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ALERT MEMORANDUM

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First Circuit Puts the 'Fund' in Pension Underfunding

The United States Court of Appeals for the First Circuit (the "Circuit Court") recently held, in *Sun Capital Partners III LP v. New England Teamsters & Trucking Industry Pension Fund,*[1] that a private equity fund was a "trade or business" under the controlled group rules of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and, as a result, could be held jointly and severally liable for the pension obligations of a bankrupt portfolio company. In effect, the Circuit Court decided that the private equity funds in the case should be treated for purposes of ERISA as holding companies rather than as investment funds.

This memorandum discusses *Sun Capital* and sets forth some practical implications of the case.

I. Facts

In 2006, Sun Capital Partners III, LP ("SCP III"), Sun Capital Partners III QP, LP ("SCP QP", and together with SCP III, "Fund III") and Sun Capital Partners IV, LP ("Fund IV", and together with Fund III, the "Sun Funds") purchased Scott Brass, Inc. ("Scott Brass"), a Rhode Island brass and copper coil manufacturing business. The Sun Funds invested in SB LLC, a limited liability company that in turn owned Scott Brass through a holding company subsidiary ("SBHC"), with ownership split 70%/30% between SCP IV and SCP III, respectively. The Sun Funds each had its own general partner entity (a "GP"), and each of the general partners was controlled by two individuals. The individuals, together with their spouses, were entitled to 64.74% and 61.04% of the aggregate profits received by the GPs of Fund III and Fund IV, respectively. A limited liability company wholly-owned by Fund IV's GP and called Sun Capital Partners Management IV LLC (the "Management Company") provided management services to Scott Brass for a fee.[2]

Pursuant to certain collective bargaining agreements, Scott Brass contributed to the New England Teamsters and Trucking Industry Pension Fund (the "Pension Fund"), a multiemployer pension plan.[3] Scott Brass filed for bankruptcy in 2008 and effected a

[1] No. 12-2312 (1st Cir. July 24, 2013) ("*Sun Capital*").

[2] The Circuit Court also notes that each of the Sun Funds pay to that Fund's GP an annual management fee of two percent of the total commitments to the Fund, and a percentage of the Fund's profits from investments.

[3] A multiemployer pension plan is a special type of defined benefit pension plan that is maintained pursuant to a collective bargaining agreement for the benefit of unionized employees employed by participating employers. Contributing employers typically agree with the union on a contribution rate or schedule that will apply in respect

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"complete withdrawal"[4] from the Pension Fund, which triggered an obligation under ERISA on Scott Brass and its controlled group affiliates to pay withdrawal liability. The Pension Fund sent the Sun Funds a notice of default with an assessment of Scott Brass' withdrawal liability. The Sun Funds sought a declaratory judgment that they were not members of Scott Brass' controlled group, while the Pension Fund filed a counterclaim seeking confirmation of the Sun Funds' controlled group liability.

In 2012, the United States District Court for Massachusetts (the "District Court") held that the Sun Funds were not jointly and severally liable for Scott Brass' withdrawal liability because the Sun Funds were not "trades or businesses" for purposes of ERISA's controlled group rules. The Pension Fund appealed the judgment to the Circuit Court.[5]

II. Legal Background

Under ERISA, generally all "trades or businesses" under "common control" are treated as part of a single "controlled group." All members of a controlled group are jointly and severally liable for the pension liabilities incurred by any member of the controlled group.

The phrase "trade or business" is not defined in ERISA, the Internal Revenue Code (the "Code") or their underlying regulations. ERISA requires, however, that any regulations interpreting the phrase "trade or business under common control" for purposes of its joint and several liability provisions be consistent and coextensive with parallel regulations under the Code.[6]

There are detailed rules under ERISA and the Code for determining whether entities are under common control. Generally, entities in an 80% direct or indirect ownership chain (i.e., up or down a single chain of entities, or connected through a common parent) will be treated as being under common control. In addition, if five or fewer individuals, estates or trusts – but not partnerships – own 80% or more of two or more

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of workers covered by the plan. The holding in *Sun Capital* is probably equally applicable in respect of liabilities under other types of ERISA-regulated defined benefit pension plans, although the circumstances in which controlled group liability may be triggered is different for different types of plans.

[4] A complete withdrawal is a triggering event for payment of pension underfunding in respect of a multiemployer pension plan. Generally, a complete withdrawal arises from a decertification of the union or a complete cessation of covered operations. *See* ERISA § 4203(a).

[5] In its counterclaim, the Pension Fund also argued, as an alternative basis for liability, that a principal purpose of the Sun Funds' acquisition structure for Scott Brass was for the Sun Funds to evade Scott Brass' withdrawal liability. Neither the District Court nor the Circuit Court upheld that claim.

[6] *See* ERISA §4001(a)(14)(B).

entities and own more than 50% of the entities taking into account only overlapping ownership interests for each of the owners[7], then the entities are under common control. The ownership rules for corporate entities are determined based on vote or value, while for entities taxed as partnerships, voting control is not relevant and the determination is based only on economic ownership (*i.e.*, capital or profits interests).[8]

PBGC Letter & Palladium

In 2007, the Pension Benefit Guaranty Corporation ("PBGC")[9] Appeals Board issued an interpretive letter[10] (the "PBGC Letter") in which it concluded that a particular private equity fund (the "PE Fund") constituted a "trade or business." In the PBGC Letter, the PBGC used the test developed in a 1987 U.S. Supreme Court case, *Commissioner v. Groetzinger*[11], to distinguish a trade or business from a "purely personal activity." The *Groetzinger* test states that an activity constitutes a "trade or business" when it is conducted (1) for the primary purpose of income or profit and (2) with continuity and regularity.[12]

In the PBGC Letter, the PBGC concluded that the PE Fund met the first part of the *Groetzinger* test because the PE Fund's partnership agreement provided that the PE Fund could receive compensation in exchange for investment advisory and management services. The PBGC concluded that the PE Fund met the second prong of the *Groetzinger* test based on the size of the PE Fund's portfolio and its profits and management fees.[13]

[7] For example, if individual A owns 70% of corporation X and 20% of corporation Y, and individual B owns 20% of corporation X and 70% of corporation Y, and none of the remaining interests in X and Y are owned by persons who own interests in both entities, then X and Y would not be part of a single controlled group because the overlapping ownership interests in both X and Y are only 40% in the aggregate.

[8] *See* 26 C.F.R. §1.414(c)-2(b)(2)(C). "In the case of an organization which is a partnership, ownership of at least 80 percent of the profits interest or capital interest of such partnership."

[9] The PBGC is a quasi-public entity established by Congress to insure the payment of private-sector pension benefits.

[10] *See* PBGC. App. Bd., Liability Within a Group of Companies, *available at* http://www.pbgc.gov/documents/apbletter/decision--(liability%20within%20a%20group%20of%20companies)%202007-09-26.pdf (Sept. 26, 2007). Generally, the PBGC issues appeals board letters in connection with the settlement of disputes between parties, and makes certain of these letters public to advise the public of its interpretation of provisions under Title IV of ERISA. Such letters are not binding on the public or the courts.

[11] 480 U.S. 23 (1987).

[12] *Id.* at 85.

[13] The PBGC distinguished older cases on the basis that they dealt with individuals managing personal investments and not with limited partnerships that managed investment interests for investors through an agent, the GP.

The views expressed in the PBGC Letter were subsequently endorsed by a Michigan district court in *Bd. of Tr. Sheet Metal Workers' Nat'l Pension Fund v. Palladium Equity Partners.*[14] In *Palladium*, the district court held that private equity funds had a business purpose other than mere investment, pointing to language in the applicable investment guidelines and limited partnership agreements ("LPAs") concerning management of portfolio company investments and to the actual exercise of influence over the management of the portfolio companies.[15]

III. Summary of Principal Arguments

The Sun Funds argued that they could not be trades or businesses for ERISA purposes because:

- Profits of the Sun Funds are derived from returns on investments in the form of dividends, interest and capital gains;
- Any investment services provided to the Sun Funds or to their portfolio companies are provided by Sun Capital Advisors Inc. ("SCAI"), a related investment advisory firm, and not by the Sun Funds; and
- The phrase "trades or businesses" as used in ERISA should be interpreted a manner consistent with relevant tax precedents.

Furthermore, the PBGC noted that whereas the investments in the older cases only generated returns on capital, the GP, as the PE Fund's agent, received compensation for its services, in the form of its 20% carried interest. *See Higgins v. Commissioner*, 312 U.S. 212 (1941) (holding that large-scale investing in stocks and bonds, keeping records related to those investments and hiring others to provide managerial attention does not constitute carrying on a business) ("*Higgins*"); and *Whipple v. Commissioner,* 373 U.S. 193 (1963) (holding that "devoting one's time and energies to the affairs of a corporation is not of itself, without more, a trade or business of the person so engaged" if the only return is that of an investor) ("*Whipple*").

The agency analysis in the PBGC Letter conflates the separate activities of the PE Fund, its GP and its management company. The PBGC Letter points to statements in the PE Fund's partnership agreement delegating full authority over the business of the PE Fund to the GP as conclusive of the existence of an agency relationship between the PE Fund and the GP. The PBGC Letter rejects the argument that the PE Fund's management company, and not the GP, was actually the entity responsible for the management of the PE. It points to language in the PE Fund's partnership agreement stating that "the appointment of the management agent shall in no way relieve the General Partner of his responsibility and authority," and notes that the management agreement between the GP and the management company reserved the right of the GP to make all decisions relating to the PE Fund's investments. The PBGC Letter concludes that the GP participated in the PE Fund's investment activities and, because of the agency relationship, the GP's activities could be imputed to the Fund. It is not clear from the facts of the PBGC Letter whether the GP had an ownership stake in the management company.

[14] 722 F. Supp. 2d 854 (E.D. Mich. 2010) ("*Palladium*"). *Palladium* was ultimately settled.

[15] *Id.* at 869-870. While the Court in *Palladium* did not engage in agency analysis, the Court frequently refers to the GP of the three private equity funds as their agent, noting that the limited partnership agreement of the three funds authorized the GP to act as their agent.

In rebutting the Sun Funds' arguments, the Pension Fund pointed to:

- The LPAs and private placement memoranda of the Sun Funds, which detailed the authority granted by the Sun Funds to their agents, the Sun Funds' general partners and limited partner committees, to execute the Sun Funds' investment strategy through their involvement in the operations of their portfolio companies;

- Provisions of the Delaware Revised Uniform Partnership Act stating that a general partner is a partner and an agent of the partnership who by conducting partnership business binds the partnership,[16] which tied the actions of the GP, and the fees paid to it, to the Sun Funds; and

- The management services provided to Scott Brass by the Management Company and the management fees paid by Scott Brass to the Management Company in consideration for those services, which fees reduced the management fees Fund IV was required to pay its GP.[17]

The Pension Fund relied heavily on the PBGC Letter, arguing that the PBGC's view should be entitled to substantial deference. The PBGC submitted an amicus brief to the Circuit Court.

IV. The Circuit Court's Opinion

The Circuit Court reversed the District Court's grant of summary judgment and held that Fund IV was a "trade or business" for relevant purposes.

Unlike the District Court, which declined to give any deference to the PBGC Letter, the Circuit Court found the PBGC Letter persuasive.[18] It applied the "investment plus" approach outlined in the PBGC Letter and relied on in *Palladium.* The Circuit Court emphasized the following factors in its opinion:

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[16] Del. Code Ann. tit. 6, §15-301(1).

[17] The Pension Fund argued that the offset arrangement resulted in Fund IV benefitting, through the GP fee reduction, from the services the Management Company provided to Scott Brass.

[18] The PBGC asserted that the PBGC Letter was entitled to deference under *Auer v Robbins*, 519 U.S. 452 (1997) as the interpretation by an agency of its own regulations. The Circuit Court, however, determined that this level of deference would be inappropriate in this case for two reasons: (a) first, the Sun Funds did not have fair notice of the interpretation at issue since the Sun Funds made their investment in early 2007, but the PBGC Letter was not issued until September 2007, and (b) second, the PBGC had not made an effort to define "trades or businesses" in its regulations, so was not interpreting the actual statute, but was simply parroting its provisions. Although the second prong of this analysis would apply as long as there are no regulations issued defining what it means to be a "trade or business" for this purpose, it is unclear whether investors (at least in the First Circuit) would be deemed to be on notice of the PBGC Letter in respect of investments made after September 2007.

- The principal purpose of the Sun Funds as set forth in their various partnership agreements was the "management and supervision of [the Funds'] investments;"[19]

- The Sun Funds' controlling interest in Scott Brass resulted in significant management influence, which was exercised through SCAI employees appointed to the board of directors of Scott Brass and through the services provided by the Management Company;[20] and

- The offset of management fees paid to the Management Company against the fees Fund IV was obligated to pay to its GP,[21] which the Circuit Court said provided Fund IV with a "direct economic benefit…that an ordinary, passive investor would not derive,"[22] unlike "ordinary investment activity," which would result only in "investment returns."

The Circuit Court embraced the "investment-plus" approach. Consistent with the PBGC Letter, the Circuit Court also concluded that the actions of the Sun Funds' GPs and the Management Company could be *attributed* to the Sun Funds themselves.[23] Where the District Court had held that the PBGC incorrectly applied agency law in the PBGC Letter by imputing the trade or business of an agent to the principal, the Circuit Court stated that the Sun Funds' GPs were carrying on the partnership's activities in the

[19] *Sun Capital* at 30. The PBGC highlighted this point in its amicus brief. *See* Brief for the Pension Benefit Guarantee Corporation, as *Amicus Curiae* in Support of Reversal, *Sun Capital* (the "*PBGC Brief*") at 10, where the PBGC describes the Sun Funds' admission regarding their purpose and control over Scott Brass and argues that it is highly relevant because it constitutes a declaration against interest, relying on prior precedent.

[20] The Pension Fund also argued that the Sun Funds' compliance with the venture capital operating company ("VCOC") exception to ERISA, which requires that a fund have direct contractual rights to participate in a majority, by value of invested capital, in the management of the operating companies in which the private equity fund invests, and that the fund exercise such rights as to at least one operating company annually, was evidence that the Sun Funds were engaged in the management of Scott Brass. The Circuit Court stated, however, that it would not conclude that any investment fund which uses the VCOC exception is necessarily a trade or business.

[21] The Circuit Court held it could not conclude whether Fund III was a trade or business because the record was insufficient to determine whether Fund III also received an economic benefit from a similar offset, and remanded this factual issue, along with the "trade or business" determination with respect to Fund III, to the District Court.

[22] *Sun Capital* at 33.

[23] *Id*. In this regard, it is worth noting the overall structure of the Sun Funds, which might be distinguishable from other funds. Each of the Sun Funds paid annual management fees to its GP, which in turn owned the management company that provided management services to the portfolio company and received a fee for those services. This is an unusual structure, and may have made it easier for the Circuit Court to conflate the activities of the GP with the active management activities of the management companies. In our experience, many other funds have management companies that are owned separately (and by different people or in different proportions than the ownership of the general partner), and the funds pay their management fees to the management company rather than to the general partner of the fund.

"ordinary course of the partnership's business"[24] due to the grant of authority from the Sun Funds (as set forth in their LPAs) to act on their behalf and effectuate their purposes. Additionally, the Circuit Court stated that the GP of Fund IV, through the Management Company, entered into a services agreement with Scott Brass solely as an agent of Fund IV, since the services of the Management Company were essential to the investment strategy of the Sun Funds and as evidenced by the fee offset afforded to Fund IV.

V. Practical Implications

Preliminarily, we note that in order for a private equity fund to be held responsible for the pension liabilities of its portfolio company, the fund must be both a trade or business *and* under common control with that portfolio company. While the District Court and Circuit Court decisions considered the trade or business issue, neither has so far considered the common control question. As noted above, "common control" in the partnership context is based on economic ownership, not voting control. Fund III and Fund IV are not connected to each other through 80% common economic ownership.

Pending a final judicial determination on the controlled group issues, the Circuit Court's holding, taken together with the PBGC Letter and the disposition of *Palladium*, is important. The implications for private equity funds include the following:

Considerations in the Acquisition Context

- Funds that are considering acquiring 80% or more of a portfolio company with US pension liabilities face a heightened risk of joint and several liability. The importance of thorough diligence, and consideration of risk-mitigating strategies, as part of the acquisition process is accordingly increased. Such strategies may, depending on the specific facts and circumstances, include:
  - If stock or assets are being acquired in a divestiture in which a credit-worthy seller will remain in place (such as a carve-out), negotiate to (i) leave behind defined benefit pension liabilities, (ii) secure an indemnification from the seller for all or a portion of any joint and several liability or (iii) in the event of a plan split, require an increased funding of the portion of the plan liabilities assumed by the buyer[25], and prioritize pension issues as a business point in negotiations;

[24] Del. Code Ann. tit. 6, §15-301(1).

[25] Note that certain rules under the Code may restrict the ability of sellers to fully or disproportionately fund the plan liabilities being transferred to the buyer relative to the liabilities being retained by seller in a transaction.

- Negotiate an appropriate purchase price reduction in light of the increased risk; and

- If acquiring operations where the seller contributes to a multiemployer pension plan, utilize structuring alternatives (or negotiate a cessation of contributions to the plan) to trigger withdrawal liability at closing. Even if the seller is unwilling to bear the full cost of the withdrawal liability, triggering the liability at closing will define the exposure when the purchase price is being negotiated.

- If feasible as a business matter, split ownership of portfolio companies, including among related funds, so that no individual fund owns 80% or more of the portfolio company. This strategy appears to continue to be a viable alternative following the *Sun Capital* decision, subject to certain caveats[26]:

  - First, neither the District Court nor Circuit Court have suggested that investments by two related (but not parallel) funds, such as Fund III and Fund IV, must be aggregated. However, both the District and Circuit Courts did appear to collapse Sun Fund III with its parallel funds and to treat these as one fund;[27] and

  - Second, care must be taken to avoid "intent to evade" liability. As noted above, neither the District Court nor Circuit Court found an intention to evade in *Sun Capital*, although their analyses differed.[28] Both Courts also noted that the Sun Funds did not enter into any binding transaction documents to acquire Scott Brass until after they determined the respective ownership split of the Sun Funds. They seemed to rely on the absence of a binding commitment at any time for either of the Sun Funds to acquire more than 80% of Scott Brass, and prudence suggests that funds take advantage of that rule

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[26] As noted above, neither Court has yet analyzed the common control prong of the controlled group test. In motions submitted to the District Court, the Pension Fund has argued that Sun Fund III (and its parallel funds) and Sun Fund IV should be treated as one joint venture or common partnership, essentially ignoring or conflating their separate corporate identities.

[27] Since the Circuit Court considered the parallel funds to be one fund because they are "run by a single general partner and *generally* make the same investments in the same proportions" (emphasis supplied), *Sun Capital* at 7 n.3. It is unclear whether providing investors with "opt-out" or similar rights would sufficiently protect parallel funds from being collapsed.

[28] The District Court focused on the congressional intent and language of the statute as exclusively directed at preventing sellers from engaging in fraudulent transactions to separate a pension liability from an ongoing business. The Circuit Court seemed to implicitly conclude that liability under an intent to evade theory was not limited to sellers, but reasoned that disregarding the 70%/30% ownership structure of Scott Brass by the Sun Funds would sever the relationship between Scott Brass and the Sun Funds, such that the Sun Funds would not be liable for Scott Brass' withdrawal liability.

if practical as a business matter.

Considerations in Respect of Currently-Held Portfolio Companies

- Funds that own more than 80% of companies that currently maintain or contribute to defined benefit pension plans should consider practical steps to limit their exposure. At a minimum, monitoring funding levels and, where appropriate, funding up or terminating plans may avoid joint and several liability in the future. In addition:

  - A small number of very large plans have "derisked" by transferring pension assets and liabilities to an insurance company. While that strategy is not appropriate across a broad spectrum of plans, it may be worth considering in particular situations; and

  - Controlled group status is generally assessed at the time of an event triggering pension funding obligations, such as a withdrawal from, or termination of, a plan. Bringing new investors into a portfolio company may affect controlled group status. If, however, a principal purpose of a transaction is to evade a liability, the transaction may be disregarded.[29]

Fund Structuring Considerations

- The Circuit Court relied on an interpretation of agency law to impute the activities of the Fund IV GP to Fund IV itself. Different facts may have mitigated the risk arising from an agency analysis. In particular, structuring the Management Company as a wholly-owned subsidiary of the Fund IV GP, providing for management fees to be paid by Fund IV to the general partner, and providing for a fee offset for Fund IV's obligation to its GP, were not helpful factors.

- Use of alternative investment vehicles ("AIVs") for investing in portfolio companies with potential underfunded pension obligations may help to isolate the liability from the main fund partnership and limit the exposure to the assets of the AIV. However, structuring investments through AIVs may raise a variety of administrative and structuring complexities.

[29] It is also important to note that **a** "principal purpose" need not be **the** sole purpose. *See Sherwin-Williams Co. v. N.Y. State Teamsters Pension Fund*, 158 F.3d 387 (6th Cir. 1998), cert.denied, 526 U.S. 1017 (1999). Note that the 'evade or avoid' statute considered in *Sun Capital* relates to liability to multiemployer pension plans. There is a similar provision in §4069 of ERISA that applies to liability in respect of single-employer defined benefit pension plans, which has a five year look-back period (*i.e.*, a person that ceases to be part of a controlled group as part of a transaction occurring within five years prior to a plan termination can nevertheless be responsible for liabilities arising from the plan's termination), but the anti-evasion provisions relating to withdrawal from multiemployer pension plans do not contain a similar limited look-back window.

- Given the Circuit Court's emphasis on the management fee offset, waiver of so-called "monitoring" or other advisory fees[30] payable by a portfolio company may mitigate risk by distancing a general partner's provision of services from the applicable fund. While this approach may not be practical for all investments, it could be particularly useful in the context of an investment through an AIV.

U.S. Federal Income Tax Implications

- In its opinion, the Circuit Court rejected the proposition that an interpretation of one provision of the tax code is determinative with respect to other sections of the tax code with different purposes, and suggested that its opinion regarding the "trade or business" analysis was limited to an interpretation under ERISA's controlled group rules. If the Circuit Court's investment plus analyses were to be more broadly applied, however, it could potentially have significant adverse U.S. federal income tax consequences for certain types of fund investors. For example, foreign investors would be adversely affected if a fund's investment were treated as giving rise to income effectively connected with a U.S. trade or business ("ECI"); certain tax-exempt investors would be adversely affected if the investment gave rise to unrelated business taxable income ("UBTI"), and foreign sovereign investors might be treated as having commercial activities income. (In each case, however, the mere fact that a fund is for some purposes engaged in a trade or business does not mean that there would necessarily be ECI, UBTI or commercial activities income, since there are specific exclusions related to gains in securities that may apply in any event.) The existence of a fund trade or business might also benefit U.S. taxable investors, by allowing them to treat expenses as not being miscellaneous itemized deductions.

Other Potential ERISA Implications

- ERISA's controlled group rules have applicability beyond defined benefit-type pension liabilities. For example, certain nondiscrimination rules apply to tax-qualified retirement plans such as 401(k) plans, and in some cases plans maintained by employers in the same ERISA controlled group may be required to be aggregated for purposes of testing compliance with these requirements. It is not clear whether the Sun Capital's "trade or business" interpretation would also be applied in this context. Although exceptions apply to some of these requirements, such as exceptions that permit employers operating in separate lines of business to avoid aggregation, funds and their counsel would need to be cognizant of the issue and take appropriate steps to address these types of concerns.

[30] It is unclear from the Circuit Court's analysis whether other types of fees, such as transaction fees, that are not necessarily linked to ongoing management or advisory services but may result in a similar economic benefit to a fund in the form of an offset would be viewed in the same light as monitoring/advisory fees for these purposes.

- If private equity funds are found to be in a parent-subsidiary controlled group with their portfolio companies, this could have far-reaching consequences. In particular, separate portfolio companies could have at least theoretical liability for each other's pension underfunding and withdrawal liabilities, raising issues for the funds, portfolio companies, lenders, underwriters and their respective counsel in many contexts, including in acquisition and sale agreements, financing documents, and public debt and equity offerings. Although we think it is premature to conclude that this will be the governing law in the wake of *Sun Capital*, we believe that these issues are likely to receive significantly more analysis and attention following the *Sun Capital* decision.

Finally, we note that there does appear to be some increased willingness by courts to make determinations that could lead to a broader application of ERISA's controlled group rules than may have been the case before the recent economic downturn. For example, in a 2012 case ("*Asahi*"),[31] the United States District Court for the District of Columbia ruled that a foreign parent corporation with few U.S. contacts was subject to the court's jurisdiction in a suit brought by the PBGC to collect unfunded pension liabilities of a U.S. subsidiary the foreign parent had acquired in 2007. The *Asahi* decision, which essentially conflated issues of jurisdiction and liability, was inconsistent with prior precedent.[32] Although a handful of cases do not necessarily constitute a trend, we will continue to closely monitor developments in this area.

If you have any questions, please feel free to contact Arthur Kohn, Robert Raymond, Michael Albano, Kathleen Emberger or Jason Factor or any of your regular contacts at the firm. You may also contact our partners and counsel listed under "Executive Compensation and ERISA" or "Private Equity" located in the "Practices" section of our website at http://www.clearygottlieb.com.

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[31] Pension Benefit Guaranty Corp. v. Asahi Tec Corp., 2012 WL 843937 (D.D.C. Mar. 14, 2012). The *Asahi* decision is currently being appealed.

[32] *See* CGSH Alert Memo -*U.S. District Court Holds Foreign Parent Subject to Personal Jurisdiction for its Bankrupt U.S. Subsidiary's Unfunded Pension Liabilities* (July 18, 2012) *available* here.

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