ACQUIRING A U.S. COMPANY WITH AN UNDERFUNDED PENSION PLAN: WHAT IS A CANADIAN COMPANY TO DO?

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When an underfunded single-employer pension plan is terminated, the contributing employer and each member of the contributing employer's controlled group are jointly and severally liable to the Pension Benefit Guaranty Corporation (PBGC) for termination liability under the Employee Retirement Income Security Act of 1974 (ERISA). Similar rules under ERISA apply when a contributing employer withdraws from an underfunded multiemployer pension plan, resulting in withdrawal liability. In either case, no exception is made for foreign members of the contributing employer's controlled group. Thus, the Canadian parent corporation of a U.S. subsidiary is liable to the PBGC for termination liability if that subsidiary terminates its underfunded single-employer pension plan (or to the multiemployer fund for withdrawal liability, in the case of underfunded multiemployer plan).

Liability to the PBGC (or the multiemployer fund) is one thing, being subject to jurisdiction in the United States is another. It is clear that corporate ownership alone is not sufficient to confer jurisdiction; rather, what is needed is corporate ownership plus. Just what constitutes "plus" is where things can get blurry.

In a 2009 case involving a multiemployer fund suing a Canadian parent company of a U.S. subsidiary for withdrawal liability, an appellate court held that the Canadian parent company, although liable to the multiemployer fund under ERISA, was not subject to specific jurisdiction in the United States. Key to this conclusion was the fact that the Canadian parent company played no direct role in the U.S. subsidiary's withdrawal from the multiemployer fund.*

So far, this seems pretty straight forward: if a Canadian controlled group member plays no role in the decision to withdraw from or to terminate a pension plan, there is no "plus." However, a 2012 court decision held that a Japanese controlled group member was subject to specific jurisdiction for termination liability associated with its United States subsidiary's termination of its single-employer pension plan, even though the Japanese member played no direct role in terminating the pension plan. The basis for the court's holding was that the Japanese member became aware of the potential pension liability during its due diligence in acquiring the U.S. subsidiary and factored the pension liability risk into the acquisition price it paid.

By now you may be wondering whether the best tactic is to bury your head in the sand. Even assuming U.S. courts would accept a jurisdictional defense to pension liabilities based on deliberate ignorance—a bet we do not recommend you make—in at least one instance, to the author's knowledge, the PBGC has initiated proceedings in Ontario relating to termination liability against a Canadian member of a controlled group. That case settled before a Canadian court decided whether it would enforce the PBGC's claims.

So, if you are a Canadian company looking to acquire a U.S. subsidiary with an underfunded pension plan (or one that is contributing to an underfunded multiemployer plan), what are you to do? Unfortunately, there are no clear answers. Until further guidance emerges, it may be advisable to proceed as if a Canadian member of a controlled group will be called upon to satisfy pension liabilities arising from a U.S. controlled group member's termination of its pension plan or withdrawal from a multiemployer pension plan.

For additional discussion of the topic, please refer to "U.S. DB Plan Underfunding," written in July 2012 by Hodgson Russ partner Richard Kaiser for *Canadian Tax Highlights*, a publication of the Canadian Tax Foundation.

* Note that a foreign controlled group member's contacts with the United States may be sufficiently systematic and continuous—such as, for example, maintaining a place of business or having employees in the United States—that general jurisdiction in the United States exists. This is opposed to specific jurisdiction, which requires that the foreign controlled group member's contacts with the United States give rise to the claim at issue. The discussion in this article assumes that general jurisdiction would not exist.