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Hands Across the Waters: The Expansion of Personal Jurisdiction for Withdrawal Liability to Foreign Entities

By Lewis Cohn

Rarely does the denial of a prediscovery motion to dismiss in civil actions signal seismic changes in the law. Given the early stages of a case and the reluctance of courts to grant such motions, the general expectation is that such dismissal motions will be denied. Because these motions are decided by the trial courts, their decisions usually do not involve policy considerations and rarely have an impact beyond the parties to the action. Even as to the parties, the denial of a motion to dismiss generally means only that the parties will continue to be engaged in litigation for the proverbial ''long haul.''

It is against this backdrop of general expectations that the denial of the defendant's motion to dismiss by the U.S. District Court for the District of Columbia in *Pension Benefit Guaranty Corporation v. Asahi Tec Corp.*[1] casts a different and more ominous shadow. Defendant Asahi, a Japanese corporation, acquired an American manufacturer whose employees participated in a multiemployer pension plan subject to the Employee Retirement Income Security Act[2] and the Multiemployer Pension Plan Amendments Act[3]. After the American subsidiary filed for bankruptcy and withdrew from the pension plan, the plaintiff Pension Benefit Guaranty Corporation—a federal agency created by ERISA to administer the act—filed an action in the federal courts to recover the withdrawal liability from Asahi that PBGC could no longer pursue against the now-bankrupt American subsidiary.

In response to the government's claim that the Japanese parent corporation was jointly and severally liable for the withdrawal liability of its subsidiary, the defendant filed a motion to dismiss the complaint for lack of personal jurisdiction. Despite the absence of any corporate presence in the United States, the trial court found jurisdiction over defendant solely by virtue of its ownership of the subsidiary. In essence, the district court utilized the legal predicate for defendant's liability under the pension statutes—i.e., defendant's ownership of the subsidiary—as a basis for determining that defendant was subject to the court's jurisdiction. Stated differently, whereas prior cases concerning jurisdiction focused on the minimum contacts related to a defendant's actions or presence in a forum state in order to assess personal jurisdiction, the district court held in *Asahi* that the foreign defendant's mere ownership of an American subsidiary was sufficient to confer jurisdiction on the court.

The court's decision not only required the parties to continue to litigate their dispute, but established a potentially new playing field on which their dispute was to be resolved. Whereas foreign entities could formerly escape the withdrawal liability incurred by their American affiliates based on the absence of minimum contests with a forum state, the district court's decision in *Asahi* potentially signaled a new era in which foreign entities would be required to pursue a two-tiered defense. Such foreign entities would have to aggressively contest the issue of jurisdiction and, if unsuccessful, thereafter equally aggressively dispute withdrawal liability.

Moreover, by allowing mere ownership of an American affiliate to serve as the basis for personal jurisdiction over a foreign entity, the *Asahi* court created a dangerous blurring of jurisdictional and withdrawal liability issues in which such ownership could simultaneously force a foreign entity before an American court, which could immediately thereafter find the defendant liable under ERISA. As foreign companies increasingly seek to infiltrate American markets through mergers and acquisitions, they do so at their own risk unless issues such as those raised by the *Asahi* decision are considered.

Withdrawal Liability Issues

At the heart of the *Asahi* decision is the concept of withdrawal liability. Conceived as a means of addressing the unfunded obligations of multiemployer pension plans whose employer-members withdraw or terminate their obligations to contribute to the plans, withdrawal

[1] 839 F.Supp.2d 118, 53 EBC 2346 (D.D.C. 2012).
[2] 29 U.S.C. §§ 1001-1361.
[3] 29 U.S.C. §§ 1381-1461.

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liability is intended ''to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated.''[4] Although prefigured by the enactment of ERISA, withdrawal liability gained particular impetus through the adoption of MPPAA in 1980 as a response to the increased amount of underfunded obligations of pension plans that PBGC had to assume.[5]

Withdrawal liability is incurred when an employer that participates in a multiemployer pension plan withdraws from a plan or terminates covered operations.[6] Withdrawal may occur voluntarily—such as when the employer terminates operations or files for bankruptcy—or involuntarily under circumstances defined by statute.[7] Regardless of how withdrawal occurs, the withdrawing employer may incur withdrawal liability and must pay its proportionate share of the pension plan's unfunded vested benefits[8]. Because these obligations may bear no relationship to the employer's participation in the plan or the manner in which it met its past obligations to the plan, the amount of such withdrawal liability may be onerous—particularly for a withdrawing employer that may already be in financial extremis.

Once an employer incurs withdrawal liability, all members of its controlled group are jointly and severally liable with the employer.[9] As generally defined by statute, all entities or persons who are engaged in ''trades or businesses'' and share more than an 80 percent common ownership with the withdrawing employer are deemed to be members of the employer's controlled group.[10] Because controlled group membership is statutorily-defined by the ownership in common shared by the withdrawing employer and the affiliated entity or individual, the fact that the employer and the other entity had no economic or business nexus is immaterial.[11]

As part of statutory scheme by which withdrawal liability was recognized, PBGC was established to administer the national pension plan termination insurance program.[12] PBGC performs a series of distinct roles in accordance with its statutory mandate. When a pension plan terminates without sufficient assets to fund benefits to which participants are entitled, PBGC, as statutory trustee, assures that participants receive guaranteed benefits.[13] PBGC is also charged with quasi-legislative powers to adopt regulations to implement the legislative intent of ERISA and MPPAA and to interpret both the statutes and such regulations.[14] Finally, PBGC may enforce the funding obligations of a withdrawing employer and its controlled group through litigation against these entities.[15]

Notwithstanding the mechanistic manner in which withdrawal liability is statutorily extended to an affiliated entity or person, at least, implicit in the assessment of such liability is the notion that the courts have personal jurisdiction over the affiliated entity or person. In most cases, both the withdrawing employer and the affiliated entities and persons comprising the employer's controlled group are located in the United States and resolution of personal jurisdiction issues occurs in accordance with well-settled principles.[16] As foreign businesses continue to infiltrate American markets, the question of the ability of the federal courts to assert jurisdiction over these businesses will increasingly be called into question. In this regard, the *Asahi* decision may be a harbinger of a new trend that may acquire acceptance as the courts are asked to intervene in such matters.

Parameters of Personal Jurisdiction

As defined primarily by decisions of the U.S. Supreme Court in response to the long-arm statutes enacted by the different states, the Supreme Court in its seminal decision in *International Shoe Co. v. Washington*[17], articulated the principle that a state could exercise personal jurisdiction over an out-of-state defendant if the defendant had ''certain minimum contacts with [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' ''[18] From this general principle, the Supreme Court, in *International Shoe*, recognized that ''general jurisdiction'' was acquired in ''instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.''[19] By way of contrast, ''specific jurisdiction'' occurred when a defendant's activity in a forum state gave rise to a cause of action against the defendant,[20] particularly when the defendant ''purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'' [21]

The evolutionary expansion of personal jurisdiction has been no happenstance. It has been a function of the growth of interstate commerce. As the Supreme Court observed in *McGee v. International Life Ins. Co.*: ''Today many commercial transactions touch two or more States and many involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time, modern transportation and communication have made much less burdensome for a party sued to defend

[4] *Nachman Corp. v. Pension Benefit Guaranty Corporation.*, 445 U.S. 359, 374, (1980).
[5] 29 U.S.C. § 1302, et seq.
[6] 29 U.S.C. § 1381; 29 U.S.C. § 1341; 29 U.S.C. § 1342.
[7] 29 U.S.C. § 1301(b)(1); 29 U.S.C. § 1383.
[8] 29 U.S.C. § 1381.
[9] 29 U.S.C. § 1301(b)(1).
[10] 29 U.S.C. § 1301(b)(1); 26 C.F.R. § 414(c)-2.
[11] *Local 478 Trucking & Allied Indus. Pension Fund v. Jayne*, 778 F. Supp. 1289, 1305, 14 EBC 2510 (D.N.J. 1991).
[12] 29 U.S.C. § 1302(a).
[13] 29 U.S.C. § 1302(b)(8); 29 U.S.C. § 1322a; 29 U.S.C. § 1342(b)(1).
[14] 29 U.S.C. § 1302(b); PBGC Opinion 87-7; *Bellande v. Pension Benefit Guaranty Corporation*, 726 F.2d 839, 843 (D.C. Cir. 1984).
[15] 29 U.S.C. § 1302(b)(1).
[16] *Haile v. Henderson Nat'l Bank*, 657 F.2d 816, 824-826 (6th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982).
[17] 326 U.S. 310 (1945).
[18] 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).
[19] 326 U.S. at 318.
[20] Id.
[21] *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

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himself in a State where he engages in economic activity.''[22]

Yesterday's growth in interstate commerce has been paralleled by today's expansion in international trade. As markets have gradually become global, the courts have addressed jurisdictional issues involving foreign entities by importing well-tested principles from the world of interstate commerce. Not the least of these principles have been the concepts of general and specific jurisdiction.

In *J. McIntyre Machinery, Ltd. v. Nicastro*, the Supreme Court considered whether the New Jersey state courts had acquired jurisdiction—without specifying general or specific jurisdiction—over a British manufacturer through a stream-of-commerce analysis.[23] Although defendant maintained no corporate presence in and engaged in no trade activities within the state, plaintiff nonetheless contended that defendant's metal-shearing machine on which plaintiff had been injured had entered New Jersey through the stream of commerce. A sharply-divided Supreme Court disagreed, finding that defendant had not ''engaged in conduct purposefully directed at New Jersey and that, as such, it was not subject to personal jurisdiction in the State.''[24] In his plurality opinion, Justice Anthony Kennedy observed that the mere transmission of goods to the United States was not enough; it is ''only where the defendant can be said to have targeted the forum'' for such goods that states obtain personal jurisdiction over foreign defendants.[25]

Preludes to Asahi

It is against the legal backdrop provided by such decisions that PBGC has cautiously sought to expand withdrawal liability to include foreign entities. Given the increased efforts of foreign businesses to acquire and merge with American entities, the paucity of cases in which PBGC has asserted withdrawal liability claims against foreign entities may indicate that the agency has ''chosen its battles'' for fear of rejection on jurisdictional grounds. Even so prior to the *Asahi* decision, the track record of PBGC has been mixed at best.

In 1993, PBGC sued Satralloy Inc. for withdrawal liability as well as Satralloy's corporate affiliates, Finsat International Ltd. and Satra Ltd. as members of Satralloy's controlled group under ERISA.[26] Finsat and Satra, both English entities, filed pre-answer motions to dismiss based on a lack of personal jurisdiction over them. The district court undertook separate analyses of whether personal jurisdiction had been acquired over Finsat and Satra.

As to Finsat, the court found, in the first instance, that defendant had not engaged in ''some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State thus invoking the benefits and protections of its laws.''[27] More important, the court held that Finsat's membership within a statutorily-defined ERISA controlled group, by itself, did not qualify as a minimum contact with the forum state.[28]

The district court reached a contrary result with respect to Satra. While the court rejected Satra's membership in a controlled group, or its ownership of an American subsidiary as bases upon which to claim personal jurisdiction,[29] the court did find that Satra had conducted operations in Ohio through the subsidiary, U.S. Chrome.[30] and, as a result, could ''reasonably foresee being haled into court here.''[31]

In early 1997, PBGC was provided with a silver-plate opportunity to provide its own interpretation as to whether withdrawal liability could reach foreign businesses without fear of judicial reversal. In Advisory Opinion 97-1, PBGC was requested to exercise its interpretive authority to provide guidance with respect to a situation involving a foreign controlled group member.

At issue in Opinion 97-1 was the withdrawal liability of eight British subsidiaries whose American parent had filed for bankruptcy and had withdrawn from a pension plan. PBGC opined that resolution of the question posed involved the application of basic principles of withdrawal liability. From PBGC's perspective, the fact that the domestic corporation that had initially withdrawn from the pension plan held controlling interests in the British subsidiaries was a sufficient basis upon which to conclude that the subsidiaries constituted a single employer with the domestic corporation and, ''as such, they would be jointly and severally liable for withdrawal liability.''[33]

In reaching this determination, PBGC explicitly found that its decision did ''not implicate the extraterritorial application of ERISA.''[33] Based on the fact that the events that gave rise to withdrawal liability all occurred within the territorial confines of the United States, PBGC characterized its decision as ''the domestic application of United States law.''[34] Further, PBGC asserted that, if the British subsidiaries could be differentiated from their American counterparts, such ''juggling of their activities to eviscerate the liability provisions of ERISA'' would contravene a basic predicate of the pension laws, namely, the avoidance of withdrawal liability by the fractionalizing of related companies' business operations.[35] As PBGC observed, ''[t]hese purposes would be ill-served by a controlled group principle that did not apply to *all* entities under common control.''[36]

Finally, PBGC noted from the language by which withdrawal liability had been defined in ERISA and MPPAA that no attempt had been made to exempt foreign entities from the reach of such statutes.[37] As PBGC stated: ''Clearly, if Congress had intended to except foreign entities from the ambit of relevant controlled

[22] *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222-223 (1957).
[23] 564 U.S. ___ (2011).
[24] 2011 BL 168067 at *2.
[25] Id. at *7.
[26] *Pension Benefit Guaranty Corp. v. Satralloy Inc.*, 1993 U.S. Dist. LEXIS 21422 (S.D. Oh. 1993).
[27] Id. at *6 (quoting, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).
[28] Id. at *7.
[29] Id. at *12.
[30] Id. at *12-13.
[31] Id. at *13.
[33] Opinion 97-1, slip op., at 2.
[33] Id.
[34] Id.
[35] Id.
[36] Id. (emphasis in original)
[37] Id.

group provisions,. . .it would have done so expressly.''[38] In so holding, however, PBGC was careful to denote the outer limits of its decision by observing that ''we express no view regarding jurisdictional issues relating to suits against foreign situs entities.''[39]

Most recently, in *GCIU-Employer Retirement Fund v. The Goldfarb Corp.*,[40] the U.S. Court of Appeals for the Seventh Circuit provided further and, perhaps, the most definitive review of the manner in which withdrawal liability could be asserted against a foreign entity. Although this case did not involve PBGC, it represented the only consideration of this issue by an appellate court prior to the issuance of the *Asahi* decision.

At issue in *Goldfarb* was not only the acquisition and ownership of more than 80 percent of an American company by the defendant, a Canadian corporation, but also defendant's considerable involvement with Fleming's (the American company's) creditors in the six-year period immediately preceding Fleming's demise. The involvement included principals of Goldfarb serving as officers and directors of Fleming and negotiating terms with Fleming's principal lender by which Fleming could remain in business. Thus, by the time Fleming ultimately filed for bankruptcy—thus, triggering withdrawal liability—not only did Goldfarb fall well within the statutorily-defined ambit of Fleming's controlled group but had a substantial history of involvement in Fleming's internal financial affairs.

After the district court granted Goldfarb's pre-answer motion to dismiss for lack of personal jurisdiction, the plaintiff appealed to the Seventh Circuit. On appeal, the pension plan conceded that Goldfarb's contacts with the United States were insufficient to support general jurisdiction over the defendant, i.e., those contacts did not constitute continuous and systematic general business within the forum state. The Seventh Circuit then directed its attention to whether Goldfarb's ''contacts would fairly and justly merit specific jurisdiction.''[41]

At the outset, the appeals court rejected the notion that Goldfarb's mere affiliation with Fleming and, in particular, its ownership interests afforded any basis for asserting personal jurisdiction over the defendant.[42] Although such ownership interests could afford a basis for assessing withdrawal liability, '' 'jurisdiction and liability are two separate inquiries.' ''[43] As the court observed, ''Goldfarb's contacts with the forum must be assessed separate from Fleming's.''[44]

The Seventh Circuit found that Fleming's withdrawal liability had not been triggered by any general decision to sell Fleming or its financial demise.[45] Rather, the withdrawal liability had resulted from the actual sale of Fleming's assets without complying with ERISA's safe-harbor provisions.[46] The court noted that the sale of Fleming's assets occurred after Goldfarb had surrendered effective control over Fleming's operations.[47]

In a final effort to translate Goldfarb's minimum contacts into a ground for asserting specific jurisdiction, plaintiff argued that Goldfarb's negotiating tactics had induced Fleming's lenders to be more aggressive and obdurate with respect to the remedies that they pursued.[48] The plaintiff similarly suggested that Goldfarb's agreement to ''abandon its investment'' had hastened the sale of Fleming's assets, which caused its withdrawal from the pension plan.[49] These arguments went for naught.

As the Seventh Circuit ultimately concluded, the contacts on which the plaintiff relied were ''too attenuated to support specific personal jurisdiction.''[50] As the court further observed: ''[I]t is important to realize that even if defendant's contacts included an acquiescence that Fleming would be sold, there is no evidence that defendant's contacts involved the decision to sell assets *without considering the Fund obligations*.''[51] The bottom line for the Seventh Circuit was that, without some direct nexus between Goldfarb's particular contacts with the forum state and the specific ground on which withdrawal liability had been incurred (in this case, the sale of Fleming's assets without complying with ERISA's safe-harbor provisions), the court would not let such contacts serve as a basis for specific jurisdiction.

Asahi Rears its Head

The *Asahi* case represents PBGC's most notable recent attempt to extend withdrawal liability to a foreign entity. As a decision on a pre-answer motion to dismiss, the district court's opinion represents an interlocutory determination that may not even be binding on the ultimate outcome of the case. Furthermore, as a decision by a trial court, the decision does not carry the policy-making implication of an appellate determination. Nonetheless, *Asahi* may be illustrative of the extents to which PBGC and the courts are prepared to go to sustain jurisdiction over a foreign member of an ERISA controlled group.

In 2007, Asahi Tec Corp. acquired an American company, Metaldyne Corp. At the time of the acquisition, Asahi and Metaldyne were in affiliated businesses with Asahi manufacturing metal components for trucks and Metaldyne manufacturing powertrain and subassemblies for automobiles and light trucks. To facilitate the acquisition transaction, Asahi formed a wholly-owned American subsidiary to pay Metaldyne's shareholders for their interests in Metaldyne.

As alleged in the complaint by which it initiated its lawsuit, PBGC asserted that Asahi had performed due diligence as to the Metaldyne liabilities that Asahi would be assuming. Among the obligations that Asahi specifically investigated were the unfunded liabilities for which Metaldyne and other employers were responsible to the multiemployer pension plan in which they participated.

Two years after it was acquired by Asahi, Metaldyne filed a voluntary petition for bankruptcy. PBGC thereafter filed an adversary-proceeding complaint against Metaldyne to terminate the pension plan and seeking appointment as the statutory trustee of the plan. Prior

[38] Opinion 97-1, slip. op., at 3.
[39] Id.
[40] 565 F.3d 1018, 46 EBC 2157 (7th Cir. 2009).
[41] Id. at 1023.
[42] Id. at 1022.
[43] Id. at 1023 (quoting *Central States, Southeast & Southwest Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 944, 25 EBC 1033 (7th Cir. 2000)).
[44] Id. at 1024.
[45] Id.
[46] 29 U.S.C. § 384.
[47] 565 F.3d at 1024-1025.
[48] Id. at 1025.
[49] Id.
[50] Id.
[51] Id. (emphasis in original)

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to doing so, PBGC approached Asahi to consider assuming sponsorship of the pension plan, which Asahi declined. Asahi's declination of this obligation prompted the filing of PBGC's complaint and the commencement of efforts to enforce withdrawal liability against Asahi as a member of the Metaldyne controlled group.

In response to Asahi's motion to dismiss, PBGC conceded that Asahi had not engaged in the type of continuous and systematic business contact that would permit the assumption of general jurisdiction over the defendant. PBGC, nonetheless, contended that specific jurisdiction had been acquired over Asahi by virtue of the purposeful activities in which defendant had engaged and by which it had become a member of the controlled group of Metaldyne.

Asahi argued that it could not be subject to specific jurisdiction because it had engaged in no wrongful conduct that resulted in the termination of Metaldyne's participation in the subject plan. PBGC countered that the imposition of withdrawal liability was not predicated on the manner in which Metaldyne's participation had terminated or any wrongful conduct on the part of Asahi. Rather, specific jurisdiction had been acquired by Asahi's purposeful action to become a member of Metaldyne's controlled group at the time that Asahi acquired the American company.

Accepting this line of reasoning, the district court observed that Asahi joined the Metaldyne controlled group ''with its eyes wide open.''[52] Indeed, the court undertook a painstakingly detailed analysis of how Asahi explored the pension fund obligations that Metaldyne had incurred.[53] As the court graphically described, ''that particular liability was a known risk expressly factored into the transaction that defendant voluntarily crossed the Pacific to undertake.''[54]

Having established a factual predicate for its eventual decision, the district court then addressed the legal arguments advanced by Asahi based on precedents such as the *Goldfarb* decision and the Seventh Circuit's decision in *Central States, Southeast & Southwest Areas Pension Fund v. Reimer Express World Corp.*[55] upon which that court had relied in reaching its decision in *Goldfarb*. As to the latter decision, the district court distinguished *Reimer* as involving ''a corporate ownership 'without more' situation.''[56] By way of contrast, the liability that PBGC sought to impose on Asahi was not based merely on its ownership of Metaldyne but, as the district court noted, ''Asahi Tec actually conducted due diligence on the potential liability and knowingly entered into the transaction, building the risk in to the price it paid for the Metaldyne acquisition.''[57]

Distinguishing the Seventh Circuit's decision in *Goldfarb* posed a greater obstacle and required greater legal ingenuity by the district court. The legal predicate for the distinction drawn by the district court was the difference between the withdrawal liability under 29 U.S.C. § 1381(a) on which the *Goldfarb* case had been decided, and termination liability under either 29 U.S.C. § 1341 or 29 U.S.C. § 1342 pursuant to which Metaldyne's participation in the pension plan had occurred.[58] Using these different sections of ERISA as the fulcrum for its decision, the district court stated: ''Thus, unlike the cause of action in Goldfarb where liability had to have been triggered by some act of the defendant, liability in this case is controlled by mere ownership at the time of termination.''[59]

In the final analysis, the district court rested its determination that specific jurisdiction existed on three articulated grounds. First, as previously noted, the court found that ''the defendant was well aware of the potential liability that attached to its purchase of Metaldyne, and it factored that into its economic calculus.''[60] Second, the district court found that Asahi had previously admitted to the existence of general jurisdiction against it in a separate action brought against Asahi before the U.S. Bankruptcy Court for the District of Delaware.[61]

Finally, the court determined that Asahi had had other contacts with the forum in terms of conducting business both prior and subsequent to Metaldyne's demise.[62] As the district court observed: ''The facts also show that Metaldyne was not simply a passive investment for defendant, but that there were at least some integration activities and shared management between the companies and that defendant viewed Metaldyne—and publicly touted the merger—as an opportunity to expand its global footprint.''[63]

As previously noted, the district court's decision in *Asahi* did not conclusively resolve the issues raised by Asahi's dismissal motion. The decision did not even fully adjudicate the competing claims of the parties to the litigation. At best, the district court's decision relegated the parties to resolving their dispute through the regular channels of the litigation process.[64]

Conclusion

On one hand, as already noted, it is easy to discount the district court's denial of Asahi's motion to dismiss as a one-time, nonprecedential decision that may not even have a binding impact on the immediate parties. On the other hand, the new ground broken by the court's opinion represents not only a significant change in terms of withdrawal liability under ERISA and MPPAA, but an expansion of personal jurisdiction beyond established precedents of the Supreme Court. The impact of the decision, however, is not in its actual holding but whether the principles it enunciates gain traction through the further efforts of PBGC and in the courts.

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[52] 839 F.Supp.2d at 124.
[53] Id.
[54] Id. at 126.
[55] *Central States, Southeast & Southwest Areas Pension Fund v. Reimer Express World Corp.*, supra.
[56] 839 F.Supp.2d at 127.
[57] Id. at 128.
[58] Id. (Section 1341 controls the involuntary termination of an employer's participation in pension plan; Section 1342 controls the employer's termination of its participation in a pension plan.)
[59] Id.
[60] Id. at 129.
[61] Id.
[62] Id.
[63] Id.
[64] On July 16, 2012, the U.S. Court of Appeals for the District of Columbia Circuit denied Asahi's petition to appeal pursuant to 28 U.S.C. § 1292(b) based on that court's determination that Asahi had failed to show ''exceptional circumstances'' to justify an interlocutory appeal. *In re Asahi Tec Corp.*, 2012 U.S. App. LEXIS 14557 (D.C. Cir. 2012).

At the outset, it is clear that the district court's decision benefited from a planets-aligned-correctly factual pattern in which it was difficult to ignore conscious choices that were made by Asahi. These choices not only bolstered its membership in Metaldyne's controlled group but also supported the assertion of specific jurisdiction over the defendant.

Prior to its acquisition of Metaldyne, Asahi undertook studied reviews of both Metaldyne's financial obligations and the underfunded status of the multiemployer pension plan in which Metaldyne participated. The acquisition of Metaldyne was facilitated by an American subsidiary that Asahi formed for that purpose. Asahi assumed titular positions of leadership within the acquired company and dominated the negotiations with Metaldyne's lenders by which the company's faltering operations were continued. Indeed, it was likely such ''eyes wide open'' considerations on the part of Asahi—rather than the nebulous legal distinction between an employer's ''withdrawal'' or ''termination'' from a pension plan—that impelled the district court to deny Asahi's motion to extricate itself from the reach of personal jurisdiction.

The direction that such facts provided to the district court's ultimate decision may not be available in future cases involving foreign entities that become entangled in the withdrawal liability web of an American affiliate. More important, there are aspects of the *Asahi* decision—which even under the best-of-all-worlds analysis adopted by the district court under the facts with which it was confronted—that raise serious questions about its legal standing on issues of both withdrawal liability and personal jurisdiction.

These questions include:

Was Asahi ''punished'' for its diligence? One of the underlying purposes of contract law is to encourage parties to undertake a benefit-risk analysis of their prospective transactions. Based on such analysis, it is hoped that the parties will make provisions in their agreements to realize and maximize the benefits and minimize, if not eliminate, the risks.

In its acquisition of Metaldyne, Asahi had exercised such diligence. Asahi examined not only the financial condition of Metaldyne but also the underfunded status of the pension fund in which Metaldyne participated. Yet, for having done so, Asahi's diligence served as the basis for the district court's conclusions that Asahi has entered into the transaction ''with its eyes wide open'' and that the resultant withdrawal liability was a ''known risk expressly factored into the transaction that defendant voluntarily crossed the Pacific to undertake.''

The district court's focus on the conscious choices made by Asahi, while certainly supported by the factual record in the case, was unnecessary to resolve either the withdrawal liability or jurisdictional issues. Under the mechanistically-applied statutory criteria established under ERISA and MPPAA, an affiliated company is part of a withdrawing employer's controlled group regardless of the diligence, knowledge, or understanding of the company to become affiliated. Similarly, for the purpose of a jurisdictional analysis, it is a defendant's presence or conduct in the forum state that determines whether the defendant may be sued and not its state of knowledge or intent.

It may be argued that the district court's decision does not turn on whether Asahi was diligent or not, but whether it incorporated provisions in the agreements by which it acquired Metaldyne to protect itself against the underfunded obligations that were imposed after Metaldyne withdrew from the pension plan. This argument assumes that such options—other than, of course, not proceeding with the acquisition of Metaldyne—were available to Asahi. More to the point, even if such options were available, the district court's decision appears to create an artificial distinction between those entities who are diligent and/or are unable to contractually protect themselves and who, thus, become subject to personal jurisdiction; and those entities who do not or cannot acquire knowledge of an acquired company's pension obligations who may remain outside a court's jurisdiction.

Is there anything left to the ''mere-ownership'' defense to both withdrawal liability and personal jurisdiction? The *Asahi* decision presents an interesting juxtaposition of issues—withdrawal liability and personal jurisdiction—in which the mere possession of ownership interests by a defendant in another entity was previously thought to be insufficient to establish either liability or jurisdiction. Courts have long held that mere ownership of interests in controlled group entities does not necessarily translate into withdrawal liability.[65] The Seventh Circuit in the *Goldfarb* case subscribed to an analogous principle by holding that Goldfarb's ownership in Fleming did not, in and of itself, constitute the minimum contacts required to sustain personal jurisdiction.

By its decision in the *Asahi* case, the U.S. District Court for the District of Columbia simultaneously placed the status of the mere-ownership contention into doubt as to both the personal jurisdiction and withdrawal liability issues addressed by the court's decision. By the very terms of its opinion, the district court unequivocally held that Asahi's mere ownership of Metaldyne was sufficient—without more—to permit the court to assert personal jurisdiction over the defendant. Furthermore, although, as the Seventh Circuit stated in its *Reimers* decision, ''jurisdiction and liability are two separate inquiries,'' it remains to be seen whether the blurring of the two issues in the *Asahi* decision may be translated in later cases to an automatic assessment of withdrawal liability once a court determines that ownership issues concerning a withdrawing employer automatically confer personal jurisdiction over a defendant on a court.

Is there truly a difference from withdrawal from, and termination of, participation in a multiemployer pension plan? As previously noted, after the district court in *Asahi* determined that the defendant's ownership of Metaldyne was sufficient to obtain jurisdiction over the defendant, the district court required some legal predicate upon which to distinguish its intended decision from the contrary result reached by the Seventh Circuit in the *Goldfarb* case. The need to legally distinguish the two cases was necessary not merely because the activities of the defendants in the two matters were qualitatively and quantitatively similar, but also because—as the decision by the highest court in the federal judicial system on the issue of personal jurisdiction over a foreign entity in a withdrawal liability context—the *Goldfarb* decision was presumably entitled to respect as a controlling precedent.

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[65] 29 U.S.C. § 1301(b); *Brown v. Astro Holdings Inc.*, 385 F.Supp.2d 519, 523, n.9; 35 EBC 2416 (E.D.Pa. 2005).

The distinction that the district court in *Asahi* drew between the termination of plan participation by Metaldyne versus the withdrawal liability that was at issue in *Goldfarb* is simultaneously artificial and dissembling. Under ERISA and MPPAA, withdrawal liability under 29 U.S.C. § 1381(a) and termination liability under 29 U.S.C. § 1341 or 29 U.S.C. § 1342 are practically synonymous with each other and permit virtually identical remedies and enforcement proceedings. Furthermore, to the extent that termination liability may be imposed on an employer through no fault of its own or members of its controlled group (for example, through decertification of the labor union with whom the employer dealt, or through an involuntary bankruptcy proceeding brought against the employer), the distinction drawn by the district court further removes the assertion of personal jurisdiction over a foreign entity from any conduct or presence by the entity in the forum state.

What is perhaps most unsettling about the distinction that the district court made between the *Asahi* case before it and the decision in *Goldfarb* was the court's importation of withdrawal liability principles (i.e., the distinction between termination liability and withdrawal liability) to resolve an issue an issue of personal jurisdiction. In the final analysis, the distinction upon which the district court founded its decision may raise more questions about the legislative intent behind the two types of ERISA liability and equal protection concerns than the district court resolved by its distinction.

Did the district court create a new type of personal jurisdiction? In its *International Shoe* decision, the Supreme Court enunciated two forms of personal jurisdiction. General jurisdiction was based on a defendant's sufficiently continuous and systematic contacts with the forum state even though the claims asserted by a plaintiff did not arise from such contacts. As expanded by the Supreme Court's subsequent decisions, specific jurisdiction was based on a defendant's particular act or acts that evidenced a purposeful intention to avail itself of privilege of conducting business within the forum state.

The personal jurisdiction that was found by the district court in *Asahi* does not fit into either of these categories. By the concession of PBGC, the district court stated that there was no jurisdiction over Asahi. The only conduct on the part of the defendant upon which the district court based its determination of specific jurisdiction was Asahi's ownership interest in Metaldyne.[66] Indeed, as the district court observed: ''The cause of action here is based on mere ownership of the company at the time of termination—not on any wrongful conduct on the defendant's behalf.''[67] This observation by the district court flies in the face of traditional definitions of specific jurisdiction that historically require some wrongful act by a defendant in the forum as a basis for the assertion of such jurisdiction.

Furthermore, the *Asahi* decision poses a Hobson's choice for foreign defendants and their counsel. If defendants present too convincing an argument that their case is one of mere ownership as part of their preanswer motion to dismiss on jurisdictional grounds, they may effectively establish the basis for plaintiff's claim of withdrawal liability—assuming that defendant owns more than the required 80 percent of the affiliated. Stated differently, if a defendant is not successful on its jurisdictional motion, defendant may be confronted almost immediately with a motion for summary judgment. Furthermore, given the holding of the district court in the *Asahi* case, the very basis (i.e., mere ownership of stock in the affiliated entity) upon which the defendant's motion to dismiss was denied, may thereafter serve as the basis upon which a plaintiff's motion for summary judgment may be granted.

If the personal jurisdiction recognized in the *Asahi* decision is of questionable legal—and possibly even constitutional—origin, further inquiries are invited about the source of this new jurisdiction. Simply put, do we want trial courts ''legislating'' new jurisdictional dimensions based on the needs of a single particular case? The answer to this overriding question must await further proceedings as the *Asahi* case wends its way through the court system and additional cases concerning the exercise of personal jurisdiction to impose withdrawal liability on foreign entities arise before other courts.

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[66] While the district court did observe that general jurisdiction had been obtained over Asahi in an unrelated bankruptcy action, and took note of certain ''integration activities and shared management'' between Asahi and Metaldyne, the court took pains to articulate that its determination of specific jurisdiction over defendant was based primarily on its ownership interest in its subsidiary.

[67] 839 F.Supp.2d at 130.