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Pensions in Pain: New Treatments for a New Time

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I. INTRODUCTION

As we all know, the current economic crisis has devastated the funding of defined benefit pension plans in the United States. By one estimate, in 2008, U.S. plans sponsored by the S&P 1500 companies alone suffered an aggregate of \$469 billion dollars in losses, 29% of

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their total funding.² This huge decrease in funding, coupled with the substantial financial weakening of many of the sponsors of these plans, has led to great pressures on the federal insurer of pension benefits, the Pension Benefit Guaranty Corporation (PBGC). This article explores the most recent interpretive problems, strategies and solutions found and utilized both by the sponsors of single employer pension plans and the PBGC as they seek their way through this newly darkened landscape.

Specifically, this article covers: (1) problems associated with the distress termination of pension plans, including what entity decides if the distress criteria are satisfied when both the PBGC and the bankruptcy court may arguably have jurisdiction, and whether an employer will be allowed to terminate all of its plans in distress even if some could survive under the distress criteria if considered alone; (2) the amount and status of PBGC claims in bankruptcy, including proper methods of calculating the amount of a PBGC pension underfunding claim, whether and when the PBGC's claim will be given priority over general unsecured

² "Pension plan deficit hits record \$409 billion for S&P 1500 companies; pension expense may rise" (Jan. 7, 2009), available

at <http://www.mercer.com/summary.htm?siteLanguage=100&idContent=1332250>.

claims, and the status in bankruptcy of the PBGC's new statutory entitlement to termination premiums; and (3) a panoply of issues involving liability of members of controlled groups with members organized outside the United States.

II. TERMINATING UNDERFUNDED PENSION PLANS

The number of active PBGC-insured defined benefit pension plans in the United States had been declining for years even before the rash of terminations occasioned by the current crisis. From a peak of approximately 175,000 plans in 1983,³ by 2009, there were less than 30,000 such plans in United States.⁴ Of course, the current environment has reduced these numbers further. The PBGC estimates that completed and probable terminations in the first half of 2009 will increase the PBGC's deficit by approximately \$11 billion.⁵ More than 125 plans covering more than 94,000 participants were terminated from the beginning of 2008 through the end of the second quarter of 2009, and an additional 900,000 participants may also become the responsibility of the PBGC should General Motors and Chrysler ultimately terminate their pension plans.⁶ Although some of the plan terminations in the first half of 2009 were standard terminations⁷ of healthy plans (i.e., in which all accrued benefits will be paid in full), many of the terminated plans were underfunded.

There are two types of plan terminations under ERISA for underfunded pension plans:⁸ distress terminations⁹ and involuntary terminations.¹⁰

³ U.S. Department of Labor, Employee Benefits Security Administration, Private Pension Plan Bulletin Historical Tables and Graphs (Feb. 2009), available at <http://www.dol.gov/ebsa/pdf/1975-2006historicaltables.pdf> (last visited on June 25, 2009).

⁴ U.S. Government Accountability Office, Report to Congressional Requesters, Defined Benefit Pensions, Survey Results of the Nation's Largest Private Defined Benefit Plan Sponsors (Mar. 2009).

⁵ Testimony of Vincent K. Snowbarger, Acting Director, Pension Benefit Guaranty Corporation, Special Committee on Aging, U.S. Senate (May 20, 2009), available at <http://www.pbgc.gov/media/news-archive/testimony/tm16758.html> (last visited June 25, 2009).

⁶ *Id.*

⁷ Employee Retirement Income Security Act of 1974 (ERISA), §4041(b).

⁸ ERISA §4041(a)(1).

⁹ ERISA §4041(c).

¹⁰ ERISA §4042.

A. Distress Terminations

Following advance notice of termination¹¹ and submission of certain information to the PBGC,¹² a distress termination of a pension plan is permitted if each person who is a contributing sponsor of the plan or a member of such sponsor's controlled group¹³ meets one of the following criteria:

- (1) the person has filed, or has had filed against it, a petition seeking liquidation under the Bankruptcy Code;
- (2) the person has filed, or has had filed against it, a petition seeking reorganization under the Bankruptcy Code, and the bankruptcy court or other applicable court determines that such person will be unable to pay its debts under a plan of reorganization and will be unable to continue business outside of bankruptcy unless the termination occurs;
- (3) the PBGC determines that, without termination, the person will be unable to pay its debts when due and will be unable to continue in business; or
- (4) the PBGC determines that, without termination, the costs of providing pension coverage would be unreasonably burdensome to such person, solely as a result of a decline of such person's workforce covered as participants under all single-employer plans of which such person is a contributing sponsor.¹⁴

B. Involuntary Terminations

If an employer does not seek a distress termination of an underfunded plan, in an appropriate case, the PBGC can seek an involuntary termination if it determines that: (1) the plan has not met the minimum funding standard; (2) the plan will be unable to pay benefits when due; (3) the plan has made a distribution of more than \$10,000 to a living substantial owner at a time when the plan is underfunded for vested benefits;¹⁵ or (4) the possible long-run loss of the PBGC with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.¹⁶ In addition, if the PBGC determines that the non-funding-related requirements for a distress

¹¹ ERISA §4041(a)(2).

¹² ERISA §4041(c)(2).

¹³ For a discussion of controlled group issues, see section IV, below.

¹⁴ ERISA §4041(c)(2)(B). Note also that any distress termination cannot occur if it would violate the terms and conditions of an existing collective bargaining agreement. ERISA §4041(a)(3).

¹⁵ See ERISA §4043(c)(7).

¹⁶ ERISA §4042(a).

termination are present and it is unable to determine that the plan is sufficient for guaranteed benefits, it will also institute an involuntary termination.¹⁷

C. Issues Regarding Distress Terminations

1. Bifurcated Determination of Satisfaction of Distress Criteria

Under ERISA, each member of the controlled group of the plan sponsor must satisfy one or more of the criteria for distress termination in order for the plan to terminate in distress, but they need not all satisfy the same criterion.¹⁸ This can lead to added complexity when some members are seeking a bankruptcy reorganization, and thus, need a “necessary for successful reorganization” determination from the court¹⁹ (item (2) in section II, A, above), and others are not, and thus, may be seeking an “unable to continue in business” determination from the PBGC²⁰ (item (3) in section II, A, above), or one or more members in bankruptcy are seeking to qualify under both tests. In particular, the “necessary for a successful reorganization” test essentially requires the bankruptcy court to make a finding (i.e., that without the termination the debtor will be unable to pay its debts when due and continue in business) which is the same as the PBGC is required to make under the “unable to continue in business” test.

Long ago recognizing this issue, the PBGC announced in 1987 that when a plan sponsor seeks termination under both the “necessary for a successful reorganization” test and the “unable to continue in business” test, it will consider itself bound by the bankruptcy court’s findings with respect to the sponsor’s ability or inability to pay debts when due and continue in business.²¹ Since then, courts have recognized the PBGC’s acquiescence to the bankruptcy court’s ruling, noting that “[t]he PBGC conceded that pursuant to the Federal Register Notice, it will be bound by the Court’s findings for purposes of Section [4041(c)(2)(B)(iii) of ERISA].”²²

Notwithstanding this position, in a more recent case, the PBGC stepped back from this deference in a matter in which a bankruptcy court was required to

address the status of non-debtor entities located outside the United States. In *In re Falcon Products, Inc. (Falcon)*,²³ the debtor sought termination of its pension plan during reorganization. In making a determination regarding the debtor’s ability to pay debts and continue in business following reorganization, the bankruptcy court made findings related both to the debtor and non-debtor foreign subsidiaries.²⁴ It held that the court “must review the status of the non-debtor subsidiaries for the sole purpose of determining whether they could enable the [d]ebtors to support the [p]ension [p]lans.”²⁵ On appeal, the PBGC challenged the bankruptcy court’s determinations regarding the non-debtors, stating that “ERISA has no role for the Bankruptcy Court under the business continuation test of ERISA §4041(c)(2)(B)(iii). . . .”²⁶ The district court disagreed with the PBGC and affirmed the bankruptcy court ruling. It noted that the bankruptcy court did not “usurp the PBGC’s jurisdiction to determine if the foreign subsidiaries satisfy the requirements of the business continuation test,” or “purport to control any subsequent PBGC determinations as to [the non-debtor] entities.”²⁷ Rather, the bankruptcy court explicitly denied any ruling within the scope of the PBGC’s determination.²⁸

ERISA provides the PBGC with the discretion to make determinations regarding a non-debtor company in order to decide whether to permit termination of an underfunded pension plan in its controlled group. Such power, however, is put into question in *Falcon*, at least to the extent that it permits a bankruptcy court to look to the financial wherewithal of controlled group entities not before the court when assessing the future of pension plans sponsored by the debtor. Although the court in *Falcon* provided some reassurance that the PBGC’s role would not be diminished in its own space, potential debtors and their controlled groups’ members may seek to utilize *Falcon* as a stepping stone to increasing the role of the bankruptcy court and concomitantly reduce the power of the PBGC.²⁹

²³ 354 B.R. 889 (E.D. Mo. 2006), *aff’d*, 497 F.3d 838 (8th Cir. 2007).

²⁴ Findings of Fact and Conclusions of Law Regarding Debtors’ Motion Seeking (1) A Determination That They Satisfy the Financial Requirements for a Distress Termination of Three Pension Plans; and (2) Approval of Termination of Such Plans at 36, *In re Falcon Products, Inc.*, No. 05-41108-399 (Bankr. E.D. Mo., Oct. 26, 2005).

²⁵ *Id.*

²⁶ *Falcon*, 354 B.R. at 898.

²⁷ *Id.* at 899 (quotations omitted).

²⁸ *Id.*

²⁹ For an analysis of *Falcon*, see Kelly and Noh, “Managing the Risks Associated with Non-Debtor Foreign Affiliates,” 4 *Int’l*

¹⁷ ERISA §4041(c)(3)(B)(iii).

¹⁸ ERISA §4041(c)(2)(B).

¹⁹ ERISA §4041(c)(2)(B)(ii).

²⁰ ERISA §4041(c)(2)(B)(iii).

²¹ Distress Terminations of Single-Employer Plans; Special Procedures Relating to the Reorganization Distress Test, 52 Fed. Reg. 38290 (Oct. 15, 1987).

²² *In re Resol Mfg. Co., Inc.*, 110 B.R. 858, 861 (Bankr. N.D. Ill. 1990); ERISA §4041(c)(2)(B)(iii).

2. Aggregate vs. Plan-by-Plan Evaluation

The criterion for a distress termination during a bankruptcy reorganization proceeding is, essentially, that unless “the plan” is terminated, a successful reorganization will not be possible. When a reorganizing employer seeks to terminate more than one plan in distress, this language leads to the question whether the plans should be considered separately (so that, for example, if a large plan were to be considered to be terminated first, the subsequent termination of a smaller plan might not be necessary to achieve a viable reorganized company) or whether all plans need be considered together.

In *In re Kaiser Aluminum Corp. (Kaiser)*,³⁰ the debtors, Kaiser Aluminum Corp. and 25 affiliates, sought to terminate six pension plans, and the PBGC argued that a plan-by-plan analysis was required. The Third Circuit rejected the PBGC’s position, noting that such analysis (1) is not discussed by the statute and would be “unworkable,” and (2) would lead to inequitable results by preferring certain employees over others in direct contravention of the bankruptcy court’s role.³¹ As a result, the Third Circuit held that the aggregate approach was warranted.

Currently, only one additional reported case has discussed the aggregation issue addressed in *Kaiser*.³² Although that court followed *Kaiser* and favored a determination based on the aggregate status of the debtor’s plans, any debtor and its affiliates should be aware that the PBGC may continue to argue that a plan-by-plan test is warranted, and thus, that distress termination of all plans may not be straightforward even if the statutory criteria seem satisfied.³³

III. PBGC RECOVERY WITH RESPECT TO PENSION PLAN LIABILITY IN A BANKRUPTCY PROCEEDING

Although termination of an underfunded pension plan will generally eliminate ongoing liabilities associated with the plan, past liabilities will remain. Indeed, there are numerous avenues through which the PBGC can seek to collect on these liabilities from the plan sponsor (or members of its controlled group) through the bankruptcy process. In particular, the PBGC may assert claims for (1) unfunded benefit li-

abilities, (2) unpaid minimum funding contributions,³⁴ and (3) termination premiums. Many bankruptcy courts have imposed substantial limitations on the recoveries pursuant to the PBGC’s efforts. This section addresses three recent modes by which the PBGC has sought recovery from the bankrupt debtor: (1) through increased valuation of its claim for unfunded benefit liabilities, (2) through the enforcement of termination premiums, and (3) through the assertion of priority for its claims — and how such claims have been treated by the courts.

A. PBGC Claim for Unfunded Benefit Liability

One method by which the PBGC has attempted to maximize recovery is through an increased valuation of unfunded benefit liabilities. Upon termination of an underfunded pension plan, the plan sponsor (and its controlled group) is liable to the PBGC for the plan’s unfunded benefit liabilities (i.e., “the excess . . . of — the value of the benefit liabilities under the plan over the current value . . . of the assets of the plan”).³⁵ Although this definition appears straightforward, the courts are split over the proper method to determine the value of the benefit liabilities.³⁶

The PBGC argues that, under ERISA, the value of the benefit liabilities is determined using a discount rate specified under ERISA regulations, which generally produces a relatively low rate and, thus, a relatively high measure of the liabilities.³⁷ Many debtors, however, seek to value the claim using a discount rate determined pursuant to the “prudent-investor” stan-

³⁴ ERISA §4062(c), as amended by the Pension Protection Act of 2006, P.L. 109-280, describes this in terms of “shortfall amortization charges” and “waiver amortization charges.”

³⁵ ERISA §4001(a)(18).

³⁶ The date of termination of a defined benefit plan is also a key issue when determining the value of the PBGC’s claim for unfunded benefit liabilities. However, in the Pension Protection Act of 2006, Congress codified a rule that, for purposes of determining the amount of PBGC guaranteed benefits, or, for certain purposes, the allocation of plan assets among categories of participants in a terminated plan, the date of termination of a pension plan terminated during bankruptcy is to be the date of the bankruptcy petition filing. See ERISA §§4022(g) and 4044(e), as amended by P.L. 109-280, §404(a) and (b), respectively. The extent to which this rule may later be extended to determinations of the value of the PBGC’s claim or underfunding arising under ERISA §4062, which depends on the finding of the termination date under ERISA §4048, remains to be seen. See *Bankruptcy Filing Date Treated as Plan Termination Date for Certain Purposes; Guaranteed Benefits; Allocation of Plan Assets; Pension Protection Act of 2006*, 73 Fed. Reg. 37390 (July 1, 2008) (to be codified at 29 CFR Parts 4001, 4022 and 4044) (noting that the termination date, not the date of bankruptcy filing, is still the applicable date for termination liability determinations under ERISA §4062).

³⁷ See 29 CFR Part 4044, Subpart B.

Corp. Rescue 208 (2007).

³⁰ 456 F.3d 328 (3d Cir. 2006).

³¹ *Kaiser*, 456 F.3d at 334-47.

³² See *Falcon*, 354 B.R. 889 (E.D. Mo. 2006), *aff’d*, 497 F.3d 838 (8th Cir. 2007).

³³ For a general discussion of this issue, see Altomare, “Comment: Applying the Reorganization Test to Pension Plans in the Aggregate: Was the Third Circuit Correct?” 32 *Del. J. Corp. L.* 843 (2007).

dard, which generally produces a higher discount rate and, thus, a lower valuation of the liabilities.³⁸ These differences in methodology can have huge monetary implications. For example, in *In re US Airways Group, Inc. (US Airways)*,³⁹ the two methods of valuation resulted in a nearly \$1.3 billion difference in the calculation of the amount of unfunded benefit liability.⁴⁰ As a result of the sometimes substantial disparity between the valuations, numerous courts have addressed this issue. In *In re CF&I Fabricators of Utah, Inc. (Fabricators I)*,⁴¹ the Tenth Circuit upheld the district court's ruling that the prudent-investor standard should be used to determine the value of the benefit liability. The court noted that ERISA is explicitly subordinated to any other federal law and stated that the ERISA-based valuations should only apply for the purposes of ERISA.⁴² In *US Airways*,⁴³ however, the bankruptcy court explicitly disagreed with *Fabricators I*. The court noted the U.S. Supreme Court's statement that a "creditor's claim 'in the first instance' is a function of the nonbankruptcy law giving rise to the claim" and, thus, concluded that ERISA determines the amount of the benefit liability.⁴⁴ Moreover, it reasoned that ERISA explicitly provides the PBGC with a "present right to recover an amount determined in accordance with the valuation regulation" and the PBGC's claim could not be discounted under §502 of the Bankruptcy Code.⁴⁵

Given this uncertainty in the courts, the PBGC continues to quantify unfunded benefit liability claims under the ERISA-based methodology in hopes of increased recovery, and courts have accepted such position as recently as in 2008.⁴⁶ Debtors and their other creditors must be aware and respond accordingly.

B. Termination Premium Liability

The PBGC received a new arrow for its quiver when the Deficit Reduction Act of 2005 (DRA) gave

birth to the concept of "termination premium" liability for plan sponsors.⁴⁷ Under the DRA, the sponsor of a pension plan that terminates in a distress or involuntary termination and the members of its controlled group are jointly and severally liable to pay termination premiums to the PBGC.⁴⁸ The amount of the termination premiums is \$1,250 per plan participant per year for three years, with payment beginning within 30 days following the end of the month of termination; provided that, if the entity terminates the plan during the pendency of a reorganization, such premiums are not payable until after the discharge or dismissal of the entity in such reorganization.⁴⁹

Unlike other pension-related liabilities, however, at least one court has held that termination premium liability cannot be extinguished in bankruptcy. In *PBGC v. Oneida Ltd.*,⁵⁰ the Second Circuit reversed the district court ruling and held that termination premiums are not dischargeable in a bankruptcy. Recognizing the "obvious" legislative intent to prevent employers from evading the obligation to pay termination premiums through bankruptcy, the court held that the PBGC did not in fact have a "claim" arising during the bankruptcy, and thus, the PBGC had no right that could be extinguished prior to emergence. Therefore, according to the Second Circuit, a company will not be able to reduce or extinguish termination premiums through a bankruptcy, and the PBGC will assuredly seek to collect termination premiums to their fullest extent.

Although the non-dischargeable nature of the termination premiums is clearly to the PBGC's benefit, ERISA creates an exception to the liability by explicitly omitting from the list of distress terminations with respect to which the premium is payable terminations pursuant to liquidations under the Bankruptcy Code.⁵¹ In *In re USA Commercial Mortgage Co. (USA Commercial Mortgage)*, the PBGC appears to have attempted to strategically avoid this exemption for Bankruptcy Code liquidations. USA Commercial Mortgage Co. (USACM) sponsored a defined benefit pension plan, had financial reversals and ultimately sought Chapter 11 bankruptcy protection on April 13, 2006. On January 7, 2007, the court approved the USACM Chapter 11 plan of reorganization, which provided for liquidation.⁵² Shortly thereafter, on January 15, 2007, the PBGC sought involuntary termination of

³⁸ See *In re Chateaugay Corp.*, 126 B.R. 165, 175 (Bankr. S.D.N.Y. 1991), *vacated by consent of the parties*, 1993 U.S. Dist. LEXIS 7327 (S.D.N.Y. 1993) ("claims for a series of cash payments in the future should be discounted to present value by a discount factor which would result in estimating the amount of cash required, as of the petition date, which when prudently invested would allow the obligations to be met as they became due") (some emphasis omitted).

³⁹ 303 B.R. 784 (Bankr. E.D. Va. 2003).

⁴⁰ See also *In re CF&I Fabricators of Utah, Inc.*, 150 F.3d 1293, 1300 (10th Cir. 1998) (noting a \$100 million difference).

⁴¹ 150 F.3d 1293 (10th Cir. 1998).

⁴² *Id.* at 1301 (citing ERISA §514(d)).

⁴³ 303 B.R. 784 (Bankr. E.D. Va. 2003); see also *In re Rhodes*, 382 B.R. 550 (Bankr. N.D. Ga. 2008) (following *US Airways*).

⁴⁴ *US Airways*, 303 B.R. at 792 (citing *Raleigh v. Illinois Dep't of Revenue*, 530 U.S. 15 (2000)).

⁴⁵ *Id.* at 793 (emphasis in original).

⁴⁶ See *Rhodes*, 382 B.R. 550.

⁴⁷ P.L. 109-171 (permanently codified by the Pension Protection Act of 2006).

⁴⁸ ERISA §4006(a)(7)(B).

⁴⁹ ERISA §4006(a)(7)(A).

⁵⁰ 562 F.3d 154 (2d Cir. 2009).

⁵¹ See ERISA §§4006(a)(7)(A), 4041(c)(2)(B)(i).

⁵² Order Confirming the "Debtors' Third Amended Joint Chapter 11 Plan of Reorganization," As Modified Herein, *In re USA*

USACM's pension plan.⁵³ This tactic may have been an indirect attempt to avoid the loss of termination premiums from USACM (which, as noted, would have been lost had the plan been terminated in distress pursuant to a Bankruptcy Code liquidation of its sponsor under ERISA §4041(c)(2)(B)(i)), and on April 23, 2007, the PBGC formally amended its outstanding claims against USACM to include a claim for such premiums. The PBGC argued that because the pension plan was involuntarily terminated, not terminated in connection with the Chapter 11 liquidation, termination premiums were statutorily mandated. USACM countered that the PBGC's claim for such termination premiums never ripened. It argued that its liquidation under Chapter 11 was a "bankruptcy reorganization proceeding" under §4006(a)(7)(B) of ERISA, and thus, that under the "special rule" of that section, any liability for termination premiums was stayed until "discharge" or "dismissal," both of which, USACM claimed, never in fact occurred.⁵⁴ As a result, USACM contended that no termination premium liability accrued. In reply, the PBGC maintained that USACM's case was clearly one of liquidation, not reorganization, that the "special rule" did not apply, and that, regardless, USACM had in fact incurred a "discharge" or "dismissal." Without an opinion or any discussion of the issues, the bankruptcy court disallowed the termination premium claim.⁵⁵

In sum, although termination premiums will generally apply to most debtors, those involved in liquidation proceedings may have arguments to be exempt from paying such premiums. The PBGC may be expected to continue to seek termination premiums in most bankruptcy contexts, however, and its failed attempt to obtain such premiums in *USA Commercial Mortgage* must be considered by all debtors. Although the lack of opinion in *USA Commercial Mortgage* limits the precedential value of the case, it nonetheless puts into question the PBGC's ability to use its involuntary termination power to receive payment of termination premiums in liquidation cases.

C. Priority of the PBGC Claims

Although the monetary value of the PBGC's claims is obviously a key issue in any bankruptcy proceed-

Commercial Mortgage Co., No. BK-S-06-10725 (D. Nev., Jan. 1, 2007).

⁵³ Under ERISA, even when a plan sponsor seeks distress termination of a plan, the PBGC may seek to terminate such plan involuntarily if it is unable to determine if the plan has sufficient assets for the guaranteed benefits. ERISA §4041(c)(3)(B)(iii). See note 17, above.

⁵⁴ ERISA §4006(a)(7)(B).

⁵⁵ Order Disallowing Amended Claim No. 791 Filed by the Pension Benefit Guaranty Corporation, *In re USA Commercial Mortgage Co.*, No. BK-S-06-10725 (D. Nev., July 18, 2008).

ing, the priority afforded to its claims has also been a recurrent issue in the bankruptcy courts. If a pension plan is terminated in a distress termination prior to a bankruptcy, ERISA gives the PBGC a lien for any unpaid benefit liabilities,⁵⁶ which lien is to be treated like a "tax due and owing to the United States"⁵⁷ and, if perfected, will of course be given priority over any general, unsecured claim in the bankruptcy proceeding.^{58,59} Because many pension plans will be terminated as part of a bankruptcy proceeding, practitioners must consider the PBGC's claims absent such lien. During a bankruptcy proceeding, §507 of the Bankruptcy Code grants certain unsecured claims "priority" status in one of 10 categories, and two factors often determine the priority of pension-related claims — the time at which such claim accrued and the characterization of such claim (e.g., tax, penalty, etc.).⁶⁰ Each is addressed in turn.

1. Accrual of the Claim

In order to assess the priority of a claim, the date of its accrual is crucial. The PBGC generally argues that its claim for pension-related liabilities does not arise until the termination of the plan (i.e., after the bankruptcy petition is filed) and, therefore, should be considered an "administrative expense" and given sec-

⁵⁶ The PBGC will obtain a lien equal to the amount of the liability following termination of a pension plan (ERISA §4062) or withdrawal from or termination of a multiple employer plan (ERISA §§4063 and 4064); *provided* that the amount of such lien may not exceed 30% of the collective net worth of all persons within the controlled group. ERISA §4068.

⁵⁷ ERISA §4068(c)(2).

⁵⁸ 11 USC §§545 and 547(c)(6). Note that it is unclear whether a *non-perfected*, pre-petition lien would be given priority equivalent to that of a tax. See *PBGC v. Washington Group, Inc.*, No. C-86-665-G, 1987 U.S. Dist. LEXIS 5686 (M.D.N.C., Mar. 9, 1987) (holding that the PBGC has priority whether or not the lien is perfected); *U.S. v. McDermott*, 507 U.S. 447 (1993) (holding that a non-perfected, pre-petition lien would be granted priority over a judgment lien in different context); *cf. In re Chateaugay*, 115 B.R. 760 (Bankr. S.D.N.Y. 1990), *vacated by consent of the parties*, 1993 U.S. Dist. LEXIS 7327 (S.D.N.Y. 1993) (refusing to follow *Washington Group* because such case was under the Bankruptcy Act); *In re Kent Plastics Corp.*, 183 B.R. 841, 845-46 (Bankr. S.D. Ind. 1995) (noting (in a post-petition termination case) that Congress proposed clarifying the ambiguity surrounding a non-perfected PBGC lien claim as part of the 1994 Bankruptcy Code amendments but ultimately did not enact such change).

⁵⁹ If, however, the plan is terminated during a bankruptcy, at least one court has held that the PBGC cannot obtain a lien for the unfunded benefit liabilities because of the automatic stay. 11 USC §362(a)(4) (2006); see *In re Chateaugay Corp.*, 130 B.R. 690, 697 (Bankr. S.D.N.Y. 1991), *vacated by consent of the parties*, 1993 U.S. Dist. LEXIS 7327 (S.D.N.Y. 1993) ("creation of a lien would violate the stay provision of the [Bankruptcy] Code"); *Kent Plastics*, 183 B.R. at 846.

⁶⁰ 11 USC §507.

ond priority.⁶¹ For example, in *In re Sunarhauserman, Inc.*,⁶² the PBGC sought administrative expense priority for all of the unpaid minimum funding contributions of a terminated plan, but the lower courts, finding that most of those contributions related to other than the “normal costs” of the plan arising post petition (most were due to pre-petition actuarial losses), refused to grant such priority to any “non-normal costs.”⁶³

On appeal, the PBGC raised two benefits-related arguments supporting “administrative expense” priority for its minimum funding contribution claim. The PBGC asserted that (1) the minimum funding obligations should have been allocated completely to the post-petition period based on methodologies arising under ERISA, and (2) ERISA and the Treasury Regulations require that the “normal cost” calculated at the beginning of a plan year should not have been reduced to reflect post-petition workforce adjustments and the freeze of benefit accruals.⁶⁴

The court dismissed the PBGC’s first argument regarding allocation of the minimum funding obligation by noting that any analysis of when a claim arose under ERISA is not relevant in the bankruptcy context because the priority status is based on “when the acts giving rise to the liability took place” under bankruptcy law, “not when they accrued” under ERISA.⁶⁵ Although, under ERISA, all of the minimum funding liability could be attributed to a post-petition period, the acts upon which the liability was based (largely actuarial losses) arose pre-petition.

The court, while accepting the validity of the PBGC’s second argument that the full “normal costs” under ERISA could not be reduced to take account of the enumerated future events until the following year, nonetheless affirmed the rejection of the PBGC’s argument in the context of a plan termination during bankruptcy,⁶⁶ noting that the only “actual and necessary” costs entitled to priority were those related to

⁶¹ “Administrative expenses” are defined as “actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case. . . .” 11 USC §503(b)(1)(A); see *In re Columbia Packing Co.*, 47 B.R. 126 (Bankr. D. Mass. 1985) (granting priority to claims related to past service).

⁶² 126 F.3d 811 (6th Cir. 1997).

⁶³ Note that the Pension Protection Act of 2006 amended ERISA and defined “target normal cost,” which includes an element potentially related to past service. It is unclear if this amendment will change the court’s interpretation; see Resnick and Sommer, 1 *Collier on Bankruptcy, Monograph 7*[3][c] (15th ed. 2009).

⁶⁴ *Sunarhauserman*, 126 F.3d at 814.

⁶⁵ *Id.* at 818; see also *Kent Plastics*, 183 B.R. at 847-48.

⁶⁶ The *Sunarhauserman* court noted that a different result may be obtained if the pension plan is ongoing at the time of the claim for minimum funding obligations. *Id.* at 820 (“it may make sense

actual (rather than actuarially-projected) post-petition services.”⁶⁷

Although the PBGC continues to seek administrative priority for its minimum funding and related pension claims, the courts have limited administrative priority to claims based on post-petition services, and all debtors will continue to oppose such claims for “administrative expenses” related to liability related to pre-petition services.⁶⁸

2. Characterization of the Claim

The characterization of a claim as a “tax” may also give rise to priority status of such claim in bankruptcy.⁶⁹ Despite the government’s efforts, however, the courts have refused to characterize pension-related claims as “taxes.”⁷⁰ First, in 1996, the U.S. Supreme Court explicitly held that excise taxes related to an accumulated funding deficiency are *not* “excise taxes” within the meaning of §507(a)(8)(E)⁷¹ of the Bankruptcy Code.⁷² In *In re CF&I Fabricators of Utah, Inc.*⁷³ (*Fabricators II*), the plan sponsor sought bankruptcy protection largely due to its inability to fund its pension plans. Following the commencement of bankruptcy, the Internal Revenue Service (IRS)⁷⁴ filed a proof of claim for excise taxes related to unpaid contributions to the pension plan and sought priority as an “excise tax” under the Bankruptcy Code.⁷⁵ The Supreme Court rejected the IRS’s characterization of the

in the context of an ongoing plan to decide what portion of post-petition expenses are ‘actual and necessary’ by looking to ERISA’s actuarial principles. . .”).

⁶⁷ *Id.*

⁶⁸ Note that the PBGC may obtain priority for some pre-petition claims, as the Bankruptcy Code provides fifth priority to all benefit plan claims within the 180-day period prior to the petition. The value of such fifth priority claim may total up to \$10,950 per plan participant, less the sum of (1) the amount paid under fourth priority (e.g., wages), and (2) the amount paid by the estate on behalf of such employees to any other employee benefit plan. Given the reduction related to fourth priority claims, however, fifth priority claims are often minimal. 11 USC §507(a)(4) and (5).

⁶⁹ “Taxes” that are given priority include certain (1) taxes on income or gross receipts; (2) property taxes; (3) taxes required to be collected or withheld and for which the debtor is liable in whatever capacity; (4) employment taxes on a wage, salary or commission; (5) excise taxes; (6) customs duties; and (7) penalties related to a claim of a kind specified as a “tax” and in compensation for actual pecuniary loss. 11 USC §507(a)(8).

⁷⁰ See, e.g., note 78, below; see also *Kent Plastics*, 183 B.R. at 847.

⁷¹ 11 USC §507(a)(7)(E) (1994) (now codified as 11 USC §507(a)(8)(E)).

⁷² *In re CF&I Fabricators of Utah, Inc.*, 518 U.S. 213 (1996).

⁷³ *Id.*

⁷⁴ The arguments of the IRS and the PBGC are analogous in this instance.

⁷⁵ See 11 USC §507(a)(8)(E).

liability as a “tax.”⁷⁶ The Court dismissed the relevance of the language of the Internal Revenue Code (Code) in the bankruptcy context. Instead, the Court looked at the underlying effect of the excise tax. Because the excise tax did not provide support for the government, the Court held it was not in fact a “tax” but was a penalty and did not grant priority under the Bankruptcy Code.

Other courts have reasoned by analogy from the Supreme Court’s opinion and refused to characterize any amounts for which the PBGC could obtain a post-petition lien as a “tax.”⁷⁷ For example, in *Fabricators I*,⁷⁸ the PBGC argued that its right to minimum funding contributions was a “tax” and should be given priority. Following the Supreme Court’s previous analysis,⁷⁹ the Tenth Circuit first determined that although the Code states that a lien related to liability for minimum funding contributions should be treated as a “tax,”⁸⁰ such characterization is not dispositive of the characterization in the bankruptcy context. Further, it noted that there was no “explicit connector” between the Code and the Bankruptcy Code with respect to the characterization of the liability for minimum funding contributions. As a result, the *Fabricators I* court was required to determine the status of the liability by conducting a “functional analysis” of the sort countenanced by *Fabricators II*.⁸¹ Upon such examination, the Tenth Circuit held that the liability was “not to defray the expenses of the government or any governmental undertaking, but rather . . . to finance a private obligation” and thus denied priority “tax” status for the PBGC’s claim.⁸²

Although the PBGC has often argued that its claims are “taxes” for purposes of the Bankruptcy Code pri-

ority, bankruptcy courts have not approved of such characterizations, and debtors can be expected to continue to contest PBGC assertions of “tax” priority status for its minimum funding and associated excise tax claims.⁸³

IV. CONTROLLED GROUP LIABILITY

Given the difficulties that the PBGC sometimes encounters when seeking recoveries of pension-related claims in bankruptcy proceedings, we may anticipate a continuation of its ventures outside the confines of the bankruptcy case to locate other deep pockets. ERISA opens the door to such strategy. Under ERISA, any member of the plan sponsor’s “controlled group”⁸⁴ is jointly and severally liable for various pension liabilities, including those related to (1) satisfaction of minimum funding requirements⁸⁵ (and associated excise taxes⁸⁶), (2) termination of underfunded plans,⁸⁷ and (3) unpaid PBGC premiums.⁸⁸ It is the public position of the PBGC⁸⁹ that foreign entities without any business in the United States are nonetheless liable for the pension-related liability of a U.S. parent, U.S. subsidiaries or even a U.S. parent’s other subsidiaries.⁹⁰ Therefore, irrespective of any bankruptcy proceeding, the PBGC may bring claims for any unsatisfied liability against non-debtor affiliates, including, particularly, those organized outside the United States. This section addresses the factors

⁸³ As cases make their way through the courts, it will also be interesting to see whether the PBGC argues for, and courts recognize, claims for termination premiums (see section III, B, above), as priority “taxes.” See, e.g., PBGC’s Response to the Supplemental Objection of the USACM Liquidating Trust to Claim No. 791 of the PBGC, *In re USA Commercial Mortgage Co.*, No. BK-S-06-10725 (D. Nev., Mar. 14, 2008).

⁸⁴ In general, there are three types of “controlled groups.” A “parent-subsidiary” group consists of groups linked by 80% ownership; a “brother-sister” group consists of entities jointly 80% owned by five or fewer persons; and a “combined group” consists of one or more combinations of the first two groups. See ERISA §4001(a)(14) (referencing Treas. Regs. §1.414(b)-1 (citing Code §1563)) and 4001(b).

⁸⁵ ERISA §302(b)(2).

⁸⁶ Code §4971(e)(2).

⁸⁷ ERISA §4062(a).

⁸⁸ 29 CFR §4007.13(g).

⁸⁹ PBGC Opinion Letter 97-1 (May 5, 1997); Amer. Bar Assoc. Joint Comm. on Emp. Benefits, *Q&A Session with PBGC* (May 9, 2007), available at <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), available at <http://www.pbgc.gov/docs/2004bluebook.pdf> (last visited on June 8, 2009).

⁹⁰ Note also that the PBGC characterizes private equity investors as a “trade or business” that may be included in a controlled group, along with related portfolio companies. PBGC Appeals Board Letter (Sept. 26, 2007).

⁷⁶ See also *In re Unicast, Inc.*, 219 B.R. 741 (B.A.P. 6th Cir. 1998).

⁷⁷ See, e.g., *In re Bayly Corp.*, No. Civ. A. 95 N 901, 1997 WL 33484011 (D. Colo., Feb. 12, 1997) (holding that payment of unfunded benefit liabilities is not a “tax”); but cf. *PBGC v. Skeen*, 163 F.3d 1205, 1208, n. 4 (questioning the district court’s analysis in dicta); Compare *In re Bethlehem Steel Corp.*, Nos. 01-15288 (BRL), 01-15302 (BRL), 01-15308 (BRL), 01-15315 (BRL), 2004 WL 601656 (Bankr. S.D.N.Y., Mar. 22, 2004) (discussing *Fabricators II* and holding that payments under the Coal Industry Retiree Health Benefit Act of 1992 are granted priority “tax” status).

⁷⁸ 150 F.3d 1293, 1297-98 (10th Cir. 1998), cert. denied, 526 U.S. 1145 (1999).

⁷⁹ *Fabricators II*, 518 U.S. 213.

⁸⁰ See former Code §412(n) (repealed 2007) (stating that such lien shall be “treated as taxes due and owing the United States and rules similar to the rules of subsections (c), (d), and (e) of §§4068 of [ERISA] shall apply”).

⁸¹ 150 F.3d at 1297.

⁸² *Id.* at 1298; but cf. *Skeen*, 163 F.3d at 1208, n. 4 (noting in dicta that *Fabricators I* may be distinguishable because in that case the PBGC admitted that the payment did not defray costs of the government).

that encourage PBGC claims against non-debtor foreign subsidiaries and certain judicial and statutorily-imposed limitations on such efforts.

A. Absence of Bankruptcy Protection Favors the PBGC

There are at least two important reasons why the PBGC would seek payment of pension liabilities from non-debtor foreign entities. First, and most obviously, such entities may not be financially stressed and, thus, unlike their bankrupt counterparts, will more likely be able to fully pay the PBGC's claims. Second, such non-debtor foreign affiliates are not provided the protections of the Bankruptcy Code, and as a result, the PBGC has more flexibility to seek relief. For example, contrary to the description in III, C, above, the PBGC's claims will not be subjected to any priority regime as under the Bankruptcy Code and, thus, will more likely result in a full recovery.⁹¹ Moreover, because the foreign entity has not filed for bankruptcy in the United States, it is not afforded the other protections of the Bankruptcy Code. For example, as opposed to the cases described in III, A, above, the PBGC will be able to use its own calculation of benefit liabilities in seeking to collect from all non-debtors (including non-debtor foreign affiliates), rather than being subject to the "prudent investor" standard under the Bankruptcy Code.⁹² Further, non-debtor foreign entities are not protected by the automatic stay under the Bankruptcy Code and may be subject to a lien in favor of the PBGC for unfunded benefit liabilities.⁹³

B. Liability in U.S. Courts

Given the PBGC's potentially greater ability to collect pension-related liability from non-debtor foreign entities, it would seem to have a strong interest in bringing such claims. Nevertheless, it cannot bring such claims unless it can find a court which will hear them.

1. U.S. Courts May Not Have Personal Jurisdiction Over Foreign Entities

Although foreign entities may have liability for pension-related claims, U.S. courts cannot entertain or adjudicate such claims without personal jurisdiction

over the foreign entities.⁹⁴ If a foreign defendant does not have sufficient contacts with the jurisdiction of the U.S. court, the case will be dismissed. This initial requirement is one of the key impediments to any PBGC claim in the U.S. courts against a foreign member of a controlled group.

For example, in *GCIU-Employer Retirement Fund v. Goldfarb Corp. (Goldfarb)*,⁹⁵ a multiemployer pension⁹⁶ plan brought a claim in a U.S. court seeking withdrawal liability from Goldfarb Corp., 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 States. Goldfarb's U.S. subsidiary, Fleming Packaging Corporation, 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.⁹⁷ The court further reasoned that the basis of the lawsuit did not directly arise out of Goldfarb's contact

⁹⁴ 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").

⁹⁵ No. 08-3229, 2009 U.S. App. LEXIS 10026 (7th Cir., May 11, 2009).

⁹⁶ 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 U.S. Dist. LEXIS 21422 (S.D. Ohio, Aug. 6, 1993).

⁹⁷ See also *Reimer Express World Corp.*, 230 F.3d at 943 ("constitutional due process requires that personal jurisdiction cannot be premised on corporate affiliation or stock ownership alone where corporate formalities are substantially observed and the parent does not exercise an unusually high degree of control over the subsidiary"); *Satralloy*, 1993 U.S. Dist. LEXIS 21422

⁹¹ See Resnick and Sommer, 1 *Collier on Bankruptcy, Monograph* 7[3][c] (15th ed. 2009) ("general unsecured claims may receive only a small portion of the total amount of their claim, may be issued equity of the reorganized debtor or may not be paid").

⁹² *Id.* at 2[3][B].

⁹³ *Id.*; 11 USC §362.

with the United States, namely its involvement with its U.S. subsidiary's lenders. Therefore, the court held that it had no personal jurisdiction over the foreign member of the controlled group, *Goldfarb*.

Although *Goldfarb* indicates that the U.S. courts will conduct a traditional minimum contacts analysis and that mere membership in a controlled group with U.S. members will not generally be sufficient to confer jurisdiction, such conclusion is not absolute. In *PBGC v. Satralloy, Inc.*,⁹⁸ 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 U.S. 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 although 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-U.S. entity. Although ERISA contemplates the liability of all members of the controlled group, under appropriate facts, *Goldfarb* indicates that, for this purpose, U.S. courts will not provide a forum for recovery from non-U.S. 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 U.S. 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 U.S. courts, foreign companies must be cognizant of their level of interaction with their U.S. affiliates if they wish to maintain the protection afforded by cases such as *Goldfarb*.

2. Other Statutes May Limit Jurisdiction Over Foreign Entities

In addition to jurisdictional limitations, statutes may also limit the PBGC's reach under ERISA. For

("The existence of a parent-subsidiary relationship, in and of itself, is insufficient to establish personal jurisdiction over a company"); *Clark v. Matsushita Elec. Indus. Co.*, 811 F. Supp. 1061 (M.D. Pa. 1993).

⁹⁸ No. C-2-90-0630, 1993 U.S. Dist. LEXIS 21422 (S.D. Ohio, Aug. 6, 1993).

example, the Foreign Sovereign Immunities Act of 1976 (FSIA)⁹⁹ limits jurisdiction over foreign states in the federal courts unless the foreign states engage in "commercial activity."¹⁰⁰ In *NYSA-ILA Pension Trust Fund v. Garuda Indonesia*¹⁰¹ (*Garuda*), the plaintiffs brought a claim for withdrawal liability against controlled group members that were considered "foreign states." The court held that although the entity directly contributing to the multiemployer pension plan had sufficient "commercial activity" to confer jurisdiction over it to the court, the association between such contributing entity and other members of its controlled group was not "commercial activity." Thus, the court held that it did not have jurisdiction over members of the controlled group other than the contributing entity. Statutory limitations such as the FSIA may impose a jurisdictional limitation in the United States.¹⁰²

C. 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.¹⁰³ 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 U.S. 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. Although 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-U.S. entities in foreign

⁹⁹ P.L. 94-583 (codified as amended in scattered sections of Title 28 USC).

¹⁰⁰ 28 USC §1605(a).

¹⁰¹ 7 F.3d 35 (2d Cir. 1993); cf. *Lasheen v. Loomis Co.*, No. S-01-227, 2008 WL 295079 (E.D. Cal., Feb. 1, 2008) (holding that the foreign nation conducted "commercial activity" such that the FSIA did not apply).

¹⁰² The enforcement of foreign pension law in the U.S. courts is outside the scope of this article, but note that at least one U.S. court has approved a settlement based on the United Kingdom Pension Regulator's assumptions and determination with respect to pension liability. *In re Sea Containers Ltd.*, No. 06-11156 (KJC), 2008 Bankr. LEXIS 2363 (Bankr. D. Del., Sept. 19, 2008).

¹⁰³ Williamson and Seider, "Pension and OPEB Obligations in US Bankruptcies — Answers to the Most Frequently Asked Questions" (July 12, 2005), available at <http://www.lw.com/Resources.aspx?page=ClientAlertDetail&publication=1309> (last visited June 8, 2009).

courts.¹⁰⁴ The case does not, however, clarify whether the PBGC will prevail on pension-related claims in foreign courts, and commentators have questioned such ability.¹⁰⁵

1. 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.¹⁰⁶ Because not all jurisdictions respect U.S. law, courts of such jurisdictions will not necessarily be willing to enforce U. S. law, or judgments obtained under U.S. law, including ERISA.¹⁰⁷ For example, in *Garuda*,¹⁰⁸ the court noted that the plaintiff brought its claim against foreign controlled group members in a U.S. court because the Indonesian courts did not recognize U.S. 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 U.S. laws, exceptions to comity may limit the enforceability of ERISA. As one example, respect for U.S. 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.¹⁰⁹ 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 contexts¹¹⁰), claims for withdrawal 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 *U.S. v. Harden*, in which the Court held that a U.S. tax claim could not be enforced in the Canadian courts.¹¹¹ 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."¹¹²

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.¹¹³ As a result, the PBGC's claims for unfunded benefit liabilities, although 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 U.S. Treasury irrespective of its recovery in the courts) and, thus, barred under the "public law" rule.¹¹⁴

2. Tax Treaties Will Further Limit Enforcement in Foreign Courts

Additionally, to the extent the plaintiff 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 U.S.-Canada Income Tax Treaty provides that each country will "lend assistance to each other in the collection of taxes,"¹¹⁵ it bars either country from assisting in any collection directed at its own

¹⁰⁴ Approval Order, *In re Ivaco*, No. 03-CL-4932 (Aug. 4, 2005).

¹⁰⁵ Reznik and Glist, "Pension Benefit Guaranty Corp.-Controlled Group Claims Abroad," 33 *N.Y.L.J.* 235 (Feb. 17, 2006).

¹⁰⁶ 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).

¹⁰⁷ See Steinhardt, *International Civil Litigation: Cases and Materials on the Rise of Intermestic Law*, Ch. 7.B. (2002) (noting that the U.S. courts' respect for foreign judgments is more "accommodating" than foreign courts' respect for U.S. judgments).

¹⁰⁸ See note 101, above

¹⁰⁹ See Restatement (Third) of the Foreign Relations Law of the United States §483 (1987) (noting that U.S. courts are not required to recognize or enforce judgments for the collection of taxes); see also note 102, above; Posner and Sunstein, "Chevronizing Foreign Relations Law," 116 *Yale L.J.* 1170 (2006-2007); see also 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.

¹¹⁰ 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 U.S. 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").

¹¹¹ *U.S. v. Harden*, [1963] S.C.R. 366.

¹¹² *Id.*; see *Her Majesty the Queen ex. rel. British Columbia v. Gilbertson*, 597 F.2d 1161 (9th Cir. 1979), for a discussion of the U.S. courts' recognition of the revenue rule.

¹¹³ See note 109, above.

¹¹⁴ The issue is hardly settled, however. One Canadian court has rejected arguments related to the public law exception in a similar context involving claims under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). *U.S. 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).

¹¹⁵ Convention with Respect to Taxes on Income and on Capital, U.S.-Canada, Sept. 26, 1980, art. XXVI A, T.I.A.S. No. 11087 (as amended by protocols).

citizens or entities.¹¹⁶ Therefore, treaties such as that between the United States and Canada may limit the recognition of ERISA claims by foreign courts.¹¹⁷

3. The U.S. Courts May Not Support the Extraterritorial Reach of ERISA

Lastly, although 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.¹¹⁸ For example, in *Maurais v. Snyder*,¹¹⁹ 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 U.S. Supreme Court, the court in *Maurais* noted that "[i]t is a longstanding principle of Ameri-

can law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' " ¹²⁰ 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.^{121,122}

V. CONCLUSION

Even as the general economy starts to settle, the effects of recent events on the level of pension funding will linger, and the ultimate resolution of the questions covered in this article on such matters as distress terminations, PBGC claims in bankruptcy and liability of members of extra-territorial controlled groups will play significant roles in the reformation of our financial topography. And although the world may have seen the worst of the recent economic strife, the automobile industry's current "reorganization" and its over 900,000 pension plan participants will serve to keep PBGC and pension underfunding issues in the forefront.

¹¹⁶ *Id.* at art. XXVI A ¶8.

¹¹⁷ See also *Gilbertson*, 597 F.2d at 1165 (noting that the prior U.S.-Canada treaty can affect the level of comity).

¹¹⁸ See *Chong v. InFocus Corp.*, No. CV-08-500-ST, 2008 WL 5205968 (D. Or., Oct. 24, 2008); see generally 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, note 107, above (noting that foreign courts may resist the recognition of a U.S. judgment that is perceived to rest on an illegitimate extraterritorial application of U.S. law, e.g., antitrust).

¹¹⁹ 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-U.S. citizen).

¹²⁰ *Maurais* at *2 (citing *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)).

¹²¹ *Id.* at *2-3.

¹²² 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).