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Proskauer Benefits Brief: Private Investment Funds and Withdrawal Liability

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In this episode of our ongoing series on withdrawal liability, Neil Shah and Justin Alex are joined by Adam Scoll to explore how the withdrawal liability of a private investment fund's portfolio company can extend to the fund itself (and potentially others). They discuss the "trade or business" and "common control" tests, the impact of the *Sun Capital* and *Longroad* decisions, and how fund structure, governance, and fee arrangements can influence exposure. The conversation also highlights practical considerations for diligence, deal structuring, and risk management, and why active oversight and ownership levels can have unintended consequences for funds and their advisors.

Neil Shah: Welcome to the Proskauer Benefits Brief, Legal Insight on Compensation and Benefits. I'm Neil Shah, Senior Counsel at Proskauer.

Justin Alex: And I'm Justin Alex, a partner at Proskauer.

Neil Shah: This is the 10th episode of our multi-part series on withdrawal liability. Today, we're going to dig into how withdrawal liability comes up in the context of private investment funds and their investments. Joining us is Adam Skoll, a partner in Proskauer's Compensation and Benefits and Private Funds groups.

Adam, why don't you tell us a little bit about what you do here at Proskauer and how withdrawal liability comes up in your practice?

Adam Scoll: Thanks, Neil. I specialize in the area of Title I of ERISA, in particular, as it relates to pretty much the entire universe of the investment of plan assets. So withdrawal liability matters come up in my practice in a number of different contexts. It could be relevant to situations like fund structuring and investment strategy, fund credit facilities, or any other arrangements where the creditworthiness of a fund is relevant. And of course, as most relevant to today's discussion, fund investments in portfolio companies.

Justin Alex: Thanks, Adam. So to start us off with some background, as we've talked about on this podcast series, a participating employer that withdraws from a multi-employer pension plan must pay its share of the plan's unfunded vested benefits, often referred to as its withdrawal liability. ERISA's control group rules extend this obligation to all, quote-unquote, “trades and businesses that are under common control with the withdrawing employer,” thereby making the withdrawing employer and each control group member jointly and severally liable for the withdrawal liability. I want to emphasize the trade or business component for today's podcast, because control groups can only include entities that are engaged in a trade or business. So, Adam, from a 50,000-foot level, why would a private investment fund ever be concerned about withdrawal liability?

Adam Scoll: The short answer is that, under the right set of facts, a private investment fund could be considered to be part of a controlled group with a portfolio company that is a withdrawing employer from a multi-employer pension, and therefore, jointly and severally liable for its withdrawal liability. In addition, a fund's separate portfolio companies could also be in a controlled group with each other, exposing them to joint and several liability for each other's pension obligations.

Neil Shah: All right, so let's dig a little deeper and break all of that down. Let's start from the top: What is a trade or business for these purposes?

Adam Scoll: Well, for better or for worse, ERISA does not define what a trade or business is for these purposes. So prior to the Sun Capital line of cases, which we'll get into in a minute, courts historically applied a two-part test to determine if an entity was engaged in a trade or business for ERISA withdrawal liability purposes. The test required that the entity be engaged in the relevant activity, both for the primary purpose of income or profit, and with continuity and regularity. And prior to a 2007 PBGC appeals board ruling on this matter, it was generally assumed that a private investment fund could not be considered to be engaged in a trade or business, since the funds themselves, as opposed to the managers of the funds, are typically structured so as to not have any employees or provide any services at all. In that 2007 PBGC opinion, however, the PBGC held that a private investment fund could be engaged in a trade or business under what was dubbed the “investment plus approach,” which, as it sounds, requires more than just passive investment. To get there, the PBGC attributed the investment services that the fund's manager provided to the portfolio company to the fund under an agency's theory in order to conclude that the fund was engaged in a trade or business.

Justin Alex: Right. And then, of course, the First Circuit ultimately adopted the PBGC's investment plus approach in the Sun Capital line of cases. Unfortunately, the court didn't provide any specific guidelines for the application of the “plus” portion of the test, and instead, the Sun Capital Court noted that it's a facts and circumstances test that requires more than mere passive investment, and looked at a number of factors to find that the Sun Capital funds were in fact engaged in a trade or business. Those factors included that: one, the funds purposely sought out distressed portfolio companies that were in need of extensive intervention and turnaround management, that they were actively involved with. Two, that the funds appointed employees of its manager to sit on portfolio company boards, and that other fund manager personnel were heavily involved in the management and operation of the portfolio companies. Then finally, three, that the funds were entitled to an offset of the management fee they owed to their manager for any fees or compensation the manager received from a portfolio company for services. Meaning that the Sun Capital funds derived a benefit that would not typically be available to ordinary passive investors, according to the court.

Neil Shah: All right, so now that we know that a private investment fund under the right factual circumstances can be deemed to be engaging in a trade or business for withdrawal liability purposes, what about the second part? What does it mean to be under common control with a withdrawing employer such that you are part of their control group, and therefore exposed to withdrawal liability?

Adam Scoll: Although the analysis can be quite complex, the most common way an entity such as a private investment fund could be considered under common control with another entity, such as a withdrawing employer, is if the two entities are considered to be a parent-subsidiary relationship, which generally requires that one entity owns 80% or more of the other entity. Again, prior to the Sun Capital line of cases, the general belief was that, so long as a fund didn't own 80% or more of a portfolio company, the fund could not be considered under common control with any portfolio companies. However, in Sun Capital, which technically involved three separate Sun Capital funds, none of which owned 80% or more of the portfolio company individually, but collectively owned 100%, the court analyzed whether the Sun Capital funds had formed a, quote-unquote, “partnership in fact,” which if they had, would have resulted in such partnership in fact owning 100% of the portfolio company and meeting that 80% threshold. Although the Sun Capital funds were managed by the same manager, there were a number of factors the court relied on to ultimately hold that a partnership, in fact, did not exist. Those factors included that the funds — the funds expressly disclaimed the formation of any partnership, and their use of an LLC to make the investment showed an intent to avoid such result. Most of the investors in the funds were different from other funds investors, so there was some overlap, but not complete overlap. The funds filed separate tax returns, kept separate books, and maintained separate bank accounts. And they did not invest in parallel in the same portfolio companies at a fixed or even variable ratio.

Neil Shah: Thanks, Adam. Continuing along that line, there's not a lot of cases since Sun Capital applying this standard, but there was a recent one last year involving long road asset management. In that case, the court held that the private investment fund was engaged in a trade or business and was under common control with the withdrawing employer, and thus, jointly and severally liable for its withdrawal liability. So kind of more confirmation beyond the First Circuit that such a finding, that is that a private investment fund can be deemed a trade or business, that's certainly possible.

Justin Alex: That's right, Neil. But what was unique about the Long Road case was that it also addressed the question of whether the fund's general partner or management company should also be liable as a member of the control group by way of being part of a partnership in fact with the fund.

Adam Scoll: Right. Although a different set of facts could have led to a different result, the Long Road court ultimately held that the fund's general partner and management company were not part of a partnership in fact with their fund. and therefore that the general partner and management company were not liable for the portfolio company's withdrawal liability, even though their fund was liable. More specifically, the court found that the GP — the general partner — had not formed a partnership in fact with the fund, because it was just a pass-through entity that had delegated all of its responsibilities and powers to the management company, and it had no employees or other operations. The court similarly found that the management company also had not formed a partnership in fact with the fund, because it had only had a nominal indirect ownership interest in the fund, and all actions taken by it were pursuant to the terms of its management agreement with the GP. And most importantly, the amount of its management fee did not depend on the profitability of the fund's portfolio companies, and it did not receive any fees or other comp from its portfolio companies that offset its management fee. Long story short, the common control analysis is not as simple as confirming whether a single fund vehicle by itself owns 80% or more of a withdrawing employer.

Neil Shah: All right, so then it sounds like, if you're trying to evaluate whether there's common control or not, there's the more simple analysis — and we've talked about that on some prior episodes, looking at parent-subsidiary relationships, brother-sister relationships. And then there's the more complicated analysis, where you have to also take into account some of these common law theories like partnership in fact, to make sure that ownership interest won't be aggregated. Sounds like there's a lot for private investment fund managers here to be considering.

Adam, what are the key takeaways in this area?

Adam Scoll: Thanks, Neil. The first is that it is possible for a private investment fund to be deemed a trade or business as opposed to just a passive entity, and that it can be held liable for the withdrawal liability of a portfolio company. Prior to the developments discussed in this podcast, practitioners had generally assumed that this wasn't the case, but now it should be on your radar if it wasn't already. Second, the Sun Capital and Long Road courts showed us that it is possible for two or more co-investing private investment funds to be deemed a partnership in fact, so that their ownership can be aggregated to make them part of a portfolio company's controlled group, and jointly and severally liable for the withdrawal liability. While those courts ultimately concluded that such a showing had not been made, again, this is something that should be on everybody's radar going forward. And lastly, although it might be unlikely, theoretically, there could be a set of facts which could also support a finding that a fund's general partner, and/or the management company should also be liable. So this is a very important issue for private investment fund managers to be aware of.

Neil Shah: Great context. Thanks so much, Adam. Why don't we pivot now to talk about how this shows up in actual transactions? We've been talking about some court cases that are kind of addressing these issues after the fact, but ultimately this shows up in the diligence process. Justin, why don't you talk a little bit about how these issues show up in our practice in the deal context?

Justin Alex: So it starts with diligence. When you're representing a client on the buy side, you want to make sure that the client is aware of the target's multi-employer pension contribution obligations, as well as any withdrawal liability it may have triggered previously. You want to go through and look at the funding levels of the plans to which the target's contributing, whether there's any plans that seem particularly risky, and also have some sense of what the withdrawal liability exposure looks like going into the future if the target were to stop contributing to one or more of the funds to which it currently contributes. Another thing to keep in mind in this context is that rep and warranty insurance policies typically carve out multi-employer plan related representations. So it's critical to make sure that the purchaser has a full understanding of what it might be stepping into. And in the private investment fund context, you also want to consider what the client's investment horizon is, and the likelihood that there may be a withdrawal event while the investment fund owns a portfolio company, and also what the withdrawal liability might look like when the investment fund is looking to exit from the portfolio company, and how successor purchasers might look at it.

Ultimately, taking that all together, you get a sense of what the risk profile is from a multi-employer pension perspective, and then work with the client to think through whether that risk is something that they're willing to bear, potential exposure to that multi-employer pension withdrawal liability, or if there's something that they might want to do to mitigate against direct exposure. On one hand, of course, there's the possibility that there's risks uncovered that are so significant that maybe they don't want to go forward with the transaction. On the other hand, there may be relatively small multi-employer plan withdrawal liability that's out there, where the fund is willing to step into it if necessary, and is confident that the portfolio company could satisfy the liability on its own. But in cases in the middle where maybe there is significant liability and the fund wants to try to protect itself from that liability, the thing that I see happen the most often is, the fund might try to find a true third-party investor to come in and own a portion of the business, such that you don't get past that 80% ownership threshold.

Now, there's a lot of considerations that come into bringing in a third-party investor like that from a business perspective. But apart from that, you also want to ensure that it is a true third-party investor. Because if not, as we've seen in some of the cases, you could be in a situation where the ownership interests might be aggregated pursuant to different arguments that a multi-employer plan might try to pursue.

So as you can probably tell, this is an incredibly complex area, and it's essential to ensure that everyone that's involved in a deal team is aware of the potential exposure with respect to multi-employer pension plans. So with that, we'll end here today. Thanks again, Adam, for joining us. If you all found this useful, be sure to follow us and subscribe on Apple Podcasts, Spotify, and YouTube so you don't miss the next episode. If you liked what you heard or want to know more, drop us a line at wl@proskauer.com. That's wl@proskauer.com. I'm Justin Alex.

Neil Shah: And I'm Neil Shah. Today's discussion is for general information and is not legal advice. Thanks for listening to the Proskauer Benefits Brief.

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