



## Private Equity Firms Appeal First Circuit's Sun Capital Decision Expanding Controlled Group Pension Liability to Supreme Court

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The ERISA liability landscape for private equity funds shifted earlier this year, when the First Circuit effectively determined that a private equity fund could be found to be engaging in a “trade or business” and therefore potentially subject to multiemployer plan withdrawal liabilities assessed against one of its portfolio companies. The First Circuit denied the funds’ petition for a rehearing on the question, but on November 21, the private equity funds involved in the case filed a petition for a writ of certiorari with the Supreme Court, asking that court to overturn the ruling.

Generally, when an employer withdraws from a multiemployer pension plan, the law may impose withdrawal liability (i.e., the employer’s proportionate share of the plan’s unfunded vested benefits) on the employer and any “trades or businesses” that are members of the employer’s controlled group. In *Sun Capital Partners III LP v. New England Teamsters & Trucking Industry Pension Fund*, 724 F.3d 129 (1<sup>st</sup> Cir. 2013), the First Circuit rejected the core argument that has been used by private equity funds to defend against controlled group exposure for pension plan liability – that such funds are not engaged in a “trade or business” and thus cannot be part of a controlled group. In so holding, the court engaged in a very fact-specific analysis of the business operations of the funds in question (including the activities of the funds’ general partners, the content of the partnership agreements and private placement memos, and the allocation of management fees) to conclude that at least one of the funds was in fact engaged in a trade or business, rather than a passive investor. If the First Circuit’s decision is upheld, it could substantially increase the risk faced by private equity funds contemplating investment in companies that have pension funding liabilities. Further, while the case was determined in an ERISA context, the court’s determination that a private equity fund could be engaged in a trade or business also could have ripple effects on how such investors are treated under the federal tax code. You can read our detailed summary and analysis of the First Circuit’s decision [here](#).

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