

Sun Capital Decision Holds Private Equity Funds Liable for Pension Liabilities of Portfolio Company Under Deemed Partnership Theory

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On March 29, 2016, the District Court of Massachusetts issued a highly controversial opinion in the *Sun Capital* case, holding that multiple private equity funds managed by Sun Capital were jointly and severally liable for the multiemployer pension withdrawal liabilities of Scott Brass Inc., a bankrupt portfolio company owned by the Sun Capital funds.

The District Court held that the funds were liable on the basis that the funds had formed a “partnership-in-fact” in pursuing and managing the funds’ investment in Scott Brass, even though neither fund’s ownership exceeded the 80% threshold required for “common control” under ERISA. The case had been on remand to the District Court from the First Circuit, which had previously held that one of the funds was engaged in a trade or business for purposes of the ERISA “controlled group” test, and remanded the case to the District Court to determine whether the other fund was also involved in a trade or business and whether the equity of Scott Brass owned by the funds could be aggregated to find that they met the applicable 80% ownership threshold to be liable for the Scott Brass pension withdrawal liability.

The District Court’s decision may have wide implications for the private equity community because (1) it further expands the reach of the “investment plus” test for purposes of concluding that a private equity fund is engaged in a trade or business and (2) its finding of a deemed partnership-in-fact between the funds (representing two separate series of funds) will frustrate attempts to formally structure funds in a manner that avoids ERISA pension liabilities.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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