Bloomberg Tax

Tax Management
Real Estate Journal™

Private Equity Fund Acquisitions of Portfolio Companies with Multiemployer Plan Obligations Using LLCs After Sun Capital

By Marina Vishnepolskaya[*]
Marina Vishnepolskaya, Esq., P.C.
New York, NY

INTRODUCTION

Private equity funds are concerned with exposure to the Multiemployer Pension Plan Amendments Act of 1980[1] (MPPAA) withdrawal liability of portfolio companies in the aftermath of the First Circuit decision in *Sun Capital Partners III, LP v. New England Teamsters & Trucking Industry Pension Fund*.[2] This article identifies key holdings in the litigation, which has lasted over a decade, relating to structuring private equity investments in under-performing businesses with potential multiemployer plan (MEP)[3] withdrawal liabilities. This article also analyzes whether LLCs are viable acquisition vehicles for such investments in light of the legal tests under *Sun IV* for the trade and business and common control requirements in the MPPAA.[4]

This article concludes that the more stringent ''investment plus'' test for the trade or business liability prong[5] remains controlling authority in the First Cir-

[*] *Marina Vishnepolskaya is principal of Marina Vishnepolskaya, Esq., P.C., an international law firm that represents business entities and exempt organizations in a broad range of domestic and cross-border tax planning, compliance and transactional matters.*

[1] Pub. L. No. 96-634, 94 Stat. 1208 (1980). An prior version of this article was published in the January 2020 issue of the Tax Management Compensation Planning Journal. *See* Marina Vishnepolskaya, *Use of LLCs for Portfolio Investments After Sun Capital,* 48 Tax Mgmt. Comp. Plan. J. No. 1, 21 (Jan. 3, 2020).

[2] *Sun Capital Partners III, LP v. New Eng. Teamsters & Trucking Indus. Pension Fund*, 943 F.3d 49 (1st Cir. 2019) (hereinafter, *Sun IV*). The case was decided on November 22, 2019. All section references herein are to the Employee Retirement Security Act of 1974, as amended (ERISA), Pub. L. No. 93-406, 88 Stat. 829 §1 et seq. (1976), and the Internal Revenue Code of 1986, as amended (the ''Code''), 26 U.S.C. §1 *et seq*.

[3] ERISA §3(37) (definition of an MEP).

[4] *See* Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (1980). Although similar controlled group analysis would apply, ERISA underfunding liability to a defined benefit single-employer plan is a separate determination. *See* ERISA §4021(a)(1), §4022(a), §4062(a) (generally providing a contributing sponsor or member of a controlled group of such plan sponsor shall be liable jointly and severally in the event of single-employer plan termination); *see Trs. of the S. Cal. IBEW-NECA Pension Plan v. Liebeck*, 775 Fed. Appx. 267, 270-271 (9th Cir. 2019) (reversing district court grant of summary judgment for trustees of single-employer plan, holding defendant was not personally liable for ERISA withdrawal liability of a trust even if the trust was under common control with defendant's leasing operation, holding further that ''ERISA's single-employer provision makes jointly and severally liable those trades and businesses that are commonly controlled, but not necessarily the entity or person that is doing the controlling. . . . Where courts have held owners of certain commonly controlled trades and businesses personally liable for withdrawal liability, they have done so not because ERISA imposes liability directly on the controlling person, but rather because the legal character of the commonly controlled entity makes its owners liable for the entity's obligations, as with a sole proprietorship.''); 29 C.F.R. §4001.2 (as amended in 2018) (definition of a single-employer plan), 29 C.F.R. §4001.3(b)(1) (1996) (controlled group definition for a single-employer plan). *Sun Capital* litigation addressed liability only for withdrawal from an MEP. Thus, structuring investments in portfolio companies maintaining MEPs to minimize or eliminate potential MPPAA withdrawal liability is the focus of this article.

[5] The holding by the district court in *Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund*, 172 F. Supp.3d 447 (D. Mass. 2016), *rev'd*, 943 F.3d 49 (1st Cir. 2019) (hereinafter, *Sun III*) on the trade or business requirement is limited to the ERISA context, and absent further guidance from Treasury, the IRS, or federal jurisprudence, does not impact the definition of a trade or business for federal income tax purposes, which may have been of particular concern to tax-exempt or foreign investors. *See, e.g.,* Code §501(a), §501(c)(3), §511, §512, §513 (federal income tax consequences for tax-exempt organiza-

cuit and controlling or persuasive authority in other federal jurisdictions.[6] This article also concludes that the eight-factor test for the common control liability prong by the First Circuit applies to a private equity investment in a portfolio company.

This article sets forth potential issues in structuring a private equity investment through an acquisition vehicle that is an LLC based on the treatment in *Sun Capital* of the trade or business and common control requirements. This article concludes that modifications to the LLC structure and operating agreements of the LLC and the funds would be advisable to conform the arrangement to the three possible MPPAA liability tests in the *Sun Capital* litigation. Absent further guidance from the Pension Benefit Guaranty Corporation (PBGC) on the trade or business and common control requirements, an LLC, with conforming modifications, would remain a viable investment vehicle for private equity funds investing in portfolio companies maintaining MEPs.

BACKGROUND

Under ERISA §4001(a)(3), a ''multiemployer plan'' means a plan, to which more than one employer is required to contribute, which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and which satisfies requirements in Department of Labor (DOL) regulations, subject to certain exceptions.

ERISA §4001(b)(1) provides that all employees employed by trades or businesses under common control are treated as employed by a single employer. Likewise, all trades and businesses under common control are treated as a single employer.[7] The common control rule applies under ERISA Title IV[8] for all purposes including provisions added by the MPPAA.[9]

The common control requirement effectively serves to pierce corporate veils of related entities seeking to evade ERISA plan obligations by fractionalizing their operations.[10] Veil piercing under the MPPAA imposes withdrawal liability on owners and businesses related to the employer maintaining the multiemployer plan (MEP).[11] An entity would be in control and therefore subject to withdrawal liability under the MPPAA if it owned at least 80% of the withdrawn employer by vote or value.[12]

The PBGC within the DOL administers and enforces ERISA plan termination provisions.[13] The DOL and IRS have dual jurisdiction to administer and enforce ERISA.[14] Accordingly, PBGC regulations incorporate the controlled group definition in §414(c) and the Reg.[15]

Thus, the trade or business of a private equity fund does not have to be the same as the trade or business of a portfolio company maintaining an MEP for its employees.[16] The fund and the subsidiary merely each have to conduct a trade or business and be under common control.[17] The common control and trade or business requirements under ERISA §4001(b)(1) would apply to a fund and a portfolio company maintaining an MEP.[18]

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tions with respect to unrelated business taxable income), §864, §1446 (federal income and withholding tax consequences for partnerships with respect to certain income effectively connected with the conduct of a trade or business within the United States).

[6] *See* 943 F.3d 49 at 53, n.4 (with respect to the profit element of the investment plus test, holding that ''The district court quite properly found Sun Fund III's fee waivers and Sun Fund IV's carryforwards to be direct economic benefits because they each provided either current, or potential future, financial benefits that a passive investor would not accrue.'') (citations omitted). This holding would apply to similarly situated funds, where a portfolio company, akin to SBI, did not generate profits that would be distributed as dividends or realized upon the sale of the company. SBI declared bankruptcy, withdrew from the MEP, and the only economic benefit that could be derived by the Sun Funds were the management fees and corresponding offsets.

[7] ERISA §4001(b)(1).

[8] ERISA §4001-§4403 (Title IV of ERISA setting forth the plan termination insurance provisions).

[9] *See* ERISA §4001(b)(1); PBGC Op. Ltr. No. 86-8.

[10] *See Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund*, 903 F. Supp.2d 107, 113 (D. Mass. 2012) (hereinafter, *Sun I*).

[11] *See Sun I*, 903 F. Supp.2d 107 at 113.

[12] 29 C.F.R. §4001.3(a); Treas. Reg. §1.414(c)-2(b)(2) (as amended in 1994) (general definition of a parent-subsidiary group of trades or businesses under common control, which was the relevant category of a controlled group with respect to the SBI investment structure in Sun Capital; controlling interest in a partnership generally would require ownership of 80% or more of capital or profits interests of such partnership).

[13] ERISA §4002(a); *see* ERISA §4001-§4403.

[14] ERISA §3001(a).

[15] ERISA §4001(b); 29 C.F.R. §4001.2 (as amended in 2018), 29 C.F.R. §4001.3(a)(1) (1996) (controlled group under MPPAA defined by incorporating the §414(c) definition of two or more trades or businesses under common control); Treas. Reg. §1.414(c)-2(a) (as amended in 1994).

[16] *See* ERISA §4001(a)(3) (definition of a multiemployer plan).

[17] *See* ERISA §4001(b)(1); 29 C.F.R. §4001.3(a) (1996); Treas. Reg. §1.414(c)-2(a) (as amended in 1994); PBGC Op. Ltr. No. 86-8.

[18] *See* ERISA §4001(b)(1); PBGC Op. Ltr. No. 86-8.

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SUN IV: NO COMMON CONTROL INVESTMENT PLUS TEST APPLIES

The issues addressed in *Sun IV* do not concern an investor as a fiduciary.[19] The First Circuit in *Sun II* found there was no breach of fiduciary duty of Sun Funds.[20] The court also found such a breach did not cause the bankruptcy filing of Scott Brass, Inc. (SBI). SBI was a portfolio company of Sun Fund III [21] and Sun Fund IV (Sun Funds)[22] held through a subsidiary LLC, Sun Scott Brass, LLC (SSB-LLC), of which the Sun Funds held 30% and 70% membership interests, respectively.[23] SSB-LLC formed a holding company, Scott Brass Holding Corporation (Holding Company or SBHC).[24] SBHC used the $3 million of investments by the Sun Funds in the SSB-LLC and additional $4.8 million in debt to purchase all the outstanding stock of SBI.[25]

The purchase price reflected a 25% discount to take into account the unfunded pension liability of SBI.[26] Two management companies (SCPM III and SCPM IV; collectively The Management Companies) were subsidiaries of general partners (GPs) of the two Sun Funds.[27] The Management Companies contracted with a private equity firm formed by two individual Sun Funds co-founders, Sun Capital Advisors, Inc. (SCAI). SCAI provided to the Management Companies the management services of SCAI employees and consultants.[28] In turn, at least one of the Management Companies, SCPM IV rendered the services to the Holding Company.[29] Sun Funds placed SCAI employees in SBI and jointly operated SBI.[30]

The company, a manufacturer of brass and copper industrial products, filed for bankruptcy due to a decline in copper prices in 2008, and withdrew from defendant MEP, the New England Teamsters and Trucking Industry Pension Fund (Pension Fund).[31] The same year, the Pension Fund commenced an action against the Sun Funds demanding payment of withdrawal liability of SBI.[32] The Sun Funds sued the Pension Fund in Massachusetts District Court seeking declaratory relief that they were not an employer liable for MPPAA withdrawal liability of SBI because they were not trades or businesses under common control with SBI.[33]

The district court granted Sun Funds motion for summary judgment, and the Pension Fund appealed to the First Circuit.[34] The Court of Appeals reversed in part, vacated in part, and affirmed in part the district court decision. The First Circuit remanded the case to the district court to determine whether Sun III was a trade or business, and whether the Sun Funds were under common control with SBI.[35]

On remand, the district court held that Sun III was a trade or business and that the Sun Funds were under common control with SBI under the theory of a partnership-in-fact, and therefore, liable for MPPAA withdrawal obligations.[36] The Sun Funds appealed the decision to the First Circuit.[37] The First Circuit reversed the district court on the common control issue and remanded to district court to enter summary judgment for plaintiffs.[38]

A Fictional Partnership-In-Fact

The First Circuit in *Sun IV* was presented with three issues on appeal from the district court.[39] First, the First Circuit ruled on whether the Sun Funds were under common control with the portfolio company, SBI.[40] Second, the circuit court addressed whether the Sun Funds formed a partnership-in-fact[41] under *Luna,*[42] as incorporated by the DOL regulations §4001.2 and §4001.3(a).[43] Third, the court was asked to rule whether, if such an arrangement existed between the funds, the partnership-in-fact engaged in a

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[19] *Sun IV*, 943 F.3d 49 at 52, n.2

[20] *Sun IV*, 943 F.3d 49 at 52, n.2.

[21] The district court in *Sun I* aggregated two parallel funds, Sun Capital Partners III, LP and Sun Capital Partners III QP, LP into "Sun Fund III" for purposes of the MPPAA analysis. 903 F. Supp.2d 107, 109, n.1.

[22] *Sun IV*, 943 F.3d 49 at 52, n.2.

[23] *Sun IV*, 943 F.3d 49 at 51, 52.

[24] *Sun IV*, 943 F.3d 49 at 51, 52.

[25] *Sun IV*, 943 F.3d 49 at 51, 52.

[26] *Sun IV*, 943 F.3d 49 at 51, 52.

[27] *Sun IV*, 943 F.3d 49 at 51, 52.

[28] *Sun IV*, 943 F.3d 49 at 51, 52.

[29] *Sun IV*, 943 F.3d 49 at 51, 52.

[30] *Sun IV*, 943 F.3d 49 at 51, 52.

[31] *See Sun IV*, 943 F.3d 49 at 52, n.2.

[32] *See Sun I*, 903 F. Supp.2d 107 at 111.

[33] 903 F. Supp.2d 107 at 112.

[34] *See Sun Capital Partners III, LP v. New Eng. Teamsters*, 724 F.3d 129 (1st Cir. 2013), *cert. denied*, 571 U.S. 1244 (2014) (hereinafter, *Sun II*).

[35] *Sun II*, 724 F.3d 129 at 150.

[36] *Sun Capital Partners III, LP v. New. Eng. Teamsters*, 172 F. Supp.3d 447, 457, 467 (D. Mass. 2016) (hereinafter, *Sun III*). *See also* 329 F.R.D. 102 (D. Mass. 2018) (motion for costs granted in part).

[37] *Sun IV*, 943 F.3d 49.

[38] *Sun IV*, 943 F.3d 49 at 61.

[39] *Sun IV*, 943 F.3d 49 at 55.

[40] 943 F.3d 49 at 55.

[41] For ease of reference, the concept of a partnership-in-fact is sometimes referenced in the article synonymously as a deemed partnership, implied partnership, or a de-facto partnership.

[42] *Luna v. Commissioner*, 42 T.C. 1067 (1964).

[43] *Sun IV*, 943 F.3d 49 at 54, 55.

ISSN 8755-0628

trade or business of operating SBI.[44] The First Circuit addressed only the common control issues on appeal.[45]

Each Sun Fund individually did not have the requisite control of SSB-LLC to be under common control with SBI. However, the aggregate interests in SSB-LLC of the Sun Funds would constitute 100 percent control of SSB-LLC, and indirectly, of SBI. Defendant Pension Fund argued the Sun Funds established a partnership-in-fact above SSB-LLC to manage SBI.[46] Thus, the deemed partnership, SSB-LLC, the Holding Company formed by SSB-LLC, and SBI under the Holding Company would be under common control.[47]

SSB-LLC was a Delaware limited liability company, and each Sun Fund was a Delaware limited partnership.[48] Members of an LLC under Delaware law are shielded from liability for the debts of the LLC.[49] Limited liability precisely is the factor that makes an LLC attractive as an investment vehicle. SSB-LLC was treated as a partnership under Treasury check-the-box regulations for federal income tax purposes.[50] Consistently, the operating agreement, in boilerplate language, expressly limited partnership status to federal income tax and certain state income or franchise tax purposes.[51]

The First Circuit rejected the argument of defendant to disregard the 70/30 split ownership of SSB-LLC and ''create a transaction that never occurred – a purchase by Sun Fund IV of a 100% stake in SBI.''[52] The district court stated the legislative intent of ERISA §4212(c) was to prevent fraudulent maneuvers lacking in economic substance to avoid ERISA minimum funding standards.[53] The First Circuit concluded, ''This is simply not a case about an entity with a controlling stake of 80% or more under the MPPAA seeking to shed its controlling status to avoid withdrawal liability.''[54]

Sun Fund IV executed a letter of intent to purchase 100% of SBI stock before the Sun Funds formed SSB-LLC under a 70/30 split.[55] The appellate court found the nonbinding letter of intent was not an agreement to purchase the entire interest in SBI.[56] The First Circuit chastised the Pension Fund for not providing ''a single case in which a court created a fictitious transaction in order to impose [29 U.S.C.] §1392(c) liability.''[57] Therefore, there was not a primary purpose to evade or avoid withdrawal liability under ERISA §4212(c).[58] Accordingly, the First Circuit affirmed the district court holding in *Sun I* that the MPPAA anti-avoidance statute did not apply to impose withdrawal liability on the Sun Funds.[59]

Neither court found authority to deem SSB-LLC a partnership for MPPAA but not tax purposes, or impose joint and several liability on the Sun Funds as SSB-LLC general partners.[60] But on remand, the district court concluded that limited liability conferred on the Sun Funds by SSB-LLC could be disregarded and an implied partnership could be found to control SSB-LLC under ERISA §4001(b)(1).[61] If the partnership were a trade or business, the Sun Funds would be liable jointly and severally as partners for its debts, including MPPAA withdrawal liability.[62]

As the First Circuit in *Sun IV* explained, prior decisions imputed withdrawal liability to partners of joint venturers generally in unincorporated settings.[63] By contrast, the Sun Funds not only formed SSB-LLC, but also, individually were organized as limited partnerships.[64] Another contributing factor was, some courts focused on intent of parties under *Culbertson*[65] in contrast to the more comprehensive *Luna* test, which took conduct of parties into account.[66]

The court in *Sun III* stated, SSB-LLC ''appears to be better understood as a vehicle for the coordination

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[44] 943 F.3d 49 at 55.

[45] 943 F.3d 49 at 51, 52.

[46] *Sun III*, 172 F. Supp.3d 447 at 458.

[47] *See Sun III*, 172 F. Supp.3d 447 at 459, 460; 29 C.F.R. 4001.3(a); Treas. Reg. §1.414(c)-2(b)(2)(i)(A) (as amended in 1994).

[48] *Sun I*, 903 F. Supp.2d 107 at 111.

[49] 903 F. Supp.2d 107 at 119; Del. Limited Liab. Co. Act §18-303(a).

[50] 903 F. Supp.2d 107 at 119; see Code §7701(a)(2); Treas. Reg. §301.7701(a)-3 (as amended in 2006).

[51] 903 F. Supp.2d 107 at 119.

[52] *Sun II*, 724 F.3d 129 at 148.

[53] ERISA §4212(c); *Sun I*, 903 F. Supp.2d 107 at 121, 122.

[54] *Sun II*, 724 F.3d 129 at 149.

[55] 724 F.3d 129 at 148.

[56] 724 F.3d 129 at 148, 149.

[57] 724 F.3d 129 at 149.

[58] 724 F.3d 129 at 148, 149.

[59] 724 F.3d 129 at 149.

[60] *See Sun IV*, 943 F.3d 49 at 58; *Sun III*, 172 F. Supp.3d 447 at 460.

[61] *Sun III*, 172 F. Supp.3d 447 at 463.

[62] *See Sun IV*, 943 F.3d 49 at 58; *Sun III*, 172 F. Supp.3d 447 at 458 (''in the absence of some mechanism by which the ownership interests of Sun Funds III and IV would be aggregated, withdrawal liability would not extend to the Plaintiff Funds themselves''); *cf.* 172 F. Supp.3d 447 at 460 (''If such a joint venture or partnership existed, it would have complete ownership of [SSB-LLC], be commonly controlled with [SBI], and, it is also a trade or business, pass withdrawal liability on to the Sun Funds as its partners.'').

[63] *Sun IV*, 943 F.3d 49 at 60.

[64] *See Sun IV*, 943 F.3d 49 at 60; *Sun II*, 724 F.3d 129 at 133.

[65] *Commissioner v. Culbertson*, 337 U.S. 733 (1946).

[66] *Sun IV*, 943 F.3d 49 at 58; *Cent. States, Se. & Sw. Areas Pension Fund v. Johnson*, 991 F.2d 387, 391, 392 (7th Cir. 1993).

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of the two Sun Funds – and an attempt to limit liability – than as a truly independent entity. It is another layer in a complex organizational arrangement.''[67] Thus, the district court left SSB-LLC as a limited liability vehicle intact under MPPAA.[68] Instead, the district court focused on investment and business decisions of Sun Funds being directed by the two cofounders in finding a deemed partnership.[69]

Authority for Imputing Liability to Partners Under MPPAA

Even if there were a partnership-in-fact above SSB-LLC, courts have not automatically imputed MPPAA liability to the implied partners. ERISA §4081 does not impute withdrawal liability to partners of a partnership treated as an employer under the common control test in ERISA §4001(b)(1).[70] MPPAA provides only that an employer's failure to pay withdrawal liability ''shall be treated in the same manner as a delinquent contribution.''[71] The question of individual liability of partners for the withdrawal liability of a partnership that is an employer under the common control test is a matter of federal common law.[72]

The Ninth Circuit in *Board of Trustees of Western Conference etc. v. H.F. Johnson, Inc.,* held that joint venturers were treated the same as general partners for tax purposes.[73] The court noted that Treasury has specifically applied this definition in the context of ERISA liability.[74] The court held that, absent any limitation in the partnership agreement, partners are personally liable for obligations of the partnership. The court cited district court decisions allowing recovery of withdrawal liability from partners and partnerships under common control with defaulting corporate employers.[75]

Accordingly, the Ninth Circuit held that an estate and an individual personally were liable for withdrawal liability of a company as joint venturers.[76] The Ninth Circuit stated there was a fundamental difference between corporations and partnerships, in that the shareholders and officers, unlike general partners, enjoyed limited liability.[77] However, shareholders and officers might be liable for a corporate withdrawal obligation under the common-law veil-piercing doctrine, the Ninth Circuit noted.[78]

The court in *Sun IV* cited to the Ninth Circuit decision indirectly by citing a Seventh Circuit opinion, *Central States, Southeast & Southwest Areas Pension Fund v. Johnson* on the issue of partner liability.[79] The *Central States* enumerated decisions that upheld withdrawal liability of joint venturers or partners.[80] The Seventh Circuit in *Central States* addressed the issue of whether spouses should be jointly liable for MPPAA withdrawal liabilities of an unincorporated business.[81]

The court in *Central States* followed precedent in other jurisdictions holding that business partners or joint venturers must share withdrawal liability of companies that they own, but only if they intended to form a partnership.[82] The Seventh Circuit held that the existence of a partnership for ERISA purposes was a matter of federal common law.[83] The court held further that the test in *Culbertson* applied to determine whether spouses intended to form a partnership.[84] Thus, the *Central State*s court vacated the district court judgment and remanded the partnership issue to the district court.[85]

The *Sun III* court acknowledged that MPPAA withdrawal liability was a matter of federal common law, citing *Board of Trustees of Western Conference*.[86] However, in that case, liability was imputed absent

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[67] *Sun III*, 172 F. Supp.3d 447 at 461.

[68] 172 F. Supp.3d 447 at 461.

[69] 172 F. Supp.3d 447 at 461, 462.

[70] ERISA §4001(b)(1) (common control test for withdrawal liability), ERISA §4081(a) (establishing MEP withdrawal liability of employer); *see Board of Trustees of Western Conference etc. v. H.F. Johnson, Inc.*, 830 F.2d 1009, 1014, 1015 (9th Cir. 1987) (stating MPPAA does not expressly create individual withdrawal liability where the employer is a sole proprietorship or a partnership; stating further, ''Whether the principals in joint ventures may be held personally liable for a joint venture's withdrawal liability is a question of first impression in this Circuit''; holding an estate and individual liable as joint venturers for the withdrawal obligation).

[71] ERISA §515, §4301(b).

[72] *See H.F. Johnson, Inc.*, 830 F.2d at 1014 (9th Cir. 1987). *Accord Cent. States, Se. & Sw. Areas Pension Fund v. Skyland Leasing Co.*, 691 F. Supp. 6, 12, 13 (W.D. Mich. 1987), *aff'd*, 892 F.2d 1043 (6th Cir. 1990) (holding, *inter alia*, partners were jointly and severally liable for withdrawal liability under MPPAA of a partnership in a controlled group with the withdrawn employer).

[73] 830 F.2d 1009 at 1015.

[74] 830 F.2d 1009 at 1015.

[75] 830 F.2d 1009 at 1015.

[76] *H.F. Johnson, Inc.*, 830 F.2d 1009 at 1014, 1015. The holding would be persuasive authority in the First Circuit.

[77] 830 F.2d 1009 at 1015.

[78] 830 F.2d 1009 at 1015, n.4.

[79] 991 F.2d 387, 391, 392 (7th Cir. 1993).

[80] 991 F.2d 387 at 390-394.

[81] 991 F.2d 387 at 391.

[82] *Central States*, 991 F.2d 387, 388, 390-394 (citations omitted).

[83] 991 F.2d 387 at 391.

[84] 991 F.2d 387 at 392.

[85] 991 F.2d 387 at 394.

[86] *Sun III*, 172 F. Supp.3d 447 at 460; *see H.F. Johnson, Inc.*, 830 F.2d 1009.

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any limitation on liability of deemed partners. [87] The district court in *Sun III* held the ''conventional theories of a general partnership. . . are not evident here''.[88] Thus, there was uncertainty the Sun Funds would have passed muster under either the Seventh or Ninth Circuit tests for imputed liability.

The district court did not analyze this issue and held the Sun Funds as deemed partners were jointly and severally liable for SBI obligations.[89]The First Circuit reversed the district court, but diverging from sister courts, stated partners-in-fact under common control would be liable *per se* under MPPAA if they were trades or businesses.[90] Under *Luna,* intent only is a factor in the analysis. Thus, unlike the Seventh or Ninth Circuits, the court in *Sun IV* implied that, absent intent to form a partnership, MPPAA liability would attach to deemed partners.

On balance, the court in *Sun IV* permitted a partnership-in-fact analysis to proceed. Thus, a First Circuit court may find a partnership-in-fact between the funds, sitting above the investment vehicle. In this scenario, participating funds deemed trades or businesses automatically would be liable under MPPAA. Other federal circuits imputed *per se* liability only to general partners absent an agreement. But the *Sun III* court stated a general partnership between the Sun Funds was not evident. Therefore, compared to circuit courts that engaged in additional imputed liability analysis after finding a partnership or joint venture, the First Circuit set forth a more stringent imputed liability criterion for the common control MPPAA prong.

Despite Per Se Imputed Liability, Higher Threshold for a Partnership-In-Fact

The two-fold relief was that, in applying *Luna*, the First Circuit limited the significance of intent to form the imaginary partnership to one factor. The objective, multi-factor *Luna* analysis, contrasts with the primary focus on subjective intent in *Culbertson*. The *Luna* test may facilitate compliance by creating express requirements for avoiding a partnership-in-fact, which funds may incorporate in deal documents and the investment structure.

Second, the *Luna* analysis by the First Circuit limited managerial control to two factors in a parent-subsidiary structure. The reluctance of the First Circuit to look through legal entities was consistent with case law in other federal circuits discussed below, despite an attempt by district court in *Sun III* to assign greater significance to this factor. Based on this precedent, a pension fund trustee would have more difficulty succeeding on a threshold partnership-in-fact claim in the First Circuit, or in other federal courts that analyzed common control similarly.

Managerial Control Limited to Two Luna Factors in Tiered Structure

The district court in *Sun III*, reversed by the First Circuit, strained to apply the *Luna* factors in concluding the Sun Funds were partners-in-fact.[91] The district court also cited jurisprudence that may have applied a more stringent test for common control under MPPAA.[92] The district court noted, ''some courts look to both ownership and managerial control, if not as a matter of doctrinal analysis then at least an atmospheric factor.''[93]

One such case was an Eleventh Circuit decision, *Plumbers & Steamfitters Local No. 150*.[94] In *Plumbers*, the district court held that an LLC and a partnership owned and controlled by the same three persons were part of a brother-sister controlled group with the withdrawn employer.[95] The test for a brother-sister controlled group is distinct from a parent-subsidiary controlled group test applicable in *Sun Capital*.[96] Thus, the management control factor in *Plumbers* was inapposite to a controlled group analysis for a parent-subsidiary structure in *Sun Capital*.

The district court also cited a Sixth Circuit opinion, *Central States, Southeast & Southwest Areas Pension Fund v. Skyland Leasing Co.*[97] In *Central States*, the Michigan district court held defendant partners in a limited partnership, to which they converted a corporation, were jointly and severally liable for MPPAA withdrawal liability.[98] The court held Leasing, the de-

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[87] *H.F. Johnson, Inc.*, 830 F.2d 1009 at 1014 – 1015.

[88] 172 F. Supp.3d 447 at 463.

[89] *Sun III*, 172 F. Supp.3d 447 at 467.

[90] *Sun IV*, 943 F.3d 49 at 58.

[91] *Sun IV*, 943 F.3d 49 at 52; *Sun III*, 172 F. Supp.3d 447 at 463, 464.

[92] *Sun III*, 172 F. Supp.3d 447 at 46, n.10; *Plumbers & Steamfitters Local No. 150 Pension Fund v. Custom Mech. CSRA, LLC*, 2009 BL 220489 (S.D. Ga. Oct. 13, 2009); *Cent. States, Se. & Sw. Areas Pension Fund v. Skyland Leasing Co.*, 691 F. Supp. 6, 11-12 (W.D. Mich. 1987), *aff'd*, 892 F.2d 1043 (6th Cir. 1990).

[93] *Sun III*, 172 F. Supp.3d 447 at 460, n.10.

[94] 2009 BL 220489.

[95] *Plumbers*, 2009 BL 220489 at 6.

[96] *Sun IV*, 943 F.3d 49 at 56, n.8; Treas. Reg. §1.414(c)-2(b) (as amended in 1994); *cf. Plumbers*, 2009 BL 220489 at 5; Treas. Reg. §1.414(c)-2(c) (defining a brother-sister group of trades or businesses under common control).

[97] 691 F. Supp. 6 (W.D. Mich. 1987), *aff'd*, 892 F.2d 1043 (6th Cir. 1990).

[98] 691 F. Supp. 6 at 16.

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fendant partnership, was a trade or business under common control with Skyland, a corporation.[99]

Thus, the district court in *Central States* granted the motion for summary judgment to plaintiff employee funds.[100] However, *Central States*, akin to *Plumbers*, addressed, albeit implicitly, a brother-sister controlled group.[101] Therefore, the common control analysis in *Central States* likewise was inapposite to the co-investment fund structure in the *Sun Capital* cases.[102] Consistently, in contrast to the district court note in *Sun III,*[103] under *Sun IV*, managerial control manifested in at most two *Luna* factors for determining common control in a parent-subsidiary structure.[104]

On the other hand, courts have applied the alter ego doctrine to hold persons jointly and severally liable for delinquent contributions under ERISA §515.[105] Briefly, under the alter ego doctrine, courts have considered whether corporations or unincorporated businesses have interrelated operations, common management, centralized control over labor relations, and common ownership to impute MPPAA liability.[106] Courts also have looked at any transactions and other dealings between the two entities.[107]

Courts have found no single factor controlling, and all need not be present to support a finding of alter ego status.[108] However, the First Circuit applied *Luna* test applies in the context to withdrawal liability of partners. Thus, management control in the context of common control analysis for MPPAA withdrawal liability remains limited to the two *Luna* factors under *Sun IV*.[109]

But, as the Ninth Circuit stated in dictum, a shareholder may be liable for withdrawal obligations of a corporation under piercing the corporate veil doctrine.[110] The doctrine is similar to or synonymous with the alter ego analysis in some jurisdictions.[111] Moreover, in certain jurisdictions, courts have applied a piercing the LLC veil doctrine to members of LLCs.[112] The extent, to which piercing the LLC veil doctrine may apply to impute MPPAA withdrawal liability to LLC members of a fund with respect to a

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[99] 691 F. Supp. 6 at 16.

[100] 691 F. Supp. 6 at 16.

[101] 691 F. Supp. 6 at 12 (''It is undisputed that Van Dyke and Keller were the sole shareholders in Skyland and co-partners in Leasing. At all times relevant to this dispute, the principals, Van Dyke and Keller, exercised actual control over both Skyland and Leasing. The activities of both companies were integrally related and both companies subsisted, directly or indirectly, in whole or substantial part, on revenues generated by Skyland's trucking business. All negotiations regarding participation in the Fund were made by either Van Dyke or Keller on behalf of Skyland''; holding Skyland and Leasing as under common control for MPPAA purposes.

[102] *See Sun IV*, 943 F.3d 49 at 56. A similar argument could not be made with respect to Sun Funds. The two co-founders served as either managers or owners, directly or indirectly, of entities in the holding company structure. Nevertheless, neither the district court nor the First Circuit collapsed the existing subsidiaries into a brother-sister controlled group under *Luna* or the basic economic substance doctrine in tax law. *See Sun IV*, 943 F.3d 49 at 60; *Sun III*, 172 F. Supp.3d 447 at 461.

[103] *Sun III*, 172 F. Supp.3d 447 at 460, n.10.

[104] *Sun IV*, 943 F.3d 49 at 58, 60 (referring to the first and eighth *Luna* factors).

[105] *See* ERISA §515; *Flynn v. Ohio Bldg. Restoration, Inc.*, 317 F. Supp.2d 22, 26 (D.D.C. 2004).

[106] *See Flynn*, 317 F. Supp.2d 22, 26 (applicable test for determining whether two corporations are alter egos to hold a corporation liable for delinquent contributions to a MEP maintained by another corporation).

[107] 317 F. Supp.2d 22 at 29, 37 (holding corporations were alter egos, and therefore, one corporation was liable for employer contributions to the pension fund of the other corporation).

[108] 317 F. Supp.2d 22 at 29; *see also Flynn v. R.C. Tile*, 353 F.3d 953 (D.C. Cir. 2004); *Mass. Carpenters Central Collection Agency v. Belmont Concrete*, 139 F.3d 304, 308 (1st Cir. 1998).

[109] *Sun IV*, 943 F.3d 49 at 59, 60.

[110] *H.F. Johnson, Inc.*, 830 F.2d 1009, 1015, n.4 (9th Cir. 1987); *see Connors v. P & M Coal Co.*, 801 F.2d 1373, 1377, 1378 (D.C. Cir. 1986) (''Courts that have refused to expand the meaning of 'employer' to include officers and shareholders, in respect to both Titles I and IV, have noted that shareholders and officers may be held personally liable for their corporations' obligations under ERISA if they have acted as the 'alter egos' of their corporations or otherwise met the requirements that justify 'piercing the corporate veil' under traditional common law principles. . . . At the same time, courts have noted that where plaintiffs in an ERISA action fail to allege that individual defendants should be held personally liable under such principles, or fail to introduce evidence that would support such a basis for liability, such claims must be dismissed''; holding shareholders and officers an employer within the meaning of ERISA Titles I and IV because of application of fundamental principles of limited liability in corporate law, and were not individually liable to the plans for MPPAA withdrawal liability of the corporation under corporate veil piercing principles.); *see* ERISA §3(5), ERISA §4081(a); *Sun IV*, 943 F.3d 49 at 55.

[111] *See, e.g.,* 801 F.2d at 1378 (D.C. Cir. 1986); *see also Glover v. S.D.R. Cartage Co.*, 681 F. Supp. 1293, 1296, 1297 (N.D. Ill. 1988) (stating, ''The MPPAA evinces no Congressional intent to treat corporate debts for withdrawal liability differently from any other corporate debts or to hold officers and shareholders personally liable for withdrawal liability assessments.'') (holding shareholder and officer liability under MPPAA was determined by state law, plaintiffs did not provide factual support for the corporate veil piercing claim and therefore, were not liable for MPPAA withdrawal obligation of the corporation).

[112] *See, e.g., Grammas v. Lockwood Assoc., LLC*, 95 A.D.3d 1073 (N.Y. App. Div. 2d Dep't 2012) (applying a four-factor piercing the LLC veil test); *Williams Oil Co. v. Randy Luce E-Z Mart One, LLC*, 302 A.D.2d 736, 739, 740 (N.Y. App. Div. 3d Dep't 2003) (holding whether general manager of Luce LLC exercised complete domination of the corporation in respect to the transaction attacked and such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury were triable issues of fact; affirming denial of motion to dismiss individual claims against Luce).

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portfolio company remains to be seen.[113] Even so, it is quite difficult to pierce a corporate veil.[114] Planning and documentation would help avoid potential adverse consequences of veil piercing for a fund or a special purpose vehicle.

Partnership-in-Fact Analysis in Sun IV: Fact Prevails Over Fiction.

Accordingly, an issue on appeal in *Sun IV*, was whether the Sun Funds formed a de facto partnership above SSB-LLC[115] which would result in withdrawal liability flowing through to the Sun Funds as partners.[116] The First Circuit applied an eight-factor *Luna* test to determine whether a de facto partnership existed between the Sun Funds.[117] The circuit court held that consideration of all the *Luna* factors led to the conclusion that the Sun Funds did not form a partnership-in-fact.[118]

On the one hand, the two Sun Funds sought investment opportunities jointly even before forming SSB-LLC.[119] The Sun Funds coinvested in and comanaged other portfolio companies using the same organizational structure.[120] Thus, the funds could have exercised mutual control and assumed mutual responsibilities over the investments.[121]

In addition, the principals of Sun Funds installed employees of SCAI to manage SBI. Managerial control of SBI indicated another partnership factor, the agreement of the parties and their conduct in executing the contractual terms.[122] Also, by installing the management structure, Sun Funds pooled resources to develop the business of SBI jointly.[123] The pooling of resources and joint development of business evidenced similarly a partnership-in-fact.[124]

On the other hand, there was no evidence of intent of the two Sun Funds to create a partnership on top or beyond the scope of activities of SSB-LLC.[125] Therefore, under *Culbertson*, the intent to join together in the present conduct of the enterprise was not met.[126] In addition, the Sun Funds expressly disclaimed any existence of a partnership.[127] The disclaimer demonstrated no agreement of the parties, no conduct of business in joint names, and no representation of joint venture status to third parties.[128] These three *Luna* factors weighed against a finding of a partnership-in-fact.[129]

Moreover, the two Sun Funds had few overlapping limited partners, filed separate partnership tax returns, kept separate books, and maintained separate bank accounts. The Sun Funds also were not parallel funds, and thus were found to be ''somewhat independent in activity and structure.''[130] These four additional *Luna* factors indicated a partnership did not exist.[131] The filing of separate returns by the Sun Funds as partnerships was distinct from SSB-LLC filing a return as a tax partnership between the Sun Funds.

The courts in *Sun III* and *Sun IV* litigation analyzed the alleged partnership for MPPAA purposes between the Sun Funds with respect to their co-investment in

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[113] *Ceco Concrete Constr., LLC v. Centennial State Carpenters Pension Trust*, 821 F.3d 1250, 1264 (10th Cir. 2016) (holding because the entities were under common control within the MPPAA definition, it was unnecessary to reach the issue of whether they were a single employer or alter egos under federal common law); *Int'l Union, Local 68 v. RAC Atl. City Holdings, LLC*, 2013 BL 22459 at 1, 11, 12 (D.N.J. 2013) (holding, ''In New Jersey, although the law is unsettled, it is generally accepted that the veil of an LLC can be pierced'' and granting the plaintiff pension fund leave to amend complaint to state a claim against LLC members who allegedly failed to wind up properly the LLC for, among other damages, withdrawal liability).

[114] *See Glover*, 681 F. Supp. 1293 at 1296 (''stringent 'pierce the corporate veil' test applies in withdrawal liability cases''); *De Breceni v. Graf Bros. Leasing, Inc.*, 828 F.2d 877, 878-880 (1st Cir. 1987) (on the issue of whether an economic reality test or a common law corporate veil piercing doctrine applies to determine personal liability of officer or shareholder for MPPAA withdrawal obligation of the corporation, holding that, in determining withdrawal liability, the general principles of corporate law applied; holding further that under the alter ego theory, defendant trustee of the pension fund had to prove ''the small respect paid by the shareholders themselves to [Graf Brothers] separate corporate identity; the fraudulent intent of the incorporators; and the degree of injustice that would be visited on the litigants by recognizing the corporate identity''; stating that limited liability was ''a cornerstone of corporate law''); affirming district court ruling finding no personal liability of defendant shareholder.

[115] *Sun IV*, 943 F.3d 49 at 77.

[116] *See Sun III*, 172 F. Supp.3d 447 at 458, 460.

[117] *Sun IV*, 943 F.3d 49 at 57, 58. See below note 168 and accompanying text.

[118] *Sun IV*, 943 F.3d 49 at 59.

[119] *Sun IV*, 943 F.3d 49 at 59 (eighth *Luna* factor).

[120] *Sun IV*, 943 F.3d 49 at 59, n. 13.

[121] *See Sun IV*, 943 F.3d 49 at 59, 60 (referring to the eighth *Luna* factor).

[122] *See Sun IV*, 943 F.3d 49 at 59, 60 (referring to the first *Luna* factor).

[123] *Sun IV*, 943 F.3d 49 at 59, 60.

[124] *Sun IV*, 943 F.3d 49 at 59, 60 (eighth *Luna* factor).

[125] *Sun IV*, 943 F.3d 49 at 59, 60.

[126] *Sun IV*, 943 F.3d 49 at 60 (first *Luna* factor); *Culbertson*, 337 U.S. 733, 742 (1949).

[127] *Sun IV*, 943 F.3d 49 at 60.

[128] *Sun IV*, 943 F.3d 49 at 60.

[129] *See Sun IV*, 943 F.3d 49 at 57, 58, 60 (first, fifth, and sixth *Luna* factors).

[130] *See Sun IV*, 943 F.3d 49 at 58, 60 (referring apparently to the sixth and seventh *Luna* factors not being met).

[131] *See Sun IV*, 943 F.3d 49 at 58, 60 (fifth, sixth, seventh, and eighth *Luna* factors).

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SBI as ''sitting atop'' SSB-LLC.[132] The tax classification of SSB-LLC as a partnership, not challenged by the Pension Fund, contradicted treatment of SSB-LLC under tax principles merely as an implied partnership. The alleged superimposition of an additional entity atop SSB-LLC effectively circumvented this potential contradiction.[133]

But SBI actually and contractually was operated through SSB-LLC. In contrast, the alleged partnership-in-fact was a fictional entity devoid of economic realities.[134] The conundrum in applying the deemed partnership principles under federal common law to SSB-LLC elucidated the challenge of sustaining a deemed partnership under *Luna* or *Culbertson*. If legal gymnastics were necessary to devise an additional entity to impute MPPAA liability to the Sun Funds, perhaps, simply there was no basis in tax law or applicable jurisprudence to impute that liability.

Moreover, precedent did not appear to support imputing a *Luna* factor from pre-acquisition exploratory activity, which may not constitute a trade or business,[135] to the period during which SSB-LLC operated and managed SBI. The First Circuit aptly noted, ''many of these cases in which courts have recognized these types of partnerships involved fractionalizing already-existing businesses, rather than pursuing investments in different ones.''[136] Thus, the court concluded most *Luna* factors weighed against finding a partnership between the Sun Funds or common control.[137]

The court also held a de facto partnership did not comport with legislative intent to ensure viability of existing pension funds or encourage private investment in distressed employers.[138] The appellate court did not reach the trade or business issue because it concluded there was no common control of SBI.[139] Therefore, the First Circuit reversed summary judgment for the MEP and remanded to district court to enter summary judgment for plaintiff Sun Funds.[140]

SUN III: COMMON CONTROL; INVESTMENT PLUS TEST

The First Circuit in *Sun III* in 2013 was asked to rule whether the Sun Funds as passive equity investors met the trade or business threshold under the MPPAA liability test.[141] The First Circuit, and the district court on remand in *Sun III,* applied the investment plus test.[142] This test was comprised of numerous factors.[143] The First Circuit concluded that *Sun Fund IV* met the trade or business requirement for MPPAA liability under ERISA §4001(b).[144]

Sun Fund III Engaged in a Trade or Business Under Investment Plus Test

SCPM IV, controlled by the same two individuals who controlled SCAI and the GPs of the Sun Funds, received management fees from Scott Brass Holding Corporation (''the Holding Company'') under a management services agreement.[145] The Management Company allocated the management fees to each Sun Fund based on percentage ownership.[146] The allocations offset SBI management fees under the Sun Fund operating agreements, which would be paid to the GP.[147] Effectively, the offset amounts would represent fees for active involvement in management of SBI by the Sun Funds, not their respective GPs.[148] Therefore, the Sun Funds were not mere passive investors, but instead, were actively involved in the trade or business of managing SBI.[149]

A factor in the investment plus test was whether each Sun Fund received an economic benefit from the

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[132] *Sun IV*, 943 F.3d 49 at 54; *Sun III*, 172 F. Supp.3d 447 at 460, 464.

[133] *Sun III*, 172 F. Supp.3d 447 at 460 (restating the argument of the Pension Fund regarding ''existence of a joint venture or partnership formed by the Sun Funds antecedent to the existence of SSB-LLC, that sits above it in the SBI ownership structure.'').

[134] *Cf. Sun III*, 172 F. Supp.3d 447 at 460 (''The question of organizational liability is not answered simply by resort to organizational forms, but must instead reflect the economic realities of the business entities.'').

[135] *See generally* §162 (pre-incorporation costs generally not deductible trade or business expenses), §7701(a)(2) (defining a partnership as among other things, carrying on a business, financial operation or a venture). *But see generally* §195 (generally providing a limited deduction for certain start-up expenses and ratable deduction for the remainder), §212.

[136] *Sun IV*, 943 F.3d 49 at 60, 61.

[137] *Sun IV*, 943 F.3d 49 at 61. The First Circuit described the distinction between its holding and the analysis of the *Luna* factors by the district court, referring also to an amicus brief filed by the PBGC in *Sun II*, 724 F.3d 129, at 133, as follows: ''the district court (and the Pension Fund and PBGC) too greatly discounted the *Luna* factors rebutting the partnership-in-fact formation. Importantly, although the district court correctly concluded that incorporating SSB-LLC did not in and of itself prevent recognizing a partnership-in-fact between the Funds, SSB-LLC's incorporation implicates many *Luna* factors counting against that recognition (an analysis absent from the district court's opinion).'' *Sun IV*, 943 F.3d 49 at 60, 61.

[138] *Sun IV*, 943 F.3d 49 at 61.

[139] *Sun IV*, 943 F.3d 49 at 61.

[140] *Sun IV*, 943 F.3d 49 at 61.

[141] *Sun III*, 172 F. Supp.3d 447 at 451, 452.

[142] *Sun III*, 172 F. Supp.3d 447 at 452.

[143] *Sun III*, 172 F. Supp.3d 447 at 452; see discussion below.

[144] *Sun III*, 172 F. Supp.3d 447 at 452.

[145] *Sun III*, 172 F. Supp.3d 447 at 454; *see Sun IV*, 943 F.3d 49 at 53, 54.

[146] *Sun III*, 172 F. Supp.3d 447 at 454.

[147] *Sun III*, 172 F. Supp.3d 447 at 454.

[148] *Sun III*, 172 F. Supp.3d 447 at 452.

[149] *Sun III*, 172 F. Supp.3d 447 at 453.

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management fee offsets that a passive investor otherwise would not derive.[150] Each factor in the investment plus analysis was not dispositive to the trade or business holding.[151] The First Circuit held Sun Fund IV received an economic benefit from an actual offset.[152]

But the circuit court remanded to the district court the issue of whether Sun Fund III directly benefitted from an offset carryforward.[153] The district court held Sun Fund III received a valuable benefit that accrued from the management fee offset carryforwards for managing SBI.[154] Thus, the Sun Funds individually satisfied the investment plus test for the trade or business requirement.[155]

District Court Applied Tax Law Under MPPAA

The First Circuit also directed the lower court to rule whether the Sun Funds were under common control with SBI.[156] The district court stated that federal common law interpreting Code §7701(a)(2) controlled on the issue of an arrangement constituting a partnership-in-fact.[157] The court said the Supreme Court in *Commissioner v. Tower* interpreted the statute to ''determine the existence of a partnership for tax (and MPPAA) purposes.''[158]

The definition of a partnership in Code §7701(a)(2) applies for purposes of the I.R.C.[159] Likewise, the Supreme Court in *Tower* held there was no partnership for federal income tax purposes.[160] The PBGC regulations incorporate the controlled group test in §414(c) and in the Treasury regulations.[161]

The district court in *Sun III* did not set forth an explicit rationale for applying the I.R.C. definition of a partnership in federal common law under MPPAA.[162] However, the district court referred to ''the closely-related area of tax law, where the same regulations and definitions are at issue.''[163] Thus, check-the-box regulations determined the status of SSB-LLC as a partnership for federal income tax purposes.[164] But the district court, accepting an argument by the Pension Fund[165] applied federal tax jurisprudence in holding there was a deemed partnership atop SSB-LLC for purposes of MPPAA withdrawal liability.[166]

Accordingly, the district court looked to the test for a partnership set forth by the Supreme Court in *Commissioner v. Culbertson*.[167] The district court applied an eight-factor analysis set forth by the Tax Court in *Luna v. Commissioner* which expanded on the analysis in *Culbertson*.[168] The court found essentially only two *Luna* factors in favor of a de facto partnership between the Sun Funds.[169]

First, the district court treated joint investment activity of Sun Funds prior to formation of SSB-LLC as ''plainly intended to constitute a partnership-in-fact,'' possibly, the first *Luna* factor.[170] Second, the court held the PPM description evidenced ''joint action'' pre-acquisition that ''would appear to extend through the operation of those LLCs and portfolio compa-

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[150] *Sun III*, 172 F. Supp.3d 447 at 452.

[151] *Sun III*, 172 F. Supp.3d 447 at 452.

[152] *Sun III*, 172 F. Supp.3d 447 at 452.

[153] *Sun III*, 172 F. Supp.3d 447 at 453, 455.

[154] *Sun III*, 172 F. Supp.3d 447 at 457.

[155] *Sun III*, 172 F. Supp.3d 447 at 458.

[156] ERISA §4001(b)(1) (MPPAA withdrawal-liability test); *Sun III*, 172 F. Supp.3d 447 at 453.

[157] *Sun III*, 172 F. Supp.3d 447 at 462. SSB-LLC was taxed as a partnership under the check-the-box regulations. *Sun I*, 903 F. Supp.2d 107 at 119; Treas. Reg. §301.7701-3(b)(1) (as amended in 2006). Thus, federal common law did not apply to a determination whether SSB-LLC was a partnership for federal income tax purposes. *Allum v. Commissioner*, T. C. Memo 2005-177; Treas. Reg. §301.7701-2(a) (as amended in 2019).

[158] *Sun III*, 172 F. Supp.3d 447 at 462; *see Commissioner v. Tower*, 327 U.S. 280, 286.

[159] §7701(a)(2).

[160] *Tower*, 327 U.S. 280 at 29.

[161] 29 C.F.R. §4001.3(a) (1996); Treas. Reg. §1.414(c)-2(b) (as amended in 1994).

[162] *See Sun III*, 172 F. Supp.3d 447 at 462.

[163] *Sun III*, 172 F. Supp.3d 447 at 460, 461.

[164] Treas. Reg. §301.7701-3(a) (as amended in 2006).

[165] *See Sun III*, 172 F. Supp.3d 447 at 461, n.13 (distinguishing the issue of MPPAA liability from liability of Sun Funds as partners of SSB-LLC under state law).

[166] *Sun III*, 172 F. Supp.3d 447 at 462. *See also Sun IV*, 943 F.3d 49 at 52, 53 (''We must look to federal tax law on the partnership-in-fact issue . . . Moreover, by statute, PBGC's 'common control' regulations must be 'consistent and coextensive' with treasury regulations under §414(c).'').

[167] 337 U.S. 733, 742 (1946).

[168] *Luna*, 42 T.C. 1067, 1068-1069, 1077-1079 (holding no partnership or joint venture for federal income tax purposes existed between an insurance agent and a life insurance company). The eight factors were: (1) the agreement of the parties and their conduct in executing its terms; (2) the contributions, if any, which each party has made to the venture; (3) the parties' control over income and capital and the right of each to make withdrawals; (4) whether each party was a principal and coproprietor, sharing a mutual proprietary interest in the net profits and having an obligation to share losses, or whether one party was the agent or employee of the other, receiving for his services contingent compensation in the form of a percentage of income; (5) whether business was conducted in the joint names of the parties; (6) whether the parties filed federal partnership returns or otherwise represented to respondent or to persons with whom they dealt that they were joint venturers; (7) whether separate books of account were maintained for the venture; and (8) whether the parties exercised mutual control over and assumed mutual responsibilities for the enterprise. 42 T.C. 1067 at 1078-1079.

[169] *See Sun III*, 172 F. Supp.3d 447 at 463, 464.

[170] *Sun III*, 172 F. Supp.3d 447 at 464.

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nies.''[171] This finding might have met the fifth *Luna* factor.[172] The court found the decision to invest in SSB-LLC in a 70/30 split evidenced a top-down coordinated decision, identity of interest and unity of decision-making, perhaps the first *Luna* factor.[173] The district court concluded a partnership existed between the Sun Funds with respect to the co-investment in SSB-LLC.[174]

The district court cited only one case, *Board of Trustees, Sheet Metal Workers' National Pension Fund v. Palladium Equity Partners, LLC* as persuasive authority on the common control issue. In *Palladium,* the court held the facts were insufficient to find common control of private equity funds with the portfolio company as a matter of law.[175] Thus, the *Palladium* court denied motions for summary judgment.[176] In contrast, the court in *Sun III* held there was a de facto partnership atop SSB-LLC under common control with SBI as a matter of law and granted summary judgment to defendant Pension Fund.[177]

SSB-LLC Was a Trade or Business Under the Investment Plus Test

The district court also held that the arrangement above SSB-LLC as a partnership-in-fact was a trade or business.[178] The district court applied the investor plus test to arrangement above SSB-LLC as a deemed partnership.[179] The court held that an arrangement above SSB-LLC as an aggregate of the partners-in-fact was a trade or business under the investor plus rule.[180]

SUN CAPITAL II: INVESTMENT PLUS TEST; REMAND OF COMMON CONTROL ISSUE

On appeal from the 2012 ruling in *Sun Capital,* the First Circuit held that an ''investment plus'' test in a 2007 PBGC appeals letter applied to the Sun Funds as a trade or business.[181] The First Circuit did not specify the general guidelines for the ''plus'' component of the test.[182] Under the test, a private equity fund had to be involved in the activity with the primary purpose of income or profit and had to conduct the activity with continuity and regularity.[183]

Sun Funds Managed SBI Through GPs as Their Agents

Departing from the district court analysis, the First Circuit found that the GP of each Sun Fund pursuant to an operating agreement acted as the agent of the Sun Fund in managing SBI.[184] The Sun Funds were organized as Delaware limited partnerships.[185] The court cited Delaware agency law, pursuant to which a partner is an agent of the partnership for purposes of its business, purposes or activities.[186] In addition, the circuit court referred to agency principles under the I.R.C., under which a person may conduct a business through an agent among others.[187]

Furthermore, the court found that the operating agreements of the Sun Funds granted actual authority for the GP to provide management services to SBI and other portfolio companies.[188] Also, the partnership agreements of the GPs conferred authority to the limited partner committee comprised of Sun Funds principals to make management decisions for Sun Funds and portfolio companies.[189] Thus, the GPs acted within their scope of authority in managing SBI for Sun Funds.[190]

Also, the Sun Funds did not have their own employees, and the management agreements with the GPs were entered into a day after execution of the SBI stock purchase agreement.[191] Thus, GPs carried out the day to day management functions on behalf of

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[171] *Sun III*, 172 F. Supp.3d 447 at 464.

[172] See above note 168 and accompanying text.

[173] See above note 168 and accompanying text.

[174] *See Sun III*, 172 F. Supp.3d 447 at 463, 464.

[175] *Sun III*, 172 F. Supp.3d 447 at 465; *Bd. of Trs., Sheet Metal Workers'*, 722 F. Supp.2d 854, 867 (E.D. Mich. 2010).

[176] 722 F. Supp.2d 854 at 875 (holding the facts precluded the determination of the issue of common control of the private equity funds with the portfolio company under the MPPAA as a matter of law, denying motions for summary judgment).

[177] *Sun III*, 172 F. Supp.3d 447 at 464, 465.

[178] *Sun III*, 172 F. Supp.3d 447 at 466.

[179] *Sun III*, 172 F. Supp.3d 447 at 466.

[180] *Sun III*, 172 F. Supp.3d 447 at 466.

[181] *Sun II*, 724 F.3d 129 at 139, 141, 142. *See* 29 C.F.R. §4003.59 (authorizing the PBGC Appeals Board to issue binding administrative rulings on certain ERISA issues).

[182] *Sun II*, 724 F.3d 129 at 141.

[183] *Sun II*, 724 F.3d 129 at 139.

[184] *Sun II*, 724 F.3d 129 at 142.

[185] *Sun II*, 724 F.3d 129 at 134, 146, 147. The First Circuit later noted this fact was crucial to the finding of no deemed partnership between the Sun Funds, because it distinguished the instant facts from prior case law, where parties had unincorporated relationships, were found to have formed partnerships-in-fact and been under common control and therefore, were held jointly and severally liable for pension withdrawal obligations. *See Sun IV*, 943 F.3d 49 at 60, 61.

[186] *Sun II*, 724 F.3d 129 at 146, 147.

[187] *Sun II*, 724 F.3d 129 at 146, 147.

[188] *Sun II*, 724 F.3d 129 at 147.

[189] *Sun II*, 724 F.3d 129 at 147.

[190] *Sun II*, 724 F.3d 129 at 147.

[191] *Sun II*, 724 F.3d 129 at 147, 148.

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the Sun Funds. Accordingly, the circuit court rejected the argument that actions of GPs could not be attributed to the Sun Funds for MPPAA purposes.[192] Moreover, the court held factors other than GP activity demonstrated that Sun Funds actively managed SBI.[193]

Management of SBI by the Sun Funds Outside of GP Authority

The limited partnership agreements and private placement memoranda (PPMs) of Sun Funds stated their active involvement in management and operation.[194] According to the PPMs, the Sun Funds would develop a strategic plan and management team for SBI prior to purchase.[195] After the effective date of the agreements, the Sun Funds would monitor or modify as needed the strategic plan, sign all checks for SBI, and hold staff meetings on management and operations.[196] The Sun Funds also placed employees of the Management Company in positions at SBI resulting in close involvement in management and operations of SBI and control of its board.[197]

Therefore, despite the characterization advanced by Sun Funds, the court held they actively were involved in management.[198] The Sun Funds managed SBI through their GPs. This was accomplished by appointing managers of their affiliate to serve as SBI employees and board members, and by directing strategy of SBI prior to the acquisition.[199] The attribution of SBI management activity to the Sun Funds from their GPs distinguished the holding of the First Circuit from the district court ruling on the trade or business prong.[200]

Likewise, attribution of actions of Management Company personnel serving as employees, consultants, or board members of SBI distinguished the First Circuit holding from the district court ruling.[201] The appellate court holding implied that the personnel appointments were a continuation of the strategic plans created by the Sun Funds prior to the acquisition.[202] Alternatively, the holding implied that the Management Company and the Sun Funds were disregarded as separate and distinct entities for purposes of attributing management activity.[203]

Fee Offsets Were Compensation to Sun Fund IV for Managing SBI

The court also held that an offset against the management fees Sun Fund IV had to remit to the GP pursuant to the operating agreement was a direct economic benefit to Sun Fund IV.[204] The First Circuit found the payments were not investment returns, but rather compensation for management services.[205] The First Circuit did not have sufficient evidence to reach the same conclusion with respect to Sun Fund III.[206]

Taking aggregate factors into account, the court held that at least Sun Fund IV was involved in management activity for profit under the investment plus test.[207] The circuit court held further factual development with respect to Sun Fund III was necessary.[208] Accordingly, the circuit court reversed the district court in part, granting partial summary judgment to the defendant, the Pension Fund.[209] The appellate court remanded to the district court to rule whether Sun Fund III was a trade or business and whether the Sun Funds were under common control with SBI.[210]

SUN CAPITAL I: NO TRADE OR BUSINESS, NO WITHDRAWAL LIABILITY

The defendant Pension Fund argued before the district court at trial level that Sun Funds were engaged in a trade or business under common control under MPPAA.[211] Alternatively the Pension Fund defendant asserted that SSB-LLC should be considered an unincorporated organization, and therefore, by default, a partnership whose liabilities extend to partners under ERISA.[212] Therefore, the narrow issue before the district court in 2012 was, whether federal partnership

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[192] *Sun II*, 724 F.3d 129 at 146.

[193] *See Sun II*, 724 F.3d 129 at 142, 143.

[194] *Sun II*, 724 F.3d 129 at 142.

[195] *Sun II*, 724 F.3d 129 at 142.

[196] *Sun II*, 724 F.3d 129 at 142.

[197] *Sun II*, 724 F.3d 129 at 142, 143.

[198] *Sun II*, 724 F.3d 129 at 141-143.

[199] *See Sun II*, 724 F.3d 129 at 142, 143.

[200] *Compare Sun II*, 724 F.3d 129 at 146-148 (GPs acted on behalf of the Sun Funds) *with Sun I*, 903 F. Supp.2d 107 at 117-118 (actions of GPs and management by Management Company employees not attributed to Sun Funds, board actions by appointed directors were taken as shareholders, not as managers).

[201] *See Sun II*, 724 F.3d 129 at 142, 143. *Cf. Sun I*, 903 F. Supp.2d 107 at 117.

[202] *See Sun II*, 724 F.3d 129 at 142.

[203] *See Sun II*, 724 F.3d 129 at 142, 143.

[204] *Sun II*, 724 F.3d 129 at 142, 143.

[205] *Sun II*, 724 F.3d 129 at 143.

[206] *Sun II*, 724 F.3d 129 at 133, 134.

[207] *Sun II*, 724 F.3d 129 at 143.

[208] *Sun II*, 724 F.3d 129 at 133, 134.

[209] *Sun II*, 724 F.3d 129 at 150.

[210] *Sun II*, 724 F.3d 129 at 150.

[211] *Sun I*, 903 F. Supp.2d 107 at 116; ERISA §4001(b)(1).

[212] *Sun I*, 903 F. Supp.2d 107 at 118.

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tax classification [213] could be imputed for MPPAA purposes.[214] In that case, the underlying issue would be, whether MPPAA amendments to ERISA preempted the Delaware LLC statute.[215]

The district court found that, pursuant to the operating agreement and under Treasury check-the-box regulations, SSB-LLC was a partnership for federal income tax purposes.[216] The court held that imputing MPPAA liability to LLC members was a matter of state law, absent a conflicting federal incorporation statute.[217] Thus, the Delaware limited liability statute governed the liability of Sun Funds as LLC members.[218] Therefore, the district court held that the Sun Funds as partners of SSB-LLC were not responsible for withdrawal liability of SSB-LLC. [219]

The district court also held in *Sun I* that the Sun Funds did not engage in a trade or business under MPPAA, and therefore, did not reach the issue of control.[220] In addition, the court held that congressional intent behind ERISA §4212(c) did not justify rearrangement of ownership interests as proposed by the pension fund to find a partnership.[221] Therefore, the district court held ERISA §4212(c) did not apply to the 70%/30% investment of the Sun Funds in SSB-LLC and granted in part the motion for summary judgment of the defendants.[222]

[213] *See* Treas. Reg. §301.7701-3(b)(1) (as amended in 2006).

[214] *See Sun I*, 903 F. Supp.2d 107 at 119.

[215] *See Sun I*, 903 F. Supp.2d 107 at 119.

[216] *Sun I*, 903 F. Supp.2d 107 at 118, 119.

[217] *Sun I*, 903 F. Supp.2d 107 at 119.

[218] *Sun I*, 903 F. Supp.2d 107 at 119.

[219] *Sun I*, 903 F. Supp.2d 107 at 119.

[220] *Sun I*, 903 F. Supp.2d 107 at 118.

[221] *Sun I*, 903 F. Supp.2d 107 at 122, *aff'd*, *Sun II*, 724 F.3d 129 at 149, 150 ("The language of [ERISA] §1392(c) instructs courts to apply withdrawal liability 'without regard' to any transaction the principal purpose of which is to evade or avoid such liability. The instruction requires courts to put the parties in the same situation as if the offending transaction never occurred; that is, to erase the transaction. It does not, by contrast, instruct or permit a court to take the affirmative step of writing in new terms to a transaction or to create a transaction that never existed.. . . Disregarding the agreement to divide SSB-LLC 70%/30% would not result in Sun Fund IV being the 100% owner of SBI.. . . In essence, the TPF requests that we create a transaction that never occurred – a purchase by Sun Fund IV of a 100% stake in SBI. But as stated, that we cannot do.") (citations omitted).

[222] *Sun I*, 903 F. Supp.2d 107 at 124, *aff'd*, *Sun II*, 724 F.3d 129 at 150.

AFTERMATH OF SUN CAPITAL AND LLC CONSIDERATIONS FOR PORTFOLIO INVESTMENTS

Investment Plus Test Is Common Law

The Court of Appeals in *Sun IV reversed Sun III* only on the common control issue.[223] Thus, the investment plus test remains controlling authority in the First Circuit.[224] In addition, a form of the investment plus test may be controlling or persuasive authority in other federal circuits. Moreover, under *Luna*, managerial control would be relevant to a finding of common control with the withdrawn employer in addition to the trade or business issue.[225] In federal jurisdictions that follow *Luna*, private equity funds must conform the structure of their portfolio investments in distressed companies with MEPs to these requirements.

First, even though GPs were separate limited partnerships, their management activity was attributed to the funds under the activity prong of the investment plus test. Courts disregarded the organizational structure. The exercise by co-founders of the private equity firm and the funds of either managerial or ownership control over each entity in the structure was sufficient to impute management by GPs to the funds. Provisions in the SSB-LLC operating agreement and the LPAs of the GPs delegated management functions exclusively to the GPs. Despite the contractual terms, the court imputed the management activity to the funds.

Second, offsets to the SSB-LLC members for management fees the funds otherwise would pay their respective GPs were direct economic benefits to the funds. Implicitly, any compensation for management paid to the funds also would have been a direct economic benefit. Thus, any amounts paid as compensation for management of the portfolio company would meet the profit prong of the investment plus test.

Luna vs. Piercing the Corporate Veil Common Control Test

The First Circuit held there was no partnership-in-fact with respect to portfolio investment through LLC treated as a partnership for federal tax but not MPPAA

[223] *See Sun III*, 172 F. Supp.3d 447 at 452; *Sun IV*, 943 F.3d 49 at 52.

[224] *See Sun III*, 172 F. Supp.3d 447 at 458; *Sun IV*, 943 F.3d 49 at 53, n.4.

[225] *Sun IV*, 943 F.3d 49 at 59, 60.

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purposes.[226] Therefore, attribution of management activity from GPs to the funds or management fee offsets alone would not render the funds under common control with the portfolio company under MPPAA. However, MEPs have three legal theories for asserting MPPAA liability of funds that are members of acquisition vehicles structured as LLCs.

First, a trustee of a MEP may assert statutory controlled group status of the participating private equity fund or co-investor with respect to the portfolio company. But a MEP would have a high threshold to overcome under the eight-factor *Luna* test applied in *Sun IV* to look through to the LLC members. The First Circuit held that management authority crucial to the trade or business determination is significant in only two out of eight factors in the *Luna* analysis.

Second, a veil piercing test is similar to the *Luna* analysis in that both standards look to the economic reality rather than the form of the investment. But, overall, more stringent requirements apply to pierce the veil of a corporation or an LLC than to imply a partnership under the eight-factor *Luna* test. To avoid piercing the LLC veil of a fund, managers should ensure the required corporate formalities are observed, and conduct of limited partners, managers, or GPs conforms to the fund structure set out in the deal documents. In such circumstances, a pension fund would have difficulty imposing withdrawal obligations under *Luna* on the investors in the private equity fund or the pass-through acquisition vehicle established for the portfolio company.

Third, the court in *Sun II* affirmed the district court holding that ERISA §4212(c) did not apply to the Sun Funds, and could not reverse a purchase of all of the stock of SBI by a Sun Fund, which never occurred. A private equity fund sponsor may purchase the entire interest in a portfolio company and lay off a portion of the investment post-closing to a co-investor. If business considerations require co-investment post-closing, the deal documents must reflect the intent to co-invest as of the closing date to comply with the MPPAA anti-avoidance rule.

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[226] *Sun IV*, 943 F.3d 49 at 52.

Tax Management Real Estate Journal

ISSN 8755-0628