

# Employee Benefit Plan Review

## Multiemployer Pension Plan Withdrawal Liability Claims—Discharge and Bar Dates: When Is a Claim a Claim?

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Withdrawal liability for underfunded multiemployer pension plans has confounded bankruptcy courts since the 1980 enactment of the Multiemployer Pension Plan Amendments Act of 1980 (MEPPAA).<sup>1</sup> The courts disagree over whether the Bankruptcy Code's<sup>2</sup> definition of claim is broad enough to sweep in contingent withdrawal liability claims, which are dependent upon complex actuarial calculations, asset valuations and estimates of future benefit obligations to participants, all of which are done at the time of the withdrawal; or instead whether the contingent nature of a withdrawal and the possibility of underfunding—(both of which are necessary for liability)—are too ephemeral to create a dischargeable claim until the withdrawal of an underfunded plan actually occurs.<sup>3</sup> A March 2019 bankruptcy case from the Southern District of New York dealing with a contingent withdrawal liability claim filed after the bar date established in a Chapter 11 case adds to the dissonance.

### MEPPAA

Prior to the 1974 enactment of ERISA,<sup>4</sup> a company with a retirement plan could go out of business without being held accountable for the promised retirement benefits. ERISA tightened funding requirements

for tax qualified plans, and created the Pension Benefit Guaranty Corporation (PBGC), an insurance program that makes some of the payments due retirees upon an underfunded plan's termination. However, multiemployer pension plans were excluded from PBGC coverage because of the concern that the PBGC, which was theoretically self-supporting, would not be able to handle the additional risk posed by multiemployer pension plans. Consequently, under ERISA as originally enacted, withdrawing participating employers in multiemployer pension plans could avoid any liability for unfunded pension benefits so long as the pension plan did not terminate within five years thereafter. This encouraged employers participating in financially shaky pension plans to "stampede for the exit doors,"<sup>5</sup> thereby potentially hastening the pension plan's demise.

Congress recognized there was a looming catastrophe presented by multiemployer pension plans in declining industries whose employee base could no longer supported a growing number of retirees with fixed benefits and, in May 1980, required the PBGC to cover such retirees. However, it quickly became apparent that this, without more, would threaten the very solvency of the PBGC. To provide the "more," Congress enacted MEPPAA, which imposed liability

upon any participating employer choosing to withdraw from an underfunded multiemployer pension plan. However, under MEPPAA, until a participating employer actually withdraws from a multiemployer pension plan, and the plan underfunding is established,<sup>6</sup> the liability (which could be enormous) remains contingent.<sup>7</sup>

#### **THE TREATMENT OF CONTINGENT CLAIMS UNDER THE CODE, GENERALLY**

One of the Code's principal objectives is to allow a debtor a "fresh start" by dealing with all of its debts, both fixed and contingent. The Code defines "debt" as a liability on a claim,<sup>8</sup> and a "claim" as a "right to payment, whether or not such a right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured."<sup>9</sup> This definition "reflects Congress' broad rather than restrictive view of the class of obligations that qualify as a 'claim' giving rise to a 'debt.'"<sup>10</sup> Indeed, Congress intended the definition of "claim" to be the "broadest possible," and added that the Code "contemplates that all legal obligations of the debtor . . . will be able to be dealt with in the bankruptcy case.

It permits the broadest possible relief in the bankruptcy court."<sup>11</sup> However, this admonition has proved difficult to put into practice when courts wrestle with contingent claims.

Bankruptcy courts have had a relatively easy time deciding the status of contingent claims which become fixed during a bankruptcy case, especially those related to employment. Courts will allocate a claim, such as vacation pay which vests upon termination but which is earned over time, to the appropriate periods when the pay was earned to determine what portions of the claim have unsecured, priority and administrative status, respectively.<sup>12</sup> However, bankruptcy courts have had considerable difficulty determining whether something

constitutes a "claim" that is discharged by a bankruptcy case.

#### **DISCHARGE OF CONTINGENT CLAIMS**

Regarding claims arising postplan confirmation and discharge, courts have generally split into two camps. Some have adopted the "conduct test," holding that a claim does not arise until the event giving rise to liability has occurred.<sup>13</sup> Others follow the "pre-petition relationship test," holding that claimants which have pre-petition contact, privity or other relationship with the debtor, but whose rights depend upon a future occurrence, nonetheless may have a pre-petition claim which will be discharged.<sup>14</sup>

Illustrative of the judicial murkiness are the decisions of the U.S. Court of Appeals for the Third Circuit, which migrated from one camp to the other. In 1994, in *In re M. Frenville Co.*,<sup>15</sup> the court focused on the "right to payment" language in the Code's definition of a claim, holding that no claim existed until a cause of action accrued under state law. The *Frenville* "accrual" theory of when a claim arises was universally criticized as far too restrictive and contrary to Congressional intent. One court observed that *Frenville* "may be fairly characterized as one of the most criticized and least followed precedents decided under the current Bankruptcy Code."<sup>16</sup> Another observed that "*Frenville* has proved a remarkably unpopular decision and no other Circuit Court of Appeals has followed it."<sup>17</sup>

Twenty-six years later, in *Jeld-Wen, Inc. v. Van Brunt (In re Grossman's Inc.)*,<sup>18</sup> the Third Circuit addressed the issue of whether a pre-petition exposure to asbestos resulting in injury manifesting 10 years after confirmation of a plan of reorganization was a claim discharged by the proceeding, and overruled *Frenville*. The court noted that "Courts have declined to follow *Frenville* because of its apparent conflict with the Bankruptcy Code's

expansive treatment of the term 'claim.'"<sup>19</sup> Continuing, the court said:

The *Frenville* court focused on the "right to payment" language in § 101(5) and, according to some courts, "impos[ed] too narrow an interpretation on the term 'claim,' . . . by failing to give sufficient weight to the words modifying it: "contingent," "unmatured," and "unliquidated." The accrual test in *Frenville* does not account for the fact that a "claim" can exist under the Code before a right to payment exists under state law.<sup>20</sup>

After reviewing the conduct test,<sup>21</sup> and the pre-petition relationship test,<sup>22</sup> the court held that "a 'claim' arises when an individual is exposed pre-petition to . . . conduct giving rise to an injury, which underlies a 'right to payment.'"<sup>23</sup>

In summary, those courts following the conduct test will find that unless conduct giving rise to "a right to payment" has occurred prior to a debtor's discharge, the claim is not discharged by the bankruptcy proceeding and the claimant is free to pursue the debtor, bankruptcy notwithstanding. On the other hand, courts following the pre-petition relationship test will find claims which arise after discharge but which are based upon a pre-petition relationship between the debtor and the claimant to be pre-petition claims, and are discharged in the bankruptcy case.

#### **CONTINGENT WITHDRAWAL LIABILITY CLAIMS ARISING POST-BANKRUPTCY ARE DISCHARGED, SAY SOME COURTS**

Courts addressing the effect of confirmation of a debtor's Chapter 11 plan of reorganization and discharge have sharply divided over whether MEPPAA withdrawal liability based upon a withdrawal after—sometimes years after—the

conclusion of a bankruptcy case is discharged. In *In re CD Realty Partners*,<sup>24</sup> the debtor took over the business of a cold storage company which was a participating employer in a multiemployer pension plan. Two years later, the debtor confirmed a plan of reorganization which did not address the withdrawal liability at all. Post-confirmation, the pension fund sued the debtor for withdrawal liability and the debtor asked the bankruptcy court to declare the withdrawal liability discharged, and enjoin the fund from taking actions to try to collect it.

The court began by noting that Congress intended the term “claim” to be interpreted as broadly as possible.<sup>25</sup> However, such expressed intention fails to guide courts grappling with contingent claims:

After all, a contingent right to payment is, by definition, a right to payment that, because it is contingent, is not yet and may never be a right to payment. In the strangely appropriate language of philosopher Martin Heidegger, it might be said to exist somewhere on the continuum between being and nonbeing. At some point on that continuum, a right to payment becomes so contingent that it cannot fairly be deemed a right to payment at all.<sup>26</sup>

Multiemployer pension plan claims, said the court, are unique because the amount and even the existence of underfunding which gives rise to the claim are unknown until the date of withdrawal.<sup>27</sup>

Contingent claims arising under multiemployer pension plans, continued the court, are based upon the pre-petition relationship between the debtor and the claimant. In this case, the relationship included the debtor and the plan understanding that it was a reasonable probability (although not a certainty) that the contributions may fall below the amounts necessary to fund the

vested benefits, and this should have been reasonably anticipated.<sup>28</sup> Additionally, at the time of plan confirmation, the parties should also have reasonably anticipated that the triggering event to liability, plan withdrawal, would someday occur:

One can assume that sooner or later, every participating employer will withdraw. Withdrawal is a sufficiently probable—if not philosophically certain—that it could fairly have been contemplated by the parties. Only the *date* of withdrawal was indefinite.<sup>29</sup>

Based upon these factors, the court held that the withdrawal liability, although contingent, was a pre-petition claim and thus discharged by the plan confirmation.<sup>30</sup>

## CONTINGENT WITHDRAWAL LIABILITY ARE NOT CLAIMS WHICH ARE DISCHARGED IN BANKRUPTCY, SAY OTHER COURTS

Other courts have reached the opposite conclusion. In *CPT Holdings, Inc. v. Industrial & Allied Employees Union Pension Plan, Local 73*,<sup>31</sup> the U.S. Court of Appeals for the Sixth Circuit addressed a withdrawal liability claim based upon a withdrawal which occurred almost two years after the debtor had confirmed its Chapter 11 plan of reorganization. The court started by discussing the definition of a “claim” under the Code, and noted the parties agreed that a withdrawal which occurred post-petition, but pre-confirmation, gave rise to a claim that could be discharged in the bankruptcy case. The debate was whether a “claim” for contingent MEPPAA liability existed and was discharged by a plan confirmation where the withdrawal occurred well after confirmation.<sup>32</sup> The court noted Congress’s intention that all legal obligations be dealt with in a bankruptcy and that the

term “claim” be read as broadly as possible. It also acknowledged the reasoning of *CD Realty* regarding the pre-petition relationship of the parties.<sup>33</sup>

However, the court also noted Bankruptcy Judge Helen Balick’s decision in *In re United Merchants & Manufacturers, Inc.*,<sup>34</sup> which addressed an obligation arising from a post-confirmation withdrawal from a multiemployer pension plan. Judge Balick held that a legal pre-petition relationship, without more, is insufficient to create a “claim” affected by the debtor’s bankruptcy. It must be, said Judge Balick, a relationship that is coupled with conduct that gives rise to a right to payment.<sup>35</sup>

Withdrawal liability requires both an unfunded vested benefit amount and a withdrawal. Only a withdrawal can trigger the contingent right to payment for withdrawal liability. It is this withdrawal that first creates the legal relationship which gives rise to the asserted right to payment.<sup>36</sup>

Finding the reasoning of *United Merchants* persuasive, the Sixth Circuit ruled there must be both a withdrawal *and* an unfunded vested benefit amount before there exists a right to payment that gives rise to a dischargeable claim.<sup>37</sup>

## WHAT ABOUT CLAIMS BASED UPON A WITHDRAWAL THAT OCCURS AFTER A COURT ESTABLISHED BAR DATE BUT BEFORE CONFIRMATION?

On March 4, 2019, U.S. Bankruptcy Judge Michael E. Wiles of the Southern District of New York decided a withdrawal liability claim dispute in *Manhattan Jeep Chrysler Dodge, Inc.*<sup>38</sup> The court entered an order establishing May 23, 2018 as the bar date for filing claims. On September 9, 2018, the court entered

an order approving the sale of substantially all of the debtor's assets, a sale which the court said was made clear in the debtor's early pleadings filed in the case. Shortly after the sale order, Local 868 International Brotherhood of Teamsters Pension Fund (Fund), which had not filed a proof of claim by the May 2018 bar date, notified the debtor that it believed a withdrawal liability was owed. However, the Fund waited until January 2019 to file a motion seeking permission to file proofs of claim based upon the alleged withdrawal liabilities. In its motion the Fund relied on *CPT Holdings* and argued that the contingent withdrawal liability claims were not "claims" at the time of the bar date and were therefore not subject to it. Alternatively, the Fund asked the court to find "excusable neglect" for failing to comply with its bar date order.

Judge Wiles noted that in *CTP Holdings*, there was no withdrawal until a year after the confirmation of the plan of reorganization. While the *CPT Holdings* court held that there was no "claim" which had been discharged prior to confirmation, Judge Wiles submitted that "...a better way to have explained the decision in *CPT* would have been to say that CPT's post-bankruptcy continued participation in the relevant pension plan...had the effect of renewing and keeping intact CPT's contingent statutory withdrawal liability."<sup>39</sup> The court went on to say that to the extent the *CTP Holdings* rationale called upon him to exempt the Fund's withdrawal liability claim from the bar date, he disagreed with it and declined to follow it.<sup>40</sup>

The Code's broad definition of claim in Section 101(5)(A), said the court, plainly encompasses claims that are contingent upon the happening of a future event. Ruling that a withdrawal liability claim could not have existed until there was a right to payment would be contrary to both the Code's broad definition

and the way "claim" was defined in the bar date order. Moreover, to rule that unmatured claims were not to be treated as "claims" until they become fully enforceable would mean that contingent claims, such as those "arising under guarantees, indemnities, attorneys' fees reimbursement provisions, or other sources – would all escape the Court's bar date orders," frustrating the purpose of bar date orders and the debtor's ability to identify the universe of claimants and structure potential distributions.<sup>41</sup> The better view said Judge Wiles, is the one expressed by *CD Realty Partners*.<sup>42</sup>

Moreover, if *CTP Holdings* were interpreted as the Fund requests, logic would require that its claim be treated as an administrative claim because no pre-petition claim would have existed. The claim would only have arisen when the withdrawal occurred, that is post-petition. This interpretation is contrary to controlling decisions in the Second Circuit and Southern District of New York.<sup>43</sup> Consequently, the court rejected the argument that the then contingent withdrawal liability claims were not claims subject to the bar date. It also concluded that the issue of excusable neglect could not be decided without further evidence.

## CONCLUSION

MEPPAA withdrawal liability is wholly dependent upon two things—a withdrawal and the plan being underfunded when the withdrawal occurs. Determining if a withdrawal has occurred is fairly straight forward. Whether a plan is underfunded, however, depends on a complex actuarial analysis of the plans assets and projected investment returns versus the future benefits due to plan participants. MEPPAA plans may be fully funded today, but underfunded in the future. Even if a plan is underfunded, a withdrawal may never occur. Outside of bankruptcy, there is no liability unless both underfunding and a withdrawal are present.

Does bankruptcy change this? The Code's broad definition of "claim" and its fresh start policies seen to favor the view taken by *CD Realty Partners*, and now, *Manhattan Jeep*—that is a contingent withdrawal liability claim is discharged by a plan confirmation and is subject to a court imposed bar date. However, although not decisions involving a claims' bar date, *CPT Holdings* and *United Merchants* would appear to treat contingent MEPPAA withdrawal liability claims the same in bankruptcy as outside of it, and require that both a withdrawal and underfunding be present before a "claim" arises. It will be interesting to see with which side other jurisdictions align. However, today the conservative view would seem to favor avoiding the *Manhattan Jeep* fight by filing the proof of claim prior to the bar date. ☼

## NOTES

1. Pub. L. No. 96-364, 94 Stat. 1208 (codified as amended in scattered sections of 29 U.S.C. and 5 U.S.C.) (MEPPAA). MEPPAA withstood a constitutional challenge under the Due Process and Takings Clauses in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984).
2. 11 U.S.C. §§ 101-1532, hereinafter the "Code."
3. For a broader discussion of contingent withdrawal liability claims in bankruptcy, see Peter C. Blain, *Contingent Withdrawal Liability in Multiemployer Pension Plans in Bankruptcy – Claims, Discharge, Solvency, and Avoidance Actions! – Part I and II*, *Employee Benefit Plan Review*, July/August and September 2018.
4. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 5 U.S.C., 18 U.S.C., 29 U.S.C., and 42 U.S.C.).
5. *Milwaukee Brewery Workers' Pension Plan v. Joseph Schlitz Brewing Co.*, 513 U.S. 414, 417 (1995).
6. See 29 U.S.C. § 1381.
7. Liability may not be limited to the multiemployer plan participant. The contributing participant's affiliates, who have no direct pension liability as a participant, but which are trades or businesses under common control with the participant, may be considered jointly and severally liable for withdrawal liability under MEPPAA as members of a controlled group. 29 U.S.C. § 1301(b)(1).
8. Code § 101(12).
9. Code § 101(5)(A).
10. See *Pa. Dep't. Pub. Welfare v. Davenport*, 495 U.S. 552, 558 (1990) (citation omitted).
11. H.R. Rep. No. 95-595, reprinted in 1978 U.S.C.A.N. 5963, 6266.
12. See *In re Roth Am., Inc.*, 975 F.2d 949 (3d Cir. 1992).

13. See *Olin Corp. v. Riverwood Int'l Corp.* (In re *Manville Forest Prods. Corp.*), 209 F.3d 125 (2d Cir. 2000).
14. See *Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268 (5th Cir. 1994).
15. 744 F.2d 332 (3d Cir. 1984). *Frenville* dealt with whether a claim existed pre-petition subjecting an action to the automatic stay of Code § 362.
16. *Firearms Imp. & Exp. Corp. v. Capital Ins.* (In re *Firearms Imp. & Exp. Corp.*), 131 B.R. 1009, 1015 (Bankr. S.D. Fla. 1991).
17. *Official Comm. of Asbestos Pers. Injury Claimants v. Sealed Air Corp.* (In re *W.R. Grace & Co.*), 281 B.R. 852, 860 (Bankr. D. Del. 2002).
18. 607 F.3d 114 (3d Cir. 2010).
19. *Id.* at 121.
20. *Id.* at 121 (citing *Epstein v. Official Comm. of Unsecured Creditor of the Estate of Piper Aircraft Corp.* (In re *Piper Aircraft Corp.*), 58 F.3d 1573, 1576 n.2 (11th Cir. 1995).
21. *Id.* at 122-23.
22. *Id.* at 123-25.
23. *Id.* at 125.
24. 205 B.R. 651 (Bankr. D. Mass. 1997).
25. *Id.* at 655.
26. *Id.* at 656.
27. *Id.* at 658.
28. *Id.* at 658-59.
29. *Id.* at 659.
30. *Id.* at 660.
31. 162 F.3d 405 (6th Cir. 1998).
32. *Id.* at 407.
33. *Id.* at 408.
34. 166 B.R. 234 (Bankr. D. Del. 1994).
35. *Id.* at 237.
36. *Id.* at 241.
37. *CPT Holdings*, 162 F.3d at 409.
38. *In re Manhattan Jeep Chrysler Dodge, Inc.*, No. 18-10657(MEW), 2019 WL 1054928 (Bankr. S.D.N.Y. Mar. 4, 2019).
39. *In re Manhattan Jeep Chrysler Dodge, Inc.*, 2019 WL 1054948 at \*2.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* See *Trustees of Amalgamated Ins. Fund v. McFarlin's, Inc.*, 789 F.2d 98 (2d Cir. 1986); *Amalgamated Ins. Fund v. William B. Kessler, Inc.*, 55 B.R. 735 (S.D.N.Y. 1985).

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