

## U.S. District Court Holds Foreign Parent Subject to Personal Jurisdiction for its Bankrupt U.S. Subsidiary's Unfunded Pension Liabilities

The United States District Court for the District of Columbia<sup>1</sup> ruled that a foreign parent corporation with few U.S. contacts was subject to the court's jurisdiction in a suit brought by the Pension Benefit Guaranty Corporation ("PBGC") to collect unfunded pension liabilities of a U.S. subsidiary the foreign parent had acquired in 2007. While all members of a controlled group are jointly and severally liable under ERISA for the unfunded pension obligations of each member, the PBGC can only collect on any such liability by prevailing in an action either in the U.S. or abroad. There is a question as to whether a foreign court would enforce the statutory liability if the suit were brought directly abroad.<sup>2</sup> In *Asahi*, the District Court concluded that it could exercise personal jurisdiction over the foreign parent on the basis that it "purposefully directed activity towards the United States" in connection with its acquisition of a U.S. company and "the attendant assumption of controlled group pension liability."<sup>3</sup>

This memorandum discusses the factual background and District Court's analysis in *Asahi* and critically examines the court's reasoning.

### I. Background

#### *ERISA – Underfunded Pension Plans & Controlled Group Liability*

The PBGC is the federal entity responsible for insuring payments of promised retirement benefits under broad-based corporate pension plans. When an underfunded pension plan is terminated, the PBGC takes over administration of the plan and guarantees a

---

<sup>1</sup> [Pension Benefit Guaranty Corp. v. Asahi Tec Corp.](#), Civil Action No. 10-1936 (ABJ), 2012 WL 843937 (D.D.C. Mar. 14, 2012) ("*Asahi*").

<sup>2</sup> See generally Allan Reznick, et al., [Pension Benefit Guaranty Corp.-Controlled Group Claims Abroad](#), N.Y.L.J., Feb. 17, 2006. (describing PBGC's limited attempts to enforce claims based on a controlled group theory in Canada - which were ultimately settled without resolution as to enforceability - and describing a number of possible bases for the denial of PBGC claims on such theory abroad, including the common law exception to comity known as the revenue rule, the terms of relevant tax treaties, the public law exception to comity, a general presumption against extraterritoriality under U.S. law, and the general reliance interest at play in international commerce in favor of corporate separateness).

<sup>3</sup> *Asahi* at 1.

minimum level of benefits to participants. Under Section 4062(a) of ERISA, upon termination of an underfunded pension plan, the plan sponsor and its controlled group are jointly and severally liable for the plan's unfunded benefit liabilities, defined as the excess of the value of the benefit liabilities over the value of the assets, as of the termination date, and may also be liable for payment of a "termination premium" in the event of an involuntary termination by the PBGC or a distress termination by the plan sponsor.<sup>4</sup> A "controlled group" is defined to include trades or businesses under common control, and is based on whether one entity holds 80% of the total vote or value of all classes of stock in the business.<sup>5</sup>

### *Requirements of Personal Jurisdiction*

Under the Due Process Clause of the Fifth Amendment, a court may exercise personal jurisdiction over a foreign defendant for claims arising under federal law only if the defendant has sufficient contacts with the U.S. as a whole to justify the exercise of personal jurisdiction.<sup>6</sup> The Due Process Clause prohibits a court from exercising personal jurisdiction under circumstances that would offend "traditional notions of fair play and substantial justice."<sup>7</sup> Personal jurisdiction may be general or specific, and a defendant may be subject to general jurisdiction only if its contacts with the forum are "continuous and systematic."<sup>8</sup> Specific jurisdiction requires a finding that (i) the foreign defendant purposefully directed activity towards the United States and (ii) the cause of action arises out of or relates to such activity.<sup>9</sup> The contacts required for specific jurisdiction are those in existence at the time the underlying claim arose.

While the PBGC has long maintained that it has authority to pursue foreign affiliates within a controlled group,<sup>10</sup> its attempts to do so in U.S. courts have generally been unsuccessful due to the challenges associated with establishing sufficient contacts for the exercise of personal jurisdiction over foreign defendants. In two separate cases against

---

<sup>4</sup> ERISA § 4006(a)(7).

<sup>5</sup> ERISA § 4001(a)(14)(B); IRC § 414(b).

<sup>6</sup> U.S. CONST. amend. V.

<sup>7</sup> [Asahi Metal Indus. Co. v. Superior Court of Cal.](#), 480 U.S. 102, 113 (1987).

<sup>8</sup> [Helicopteros Nacionales de Colom., S.A. v. Hall](#), 466 U.S. 408, 415 (1984).

<sup>9</sup> [Burger King Corp. v. Rudzewicz](#), 471 U.S. 462, 472-73 (1985).

<sup>10</sup> [PBGC Opinion Letter 97-1](#) (May 5, 1997). In this opinion, a U.S. company which contributed to a multiemployer plan filed for bankruptcy under chapter 11 of the Bankruptcy Code and requested an opinion regarding the application of controlled group liability to its sister subsidiaries located in the United Kingdom. The PBGC concluded that Congress did not intend to exclude foreign entities from the requirements of Sections 414(c) and 1563(a) of the Internal Revenue Code or Section 4001(b) of ERISA, and the UK subsidiaries could be held liable under the theory of controlled group liability. However, the PBGC "express[ed] no view regarding jurisdictional issues relating to suits against foreign situs entities.

foreign defendants for withdrawal liability under a controlled group theory,<sup>11</sup> the Seventh Circuit held that it could not exercise personal jurisdiction over the foreign defendant as a member of the U.S. subsidiary's controlled group solely because ERISA imposes controlled group liability on the foreign affiliate. Specifically, the Seventh Circuit held that "constitutional due process requires that personal jurisdiction cannot be premised on stock ownership alone where corporate formalities are substantially observed and the parent does not exercise an unusually high degree of control over the subsidiary."<sup>12</sup>

## II. Asahi Tec's Motion to Dismiss and the District Court's Analysis

The facts in *Asahi* are not particularly remarkable. In January 2007, Asahi Tec acquired Metaldyne, an automotive parts manufacturer based in Michigan. Metaldyne maintained a defined benefit pension plan subject to Title IV of ERISA (the "Plan"). Metaldyne subsequently filed for bankruptcy in 2009 under chapter 11 in the United States Bankruptcy Court for the Southern District of New York.<sup>13</sup> In July 2009, the PBGC filed a complaint seeking termination of the Plan and appointment as the Plan's statutory trustee under Section 4042(c) of ERISA. The Plan was terminated effective July 31, 2009 and on September 18, 2009, the PBGC sent a demand letter to Asahi Tec for unfunded benefit liabilities and termination premiums. Asahi Tec refused to pay and the PBGC filed suit.

In its motion to dismiss the PBGC's complaint, Asahi Tec argued that there was no basis for the District Court to exercise personal jurisdiction over it since it did not have the necessary "systematic and continuous"<sup>14</sup> contacts with the United States, and it had no involvement in the circumstances relating to the underfunding or termination of the Plan underlying the PBGC's claim.

The PBGC argued that Asahi Tec had the requisite contacts with the U.S. to justify an exercise of general or specific jurisdiction, citing in particular the following:

- Asahi Tec performed extensive due diligence prior to the acquisition, knew that the Plan was underfunded and knew that by acquiring Metaldyne it would become part of Metaldyne's controlled group for ERISA purposes, and Asahi Tec's potential exposure was reflected in the purchase price;
- The merger agreement between Asahi Tec and Metaldyne contained customary standstill covenants under which Metaldyne agreed not to take certain non-ordinary course actions prior to closing without obtaining Asahi Tec's consent and a

---

<sup>11</sup> See [GCIU-Employer Retirement Fund v. Goldfarb Corp.](#), 565 F.3d 1018 (7th Cir. 2009); see also [Cent. States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp.](#), 230 F.3d 934 (7th Cir. 2000).

<sup>12</sup> [Cent. States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp.](#), 230 F.3d 934, 943 (7th Cir. 2000).

<sup>13</sup> [In re Metaldyne Corp., et al.](#), Case No. 09-13412 (MG) (Bankr. S.D.N.Y. 2009).

<sup>14</sup> [Int'l Shoe Co. v. State of Washington](#), 326 U.S. 310, 317 (1945).

commitment to continuing certain benefits for a year following the acquisition;

- Asahi Tec’s alleged use of Metaldyne as its “corporate agent and alter ego” to create a “globally integrated automotive parts supplier.” The PBGCs only support for this position was to cite various Asahi Tec-issued communications referencing integration plans for Metaldyne, and describing itself as a company with a “modern, global footprint”; and
- Asahi Tec agreed to submit to jurisdiction in unrelated prior litigation, which the PBGC concluded was an admission that Asahi Tec was subject to U.S. jurisdiction in that case.

To rebut the PBGC’s argument that Asahi Tec had sufficient contacts for an exercise of personal jurisdiction, Asahi Tec pointed to the following facts:

- It is a Japanese company with headquarters, offices and manufacturing facilities all located in Japan and its principal customers (truck and car manufacturers) are located in Japan, other parts of Asia and Europe;
- Asahi Tec conducts no business in the U.S., does not sell products to customers in the U.S. and has no offices, employees, bank accounts, property or other assets in the U.S.; and
- Following its acquisition of Metaldyne, Asahi Tec performed the usual role of a corporate parent (where it elected Metaldyne’s directors, reported consolidated financial results that included Metaldyne and received information from Metaldyne about its operations) and the CEO of Metaldyne became co-CEO with Asahi Tec’s then-CEO, but the two companies operated independently – Asahi Tec and Metaldyne kept separate books and bank accounts, held separate board meetings and filed separate tax returns.

*District Court’s Opinion*

The District Court denied Asahi Tec’s motion to dismiss for lack of personal jurisdiction, holding that the PBGC had made a prima facie showing that Asahi Tec was subject to the specific jurisdiction of the Court, where Asahi Tec had purposefully directed activity towards the United States in connection with its acquisition of Metaldyne and its knowing assumption of controlled group liability. The District Court emphasized Asahi Tec’s knowledge of the Plan’s unfunded liabilities and potential controlled group liability as a result of the diligence process in connection with the acquisition. The District Court cited this fact as evidence of Asahi Tec’s purposeful contacts with the forum in determining that its exercise of personal jurisdiction was “fair and just” in conformance with the requirements

of the Due Process Clause, since Asahi Tec should have reasonably anticipated being sued in the U.S.<sup>15</sup>

The District Court noted that its exercise of specific jurisdiction over Asahi Tec does not automatically make Asahi Tec liable for unfunded benefit liabilities related to Plan termination, but simply requires Asahi Tec to be subject to litigation on its *potential* liability in U.S. courts. However, since joint and several liability arises by operation of law once an entity is a member of a plan sponsor's controlled group and the plan is terminated, the Court's caveat is little more than a tautology.

### III. Is the Court's Decision Correct?

We do not believe that the Court's decision is correct.

First, the position taken by the District Court is inconsistent with well-established law that merely owning a subsidiary does not automatically create personal jurisdiction over a foreign parent,<sup>16</sup> since contacts of a subsidiary cannot be imputed to a corporate parent so long as corporate formalities are observed. The record indicates that Asahi Tec and Metaldyne operated as two separate corporations and observed corporate formalities. The District Court conflated liability with jurisdiction when it held that being a member of a "controlled group" under ERISA is sufficient contact with the forum to subject Asahi Tec to suit in the U.S., absent any other contacts with the U.S. or relating to the Plan and its termination.

Second, mere knowledge of a potential injury is usually not considered conduct directed at the forum, absent further activity in the forum by the foreign corporation.<sup>17</sup> The District Court's reasoning suggests that Asahi Tec would not have been subject to personal jurisdiction if it had acquired Metaldyne *without doing any diligence* on Metaldyne's pension plan or if it conducted its diligence through a U.S. subsidiary or, perhaps, even if counsel had advised it that it would not be subject to personal liability. That could not possibly be the intended result. Additionally, Asahi Tec's possible consideration of exposure to controlled group liability in its Metaldyne purchase price deliberations is not sufficient for the District Court to conclude that the exercise of personal jurisdiction comports with the Due Process Clause without Asahi Tec having any additional contacts with the forum.

---

<sup>15</sup> The Court also noted that Asahi Tec had previously submitted to general jurisdiction in an action in 2004 and had other contacts with the United States following its acquisition with Metaldyne, which while insufficient to warrant a finding of general jurisdiction on their own, bolstered the Court's belief that the exercise of specific jurisdiction in this case was fair and just.

<sup>16</sup> See [United States v. Bestfoods](#), 524 U.S. 51, 61 (1998) ("It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries.").

<sup>17</sup> See [Burger King Corp. v. Rudzewicz](#), 471 U.S. 462, 474 (1985).

Third, citing a prior admission by Asahi Tec to personal jurisdiction in an unrelated case as a factor to consider in determining whether the exercise of personal jurisdiction in an instant case is fair and just is unsupported by the case law since courts generally require minimum contacts to be present when the complaint is filed and will not consider stale contacts when determining whether to exercise personal jurisdiction.<sup>18</sup>

#### **IV. Implications of the Decision if it is Upheld**

Though the District Court granted Asahi Tec's request that it certify its decision dismissing Asahi Tec's motion to dismiss for lack of personal jurisdiction to the Court of Appeals for the D.C. Circuit for interlocutory appeal, it simultaneously denied Asahi Tec's motion to stay proceedings – requiring it to litigate while the appellate process runs its course.<sup>19</sup> The D.C. Circuit Court reinforced this dynamic by denying Asahi Tec's petition for permission to appeal – holding that Asahi Tec had “failed to show that ‘exceptional circumstances’ justify an interlocutory appeal.”<sup>20</sup> As such, Asahi Tec will be required to litigate the merits of the PBGC's case against it before it is able to raise jurisdictional challenges at the appellate level.

We believe that other courts addressing the issue of personal jurisdiction over a foreign parent corporation are unlikely to follow the District Court's reasoning and conclusion. However, the decision as it currently stands discourages foreign entities from investing in U.S. entities with significant unfunded pension liabilities. In other words, the PBGC may have prevailed to the detriment of future foreign investment in U.S. companies, restricting the potential growth and sustainability of those companies requiring additional capital and potentially increasing the number of distress plan terminations.

Please contact any of the partners or counsel listed under Bankruptcy or Executive Compensation and ERISA in the “Practices” section of our website ([www.cgsh.com](http://www.cgsh.com)) or any of your other regular contacts at the firm for further information about the matters discussed above.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

---

<sup>18</sup> See, e.g., In re S. African Apartheid Litig., 643 F.Supp. 2d 423, 436-37 (S.D.N.Y. 2009) (refusing to consider contacts more than seven years before the complaint was filed).

<sup>19</sup> Order, Pension Benefit Guaranty Corp. v. Asahi Tec Corp., Civil Action No. 10-1936 (ABJ), (D.D.C. Apr. 24, 2012), ECF No. 47.

<sup>20</sup> Per Curiam Order, In re Asahi Tec Corp., No. 12-8007 (D.C. Cir. July 16, 2012), ECF No. 1383743.

NEW YORK

One Liberty Plaza  
New York, NY 10006-1470  
T: +1 212 225 2000  
F: +1 212 225 3999

WASHINGTON

2000 Pennsylvania Avenue, NW  
Washington, DC 20006-1801  
T: +1 202 974 1500  
F: +1 202 974 1999

PARIS

12, rue de Tilsitt  
75008 Paris, France  
T: +33 1 40 74 68 00  
F: +33 1 40 74 68 88

BRUSSELS

Rue de la Loi 57  
1040 Brussels, Belgium  
T: +32 2 287 2000  
F: +32 2 231 1661

LONDON

City Place House  
55 Basinghall Street  
London EC2V 5EH, England  
T: +44 20 7614 2200  
F: +44 20 7600 1698

MOSCOW

Cleary Gottlieb Steen & Hamilton LLC  
Paveletskaya Square 2/3  
Moscow, Russia 115054  
T: +7 495 660 8500  
F: +7 495 660 8505

FRANKFURT

Main Tower  
Neue Mainzer Strasse 52  
60311 Frankfurt am Main, Germany  
T: +49 69 97103 0  
F: +49 69 97103 199

COLOGNE

Theodor-Heuss-Ring 9  
50688 Cologne, Germany  
T: +49 221 80040 0  
F: +49 221 80040 199

ROME

Piazza di Spagna 15  
00187 Rome, Italy  
T: +39 06 69 52 21  
F: +39 06 69 20 06 65

MILAN

Via San Paolo 7  
20121 Milan, Italy  
T: +39 02 72 60 81  
F: +39 02 86 98 44 40

HONG KONG

Bank of China Tower  
One Garden Road  
Hong Kong  
T: +852 2521 4122  
F: +852 2845 9026

BEIJING

Twin Towers – West (23rd Floor)  
12 B Jianguomen Wai Da Jie  
Chaoyang District  
Beijing 100022, China  
T: +86 10 5920 1000  
F: +86 10 5879 3902

BUENOS AIRES

CGSH International Legal  
Services, LLP-  
Sucursal Argentina  
Avda. Quintana 529, 4to piso  
1129 Ciudad Autonoma de Buenos Aires  
Argentina  
T: +54 11 5556 8900  
F: +54 11 5556 8999

SÃO PAULO

Cleary Gottlieb Steen & Hamilton  
Consultores em Direito Estrangeiro  
Rua Funchal, 418, 13 Andar  
São Paulo, SP Brazil 04551-060  
T: +55 11 2196 7200  
F: +55 11 2196 7299