EMPLOYMENT LAW — PENSION WITHDRAWAL LIABILITY — FIRST CIRCUIT HOLDS PRIVATE EQUITY FUND IS "TRADE OR BUSINESS" UNDER MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT. — *Sun Capital Partners III, LP v. New England Teamsters & Trucking Industry Pension Fund*, 724 F.3d 129 (1st Cir. 2013).

Private equity firms often make money by taking over troubled companies, improving their business operations, and selling them at a profit.[1] Occasionally, however, private equity firms' best efforts fail, and their portfolio companies wind up bankrupt. Sometimes these companies go bust before they are able to pay out all of the pension obligations they owe their employees. Recently, in *Sun Capital Partners III, LP v. New England Teamsters & Trucking Industry Pension Fund*,[2] the First Circuit held as a matter of first impression that a private equity fund was a "trade or business" under the Multiemployer Pension Plan Amendments Act of 1980[3] (MPPAA). That designation leaves the private equity fund potentially liable for a bankrupt portfolio company's unfunded pension obligations. The First Circuit's decision would have been more compelling, and possibly more helpful, if the court had grounded it in an explicit discussion of the MPPAA's statutory objectives. Nevertheless, the court was wise to advance cautiously. In future cases, courts should likewise hesitate before adopting or expanding *Sun Capital*. Federal agencies and Congress are likely better positioned to resolve this dispute.

Sun Capital Advisers, Inc. is a private equity firm specializing in leveraged buyouts.[4] In 2006, Sun Capital drew money from two of its private equity funds,[5] together called "the Sun Funds," to purchase

---

[1] *See, e.g.*, Chris William Sanchirico, *The Tax Advantage to Paying Private Equity Fund Managers with Profit Shares: What Is It? Why Is It Bad?*, 75 U. CHI. L. REV. 1071, 1103 (2008).

[2] 724 F.3d 129 (1st Cir. 2013).

[3] Pub. L. No. 96-364, 94 Stat. 1208 (codified as amended in scattered sections of 26 and 29 U.S.C.). Congress passed the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.), in part "to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 374 (1980) (quoting Sen. Lloyd Bentsen). The MPPAA amended ERISA in 1980 to discourage employers from pulling out of multiemployer pension plans. It "impos[es] mandatory liability on all withdrawing employers for their proportionate shares of 'unfunded vested benefits.'" Cent. States Se. & Sw. Areas Pension Fund v. Messina Prods., LLC, 706 F.3d 874, 878 (7th Cir. 2013) (quoting 29 U.S.C. § 1381 (2006)).

[4] Sun Capital Partners III, LP v. New Eng. Teamsters & Trucking Indus. Pension Fund, 903 F. Supp. 2d 107, 109 (D. Mass. 2012). In a leveraged buyout, an investor acquires a company using mostly borrowed money.

[5] The two funds are Sun Capital Partners III, LP and Sun Capital Partners IV, LP. *Sun Capital*, 724 F.3d at 133–34. Funds are limited partnerships comprised of pools of money. The investors are limited partners. A general partner manages the partnership, deploying the capital in the funds to invest in portfolio companies. For an overview of typical private equity fund structures,

Scott Brass, Inc., a Rhode Island metals producer.[6] After the Sun Funds acquired Scott Brass, Sun Capital Advisers implemented a plan designed to revitalize the ailing corporation. Management companies were set up for each fund, providing Scott Brass "with employees and consultants from Sun Capital."[7] A host of Sun Capital agents, including co-CEOs Marc Leder and Rodger Krouse, "exerted substantial operational and managerial control" over Scott Brass.[8] But in the autumn of 2008, declining copper prices drove Scott Brass into bankruptcy.[9] By stopping required payments to the New England Teamsters and Trucking Industry Pension Fund, Scott Brass triggered withdrawal liability under the MPPAA, obligating it to pay $4.5 million in "unfunded vested benefits."[10]

The Teamsters Fund alleged that the Sun Funds' relationship with Scott Brass made them jointly and severally liable for Scott Brass's withdrawal obligations.[11] Under the MPPAA, "[t]o impose withdrawal liability on an organization other than the one obligated to the [pension] Fund, two conditions must be satisfied: 1) the organization must be under common control with the obligated organization, and 2) the organization must be a trade or business."[12]

In June 2010, the Sun Funds sought a declaratory judgment in federal district court.[13] The district court granted summary judgment in favor of the Sun Funds, ruling that they are not "trades or businesses" and hence cannot be subject to MPPAA withdrawal liability.[14] As the district court noted, neither ERISA nor the MPPAA defines "trade or business." Rather, courts are directed to "look to the tax code and tax caselaw to interpret" the phrase.[15] The district court relied on two

---

see Victor Fleischer, *Two and Twenty: Taxing Partnership Profits in Private Equity Funds*, 83 N.Y.U. L. REV. 1, 8–9 (2008).

[6] *Sun Capital*, 724 F.3d at 135.

[7] *Sun Capital*, 903 F. Supp. 2d at 111.

[8] *Sun Capital*, 724 F.3d at 136.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 136–37.

[12] *Id.* at 138 (alterations in original) (quoting McDougall v. Pioneer Ranch Ltd. P'ship, 494 F.3d 571, 577 (7th Cir. 2007)) (internal quotation marks omitted); *see* 29 U.S.C. § 1301(b)(1) (2006 & Supp. V 2011).

[13] The Sun Funds actually sought declaratory judgment first, and the Teamsters Fund followed by asserting joint and several liability as a counterclaim. *Sun Capital*, 724 F.3d at 137.

[14] Sun Capital Partners III, LP v. New Eng. Teamsters & Trucking Indus. Pension Fund, 903 F. Supp. 2d 107, 118 (D. Mass. 2012). The common control issue will be determined on remand, but is far less controversial than the trade or business question. As the First Circuit explained, "to be in a parent-subsidiary group under common control, the parent must have an 80% interest in the subsidiary." *Sun Capital*, 724 F.3d at 149. The Sun Funds together owned Scott Brass in full, almost certainly passing the "common control" threshold.

[15] *Sun Capital*, 903 F. Supp. 2d at 113; *see* 29 U.S.C. § 1301(b)(1).

seminal Supreme Court tax cases, *Higgins v. Commissioner*[16] and *Whipple v. Commissioner*,[17] which held that "investments are not trades or businesses."[18] The district court refused to attribute Sun Capital's management activities to the Sun Funds; instead, it accepted their self-characterization as mere "passive pools of investing funds."[19] On that basis, the court concluded that *Higgins* and *Whipple* shield the Funds from trade or business designation. Finally, the court rejected the Teamsters' alternative theory: that the Sun Funds should be made to cover Scott Brass's withdrawal obligations because they structured their acquisition purposely to "evade or avoid" withdrawal liability.[20]

The First Circuit affirmed the district court's judgment that the Sun Funds are not subject to "evade or avoid" liability,[21] reversed the trade or business designation in part, and remanded.[22] Writing for a unanimous panel, Chief Judge Lynch[23] first considered a 2007 opinion issued by the Pension Benefit Guaranty Corporation (PBGC) Appeals Board,[24] which held that a private equity fund did qualify as a trade or business under the MPPAA. The PBGC sought to reconcile its conclusion with *Higgins* and *Whipple* by employing an "investment plus" standard, reasoning that the extent of the management company's involvement with its portfolio company rendered it more than an ordinary investor.[25] Crucially, this theory required that the PBGC attribute the activities of the management company directly to the private equity fund, and from there the Board concluded that the fund itself

---

[16] 312 U.S. 212 (1941) (ruling that an individual was not engaged in a trade or business despite actively managing his very large investments on a continuous basis).

[17] 373 U.S. 193 (1963) (denying trade or business status to an individual who provided services to a handful of corporations in the hopes of yielding higher returns on his investments).

[18] *Sun Capital*, 903 F. Supp. 2d at 114. The most recent Supreme Court decision that interprets "trade or business" held that an activity constitutes a trade or business when (1) the primary purpose of the activity is income or profit, and (2) the activity is performed with continuity and regularity. Comm'r v. Groetzinger, 480 U.S. 23, 35 (1987). Nevertheless, "[i]t is generally accepted that *Higgins* and *Whipple* remain good law, and their caution that investments are not trades or businesses survives *Groetzinger*." *Sun Capital*, 903 F. Supp. 2d at 114.

[19] *Sun Capital*, 903 F. Supp. 2d at 117.

[20] *Id.* at 124 (internal quotation marks omitted); *see* 29 U.S.C. § 1392(c).

[21] The court said that imposing liability under 29 U.S.C. § 1392(c) would require it to "create a transaction that never occurred," which the court refused to do. *Sun Capital*, 724 F.3d at 150.

[22] As explained below, the court held that Sun Fund IV was a trade or business and remanded to decide whether Sun Fund III was the same. The district court will also decide whether the Sun Funds and Scott Brass were under common control. *See supra* note 14.

[23] Chief Judge Lynch was joined by Judges Thompson and Kayatta.

[24] The PBGC, which insures multiemployer pension plans, is "the agency responsible for interpreting the MPPAA and enacting regulations pursuant thereto." *Sun Capital*, 903 F. Supp. 2d at 115. "The PBGC's Appeals Board renders final agency decisions on various liability and benefit determinations" under the MPPAA. *Sun Capital*, 724 F.3d at 139 n.13.

[25] *Sun Capital*, 724 F.3d at 140 (quoting Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Palladium Equity Partners, LLC, 722 F. Supp. 2d 854 (E.D. Mich. 2010)) (internal quotation marks omitted); *see also id.* at 139–40.

was engaged in a trade or business.[26] While the First Circuit agreed with the district court that the PBGC's "investment plus" approach deserved no special deference,[27] it nonetheless declared that it "would reach the same result through independent analysis."[28]

The First Circuit characterized this "investment plus" framework as "very fact-specific," dependent on "a number of factors . . . none [of which] is dispositive in and of itself."[29] First, the court noted that the Sun Funds' limited partnership agreements and private placement memos "explain that the Funds are actively involved in the management and operation of the companies in which they invest."[30] The general partners had authority to hire, fire, and compensate Scott Brass's agents and employees.[31] Similarly, the private placement memos explain that the general partners "typically work to reduce costs, improve margins, accelerate sales growth . . . [,] implement or modify management information systems and improve reporting and control functions" for the Sun Funds' portfolio companies.[32] On top of that, the court highlighted that a sum of $186,368 paid by Scott Brass to Sun Fund IV's general partner was deducted from the management fee Sun Fund IV was otherwise obligated to pay the general partner.[33] This "offset" arrangement, in the court's view, proved that Sun Fund IV enjoyed "a direct economic benefit . . . that an ordinary, passive investor would not derive."[34] In combination, the court concluded, "these factors satisfy the 'plus' in the 'investment plus' test."[35]

The court also rejected the Sun Funds' argument that they cannot be trades or businesses because to hold otherwise would contradict *Higgins* and *Whipple*. First, the court denied that Congress intended the phrase "trade or business," which litters the Internal Revenue Code,[36] to have a consistent meaning across contexts.[37] Second, and

---

[26] *Id.* at 139–40.

[27] *Id.* at 140–41. The court rebuffed the PBGC's claim to *Auer* deference, which would have bound the court to defer to the PBGC unless its interpretation was "plainly erroneous or inconsistent with its own regulations." *Id.* at 140 (citing Auer v. Robbins, 519 U.S. 452, 461 (1997)). Instead the court held the PBGC's interpretation was merely persuasive under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Sun Capital*, 724 F.3d at 140.

[28] *Id.* at 141.

[29] *Id.*

[30] *Id.* at 142.

[31] *Id.*

[32] *Id.* (quoting Sun Capital private placement memo) (internal quotation mark omitted).

[33] *Id.* at 143.

[34] *Id.* The court declined to determine whether Sun Fund III was a trade or business because the record was unclear as to whether it also enjoyed a fee offset arrangement. *Id.* at 143 n.20.

[35] *Id.* at 143.

[36] As of 2001, "trade or business" appeared almost two hundred times in the tax code. Cent. States, Se. & Sw. Areas Pension Fund v. Fulkerson, 238 F.3d 891, 895 n.2 (7th Cir. 2001).

[37] *Sun Capital*, 724 F.3d at 144–45. The Supreme Court has also been reluctant to embrace a uniform definition. *See id.* at 139.

perhaps more importantly, the court argued that the "investment plus" approach entails "no inconsistency" with *Higgins* and *Whipple*.[38] The First Circuit reaffirmed that "mere investment made to make a profit, without more, does not itself make an investor a trade or business."[39] But much like the PBGC, the court proposed that the extent of Sun Capital's involvement in Scott Brass's day-to-day operations made it more than an ordinary investor.[40]

Finally, the court held that "corporate formalities" would not deter it from attributing Sun Capital's management activities to the Sun Funds.[41] "[I]t is clear," declared the court, "that the general partner of Sun Fund IV, in providing management services to [Scott Brass], was acting as an agent of the Fund."[42] Applying agency principles,[43] the court held that Sun Fund IV itself was engaged in a trade or business.

The First Circuit's decision to classify a private equity fund as a trade or business broke new ground. Despite the court's attempt to limit its ruling to the facts before it, *Sun Capital* will likely prove difficult for other private equity funds to avoid. The court, therefore, should have done more to clarify how its decision relates to the MPPAA's statutory purposes, a clarification that might have been helpful to future courts and especially appropriate given how little guidance the statute's text provides. Yet the court's approach was in a certain sense fundamentally cautious, perhaps reflecting a sensible recognition that the judiciary is unlikely to be as adept as federal agencies or Congress at balancing the host of competing policy interests at play. Indeed, the complex of tradeoffs implicated in this dispute counsels courts to tread carefully before adopting or extending *Sun Capital* going forward.

Even though the First Circuit declared that its holding goes "no further than to say that on the undisputed facts of this case, Sun Fund IV is a 'trade or business'" under the MPPAA,[44] the court's analysis advances at a level of generality that will likely make it applicable to a sizable subset of the private equity industry.[45] Indeed, at least three of

---

[38] *Id.* at 145.

[39] *Id.* at 141–42.

[40] *Id.* at 145–46.

[41] *Id.* at 146.

[42] *Id.* at 147. By contrast, the district court emphasized that "[t]he Sun Funds do not have any employees, own any office space, or make or sell any goods." Sun Capital Partners III, LP v. New Eng. Teamsters & Trucking Indus. Pension Fund, 903 F. Supp. 2d 107, 117 (D. Mass. 2012).

[43] *Sun Capital*, 724 F.3d at 146–47 (citing DEL. CODE. ANN. tit. 6, § 15-301(1) (1999); RESTATEMENT (THIRD) OF AGENCY §§ 2.01, 3.01, 7.04 (2006)).

[44] *Id.* at 141.

[45] Several court watchers have reached this conclusion. *See, e.g.*, *Alert Update: First Circuit Court of Appeals Concludes that Private Equity Funds Can Be Liable for Portfolio Company Pension Obligations*, SIMPSON THACHER & BARTLETT LLP, 2 (Aug. 1, 2013), http://www.stblaw.com/content/Publications/pub1636.pdf.

the factors the court emphasized appear to be common features of private equity funds: (i) written representations that the funds will take an active role in the management of portfolio companies;[46] (ii) provisions authorizing the general partner to make hiring, firing, and compensation decisions related to the funds' portfolio companies;[47] and (iii) the general partner's practice of furnishing employees and consultants to portfolio companies.[48] Sun Fund IV's fee offset arrangement, the court itself said, is also typical of private equity funds.[49]

However, proceeding in largely uncharted territory, the First Circuit's analysis would have been more compelling if it had discussed the extent to which its decision comports with the MPPAA's statutory objectives. After all, at bottom this suit presented a question of statutory interpretation. The First Circuit was called on to decide whether the MPPAA should be applied to the Sun Funds, a type of entity never before brought within the statute's purview. In this case, of course, the relevant statute is quite unashamed of its naked ambiguity. Text yielding little, the court correctly noted that the MPPAA's broad goals are "to protect the viability of defined pension benefit plans, to create a disincentive for employers to withdraw from multiemployer plans, and also to provide a means of recouping a fund's unfunded liabilities."[50] But the MPPAA also targeted a more specific problem: businesses "shirking their ERISA obligations by fractionalizing operations into many separate entities."[51] In this case it seems a stretch to say that Sun Capital organized the Sun Funds as separate entities from the general partner and management company in order to protect the assets of the limited partnerships from withdrawal liability. The court alluded to this wrinkle in a footnote,[52] but could have offered a more detailed discussion of why imposing withdrawal liability is appropriate even if doing so would not necessarily discourage fractionalization.

---

[46] *See, e.g.*, Apollo Global Mgmt., LLC, Registration Statement Under the Securities Act of 1933 (Form S-1), at 152 (Apr. 8, 2008) [hereinafter Apollo S-1]; The Blackstone Grp. L.P., Registration Statement Under the Securities Act of 1933 (Form S-1), at 131, 144 (Mar. 22, 2007) [hereinafter Blackstone S-1].

[47] *See, e.g.*, Apollo S-1, *supra* note 46, at 160; Blackstone S-1, *supra* note 46, at 146.

[48] *See, e.g.*, THE SEC'Y OF THE TREASURY ET AL., A REPORT TO CONGRESS IN ACCORDANCE WITH § 356(C) OF THE UNITING AND STRENGTHENING AMERICA BY PROVIDING APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM ACT OF 2001 (USA PATRIOT ACT) 27 (2002) [hereinafter TREASURY REPORT], *available at* http://www.fincen.gov/news_room/rp/files/356report.pdf.

[49] *See Sun Capital*, 724 F.3d at 135 n.7. Note, however, that the private equity fund earlier found to be a trade or business by the PBGC did not mention any fee offset. *See id.* at 140 n.14.

[50] *Id.* at 138.

[51] Cent. States Se. & Sw. Areas Pension Fund v. Messina Prods., LLC, 706 F.3d 874, 878 (7th Cir. 2013) (quoting Cent. States, Se. & Sw. Areas Pension Fund v. White, 258 F.3d 636, 644 (7th Cir. 2001)) (internal quotation mark omitted).

[52] *See Sun Capital*, 724 F.3d at 144 n.23 (declining to rule "that in order to impose withdrawal liability the purpose of having a separate 'trade or business' must be to fractionalize assets").

Had the First Circuit explained why the legal form of the parent is not a compelling reason to alter the ERISA outcome — or at least, why ERISA's more basic remedial purposes[53] carry the day — courts facing the trade or business question in the future might be better able to discern the limits of the newly minted "investment plus" approach.[54]

Nevertheless, the court was wise to refrain from an overly broad judgment or sweeping dicta, for this controversy has no obvious right answer. In fact an optimal resolution may lie beyond the judiciary's comparative competence, as it will almost certainly require balancing ERISA's remedial functions against other, perhaps less obvious, policy concerns. For one, the First Circuit's ruling and the threat of its broader ramifications[55] might discourage private equity funds from undertaking the very investment strategies most likely to create value for troubled companies and their employees. Although scholars debate the extent to which businesses acquired by private equity firms are made better off,[56] several recent papers[57] and high profile buyouts[58] attest to the private equity industry's ability to make money for inves-

---

[53] *See supra* note 3.

[54] As the court noted, the Seventh Circuit has recently adjudicated trade or business claims using a standard that closely resembles the "investment plus" framework. *See Sun Capital*, 724 F.3d at 143 (citing *Messina*, 706 F.3d at 885–87).

[55] For instance, if private equity funds were held to be trades or business under the Internal Revenue Code, foreign and tax-exempt investors — including pension funds and university endowments — could be subject to U.S. income tax for the first time. I.R.C. §§ 511–13 (2006 & Supp. V 2011) (tax-exempt investors); *id.* §§ 872(a)(2), 882(a)(1) (foreign investors); *see also, e.g.*, Andrew W. Needham, *A Guide to Tax Planning for Private Equity Funds and Portfolio Investments (Part 1)*, 95 TAX NOTES 1215, 1229–30 (2002). It is also worth noting that solvent portfolio companies might now be stuck with a fellow portfolio company's withdrawal liability should one go bankrupt. *See* Cent. States, Se. & Sw. Areas Pension Fund v. Fulkerson, 238 F.3d 891, 895 n.1 (7th Cir. 2001) ("[N]o economic nexus is required between the obligated organization and trades or business under common control . . . ."); *Federal Appeals Court Holds that a PE Fund May Be Responsible for a Portfolio Company's ERISA Pension Liabilities*, PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, 2–3 (July 25, 2013), http://www.paulweiss.com/media/1754073/25july13_alert.pdf.

[56] *See* Steven M. Davidoff, *Amid Attacks on Private Equity, Efforts to Study Its Value*, N.Y. TIMES DEALBOOK (Jan. 24, 2012, 5:59 PM), http://dealbook.nytimes.com/2012/01/24/amid-attacks-on-private-equity-efforts-to-study-its-value.

[57] *See, e.g.*, Jerry Cao & Josh Lerner, *The Performance of Reverse Leveraged Buyouts*, 91 J. FIN. ECON. 139, 140 (2009); Jarrad Harford & Adam Kolasinski, *Do Private Equity Returns Result from Wealth Transfers and Short-Termism?: Evidence from a Comprehensive Sample of Large Buyouts*, MGMT. SCI. (forthcoming) (manuscript at 22–23), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1785927; Shai Bernstein et al., *Private Equity and Industry Performance* 2 (Harvard Bus. Sch. Entrepreneurial Mgmt., Working Paper No. 10-045, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1524829. *See generally* Bronwyn Bailey, *Another View: Private Equity Creates Value*, N.Y. TIMES DEALBOOK (Jan. 27, 2012, 11:52 AM), http://dealbook.nytimes.com/2012/01/27/another-view-private-equity-creates-value (collecting studies).

[58] *See, e.g.*, Steven M. Davidoff, *The Private Equity Wizardry Behind Realogy's Comeback*, N.Y. TIMES DEALBOOK (Oct. 9, 2012, 4:19 PM), http://dealbook.nytimes.com/2012/10/09/the-private-equity-wizardry-behind-realogys-comeback; Mike Spector, *Realogy Investment Pays Off for Apollo*, WALL ST. J. (Sept. 8, 2013), http://online.wsj.com/article/SB10001424127887323893004579055560985688966.html.

tors — many of which are themselves pension funds[59] — while revitalizing moribund companies in the process.[60] And although there is no consensus on exactly *how* private equity firms add value,[61] whatever value they do contribute likely flows from those activities that made up the "plus" at the heart of the First Circuit's "investment plus" analysis.[62] Thus, after *Sun Capital*, private equity funds seeking to avoid the hazards of "trades or businesses" might hesitate to take an active role in the operations of their portfolio companies, perhaps passing over "portfolio companies that are in need of extensive intervention,"[63] or else opting for lucrative but potentially more destructive investing strategies instead.[64] At the same time, they might decline to invest in struggling companies with underfunded pension obligations altogether.[65] This outcome could work to the detriment not only of private equity investors, but also of their foregone turnaround targets.

Courts should be mindful of these possible consequences before adopting or extending the First Circuit's trade or business analysis in future cases. Indeed, it seems plausible that a wise balance is more likely to be struck by a body that has a more intimate understanding of the MPPAA's objectives, and that can better solicit information from the large number of diverse parties with a stake in the outcome. In that sense, it might be preferable for the PBGC (rather than a federal court) to effect any further changes to the established norm, and then only after engaging in notice-and-comment rulemaking.[66] Better still, a shift of this magnitude might be inaugurated by Congress.

---

[59] *See* TREASURY REPORT, *supra* note 48, at 28 n.95; Michael Corkery, *Public Pensions Increase Private-Equity Investments*, WALL ST. J. (Jan. 26, 2012), http://online.wsj.com/article/SB10001424052970203806504577181272061850732.html; Steven M. Davidoff, *Wall St.'s Odd Couple and Their Quest to Unlock Riches*, N.Y. TIMES DEALBOOK (Dec. 13, 2011, 7:18 PM), http://dealbook.nytimes.com/2011/12/13/wall-st-s-odd-couple-and-their-quest-to-unlock-riches.

[60] *See, e.g.*, Davidoff, *supra* note 58.

[61] *See* Davidoff, *supra* note 56.

[62] *See* Spector, *supra* note 58 (noting that Realogy turnaround "highlights how private-equity firms can pull a host of financial levers to keep even the most troubled companies they own afloat").

[63] *Sun Capital*, 724 F.3d at 142.

[64] Private equity investors can indeed reap large profits without actually improving their portfolio companies. *See, e.g.*, Andrew Ross Sorkin, *The Great Global Buyout Bubble*, N.Y. TIMES DEALBOOK (Nov. 13, 2005), http://www.nytimes.com/2005/11/13/business/yourmoney/13buyout.html. The reality that private equity firms can profit without creating value suggests a danger that *Sun Capital* might induce a shift toward investing strategies that are potentially destructive — for instance, fattening portfolio companies with debt before unloading them — precisely because those strategies do not require the sort of hands-on investing at issue here.

[65] *See, e.g.*, Gregory Roth, *BUYOUTS-Ruling Against Sun Capital Could Have Wider Private Equity Impact*, REUTERS (Aug. 8, 2013, 2:02 AM), http://in.reuters.com/article/2013/08/07/buyouts-suncapital-scottbrass-idINL1N0G81TV20130807. The court briefly noted this concern. *See Sun Capital*, 724 F.3d at 148.

[66] The First Circuit chided the PBGC for not giving "more and earlier guidance on this 'trade or business' 'investment plus' theory to the many parties affected." *Sun Capital*, 724 F.3d at 148.