

PRIVATE EQUITY FUNDS NOT LIABLE FOR WITHDRAWAL LIABILITY

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In the latest round of the long-running Sun Capital withdrawal liability saga, the First Circuit Court of Appeals recently held that the two Sun Capital private equity funds that were the indirect owners of 100% of Scott Brass, Inc. (“SBI”) were not jointly and severally liable for withdrawal liability incurred by SBI to a multiemployer pension plan. For prior coverage of the *Sun Capital* case, please see our December 2012, August 2013 and April 2016 newsletters.

To briefly recap the relevant facts, Sun Capital Partners III, LP and Sun Capital Partners IV, LP (collectively, the “Sun Funds”) invested \$900,000 and \$2.1 million in Sun Scott Brass, LLC (“SSB-LLC”) in exchange for a 30% and 70% ownership interest in SSB-LLC, respectively. In turn, SSB-LLC formed Scott Brass Holding Corporation (“SBHC”) as a wholly owned subsidiary. SBHC used the \$3 million initially invested in SSB-LLC and \$4.8 of debt to purchase all of SBI’s stock. After the acquisition, SBI filed for bankruptcy and withdrew from the multiemployer pension fund.

Under ERISA, each trade or business under common control is jointly and severally liable for withdrawal liability. In the case of a parent-subsiary group, common control is generally defined as direct or indirect ownership of at least 80% of the voting power or 80% of the value in the subsidiary organization. The multiemployer pension fund sought to recover the SBI withdrawal liability from the Sun Funds. Since neither Sun Fund alone owned 80% of SBI, the multiemployer pension fund alleged that the Sun Funds had formed a partnership-in-fact which, in turn, was the indirect owner of 100% of SBI and could, therefore, be jointly and severally liable for the withdrawal liability.

The First Circuit rejected the multiemployer pension fund’s allegations that a partnership-in-fact had been formed. In doing so, the First Circuit emphasized the following:

- The Sun Funds did not intend to form a partnership. Indeed, the Sun Funds’ documents expressly disclaimed that any partnership or joint venture was formed between the two entities.
- The creation of SSB-LLC evidenced an intent not to form a partnership.

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- The Sun Funds conducted business in their own names (rather than the joint names of both Sun Funds).
- The Sun Funds kept separate books and records and filed separate Federal income tax returns.
- The Sun Funds did not operate in parallel – that is, invest in the same companies at a fixed or even variable ratio, evidencing independence in activity and structure.

Sun Capital Partners III, LP, et al. v. New England Teamsters & Trucking Industry Pension Fund (1st Cir. 2019)