A plan maintained by a single employer pursuant to a collective bargaining agreement (a “CBA”) is generally subject to the same rules under Title I and Title IV of ERISA and to the same or more liberal rules under the Internal Revenue Code as a plan maintained by a single employer that is not established pursuant to a collective bargaining agreement. Among the exceptions to this generalization are that collectively bargained plans will automatically satisfy coverage, top-heavy and certain non-discrimination qualification tests under the Code. Additionally, in practice, CBA plans are often allowed a longer remedial amendment period with respect to new legislation and regulation, so as to not force renegotiation of a CBA prior to its normal expiration. The negotiation and construction of a collectively bargained plan, however, is subject to both the Labor Management Relations Act (“LMRA”) and ERISA, and thus the case law interpreting collectively bargained plans and CBAs warrants separate treatment.

As defined in ERISA Section 3(37) and Code Section 414(f), multiemployer plans are, as the name suggests, plans maintained pursuant to a collective bargaining agreement between an employee organization and more than one employer. These plans are subject to a variety of different rules than are single employer plans, including as created by the Multiemployer Pension Plan Amendment Act of 1980 (“MPPAA”) and found in ERISA Sections 4201-4303 and Code Section 413. Multiemployer plans are administered by a joint committee of union and employer representatives, as opposed to being administered by each participating employer. Contributing employers can have differing incentives, and the courts are often called in to resolve disputes concerning contribution liabilities and concerning the liabilities for employers that wish to withdraw from the multiemployer plan. One of the pension plans established for members of the International Brotherhood of Teamsters, the Central States, Southeast and Southwest Areas Pension Fund (the “Central States Fund”), is a frequent party to litigation. Since the Central States Fund is administered within the Seventh Circuit, a majority of the cases under the MPPAA and as reported in this section are from the Seventh Circuit.

A. Contribution Liability under MPPAA

ERISA Section 515 provides a collection action for delinquent contributions:

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

1. Contribution Liability of Parties Related to the Employer

Multiemployer plans often seek to impose liability on individuals or entities that are related to a participating employer when the participating employer itself has not or seems unlikely to cover the obligation itself. ERISA Section 4001(b)(1) provides that trades or businesses under common control are treated as a single employer, and calls for the PBGC to issue regulations that “shall be consistent and coextensive with” the regulations under Code Section 414(c). Consequently, trades and businesses under common control with a participating employer as determined under Code Section 414(c) principles are jointly and severally liable for the participating employer’s participating liability. ERISA Section 4001(b)(1) applies generally to Title IV of ERISA, and does not apply by its
terms to collection actions under ERISA Section 515. Some courts have turned to general principles of labor law and alter ego, single employer and successor liability theories to impose liability in actions under ERISA Section 515. These theories determine joint and several liability on a more subjective basis than the generally mechanical rules of ERISA Section 4001(b)(1).

(a) **Liability Under Single Employer and Alter Ego Theories**

Trustees of the Local 282 Welfare, Pension Annuity and Job Training Trust Funds (“Funds”) established pursuant to CBAs sought to recover delinquent pension fund contributions for the period of October 1, 1993 to June 30, 1997 (the “1993-1997 period”) under single employer and alter ego theories in *LaBarbera v. C. Volante Corp.*, 164 F. Supp. 2d 321 (E.D.N.Y. Sept. 26, 2001) (joint and several liability found for delinquent contributions to pension fund under single employer and alter ego theories).

C. Volante Corp. (“Volante”) signed a CBA with Building Material Local Union 282 of the International Brotherhood of Teamsters (“Union”) that was in effect between July 1, 1987 and June 30, 1990, but was not a signatory to subsequent CBAs. Id. at 324. In an earlier decision, the court held that Volante was liable to the Trustees for delinquent pension fund contributions for the period from May 30, 1990 to September 30, 1993 because Volante had adopted the CBAs through a course of conduct consisting of continuing to submit monthly fund contributions and dues checkoffs and remittance reports, and continuing to maintain a surety bond, permit audits, and use only drivers who were members of the Union or who sought to become members. Id. (citing *Brown v. C. Volante Corp.*, 1997 WL 441799 (E.D.N.Y 1977), aff’d, 194 F.3d 351(2d Cir. 1999)). The *LaBarbera* court found, just as in the earlier decision and for the same reasons, that Volante had indicated its intent to be bound by the CBAs during the 1993-1997 period. Id. at 325.

The court also held that C. Volante Trucking Corp. (“Trucking”) and Vital Trucking Corp. (“Vital”) were liable for the delinquent contributions because they assumed Volante’s liability. Id. Trucking was formed in 1993 with Rita Volante as sole owner, director and officer of Volante and Trucking. Id. at 324. Since 1995, Carmine Volante, Rita’s son, was responsible for management functions. The working conditions for the companies were the same, and both used the same insurance broker. Both companies ceased operations in June 1997. Id. at 324 Vital was formed in July 1997 and was signatory to a series of CBAs from July 1, 1997 through June 30, 2002. Volante, Trucking and Vital had “the same employees, customers, accountants, attorneys, business purpose of moving construction materials, equipment, assets, property and principal place of business.” Id. All three companies shared the same telephone number, the principal place of business had one sign reading “C. Volante,” and signs on the common trucks read “C. Volante Trucking.” Id. at 324-25. Rita’s daughter-in-law and Carmine’s sister-in-law, Sherry Volante, was the sole owner, director and officer of Vital. Id. at 325.

The court determined that, while Trucking was not a party to the CBA, it was liable for the delinquent trust funds under a single employer theory. The court applied four factors identified by the Supreme Court to determine whether two companies are a single employer: “interrelation of operations, common management, centralized control of labor relations and common ownership.” Id. In *LaBarbera*, the court stated the factors were met because “the two companies were in the same business of hauling construction materials; used the same trucks, offices, insurance company, accountant, and lawyer; and third parties would deal with any family member when conducting business with either company.” Id. at 325-26. Also, there was common management and ownership because Rita Volante owned both companies and Carmine Volante ran both companies and both
were responsible for the labor relations of both companies. \textit{Id.} at 326. Further, the court determined, Trucking was bound by the CBAs because Volante and Trucking were an appropriate bargaining unit. \textit{Id.} The court also found that Vital was liable for the delinquent trust funds, but under an alter ego theory. \textit{Id.} at 327. The court stated the alter ego theory is distinct from the single employer theory because the former focuses on “the existence of a disguised continuance or an attempt to avoid the obligations of a CBA through a sham transaction or technical change in operations.” \textit{Id.} (quoting \textit{Truck Drivers Local Union No. 807 v. Regional Import & Export Trucking Co., Inc.}, 944 F.2d 1037, 1046 (2d Cir. 1991)). The factors used by the court to determine whether the companies were alter egos were “whether the two enterprises [had] substantially identical management, business purpose, operation, equipment, customers, supervisions, and ownership.” \textit{Id.} Also, anti-union animus was a relevant factor. Here, the court found the factors were met. The companies shared the same business purpose of moving construction materials and also had the same equipment and customers. In addition, Volante family members owned, managed, supervised and operated all three companies. The court found evidence of anti-union animus in that Vital had been formed while Volante was facing damages for failure to make trust fund contributions. \textit{Id.} Thus, the court held Vital was the alter ego of Volante and Trucking and jointly and severally liable for the trust fund contributions. \textit{Id.}

Whether a company was the alter ego of another company and therefore jointly and severally liable for delinquent pension contributions was also at issue in \textit{Northwestern Ohio Adm’rs., Inc. v. S.E.A. Builders Corp.}, 2001 WL 1344826 (N.D. Ohio Oct. 31, 2001) (the court denied cross-motions for summary judgment because material issue of fact existed whether a company was or was not alter ego for another company). The plaintiff, Northwestern Ohio Administrators (“NOA”), sought enforcement of a contract between S.E.A. Builders Corporation (“S.E.A.”) and Iron Workers Local No. 55 (“Local 55”). \textit{Id.} at *1. NOA contended that Deke Enterprises (“Deke”) was the alter ego of S.E.A. and therefore should be liable for pension contributions under the contract between S.E.A. and Local 55. The court denied cross-motions for summary judgment on the issue. \textit{Id.}

Both S.E.A and Deke were Ohio corporations engaged in the construction industry. Allen Frey and Ed Baer each owned fifty percent of S.E.A. and their wives, Amy Frey and Marlene Baer, each owned fifty percent of Deke. Before 1992, S.E.A. was involved in the buying, selling and erecting of steel buildings. Since 1992, S.E.A. primarily focused on buying and selling steel buildings. \textit{Id.} Deke was formed in 1992 and was primarily involved in the erection of steel buildings. Although neither Ed Baer nor Allen Frey had an ownership interest in Deke, each received a salary of $2,000 per week from Deke. Neither Marlene Baer nor Amy Frey received income from Deke. Deke and S.E.A leased office space in the same building, shared phone lines, a fax machine, and a coffee machine. \textit{Id.}

In 1990, S.E.A signed a certificate accepting the terms of a CBA, which was effective from July 1, 1989 through June 30, 1992. NOA filed suit seeking amounts due under successive CBAs and claimed that Deke was the alter ego of S.E.A. \textit{Id.} at *2. The court stated that, to determine whether the application of the alter ego doctrine was appropriate, “the circumstances surrounding a change in corporate form must be examined to determine whether the change resulted in a ‘\textit{bona fide}’ discontinuance and a true change of ownership’ or was merely a ‘disguised continuance of the old employer.’” \textit{Id.} at *3 (quoting \textit{Southport Petroleum Co. v. NLRB}, 315 U.S. 100, 106 (1942)). The court determined that the factors relevant to finding alter ego status included “whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership.” \textit{Id.} (quoting \textit{Nelson Electric v.
NLRB, 716 F.2d 965, 968 (6th Cir. 1981)). Also, an intent “to evade labor law obligations or anti-union animus is a relevant factor, but not essential.” *Id.* Based on case precedent, the court found that alter ego analysis required a flexible approach and that all of the relevant factors must be considered together. *Id.*

The court denied both parties’ motions for summary judgment, finding that both parties had presented evidence that could establish the existence or nonexistence of each factor and therefore that a material issue of fact existed regarding each factor (except for common ownership -- which was established). In a factual analysis, the court examined each factor and the evidence presented by the parties. *Id.* *3-4. The court emphasized, in examining the establishment of common ownership, that ownership by members of the same family could be considered. *Id.* at *5 (citing Central States Southeast & Southwest Areas Pension Fund, 902 F.2d 593, 597 (7th Cir. 1990)). Here, Amy Frey and Marlene Baer were the sole owners of Deke and were married to Allen Frey and Ed Baer, sole owners of S.E.A. Further, the court considered it significant that Amy Frey and Marlene Baer neither received income from Deke nor participated substantially in its management. Ed Baer and Allen Frey did receive income from Deke, but Ed Baer had little involvement with the company. Therefore, the court stated that it appeared that S.E.A. and Deke shared the same ownership. *Id.* Because of the material issues of fact regarding all of the other factors, the court concluded that the issue of Deke’s alter ego status required a determination at trial and denied summary judgment. *Id.* at *6.

(b) **Personal Liability**

Employee pension trust funds (the “Funds”) sought to impose personal liability on Abel Angulo (“Angulo”) and Maria Rodriguez (“Rodriguez”) for unpaid contributions when the contracting employer, LAMA Interiors, Inc. (“LAMA”) filed bankruptcy proceedings. *Chicago Dist. Council of Carpenters Pension Fund v. Angulo*, 150 F. Supp. 2d 976, 977 (N.D. Ill. July 30, 2001) (granting motion to dismiss claim that defendant owner breached a fiduciary obligation to trust funds for unpaid contributions, but denying such motion for claim that defendant intentionally diverted contributions interfering with participants’ rights to benefits under the plan in violation of ERISA Section 510). The Funds alleged the defendants had diverted plan contributions resulting in hundreds of thousands of dollars in unpaid contributions. *Id.*

Angulo, an owner of LAMA, sought to escape liability by first arguing that LAMA’s unpaid contributions were not “plan assets.” *Id.* at 978. In support of his position, Angulo cited authority opining that, “[u]ntil the employer pays the employer contributions over to the plan, the contributions do not become plan assets over which fiduciaries of the plan have a fiduciary obligation; this is true even where the employer is also a fiduciary of the plan.” *Id.* (quoting Cline v. Industrial Maintenance Eng’g & Contracting Co., 200 F.3d 1223, 1224 (9th Cir. 2000)). The court disagreed with Argulo (and *Cline*), stating that once wages were paid to union members, the employer had contractual obligations to the funds that constituted “assets” of the funds. Also, the court noted that Fund documents specifically defined “assets” as including “all employer contributions made or due to the trustees.” *Id.*

The court, however, then disagreed with the Funds’ argument that Angulo was a plan fiduciary because he had diverted money that should have been used to honor the contributions obligation. Under ERISA, the court noted, “a person is a fiduciary with respect to a plan to the extent . . . he . . . exercises any authority or control respecting management or disposition of its assets . . . .” *Id.* (quoting ERISA § 3(21)). The court found that it would be too broad of a reading to find Angulo a plan fiduciary, since such reading would convert every contributing employer into a plan fiduciary. *Id.*
The court stated that “every delinquent employer’s nonpayment of a contribution [could not be equated] to its exercising its control over the ‘disposition’ of a plan’s assets, so as to impose fiduciary liability by reason of the nonpayment.” Id. at 979. Although the court found the Funds could not premise Angulo’s liability on breach of fiduciary obligations, the court would not dismiss the Funds’ claim that Angulo had violated ERISA by intentionally interfering with participants’ rights to benefits under the plan. Id. The Funds alleged that Angulo intentionally underreported hours worked for contribution purposes. Denying Angulo’s motion to dismiss, the court stated that it “remain[ed] to be seen as a matter of proof whether Funds can demonstrate that [a specific intent to infringe on employees’ rights to benefits] was at work, rather than sheer greed alone.”

The same court more recently addressed a similar issue in Motion Picture Laboratory Technicians and Film Editors Local 780 Pension Fund and Motion Picture Laboratory Technicians and Film Editors Local 780 Welfare Fund v. Astro Color Laboratories, Inc., 2002 WL 596364 (N.D. Ill. Apr. 17, 2002) (corporate officers not personally liable for delinquent employer contributions where Funds failed to establish that employer contributions were plan assets).

In Astro, the Motion Picture Laboratory Technicians and Film Editors Local 780 Pension Fund and Motion Picture Laboratory Technicians and Film Editors Local 780 Welfare Fund (the “Funds”) sued a company and its president and CEO for delinquent contributions. Count I alleged an ERISA claim against the company and Counts II through IV alleged personal liability against the two individuals, either as fiduciaries (Counts II and IV) or under a piercing the corporate veil theory (Counts III and V). Id. at *1. The individuals filed a motion to dismiss Counts II and IV on the grounds that, pursuant to Plumbers Pension Fund Local 130 v. Niedrich, 891 F.2d 1297 (7th Cir. 1989), corporate officers who are not parties to a CBA are not personally liable for a corporation’s failure to make contributions absent facts warranting a piercing of the corporate veil. Astro Color, 2002 WL 596364 at *1. The individuals also moved to dismiss Counts III and V on the grounds that the Funds failed to state a claim. Id. The court dismissed all four counts, giving the Funds the opportunity to replead Counts III and V with additional facts if they could do so. Id. The Funds moved for reconsideration of the court’s dismissal of Counts II and IV.

The court noted at the outset that, since the motion for reconsideration was filed, the Funds had indicated that there may be $2,500 of employee contributions at issue. Id. at *2. Because the defendants represented that they would pay this amount over to the Funds as soon as the amount is determined, however, the court concluded that the issue of the defendants’ personal liability for employee contributions was moot. Id.

With respect to the defendants’ personal liability for employer contributions, the court noted that the Funds’ argument appeared to be based on dicta from the Seventh Circuit in Sullivan v. Cox, 78 F.3d 322 (7th Cir. 1996), which noted that there may be exceptions to the Niedrich rule where the officer “committed fraud or acted in concert with a fiduciary to breach a fiduciary duty.” Astro Color, 2002 WL 596364 at *1-2. In so arguing, the Funds relied on Bd. of Trustees of the Airconditioning and Refrigeration Indus. Health and Welfare Trust Fund v. J.R.D. Mech. Serv., Inc., 99 F. Supp. 2d 1115 (C.D. Cal. 1999), which held that, although the trust agreements at issue did not specify that unpaid employer contributions were assets of the funds, the idea that the employer contributions were plan assets was “inherent” in the agreements because they specified that the contributions were due and owing within a certain time period. Astro Color, 2002 WL 596364 at *2.

The court noted that the J.R.D. holding appears to have been overruled by Cline (discussed above in connection with Angulo) and, even if not, its holding was limited to situations in which the contract