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Supreme Court Update: High Court Ends Attempt to Impose Company Pension Liabilities on Private Equity Funds

On October 5, 2020, the Supreme Court denied a petition for a writ of certiorari in the case of *New England Teamsters & Trucking* v. *Sun Capital Partners, et al.* ("*Sun Capital*"), putting an end to years of litigation that has plagued the private equity industry. The denial leaves in place holdings by the First Circuit that potentially exposes private equity funds to the pension withdrawal liabilities of their portfolio companies.

Sun Capital first shocked the private equity industry in 2013, when the First Circuit held that multiple affiliated funds owning a controlling interest in a portfolio company could be held jointly and severally liable, under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), for the pension withdrawal liabilities of the portfolio company. This potential liability arose, the First Circuit held, because such funds could be deemed to constitute a single "trade or business" within the portfolio company's controlled group. This degree of affiliation was sufficient, under ERISA, to impose pension withdrawal liabilities on the funds. *See* here for our analysis of the First Circuit's 2013 opinion.

On remand in 2016, the *Sun Capital* district court imposed withdrawal liability on the funds, reasoning that they together constituted a "partnership-in-fact" and so were part of the portfolio company's controlled group. The First Circuit subsequently reversed this decision, again on appeal, in 2019. While the First Circuit accepted the relevance of the district court's "partnership-in-fact" analysis and did not disturb its prior 2013 holding, it held that the facts in *Sun Capital* did not satisfy the applicable multi-factor test for determining whether a "partnership-in-fact" existed among the funds. It therefore reversed the district court's finding of withdrawal liability for the funds, and the plaintiffs petitioned the Supreme Court for a writ of certiorari reviewing that decision. *See* here for our analysis of the district court's 2016 opinion, and here for our analysis of the First Circuit's 2019 opinion.

With the Supreme Court's denial, the *Sun Capital* litigation appears to have reached its conclusion. While this represents a win for the *Sun Capital* defendants, this outcome leaves the First Circuit's endorsement of a "trade or business" theory of withdrawal liability under ERISA undisturbed, as well as its incorporation of a multi-factor test for determining whether multiple funds could together constitute a "partnership-in-fact" for these purposes. Thus, sponsors of private equity funds – especially those operating within the jurisdiction of the First Circuit – should continue to be mindful of the risks that the *Sun Capital* opinions present for their funds, when acquiring controlling interests in companies with potential pension liabilities.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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