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Japanese Acquirer Resolves Pension-Related Liabilities of US Subsidiary

On November 4, 2014, Asahi Tec Corporation (Asahi), a Japanese corporation that acquired U.S.-based Metaldyne Corporation (Metaldyne) in 2007, announced a settlement of its long-running dispute with the Pension Benefit Guaranty Corporation (PBGC) regarding the 2009 termination of Metaldyne's significantly underfunded defined benefit pension plan. The settlement followed a ruling by the U.S. District Court for the District of Columbia that Asahi —having acquired Metaldyne with the knowledge that Metaldyne maintained a significantly underfunded defined benefit pension plan — had sufficient contacts with the United States to allow the court to exercise personal jurisdiction over Asahi in an action brought by PBGC to recover liabilities associated with the underfunded plan.[1]

The court's decision that it had jurisdiction over Asahi (a non-U.S. corporation) should be carefully considered by non-U.S. companies that own or seek to acquire U.S.-based companies with significant pension liabilities.

The Asahi Case

Asahi acquired Metaldyne in 2007, when Metaldyne was the contributing sponsor of a single employer defined benefit pension plan. In 2009, Metaldyne commenced a voluntary Chapter 11 bankruptcy case. During the course of Metaldyne's bankruptcy proceedings, the PBGC sought and obtained a court order terminating Metaldyne's pension plan.[2] Following the termination, the PBGC sued Asahi in district court to recover from Asahi the unfunded benefit liabilities and termination premiums associated with the plan, alleging that Asahi was a member of Metaldyne's controlled group. In 2011, Asahi moved to dismiss the PBGC suit, asserting that the district court lacked personal jurisdiction over Asahi, but the district court denied Asahi's motion.[3] In May of 2012, the PBGC moved for summary judgment on the issues of personal jurisdiction over Asahi and Asahi's liability as a member of the controlled group for the unfunded benefit liabilities and termination premiums. In October 2013, the district court ruled in the PBGC's favor on both issues. Finding it had personal jurisdiction, the district court ruled that, as a result of Asahi's acquisition of Metaldyne, Asahi became a member of Metaldyne's controlled group and therefore was liable for the unfunded benefit liabilities and termination premiums that arose in connection with the termination of the Metaldyne plan.[4]

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1 *PBGC v. Asahi Tec Corp.*, 979 F. Supp. 2d 46, 57 (D.D.C. 2013).

2 The PBGC settled a separate dispute with Metaldyne over the pension plan in February 2010, receiving a $141.2 million claim against the bankruptcy estate. The PBGC's recovery from the debtor was limited to its portion of unsecured creditor distributions. PBGC is estimated to have received distributions of less than $3 million on account of the allowed claim.

3 *PBGC v. Asahi Tec Corp.*, 829 F. Supp. 3d 118 (D.D.C. 2012). The district court granted Asahi leave to file an interlocutory appeal on the jurisdictional issue, which the D.C. Circuit Court of Appeals denied in July 2012 on the grounds that Asahi had failed to demonstrate that "exceptional circumstances" justified an interlocutory appeal.

4 Under the terms of the settlement, Asahi agreed to pay $39.5 million to resolve the PBGC's action with no admission of liability or jurisdiction. The PBGC had sought more than $190 million in damages from Asahi.

Controlled Group Liability Under ERISA

Under ERISA, an employer that is a contributing sponsor with respect to a single employer defined benefit pension plan is liable for any unfunded pension liabilities that exist at the time the plan is terminated. Similarly, a contributing employer that withdraws from a multiemployer pension plan is liable for its allocable share of the plan's unfunded pension liabilities at the time of withdrawal.

Each member of a "controlled group" — consisting of the employer and each trade or business under common control with the employer — is jointly and severally liable for the pension liabilities that are incurred in connection with the termination of, or the employer's withdrawal from, an underfunded pension plan. For these purposes, a trade or business is generally considered to be under "common control" with a contributing employer if:

- the trade or business owns, directly or indirectly, a controlling interest (generally, an 80 percent or greater interest) in the contributing employer;
- the contributing employer owns, directly or indirectly, a controlling interest in the trade or business; or
- a parent organization that is a trade or business (or, in certain cases, an investor group consisting of five or fewer individuals, trusts or estates) owns, directly or indirectly, a controlling interest in the contributing employer and the trade or business.

Extraterritorial Application of ERISA's Controlled-Group-Liability Provisions

ERISA does not expressly address whether controlled group liability extends to entities based outside in the U.S. In a 1997 advisory opinion letter (the 1997 Opinion Letter), the PBGC took the position that non-U.S. entities who are under "common control" with a U.S. employer may be included within the employer's controlled group.[5] The PBGC expressed the view that imposing liability on non-U.S. controlled group members did not implicate the extraterritorial application of ERISA where the events triggering the liability occurred in the United States, but further noted that it would reach the same conclusion even where extraterritorial application was implicated.[6]

While the PBGC acknowledged in the 1997 Opinion Letter that there existed a presumption against extraterritorial application of U.S. laws absent clear congressional intent to the contrary,[7] the PBGC reasoned that the purpose behind ERISA's controlled group principle was to prevent business owners from avoiding liability by fractionalizing their business operations or otherwise organizing their activities so as to avoid the liability provisions of ERISA, and that this purpose would be "ill-served" by limiting controlled group liability to U.S. entities. Accordingly, the PBGC determined that the controlled group liability provisions of ERISA were intended to have extraterritorial application.[8]

Case law addressing the ability of the PBGC to obtain and enforce a lien against non-U.S. entities recognizes that a court must first address whether the court has personal jurisdiction over the defen-

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5 PBGC Op. Ltr. 97-1 (May 5, 1997).

6 *Id.*

7 *See, e.g.*, *EEOC v. Arabian Oil Co.*, 499 U.S. 244, 248 (1991) ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intention appears, is meant to apply only to the territorial jurisdiction of the United States.'") (citation omitted).

8 PBGC Op. Ltr. 97-1 (May 5, 1997).

dant non-U.S. entity. A court may find two types of personal jurisdiction (i) general (or all-purpose) jurisdiction or (ii) specific (or case-linked) jurisdiction.

General jurisdiction generally requires a higher level of business activity in the United States than typically results from a non-U.S. company's ownership of a U.S. subsidiary. In contrast, specific jurisdiction may apply where (i) the non-U.S. defendant purposely has directed its activities at the U.S. and (ii) the claim arises out of the activities directed at the U.S. When a non-U.S. defendant maintains continuous and systematic contacts with the United States, general jurisdiction exists and a U.S. court can hear any and all claims against the defendant.

In *PBGC v. Satralloy, Inc.*,[9] a federal district court held that in order to adjudicate whether a PBGC lien is properly assertable against a non-U.S. company, the PBGC must establish the minimum contacts necessary for the court to have personal jurisdiction over the defendant, *i.e.*, the party against whom the PBGC is asserting the lien.[10] The court dismissed the claims by the PBGC for lack of personal jurisdiction, stating that being a controlled group member, by itself, did not amount to sufficient minimum contacts to establish personal jurisdiction.[11] The court subsequently reconsidered its decision and found that the dismissal was improper as to one of the parties because the PBGC made a *prima facie* case for personal jurisdiction when it asserted that the non-U.S. company acted through a U.S. agent.[12] The court remanded the case for rehearing on the issue of jurisdiction over the non-U.S. company, noting 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" of the parent.

In a more recent Seventh Circuit Court of Appeals case, *GCIU-Employer Retirement Fund v. Goldfarb Corporation*,[13] a multiemployer pension plan sought to collect withdrawal liability payments from a non-U.S. entity that was a member of the same controlled group as the withdrawing employer. In considering whether to dismiss the claim for lack of personal jurisdiction, the Seventh Circuit held that a non-U.S. parent's ownership of a majority of the contributing employer's stock was insufficient to establish the minimum contacts necessary for personal jurisdiction.[14]

Although the *Asahi* court did not address the extraterritorial enforceability of any judgment obtained under ERISA, the court did find that it had personal jurisdiction over Asahi with respect to the PBGC's claims and that, notwithstanding Asahi's status as a non-U.S. entity, Asahi was liable for unfunded benefit liabilities under 29 U.S.C. § 1362 and for termination premiums under 29 U.S.C. §§ 1306(a)(7) and 1307(e)(2) by virtue of being a member of a controlled group that included Metaldyne.

The *Asahi* district court determined that Asahi had directed its activities at the United States by acquiring Metaldyne with prior knowledge of the pension liability issues, and that this was sufficient to establish personal jurisdiction over Asahi. The district court highlighted the fact that Asahi had hired a U.S. company to conduct due diligence on Metaldyne for the specific purpose of identifying Metaldyne's pension plan obligations, and the court cited additional evidence showing that Asahi

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9 1992 U.S. Dist. LEXIS 22829 (S.D. Ohio July 16, 1992).

10 *Id.*

11 *Id.*

12 *PBGC v. Satralloy, Inc.*, 1993 U.S. Dist. LEXIS 21422 (S.D. Ohio Aug. 6, 1993).

13 565 F. 3d 1018 (7th Cir. 2009).

14 *Id.*

senior officers were aware of both the underfunded status of the Metaldyne plan and of the potential for controlled group liability.

The *Asahi* district court also determined that the PBGC's claim was based on Asahi's status as a controlled group member, which resulted from its acquisition of Metaldyne, and that the PBGC claim against Asahi therefore arose out of the activities that Asahi had directed at the United States. The *Asahi* court distinguished the Seventh Circuit's *Goldfarb* decision by noting that in that case, "liability had to have been triggered by some act of the defendant," *i.e.*, the decision to withdraw from a multiemployer plan, whereas in *Asahi* liability was controlled by "mere ownership at the time of termination."[15] However, in both the *Asahi* and *Goldfarb* cases, the liability of the non-U.S. entity arose as a result of it being a member of the same controlled group as the entity whose action (the withdrawal from the multiemployer plan in *Goldfarb* and the termination of the single employer plan in *Asahi*) resulted in the original liability upon which the controlled group liability was based.

The *Asahi* district court disagreed with the *Goldfarb* court's test for determining personal jurisdiction, criticizing the Seventh Circuit's ruling that specific jurisdiction exists against a non-U.S. defendant only where the action "*directly* arise[s] out of the specific contacts" between the defendant and the forum state as imposing "a more stringent test than the one required by the Supreme Court."[16] Having found personal jurisdiction over Asahi, the district court held that Asahi could be held liable on a controlled group theory for both any unfunded pension liabilities and any termination premiums. The *Asahi* district court therefore implicitly determined that such liabilities may be imposed on non-U.S. members of a controlled group.

Impact on Inbound M&A Activity

In the wake of the *Asahi* decision, a non-U.S. company that conducts customary due diligence in the course of an acquisition of a U.S.-based company is at risk of being found to have purposely directed its activities at the U.S., thereby meeting the first prong of the test for special jurisdiction. In the event that the non-U.S. company acquires the U.S.-based company and becomes a member of a controlled group with the U.S.-based company, any pension-related liabilities of the U.S.-based company may be viewed as arising out of the activities that the non-U.S. company directed at the United States, thereby meeting the second prong of the test for special jurisdiction. Once personal jurisdiction is established, the non-U.S. company likely will be held liable on the controlled group theory for any pension-related liabilities of the U.S. corporation.

While other courts ultimately may disagree with the *Asahi* court's analysis in finding personal jurisdiction,[17] non-U.S. corporations are on notice that pension liabilities of a U.S.-based target company might attach to the non-U.S. acquirer.

Practical Considerations

Establishing personal jurisdiction over a non-U.S. defendant is not the only significant hurdle that the PBGC faces when seeking to collect pension-related liabilities from non-U.S. corporations. Even if personal jurisdiction is found and controlled group liability is applied to a non-U.S. defendant, the

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15 *PBGC v. Asahi Tec Corp.*, 839 F. Supp. 2d 118, 128 (D.D.C. 2012).

16 *Id.*

17 *See, e.g., GCIU-Employer Retirement Fund v. Goldfarb Corp.*, 565 F.3d 1018 (7th Cir. 2009) (mere ownership of a controlling interest in a U.S. subsidiary not enough to establish personal jurisdiction over Canadian parent in suit by a multiemployer pension plan seeking to recover withdrawal liability).

PBGC may have difficulty collecting a judgment against the non-U.S. corporation if it has no assets in the United States other than a U.S.-based subsidiary that has filed for bankruptcy. We are aware of only one instance where the PBGC has taken action abroad to enforce its alleged claims.[18]

The *Asahi* case underscores the importance for all potential acquirers (particularly non-U.S. companies) of consulting with counsel early in the diligence process to consider investment structures that would mitigate the risk that the acquirer would be subject to significant legacy liabilities.

18 In *In re Ivaco*, the PBGC filed proofs of claim in Ontario, Canada, against Ivaco and certain of its Canadian subsidiaries for liability related to the pension plan of the U.S. subsidiary of Ivaco. Ivaco and certain of its affiliates had filed in Ontario Superior Court for protection under the Companies' Creditors Arrangement Act (the Canadian equivalent of chapter 11). Although the matter settled before the court addressed the controlled group liability issue and the issue of whether PBGC claims under ERISA are enforceable in Canada was not determined, it demonstrates the PBGC's willingness to pursue such claims against non-U.S. entities in foreign courts. *See* Approval Order, *In re Ivaco*, No. 03-CL-4932 (Aug. 4, 2005). The case does not, however, clarify whether the PBGC would prevail on pension-related claims in foreign courts. Even if a non-U.S. jurisdiction generally respects U.S. law, comity exceptions such as the revenue rule (a common law exception to comity barring the recovery of tax or revenue claims of foreign sovereigns) or the public law rule (barring statutory claims based on a public or penal purpose) may limit the enforceability of ERISA controlled group liability claims in non-U.S. courts. The issue becomes admittedly more interesting if the PBGC successfully sues the non-U.S. company in the U.S. and then seeks to enforce any resulting judgment abroad (*e.g.*, through a treaty).