

Client Alert

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The Long Arm of the (Pension) Law: ERISA Liability Outside the United States

A recent Seventh Circuit case highlights an important defense for foreign companies seeking to avoid exposure for pension-related liabilities of their U. S. affiliates. Under ERISA every member of an employer's "controlled group"¹ is jointly and severally liable for many types of pension liabilities² if the employer does not pay. There is nothing in the law that explicitly limits the reach of controlled group liability to entities based in the United States, and in the current economic climate the Pension Benefit Guaranty Corporation (in the case of pension plans sponsored by a single company or family of companies) or the plan itself (in the case of union-sponsored multiemployer pension plans) can be expected to cast as wide a net as possible, including to entities maintained outside the United States,³ in an attempt to find solvent entities to satisfy pension claims.⁴

In *GCIU-Employer Retirement Fund v. Goldfarb Corp.*,⁵ the Seventh Circuit rejected one such attempt to proceed in a US court, on the grounds that the foreign parent of the US entities which had the primary liability did not have sufficient contacts with the United States to confer jurisdiction on a US court, but we can expect the issue to arise with increasing frequency in courts both domestic and foreign.

Liability in US Courts

Foreign entities often do not file for bankruptcy protection concurrently with their related US entities and as a result, such foreign entities may expose themselves to pension and multiemployer plan liability of their US counterparts. Nevertheless, while foreign entities may have liability for pension-related claims, the US courts cannot entertain or adjudicate such claims without jurisdiction over the foreign entities.⁶ If a foreign defendant does not have sufficient contacts with the jurisdiction of the US court, the case will be dismissed. This initial requirement is one of the key impediments to any Pension Benefit Guaranty Corporation (the PBGC) or multiemployer plan claim in the US courts against a foreign member of a controlled group.

For example, in *GCIU-Employer Retirement Fund v. Goldfarb Corp. (Goldfarb)*,⁷ a multiemployer pension plan⁸ brought a claim in a US court seeking withdrawal liability from Goldfarb Corp. (Goldfarb), the Canadian indirect parent of the contributing employers. Goldfarb was based in Canada and did not maintain a place of business, employ individuals, serve customers, or have a designated agent for service of process inside the United

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States. Goldfarb's US subsidiary Fleming Packaging Corporation (Fleming) contributed through its subsidiaries to a multiemployer plan. Beginning in 1997 and for years thereafter, the Court found that Goldfarb had "considerable involvement" with the creditors of Fleming in relation to certain loan agreements and negotiations. Despite Goldfarb's efforts, Fleming filed for bankruptcy protection in May 2003 and the plan filed a claim for withdrawal liability against Goldfarb thereafter. The District Court dismissed the case due to a lack of personal jurisdiction and on appeal, the Seventh Circuit affirmed. The Seventh Circuit first recited that the parent Goldfarb's mere ownership of a majority of the equity interest in Fleming and ERISA's broad "definition of corporate affiliation as an element of withdrawal liability" were insufficient to result in personal jurisdiction. The Court further reasoned that the basis of the lawsuit did not directly arise out of Goldfarb's contact with the United States, namely its involvement with its US subsidiary's lenders. Therefore, the Court held that it had no personal jurisdiction over the foreign member of the controlled group, Goldfarb.

While *Goldfarb* indicates that the US courts will conduct a traditional minimum contacts analysis and that mere membership in a controlled group with US members will not generally be sufficient to confer jurisdiction, such conclusion is not absolute. In *PBGC v. Satralloy, Inc.*,⁹ the PBGC requested reconsideration of the dismissal of two defendants for lack of personal jurisdiction. The two defendants, Finsat International, Limited and Satra Limited, both based in the United Kingdom, were members of a controlled group with Satralloy, Inc., which was liable to the PBGC for pension obligations. Upon reconsideration, the Court affirmed its dismissal of Finsat, noting that inclusion in a controlled group and ownership by a US person were not sufficient contacts to subject Finsat to personal jurisdiction. In contrast, the Court reversed its prior decision regarding Satra Limited. The Court held that while

a parent-subsidiary relationship is not, in and of itself, sufficient to establish personal jurisdiction, such relationship may serve as a basis for jurisdiction if the subsidiary acts as the "alter ego" or agent of the parent.

Goldfarb presents a clear roadblock in a multiemployer plan's, and by analogy the PBGC's, ability to recover controlled group liability from a non-US entity. While ERISA contemplates the liability of all members of the controlled group, under appropriate facts, *Goldfarb* indicates that for this purpose US courts will not provide a forum for recovery from non-US entities unless such entities have sufficient contact with the United States to result in personal jurisdiction. As noted, however, foreign entities may still be subject to personal jurisdiction if their interaction with the United States (which may include interactions with the US members of their controlled groups) is sufficiently significant. Therefore, although jurisdictional limitations may restrict the PBGC from enforcing controlled group liability against a foreign entity in the US courts, foreign companies must be cognizant of their level of interaction with their US affiliates if they wish to maintain the protection afforded by cases such as *Goldfarb*.

Liability in Foreign Courts

Given the jurisdictional limitations on claims brought in the United States, the PBGC may seek recovery in foreign courts. Although historically, the PBGC has been reluctant to bring claims in foreign courts, it may be changing its tune. In *In re Ivaco*, the PBGC brought proceedings in Ontario, Canada asserting claims against Ivaco and its Canadian subsidiaries for liability related to the pension plan of the US subsidiary of Ivaco under a controlled group liability theory. Ivaco and certain of its affiliates had filed in Ontario Superior Court for protection from their creditors under the Companies' Creditors Arrangement Act, the Canadian equivalent of Chapter 11 of the Bankruptcy Code. While the case

settled before the Court had to address the issue of the reach of ERISA into Canada, it demonstrates the PBGC's willingness to pursue non-US entities in foreign courts.¹⁰

Exceptions to Comity May Limit Claims in Foreign Courts.

Despite the PBGC's willingness to bring claims in foreign jurisdictions, its actual ability to bring claims and recover judgments from foreign courts is unclear. The first obstacle to bringing a claim in any foreign court is the degree of comity (*i.e.* legal recognition between different jurisdictions) afforded by the foreign jurisdiction.¹¹ Because not all jurisdictions respect US law, courts of such jurisdictions will not necessarily be willing to enforce US law, or judgments obtained under US law including ERISA. For example, in *Garuda*,¹² the Court noted that the plaintiff brought its claim against foreign controlled group members in a US court because the Indonesian courts did not recognize US judgments and the plaintiff could not collect withdrawal liability in Indonesia. Thus, the degree of comity provided by a foreign jurisdiction is the first impediment to enforcing ERISA claims in such jurisdiction.

Moreover, even if the foreign jurisdiction generally respects US laws, exceptions to comity may limit the enforceability of ERISA. As one example, respect for US laws in the Canadian courts may be limited by multiple exceptions to comity. First, the "revenue rule," a common law exception to comity, bars recovery of tax or revenue claims of foreign sovereigns.¹³ Therefore, if foreign courts characterize pension liability to the PBGC as a tax or revenue claim (as has been argued by the PBGC in other contexts),¹⁴ claims for pension liability may not be recognized under the revenue rule exception. This exception was explicitly recognized in the Canada-United States tax context by the Supreme Court of Canada in *US v. Harden*, in which the Court held that a US tax claim could not be enforced in the Canadian courts.¹⁵ The Court noted the "well-established" rule that "a foreign State is precluded from suing in

[Canada] for taxes due under the laws of the foreign State."¹⁶ Second, under the "public law" exception to comity, the PBGC's status as a government instrumentality may preclude recovery from a foreign entity. The public law exception bars statutory claims based on a "public" or "penal" purpose (*e.g.*, tax, antitrust, securities regulation, labor law, etc.) as opposed to claims between private parties.¹⁷ As a result, the PBGC's claims for unfunded benefit liabilities while intended to benefit plan participants, may, particularly to the extent of claims for PBGC-guaranteed benefits, be characterized as for the benefit of the government (*i.e.*, refunding costs paid by the US Treasury irrespective of its recovery in the courts) and thus barred under the "public law" rule. The Canadian courts, however, may be amenable to enforcing the PBGC's claims, as one Canadian court has rejected arguments related to the "public law" exception in a similar context involving C.E.R.C.L.A. claims.¹⁸

Tax Treaties Will Further Limit Enforcement in Foreign Courts.

Additionally, to the extent the PBGC asserts that its claim is one for taxes, then irrespective of any comity issues, the courts may also have to consider the effect of any international tax treaties. For example, although the US-Canada Income Tax Treaty provides that each country will "lend assistance to each other in the collection of taxes,"¹⁹ it bars either country from assisting in any collection directed at its own citizens or entities.²⁰ Therefore, treaties such as that between the United States and Canada may limit the recognition of ERISA claims by foreign courts.

The US Courts May Not Support the Extraterritorial Reach of ERISA.

Lastly, while the courts have not directly addressed the extraterritorial reach of ERISA in the context of pension-related liability, some courts have held as recently as in 2008 that ERISA's extraterritorial reach is limited

in other contexts.²¹ For example, in *Maurais v. Snyder*,²² the plaintiff, a Canadian citizen, brought claims for unpaid medical services provided to the defendant, an American citizen, in Canada. The defendant's insurer argued that the plaintiff's claims were preempted by ERISA. The Court rejected the preemption argument and held that the preemption provisions of ERISA did not have an extraterritorial reach and thus, did not apply to abrogate the claims. Citing the US Supreme Court, the Court noted that "[i]t is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" ²³ The Court held that ERISA did not evidence such "affirmative intent," as the broad jurisdictional language was not sufficient to overcome the presumption against extraterritorial application.^{24,25}

Implications of Controlled Group Liability Issues

As companies with significantly underfunded pensions (such as General Motors with over \$13 billion in underfunding in the United States alone²⁶) begin to file for bankruptcy protection, the PBGC may be tempted to expand its search for financially-stronger parties to share the burden of the underfunding. Such search could well lead to claims against foreign controlled group members, but the success of such claims in either the United States or foreign courts is unclear. Nonetheless, the threat of such claims is real, and every member of a controlled group should be cognizant of pension and multiemployer plan liability within the group. Similarly, one considering a debt or equity investment in any target company ought to consider similar liabilities of the target company and its controlled group. Any failure to assess such liabilities could lead to significant adverse surprises, even with the uncertainty regarding the PBGC's or multiemployer plan's ability to collect pension-related liabilities in the United

States or abroad.

We recognize and give thanks to Stikeman Elliott LLP in Toronto for their valuable input and support for the Canadian law aspects of this Client Alert.

Endnotes

- ¹ A company's "controlled group" includes its subsidiaries, parent, and other subsidiaries of the parent, so long as an 80 percent ownership test is satisfied. For a definition of "controlled group," see 26 U.S.C. § 1563 (2009).
- ² These liabilities include those related to (1) satisfaction of minimum funding requirements (and associated excise taxes), (2) termination of underfunded plans, (3) unpaid PBGC premiums, and (4) multiemployer plan withdrawal liability.
- ³ Pension Benefit Guaranty Corp., Opinion 97-1 (May 5, 1997); Amer. Bar Assoc. Joint Comm. on Emp. Benefits, *Q&A Session with PBGC* (May 9, 2007), <http://www.abanet.org/jceb/2007/PBGC07Final.pdf> (last visited on June 8, 2009); 2004 Enrolled Actuaries Meeting, *Questions to the PBGC and Summary of their Responses* (May 2004), <http://www.pbgc.gov/docs/2004bluebook.pdf> (last visited on June 8, 2009).
- ⁴ For example, on July 28, 2009, the PBGC filed an objection in the Bankruptcy Court to a sale of debtor assets under Section 363 of the Bankruptcy Code on the grounds that the sale could potentially include assets of non-debtor entities (including foreign entities that had not initiated insolvency proceedings) within the controlled group of the U.S. debtor. The PBGC argued that the sale of any non-debtor assets should be addressed in separate sale agreements or, at a minimum, that the proceeds attributable to such assets should be "segregated and preserved for the creditors of the [n]on-debtors, like the PBGC and the Pension Plan." The gravamen of the objection was the PBGC's assertion of claims against the foreign non-debtors and its desire to avoid extinguishment of such claims through the U.S. bankruptcy proceedings. Limited Objection of the Pension Benefit Guaranty Corporation to Debtors' Motion for Orders, In re Nortel Networks, Inc., No. 09-10138 (KG) (Bankr. D. Del. July 28, 2009).
- ⁵ No. 08-3229, 2009 US App. LEXIS 10026 (7th Cir. May 11, 2009).
- ⁶ See *Central States, Southeast and Southwest Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 944 (7th Cir. 2000) ("The fact that a defendant would be liable under a

- statute if personal jurisdiction over it could be obtained is irrelevant to the question of whether such jurisdiction can be exercised”).
- ⁷ No. 08-3229, 2009 US App. LEXIS 10026 (7th Cir. May 11, 2009).
- ⁸ Note that the controlled group issues for claims by multiemployer plans and the PBGC are essentially identical and thus, *Goldfarb* should have precedential weight for similar situations related to PBGC claims for liability of single-employer pension plans; see also *Reimer Express World Corp.*, 230 F.3d 934 (holding that there was no jurisdiction over a foreign entity); *Central States, Southeast and Southwest Areas Pension Fund v. Phencorp Reinsurance Co.*, 440 F.3d 870 (7th Cir. 2006) (acknowledging that personal jurisdiction over a foreign entity was required and remanding for consideration of general personal jurisdiction); cf. *PBGC v. Satralloy, Inc.*, No. C-2-90-0630, 1993 US Dist. LEXIS 21422 (S.D. Ohio Aug. 6, 1993).
- ⁹ No. C-2-90-0630, 1993 US Dist. LEXIS 21422 (S.D. Ohio Aug. 6, 1993).
- ¹⁰ Approval Order, *In re Ivaco*, No. 03-CL-4932 (Aug. 4, 2005).
- ¹¹ Black’s Law Dictionary defines “comity” as “a practice among political entities (as nations, states, or courts of different jurisdictions), involving esp. mutual recognition of legislative, executive, and judicial acts.” Black’s Law Dictionary 284 (8th ed. 1999).
- ¹² 7 F.3d 35, 37 (2d Cir. 1993) (noting that the multiemployer pension fund could not recover in the Indonesian courts because they do not recognize money judgments issued by American courts).
- ¹³ See Restatement (Third) of the Foreign Relations Law of the United States § 483 (1987) (noting that US courts are not required to recognize or enforce judgments for the collection of taxes); see also *supra* note 12; Eric A. Posner and Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 Yale L.J. 1170 (2006-2007); see also Brenda Mallinak, *The Revenue Rule: A Common Law Doctrine for the Twenty-First Century*, 16 Duke J. Comp. & Int’l L. 79 (2006) for a background discussion on the revenue rule in both American and foreign jurisprudence.
- ¹⁴ See, e.g., *In re Chateaugay Corp.*, 130 B.R. 690, 697 (Bankr. S.D.N.Y. Sept. 18, 1991), vacated by consent of the parties, 1993 US Dist. LEXIS 7327 (S.D.N.Y. 1993) (acknowledging the PBGC’s argument that an unfunded benefit liability claim should be given the same priority as “any tax . . . incurred by the estate’ post-petition”).
- ¹⁵ *US v. Harden*, [1963] S.C.R. 366.
- ¹⁶ *Id.*; see *Her Majesty the Queen ex. rel. British Columbia v. Gilbertson*, 597 F.2d 1161 (9th Cir. 1979) for a discussion of the US courts’ recognition of the revenue rule.
- ¹⁷ See *supra* note 20.
- ¹⁸ *US v. Ivey*, 26 O.R. (3d) 533 (Ont. Ct. (Gen. Div.) 1995) (holding that recovery of clean-up costs under CERCLA are not penal in nature).
- ¹⁹ Convention with Respect to Taxes on Income and on Capital, US-Canada, Sept. 26, 1980, art. XXVI A, T.I.A.S. No. 11087 (as amended by protocols).
- ²⁰ *Id.* at art. XXVI A ¶ 8.
- ²¹ See *Chong v. InFocus Corp.*, No. CV-08-500-ST, 2008 WL 5205968 (D. Or. Oct. 24, 2008); see generally Paul M. Secunda, “*The Longest Journey, With a First Step*”: *Bringing Coherence to Sovereignty and Jurisdictional Issues in Global Employee Benefits Law*, 19 Duke J. of Comp. & Int’l L. 107 (2008), for a discussion of extraterritorial reach of ERISA in non-pension liability contexts; see also Steinhardt, *supra* note 18 (noting that foreign courts may resist the recognition of a US judgment that is perceived to rest on an illegitimate extraterritorial application of US law, e.g., antitrust).
- ²² No. C.A. 00-2133, 2000 WL 1368024 (E.D.Pa. Sept. 14, 2000); see also *Chong*, 2008 WL 5205968 (refuting the extraterritorial reach of ERISA and holding that ERISA protection is not applicable to a non-US citizen).
- ²³ *Maurais* at *2 (citing *EEOC v. Arabian American Oil Co.*, 499 US 244, 248 (1991)).
- ²⁴ *Id.* at *2-3.
- ²⁵ We note however, that three years before *Maurais*, the PBGC had expressed its view that ERISA did have extraterritorial reach in relation to controlled group liability. In a 1997 opinion regarding withdrawal liability, the PBGC noted that no Congressional action indicated any intent to limit controlled group liability to domestic entities and, unlike other statutory frameworks, ERISA did not include an exclusion for “foreign corporations.” The PBGC stated that Congress clearly understood how to limit extraterritorial reach and the absence of any express limitation supported a legislative intent to allow extraterritorial application of ERISA. PBGC Opinion Letter 97-1 (May 5, 1997).
- ²⁶ General Motors Corp., Annual Report (Form 10-K), at 193 (March 5, 2009).

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