. The employer had challenged the withdrawal liability assessment on several grounds, but the parties agreed to submit only the § 4225 issue to arbitration while all other issues were held in abeyance. The fund sought to dismiss the employer’s suit for lack of subject matter jurisdiction and failure to state a claim, since the arbitration proceedings were not complete as required by MPPAA, and therefore not yet subject to judicial review.

First reviewing § 4221(b)(2), the court concluded that the limitation on judicial review of arbitration awards until after “completion of the arbitration proceedings” was a prudential limitation and did not impose a jurisdictional bar. Next reviewing whether the arbitration had reached completion within the meaning of § 4221, the court determined that guidance under the Federal Arbitration Act (FAA), which treats an award as “final” when it finally and definitely disposes of an independent claim even where other independent claims remain unresolved, was not inconsistent with MPPAA and therefore relevant to this case. Reviewing the case in light of the FAA guidance and Second Circuit case law, the court held that the arbitrator’s decision was final and complete because the parties had agreed to bifurcate the arbitration between the § 4225 issue and the remaining issues, and the fund’s motion to dismiss was denied. The court rejected the fund’s contention that the court was prevented under the FAA from vacating an arbitration award for legal error, noting that, while the FAA informs MPPAA’s procedural arbitration framework, it does not supplant it, and MPPAA explicitly provides for judicial review of legal conclusions reached in arbitration.

In *American Federation of Musicians and Employers’ Pension Fund v. Neshoma Orchestra and Singers, Inc.*, 2018 WL 3711811 (S.D.N.Y. Aug. 3, 2018), the defendant, a withdrawn employer, sought leave to perfect an interlocutory appeal of the court’s dismissal of the employer’s third-party claim against the union, the Associated Musicians of Greater New York Local 802, which it claimed had breached a guarantee that the Fund would not seek withdrawal liability from the employer. The court previously had ruled that the employer forfeited its ability to challenge the withdrawal liability by failing to initiate arbitration, and had dismissed the claim against the union, both because the claim was preempted by the NLRA and because the employer’s complaint failed to state a claim. Reviewing the criteria for granting an interlocutory appeal, the court found that the employer’s motion failed to demonstrate that there were controlling questions of law as to which there was substantial ground for difference of
opinion, and the appeal would unnecessarily prolong, rather than expedite, the resolution of the case, in which the sole remaining issue was calculation of the amounts owed to the fund. Consequently, the motion for interlocutory appeal was denied.

In Division 1181, ATU—New York Employees Pension Fund v. New York City Dep’t of Education, 2018 WL 4757938, 2018 EB Cases 362411 (S.D. N.Y. Oct. 2, 2018), the fund brought an action against the New York City Department of Education (DOE). While the court dismissed four of the five claims, the fund alleged in a fifth claim that eleven non-party bus companies that had historically contracted with the DOE were alter egos of the DOE. The fund claimed that DOE had over $100 million in withdrawal liability owed by the non-party bus companies. After this claim survived a motion to dismiss under FRCP 12(b)(6), the parties conducted extensive discovery on the alter ego issue. After DOE’s motion for summary judgment was granted, it moved for a $2.9 million award of attorneys’ fees against the fund under ERISA §§ 502(g) and 4301(e).

In denying the fee request in its entirety, the court noted that under Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242 (2010), the sole factor a court must consider in exercising its discretion to award fees is whether the moving party obtained some degree of success on the merits. However, the court may, in its discretion, consider five additional factors to determine whether the prevailing party may recover attorneys’ fees: (1) the degree of the opposing party’s culpability or bad faith; (2) the opposing party’s ability to satisfy a fee award; (3) whether an award of fees would act as a deterrent; (4) whether the party seeking fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relevant merits of the parties’ positions.

With respect to the culpability or bad faith factor, the court held there was no bad faith or culpability in pursuing a potentially meritorious, but ultimately unsuccessful claim. The court noted that having survived the Rule 12(b)(6) motion, the fund’s claim was potentially meritorious. There was no bad faith or culpability because DOE prevailed on summary judgment. The fifth factor, the relative merits of the parties’ position, was weighed with the culpability/bad faith factor. Because the DOE could not demonstrate culpability or bad faith, the merits of the parties’ positions did not weigh in favor of the fee application.

Analyzing the second and third factors, the court held that an award of fees would be detrimental to the fund’s participants and would direct resources away from the participants’ benefits. As to the fourth factor, the court found that an award of fees in this instance would not benefit the plan participants or beneficiaries; it would instead result in a loss to the plan. The court concluded that the five discretionary factors weighed heavily against the DOE’s fees application.

I. Bankruptcy Issues

In In re Central Grocers, Inc., 2018 WL 3108885 (N.D. Ill. June 25, 2018), a grocery store distributor and its affiliates (the “debtors”) were contributors to two funds. The debtors withdrew from the funds and filed for bankruptcy. In the bankruptcy, the funds filed an unsecured claim of over $5 million for the debtors’ withdrawal liability.
After the debtors filed for bankruptcy, the bankruptcy court entered an order authorizing and approving the debtors’ sale of substantially all of their assets free and clear of all claims. The funds appealed, seeking to preserve their right to proceed on claims for withdrawal liability against the purchaser. The funds did not, however, move for a stay of the sale of the assets. The sale of the assets to a good faith purchaser subsequently closed, and the debtors proceeded to distribute the proceeds of the sale to secured creditors.

The court dismissed the funds’ appeal as moot because the funds were required to move for a stay on the sale of the assets in order to seek a modification of the bankruptcy court’s order that would allow them to proceed on claims for withdrawal liability against the purchaser. Because the funds did not do so, and because the sale was made to a good faith purchaser who bought the assets free and clear of all claims, the funds could not now seek a modification of the bankruptcy court’s order. The sale of assets was thus free and clear of any claims that the funds may have had for withdrawal liability.

IX. Co-Employer Liability

A. Definition of Employer

In Division 1181 A.T.U.-New York Employees Pension Fund v. City of New York Department of Education, 2018 WL 6441113 (2d Cir. Dec. 10, 2018), the fund filed suit against the City of New York Department of Education (DOE) for interim withdrawal liability payments arising from the complete withdrawal of four former contributing employers who had been retained by DOE as contractors, to provide transportation services for the City’s public schools. The fund asserted four claims for DOE’s liability: (i) DOE had an obligation to contribute under the terms of the transportation contracts; (ii) DOE was a “single employer” with each contractor; (iii) DOE was an alter-ego of each contractor; and (iv) DOE and each contractor were joint-employers. The district court dismissed three of the fund’s claims but allowed discovery on the alter ego claim and then granted summary judgment to the DOE. On de novo review, the Second Circuit affirmed the district court conclusions on all four counts.

The Second Circuit explained that only an “employer” is exposed to withdrawal liability under MPPAA, and reviewed circuit precedent construing “employer” as a person obligated to contribute to a plan, “either as a direct employer or in the interest of an employer of the plan’s participants.” The court noted that the foregoing construction incorporates ERISA § 4212(a)’s definition of “obligation to contribute,” which includes both contractual and statutory obligations.

With respect to its contention that the DOE was obligated to contribute under the terms of the transportation contracts with the contractors, the fund argued, inter alia, that the transportation contracts created an indirect “obligation to contribute.” Specifically, the fund cited a clause allowing contractors to be reimbursed by the DOE for contributions made on behalf of its “escort employees.” This argument posed a question of first impression for the Second Circuit—whether an entity’s contractual obligation to reimburse an employer for pension contributions means the entity assumes an obligation to contribute under MPPAA. In agreement with the Seventh Circuit, the court concluded that an obligation to reimburse employers for pension contributions is not an “obligation to contribute” under MPPAA. As discussed by the
Seventh Circuit, an obligation to reimburse arises only after contributions are remitted and is limited to the amount actually contributed. The Second Circuit reasoned that the fund similarly could not look to the DOE “to cover any shortfall in the contractors’ contributions.”

The Second Circuit further concluded that the fund failed to sufficiently plead allegations suggesting the DOE was a single employer with the contractors. Similarly, the court found nothing in the district court record supporting the fund’s claim that the DOE and contractors were alter egos. Accordingly, it affirmed the district court’s decision on both counts.

In its final argument, the fund alleged the DOE had an obligation arising “as a result of a duty under applicable labor-management relations law” within the meaning of ERISA § 4212(a)(2) under the joint-employer doctrine. Assuming, for the sake of argument, that ERISA § 4212(a)(2) extends beyond the National Labor Relations Act and the Labor Management Relations Act, the court emphasized that the obligation to contribute must arise as a result of a “duty” under labor-management relations law. The Second Circuit affirmed the district court, concluding that the joint employer doctrine “does not independently create a duty to contribute under [ERISA § 4212(a)(2)].”

B. Controlled Group Liability

In Trustees of the Suburban Teamsters of Illinois Pension Fund v. The E Company, 2018 WL 1427172 (N.D. Ill. Mar. 22, 2018), appeal docketed, No. 18-2273 (7th Cir. June 6, 2018), the court granted summary judgment in favor of the fund and against contributing employers and alleged members of their controlled groups. The contributing employers failed to request review or demand arbitration and, therefore, they waived their right to contest the fund’s withdrawal liability assessment. Accordingly, the court entered judgment against these employers. A separate issue existed as to whether the alleged controlled group members also waived their rights to contest the fund’s controlled group determination. Recognizing that some circuits have held that whether an employer is a controlled group member is never subject to mandatory arbitration, the court found that in the Seventh Circuit employers must timely arbitrate controlled group issues unless such employer had no reasonable basis for knowing that a fund might find it to be a controlled group member. Here, one alleged controlled group member received notice of the withdrawal liability assessment addressed to it; therefore, the court found this member to have waived any claim that it was not a controlled member by failing to request review or demand arbitration. Although the other alleged controlled group members shared the same mailing address as the one member, the court found some ambiguity as to whether they received notice and had a reasonable basis to know that a fund may consider them controlled group members. Accordingly, the court undertook an analysis to determine if these alleged members were in fact controlled group members of one or both of the contributing employers.

The court concluded that all the entities were trades or businesses (including the two individuals who owned all the relevant businesses to varying degrees, and who operated a leasing business as sole proprietors that leased the premises to the contributing employers). The court further determined that all the entities but one were in a brother-sister controlled group with at least one of the contributing employers, because the same two shareholders owned 100% of the entities with at least 50% identical ownership. Because these entities were controlled group members of at least one of the contributing employers, they waived their rights to
challenge the assessment by failing to demand arbitration within the statutorily prescribed deadline. The remaining entity that was not a controlled group member was the entity that had actually received notice of the withdrawal liability assessment, and accordingly this entity waived its right to challenge the assessment or the controlled group determination.

In *Groden v. Reichert & Son Trucking, Inc.*, 2018 WL 1326389, 2018 EB Cases 91074 (D. Mass. Mar. 15, 2018), a magistrate judge entered a recommendation to the district court to grant the fund’s motion for summary judgment. It was undisputed that Donna Reichert owned 100% of Reichert Trucking, the signatory employer, and that William Reichert, her spouse, owned 100% of Reichert Fuel. The Fund argued, therefore, that, under the spousal attribution rule, both Reichert companies were within the same controlled group and were, accordingly, jointly and severally liable for Reichert Trucking’s withdrawal liability. In response, the defendants argue that the exception to the spousal attribution rule set forth in 26 C.F.R. § 1.414(c)-4(b)(5)(ii) applied because each spouse did not participate in the management of the other spouse’s company. The magistrate rejected as a matter of law the employer’s argument that the spousal attribution rule would only apply if the wife, as the owner of the contributing employer, had a role in the management of the non-contributing company, and not vice versa. The magistrate also found, however, that William controlled the operations of the trucking company, including labor relations, and that Donna performed all tasks that were necessary in the operation of the fuel company and signed agreements as vice-president of the fuel company.

In *Central States, Se. & Sw. Areas Pension Fund v. Dizack*, 2018 WL 1087640, 2018 EB Cases 67900 (N.D. Ill. Feb. 28, 2018), the court granted the fund summary judgment against an individual as a controlled group member of a withdrawn contributing employer that had defaulted on its withdrawal liability payments. The fund claimed that the individual’s renting of a condominium attached to the condominium in which he resided, and the renting of a separate condominium in Florida, constituted a trade or business. The defendant asserted that his renting activities were akin to renting the space over a homeowner’s garage and, therefore, were not a trade or business. Although the court determined the renting of a condominium attached to a primary residence was not a trade or business, the court concluded that the renting of a property in a different state, which did not serve as the individual’s residence, was a trade or business. The court denied the parties’ summary judgment motions as to the fund’s evade and avoid and fraudulent conveyance claims, finding that a question of fact existed on whether the individual’s payments to his company were loans or capital contributions.

In *Carpenters Pension Fund of Illinois v. Martinak*, 2018 WL 3232791, 2018 EB Cases 236376 (N.D. Ill. July 2, 2018), the fund sought a declaration that the defendant is the alter ego of a trust that was previously found liable for withdrawal liability. The defendant was the grantor, trustee, and sole beneficiary of the trust. The defendant also had previously owned and operated an employer that rented property from the trust to operate its business. The employer stopped making contributions to the fund and declared bankruptcy after the fund made a demand for the payment of withdrawal liability. At that time, a court found that the employer and the trust were under common control, and accordingly that the trust was liable for the employer’s withdrawal liability. The defendant then allegedly moved money out of the trust and into his individual account, causing the fund to seek the alter ego declaration. The defendant moved to dismiss.
The court denied the defendant’s motion to dismiss, finding that the fund had alleged sufficient facts to support a claim that the defendant was the alter ego of the trust. In denying the defendant’s motion, the court found significant that (1) there did not appear to be much of a separate identity between the defendant and the trust given that the defendant was grantor, trustee, and sole beneficiary and that the defendant allegedly deposited checks made out to him into the trust; (2) the defendant’s transfer of money from the trust into his individual account was suggestive of fraudulent intent; and (3) injustice would result if the defendant were not considered the alter ego of the trust.

In *Division 1181 Amalgamated Transit Union-New York Employees Pension Fund v. B & M Escorts, Inc.*, 2018 WL 2417842 (E.D.N.Y. May 29, 2018), appeals docketed, Nos. 18-1874, 18-1877 (2d Cir. June 21, 2018), the fund assessed withdrawal liability against a withdrawn employer (“Corp A”), three related entities (“Corp B,” “Corp C,” and “Corp D”), and their common owner (“Owner”), as part of a single controlled group. Having a common Owner, Corp A and Corp B were found to be part of a brother-sister controlled group. However, the court noted that Corp C and Corp D were not involved in any business activity with any continuity or regularity such that either could be considered a “trade or business” for purposes of establishing a controlled group relationship.

The court also concluded that Owner was part of the controlled group. Owner was the sole owner of a property used by Corp A and Corp B. Citing precedent from the Second Circuit, even where a withdrawing employer uses, but does not lease, property from an entity under common control with the withdrawing employer, the court noted that such arrangement is sufficient to establish that a sole owner of that property could fall within the controlled group. Because Owner allowed Corp A and Corp B to use Owner’s own property, the Owner was within the applicable controlled group, and would be jointly and severally liable for withdrawal liability.

In *Central States, Se. & Sw. Areas Pension Fund v. PHBC, LLC*, 2018 WL 4898878, 2018 EB Cases 370610 (N.D. Ill. Oct. 9, 2018), Port Huron partially withdrew from the fund on December 31, 2012, triggering withdrawal liability in the amount of $2,114,166.93. The fund obtained a judgment against Port Huron, and moved for summary judgment seeking to hold three other defendants (ML Land, PHBC, and L&L) liable for the withdrawal liability incurred by Port Huron on the grounds they were “trades or business” under “common control” with Port Huron on the withdrawal date. The fund also sought to hold defendant Michael Lauth personally liable for attempting to “evade or avoid” withdrawal liability by converting one of the defendant entities (L&L) from a Michigan limited partnership to an LLC. Summary judgment was granted as to liability of the other defendants, and denied as to Lauth’s individual liability because genuine issues of material fact existed as to whether evading withdrawal liability was a principal purpose behind the conversion of L&L.

Port Huron operated a retail hardware store and a concrete block plant on separate parcels of property owned by one of the other defendants, PHBC. PHBC never charged or collected rent from Port Huron. As of the date of withdrawal, Lauth directly or indirectly owned at least 80% of the total combined voting power of all classes of Port Huron stock entitled to vote or at least 80% of the total value of outstanding shares of Port Huron stock. He also directly or indirectly held at least 80% of the ownership interests in defendant PHBC. The court determined that
PHBC was a trade or business as it was leasing property to Port Huron, the withdrawing employer. The court determined that ML Land was more than a mere passive investment vehicle for Lauth because its purpose was to conduct business. Given that defendants conceded common control of PHBC and ML Land, the court granted summary judgment to the fund as to ML Land and PHBC.

Regarding L&L, the court found that L&L’s real estate activities qualified as a trade or business because they were continuous, regular, and designed to produce income. Defendants, however, disputed the extent of Lauth’s ownership of L&L as of the withdrawal date. The court applied 26 C.F.R. § 1.414(c)-4(b)(3) to determine “common control;” it provides that “interests owned by a trust are considered owned by the beneficiaries who have an actuarial interest of five percent or more in the organization interest, to the extent of such actuarial interest.” Defendants argued that the entities owed by Lauth on the withdrawal date were less than 80% of L&L’s total interest because of an assignment transferring Lauth’s mother’s interest to Lauth and his sister. The court determined that the assignment postdated the December 2012 withdrawal, however, and concluded that Lauth’s ownership of L&L stock on the date of the withdrawal meant that he had both a controlling interest in and effective control over L&L as of the date of the withdrawal. Accordingly, the court granted summary judgment against L&L.

Regarding Lauth’s liability, the fund argued that a series of events occurring before and after the conversion of L&L from a partnership to an LLC suggested that Lauth executed the conversion to avoid withdrawal liability. These events included the fact that during the 7 years prior to Port Huron’s withdrawal, it requested six withdrawal liability estimates, which were transmitted to Lauth, and that, following the conversion, Lauth entered into two transactions with his sister that resulted in his controlling interest in L&L being reduced to 79%. Furthermore, communications between Lauth and his attorneys before and after the conversion suggested they were “preoccupied with withdrawal liability exposure” until after the 2013 transfer of L&L voting stock to Lauth.

Lauth presented evidence that the conversion was first discussed and should have occurred in 2005, when he signed the conversion documents, and that, but for the failure to file the conversion documents, the conversion would have taken place 7 years before Port Huron’s withdrawal. Based on this evidence, the court found there was a question of fact as to whether Lauth “even had an inkling of impending withdrawal liability” when he signed off on the conversion, and therefore denied summary judgment on the evade or avoid issue.

C. Shareholder, Director, or Officer Liability

The district court, in Operating Engineers’ Local 324 v. Bourdow Contracting, Inc., 2018 WL 731944, 2018 EB Cases 39113 (E.D. Mich. Feb. 6, 2018), appeal docketed, No. 18-1491 (6th Cir. Apr. 30, 2018), granted summary judgment to a fund against an alleged alter-ego of a withdrawn construction company. The defendant was a family-owned business established shortly after the bankruptcy of the family’s prior business. Although not all family members were involved in both businesses, after weighing the alter-ego factors, the court found that most, but not all, of the factors weighed in favor of the fund. The court also found that the building and construction industry exemption did not prevent the assessment of withdrawal liability, because the defendant as the alter ego of the withdrawn employer was performing the same work.
in the jurisdiction of its predecessor’s collective bargaining agreement. The court also rejected defendant’s challenge to the amount of the assessment as defendant had failed to request review and demand arbitration and, therefore, could not challenge the amount of the assessment. Lastly, the court found that the discharge of the withdrawn employer’s liability in the bankruptcy did not prevent collection against the non-debtor alter ego.

In Division 1181 Amalgamated Transit Union-New York Employees Pension Fund v. R & C Transit, Inc., 2018 WL 794572, 2018 EB Cases 43261 (E.D.N.Y. Feb. 7, 2018), the court granted the third-party defendant’s motion to dismiss. The fund was seeking to collect delinquent contributions and withdrawal liability against an employer, a school bus operator and the signatory to the collective bargaining agreement. The employer filed a third-party complaint against the government agency claiming that the agency was its alter ego for purposes of the pension obligations. The agency filed a motion to dismiss, which the court granted because ERISA §502 does not provide employers a cause of action for an alter-ego claim. The court also found that the employer abandoned its indemnification and contribution claims by not responding to the motion to dismiss on these issues.

In Anderson v. Union City Mirror & Table Co., 2018 WL 565727, 2018 EB Cases 25801 (S.D.N.Y. Jan. 25, 2018), the fund filed a withdrawal liability collection action against Union City Mirror & Table Co., Inc. (“UCM”) and a series of limited liability companies controlled by the owners of UCM. Those defendants consented, on the eve of trial, to a judgment against them. The bench trial was then limited to the question of whether another company, Russo Realty, was an alter ego of UCM. The court found that the evidence was insufficient to treat Russo Realty as UCM’s alter ego because the two companies did not share a common business purpose, did not share equipment or customers, and did not have common supervision. The only relationship between the companies was the fact that their individual owners were brothers. The court rejected this as a basis for an alter ego claim, as otherwise businesses owned by different family members would always be treated as single entities.

In Trustees of the Local 813 Insurance Trust Fund v. Rogan Brothers Sanitation Inc., 2018 WL 1587058, 2018 EB Cases 107611 (S.D.N.Y. Mar. 28, 2018), appeal docketed, No. 18-1274 (2d Cir. Apr. 30, 2018), the court granted two funds summary judgment against a withdrawn employer, its controlled group members, and two related entities (“alter-ego defendants”) that the NLRB, in an unrelated action, found to be the alter egos of the withdrawn employer. In the NLRB action, the Board determined that the alter-ego defendants shared with the withdrawn employer common ownership, interrelated operations, common management, and common control of labor relations.

The contributing employer and controlled members had failed to request review or demand arbitration, and therefore the court entered summary judgment on the funds’ withdrawal liability claim. The alter-ego defendants argued that they were not employers for withdrawal liability purposes, and that an alter-ego theory was not sufficient to establish employer status in a withdrawal liability claim. The court disagreed, relying on the NLRB determination that the alter-ego defendants were a single employer along with the contributing employer and controlled group members. The court rejected the alter-ego defendants’ argument that, because single employer status had no longer existed at the time of withdrawal, they were not employers. The court reasoned that the employer’s status at any time while the employer was contributing to the
fund is sufficient to establish employer status for withdrawal liability purposes. The alter-ego defendants had also failed to request review or demand arbitration. The court concluded that notice to the contributing employer was notice to alter-ego defendants, and therefore alter-ego defendants waived their argument that they were not a single employer with the contributing employer at the time of the withdrawal.

In Michiana Area Electrical Workers Pension Fund v. La Place’s Electric Co., 2018 WL 3833529 (N.D. Ind. Aug. 10, 2018), the court, which had previously granted summary judgment against a company under common control with the withdrawn employer and the withdrawn employer, granted summary judgment against the sole owner and operator of those two entities under a corporate veil-piercing theory. Reviewing the factors to be considered under Indiana law in corporate veil-piercing, and remarking that not all factors must be satisfied to pierce the corporate veil, the court noted that the company had paid the owner’s entire mortgage and deducted the payments as rental expenses; had paid all utility bills for the owner’s home despite using only one room; had paid for non-business expenses for the owner, his wife and son, including groceries, gas, and satellite radio service; and had reimbursed the owner’s wife several thousand dollars for Christmas gifts for family members. The court ruled that the owner had not respected the corporate form and had promoted an injustice to the fund, and therefore granted summary judgment against the owner.

D. Successor Employer Liability

In Indiana Electrical Workers Pension Benefit Fund v. ManWeb Services, Inc., 884 F.3d 770, 63 EB Cases 1937 (7th Cir. 2018), the Seventh Circuit remanded a successor liability claim against an asset purchaser to district court for further analysis and weighing of the continuity factors. The district court found that the continuity of the workforce factor weighed against successor liability because former employees of the seller made up a small percentage of the buyer’s workforce post-transaction. Similarly, the district court found that the buyer was not continuing the businesses services of the seller because the seller’s refrigeration services constituted a small part of the buyer’s post-transaction business. In addition, the district court determined that buyer did not retain the seller’s customers because it only completed projects started prior to the transaction, and did not obtain any new projects from such customers.

The Seventh Circuit held that the district court incorrectly applied the continuity test because it: (1) analyzed the workforce continuity factor based on the percentage of the buyer’s workforce that consisted of the seller’s former employees, rather than by the percentage of the seller’s former employees that went to work for the buyer; (2) analyzed the continued business services factor based on the percentage of the buyer’s total services that consisted of the seller’s former refrigeration services, rather than the percentage of the seller’s former services that the buyer purchased; and (3) analyzed whether the buyer retained the seller’s customers based on its success in obtaining new projects from the seller’s customers, rather than the buyer’s attempts to obtain new projects from such customers. The Seventh Circuit also found that the buyer did have sufficient notice of the seller’s contingent withdrawal liability, evidenced by the fact that such liability was referenced in the asset purchase agreement, and the buyer had obtained an indemnification agreement from the seller in the event the buyer became liable for the seller’s withdrawal liability. The Seventh Circuit did not reach a determination as to whether the factors in total weighed in favor of holding the buyer liable under a successor liability theory, but rather
found that it was for the district court to make such a determination after correctly applying the relevant factors.

In *Heavenly Hana LLC v. Hotel Union & Hotel Industry of Hawaii Pension Plan*, 891 F.3d 839, 2018 EB Cases 194023 (9th Cir. 2018), the court found that constructive notice of a predecessor’s withdrawal liability is sufficient to trigger successor withdrawal liability. In other words, a successor can be liable for a predecessor’s withdrawal liability where reasonable care would have led to knowledge of the predecessor’s withdrawal liability, even if the successor did not have actual knowledge of the withdrawal liability.

A successor purchased a hotel from a predecessor. The predecessor had previously been assessed withdrawal liability. The fund sought to hold the successor liable for the predecessor’s withdrawal liability. It was undisputed that the successor was in fact a “successor” for withdrawal liability purposes and that the successor did not have actual notice of the predecessor’s withdrawal liability. The successor filed suit in district court to contest its responsibility for the predecessor’s withdrawal liability. The district court found that successor liability could not be based on the successor’s mere constructive notice of the liability, and accordingly the successor could not be liable because it did not have actual notice of the withdrawal liability.

The Ninth Circuit reversed, finding that successor liability could be based on a successor’s mere constructive notice of the predecessor’s withdrawal liability. The court held that such a finding served the MPPAA’s intended purpose of protecting participants.

The Ninth Circuit also found that the successor had constructive notice of the predecessor’s withdrawal liability based on the following factors: (1) the successor had previously operated a hotel that participated in a multiemployer pension plan; (2) the successor was aware that the predecessor had contributed to a multiemployer plan; and (3) the fund’s annual funding notices, which indicated a state of underfunding, were publicly available. The predecessor’s failure to provide deficiency notices to the successor, the predecessor’s representation that the fund was not underfunded “to their knowledge,” and the successor’s reliance on incorrect legal advice that it would not assume withdrawal liability absent an express assumption of the liability did not negate the fact that the successor had constructive notice and, therefore, was liable for the predecessor’s withdrawal liability.

On remand from the Ninth Circuit, the court in *Heavenly Hana LLC v. Hotel Union & Hotel Industry of Hawaii Pension Plan*, 2018 WL 6305615, 2018 EB Cases 445270 (N.D. Cal. Dec. 3, 2018), the fund filed a motion for declaratory judgment, arguing that judgment should be entered against the purchaser, Amstar, because the elements of successor liability had been established. Amstar argued that the court should allow it to resume paying installments without interest, pending arbitration, in light of the Ninth Circuit’s “change in law.” In granting the fund’s motion, the court explained that the Ninth Circuit’s decision established that Amstar is an employer subject to withdrawal liability and, therefore, was required to make payments on the schedule set forth in the fund’s demand, and incurred interest on installments that it failed to timely make under that schedule. In rejecting Amstar’s argument that the fund’s “undue delay” justified a waiver of interest, the court noted that interest did not begin accruing until after the plan assessed withdrawal liability.
In *Central States, Se. & Sw. Areas Pension Fund v. B&M Marine Construction, Inc.*, 2018 WL 318483, 2018 EB Cases 6164 (N.D. Ill. Jan. 8, 2018), the court denied the defendants’ motion to dismiss the fund’s successor liability and evade and avoid withdrawal liability claims. The defendant company asserted that the court had no personal jurisdiction because the successor liability claim against the company was not a claim under ERISA and, therefore, ERISA’s jurisdictional provision did not apply. The defendant shareholder claimed that evade and avoid claims apply only to employers, and not to shareholders. The district court rejected the defendant company’s claim finding that successor liability was a direct—and not a vicarious—ERISA claim. The court further found that the fund’s allegations that the defendant company used the same workforce, equipment, and facilities used by the selling contributing employer and controlled group members was sufficient to state a plausible claim for successor liability. The court rejected the defendant shareholder’s claim that the evade and avoid provision does not apply to shareholders.

In *New Jersey Bldg. Laborers’ Statewide Pension Fund & Trustees Thereof v. Richard A. Pulaski Constr., Inc.*, 322 F. Supp. 3d 546, 2018 EB Cases 176794 (D.N.J. 2018), a contributing employer ceased operations after a period of financial distress. The employer was owned by one brother, and managed by another brother. After the employer ceased operations, the brothers established new companies. The fund sought to assess withdrawal liability against these new companies under a successor liability theory (in addition to an alter ego theory).

The court noted that successor liability applies when a successor purchases assets but not liabilities. The court held that, under the totality of the circumstances, there was no substantial continuity between the enterprises in this case, because: (1) the original employer lost its real property, heavy equipment, and bank accounts to creditors – they weren’t purchased by the new companies; (2) the original employer had a workforce of hundreds of union members, while the new companies employed only two non-family individuals; (3) the nature of the businesses and customer bases were different; and (4) one of the new companies rented property formerly owned by the original employer from creditors. All of these factors led the court to conclude that successor liability did not apply.

Similarly, the court ruled that alter ego liability was not applicable. Alter ego liability requires that there be some substantially identical management, business purpose, operation, equipment, customers, and supervision, as well as ownership. The original employer had been involved in heavy construction projects, while the new companies worked only on light construction projects and snow removal. Moreover, there was no evidence that the new companies merely changed the corporate form of the original employer; instead, the court found that these were new entities that served different purposes. Therefore, the court found there was no basis to apply an alter ego theory of liability.

In *Members of Bd. of Admin. of Toledo Area Indus. UAW Ret. Income Plan v. Obz, Inc.*, 2018 BL 477502 (N.D. Ohio Dec. 26, 2018), the court granted partial summary judgment in favor of a multiemployer plan against the entity that purchased a participating employer’s operating assets. The asset purchaser claimed the seller didn’t notify it of the potential for withdrawal liability, but documents received by the purchaser from the seller showed that: (1) the seller made contributions to the plan; (2) the seller withdrew from the plan 18 months before the sale; and (3) the plan had not waived, and thus was maintaining its right to collect, any
withdrawal liability that may be determined and imposed in the future by the plan. Finding Heavenly Hana LLC v. Hotel Union & Hotel Industry of Hawaii Pension Plan, 891 F.3d 839 (9th Cir. 2018) persuasive, the court concluded that the purchaser had constructive notice, as these documents should have put the purchaser’s attorney on sufficient notice of possible withdrawal liability.

X. Third-Party Claims

In Nitterhouse Concrete Products, Inc. v. Glass, Molders, Pottery, Plastics & Allied Workers International Union, AFL-CIO, CLC, 2018 WL 656013, 2018 EB Cases 34590 (M.D. Pa. Feb. 1, 2018), appeal docketed, No. 18-1429 (3d Cir. Mar. 2, 2018), the district court granted summary judgment to a union, holding that the indemnification agreement in the relevant collective bargaining agreement did not require the union to indemnify the employer for its withdrawal liability. Although the court rejected the union’s argument that the indemnification provision did not include withdrawal liability, the court agreed with the union that the indemnification agreement did not survive the expiration of the collective bargaining agreement. The employer argued that, because a withdrawal can only occur after the expiration of a collective bargaining agreement, the indemnification would be meaningless if it did not survive the contract’s expiration. But, as the union noted, and the court agreed, the employer’s argument was incorrect because a withdrawal can occur while a collective bargaining agreement is still in effect, for instance when an employer ceases covered operations.

In Cohen v. Jaffe, Raitt, Heuer & Weiss, P.C., 2018 WL 1089723 (E.D. Mich., Feb. 28, 2018), the court denied the defendant’s motion for judgment as a matter of law. The defendant was a law firm retained to provide plaintiffs advice on how to structure a transaction to avoid controlled group liability for their other businesses, or to advise that such a structure was not possible. The law firm failed to request information about all of the plaintiffs’ businesses. Due to the transaction, these businesses became part of the contributing employer’s controlled group and were jointly and severally liable for withdrawal liability. The law firm claimed it was entitled to judgment as a matter of law because plaintiffs never advised it of all of their businesses. The court rejected this claim, finding that the plaintiffs retained the law firm to provide an analysis of potential controlled group issues, and the law firm should have inquired as to all of the plaintiffs’ businesses.

In Atlas Sanitation Co., v. Horowitz Law Group, LLC, 2018 WL 1581973 (E.D.N.Y. Mar. 29, 2018), a court denied a law firm’s motion to dismiss a malpractice claim brought against it by a former contributing employer to a fund. The employer alleged that, on advice of counsel, it did not make any of its interim withdrawal liability payments pending the fund’s response to its request for review. The employer also alleged that the law firm failed to advise it of the requirement to demand arbitration within 60 days of the fund’s response to its request for review, in order to challenge the assessment. According to the employer, the alleged malpractice caused the employer to: (1) lose the right to challenge the withdrawal liability assessment; (2) not make the required interim payments allowing the fund to accelerate the employer’s payments and require a lump-sum payment of the assessment; and (3) owe additional amounts in interest and liquidated damages. The court concluded that the employer’s complaint sufficiently pled a cause of action for legal malpractice.
In *Transport Drivers, Inc. v. Coca-Cola Refreshments USA, Inc.*, 2018 WL 3682513, 2018 EB Cases 276001 (D. Minn. Aug. 2, 2018), a withdrawn employer, which provided leased employees to Coca-Cola under a series of labor leasing service agreements, and which incurred a complete withdrawal from the fund when it was terminated by Coca-Cola, sought reimbursement from Coca-Cola for its withdrawal liability based on contractual indemnification and promissory estoppel claims. The employer, which acknowledged it was generally knowledgeable about withdrawal liability when it entered into the original agreement, viewed the agreement as a “pass-through” arrangement under which Coca-Cola was obligated to reimburse the employer for leased employees’ wages and other benefits, including pension contributions to the fund, as determined under the CBA.

Reviewing the language of the agreement, the court noted that, although the agreement required Coca-Cola to indemnify the employer for certain losses and to refrain from causing the employer to violate the CBA, it did not explicitly reference withdrawal liability. The court rejected the employer’s argument and the testimony of its expert witness that withdrawal liability was conceptually equivalent to Coca-Cola’s contractual obligation to reimburse pension contributions, pointing out the separate provisions under ERISA for calculating and collecting contributions on the one hand and withdrawal liability on the other. The court also reviewed Seventh Circuit case law holding that, even in cases where an entity is contractually obligated to reimburse pension contributions, this does not amount to an obligation to contribute which would give rise to a withdrawal liability obligation under MPPAA, and such an entity cannot be held liable absent an express contractual agreement. Finding no express contractual agreement, the court concluded the employer did not have a contractual right to reimbursement by Coca-Cola for withdrawal liability and granted Coca-Cola summary judgment.

The court also granted summary judgment on the promissory estoppel claim, finding that the evidence did not show a clear and definite promise by Coca-Cola to reimburse the employer for withdrawal liability. Finally, the court granted summary judgment dismissing Coca-Cola’s counterclaim for breach of contract based on language in a subsequent version of the leasing services agreement, finding that the ambiguous indemnification language in the agreement did not support the right of one party to be indemnified against claims brought by the other party.

In *Chicago Bridge & Iron Co. v. Fairbanks Joint Crafts Council, AFL-CIO*, 2018 WL 4781167 (D. Alaska Oct. 3, 2018), Chicago Bridge and Iron (“CB&I”) was signatory to a CBA with Fairbanks Joint Craft Council (“Fairbanks”) and its affiliates, including the IBEW. The CBA contained a provision that CB&I’s “liability with respect to providing pension benefits shall be no higher” than the amount set in Schedule A to the CBA. CB&I contributed to various multiemployer pension plans, including the Alaska Electrical Pension Fund (“Fund”). The Fund determined that CB&I withdrew, and assessed it $678,171 in withdrawal liability.

CB&I filed a complaint for breach of contract and declaratory relief alleging that the withdrawal liability represented an increase in the cost of providing the pension benefits that CB&I was required to provide under the CBA, and violated the “express warranty” in the CBA. CB&I sought an order requiring Fairbanks and the IBEW to reimburse CB&I for the withdrawal liability payments made to the Fund.
First, Fairbanks and IBEW moved to dismiss on the ground that CB&I failed to arbitrate and grieve the dispute under the terms of the CBA. The court concluded that a dismissal was not warranted as the clear and unambiguous mandatory arbitration provisions of the CBA applied to employee grievances only.

Second, Fairbanks and the IBEW moved to dismiss on the ground that CB&I’s complaint was an attempt to evade or avoid withdrawal liability, which was unlawful and against public policy, and could not form the basis for a breach of contract action. Fairbanks and the IBEW argued that interpreting the provision of the CBA as an indemnification agreement or express warranty would “contravene the MPPAA by allowing CB&I to evade its withdrawal liability obligations” and would be contrary to public policy.

After noting that the Ninth Circuit has not addressed the public policy concerns of “whether a third party may contractually agree to be held liable for an employer’s withdrawal liability obligations,” the court looked to Shelter Dist., Inc. v. General Drivers, Warehousemen & Helpers Local Union No. 89, 674 F.3d 608 (6th Cir. 2012) and Pittsburgh Mack Sales & Serv., Inc. v. Int’l Union of Operating Eng’rs, Local Union No. 66, 580 F.3d 185 (3d Cir. 2009), both of which recognize that employers may enforce valid indemnification provisions in CBAs against unions. These cases found no violation of public policy because the employer remained liable to the fund and only sought reimbursement from the union, thus allowing the fund to remain adequately funded.

Because CB&I’s complaint sought to have the unions “reimburse” CB&I rather than having the unions be held directly liable to the Fund, the court found Fairbanks and the IBEW failed to establish “a well-defined and dominant public interest” that the scope of the requested relief would violate, so the court denied the motion to dismiss.