New Case Highlights Importance of Analyzing Personal Jurisdiction in ERISA's Controlled Group Context

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The Tenth Circuit Court of Appeals recently issued a decision that may make it harder for multiemployer pension funds to collect withdrawal liability: *GCIU-Employer Retirement Fund v. Coleridge Fine Arts*, No. 19-3161, 2020 WL 1672776 (10th Cir. April 6, 2020) (non-precedential).

As background, ERISA imposes withdrawal liability on an employer that permanently stops contributing in whole or in part to an underfunded multiemployer pension fund. The amount of the withdrawal liability roughly equals the employer's pro rata share of the funding deficit. Withdrawing employers, however, are often financially troubled companies and are unable to pay their withdrawal liability. So ERISA makes all members of the employer's "controlled group" jointly and severally liable for the withdrawal liability, too. An individual or entity is in the employer's controlled group if it is under common control with the employer, as defined by IRS regulations.

ERISA's controlled group rules are a powerful tool for pension funds. Under most areas of the law, a holding or parent company is not liable for the debts of a subsidiary, unless it is involved in the subsidiary's "day-to-day" business operations. But ERISA strays from this general rule and imposes withdrawal liability on such entities, regardless of whether or not they are involved in the employer's day-to-day operations, to protect the participants of the funds. This is a major advantage to pension funds, and being able to identify an employer's controlled group members is often the difference between actually collecting money on a withdrawal liability claim and having to write it off.

In *Coleridge*, the fund obtained a judgment against a withdrawn employer for $4.5 million, but the withdrawn employer was unable to pay it, so the fund filed an action against the withdrawn employer's parent companies (both Irish entities) under a controlled group theory. Based on the facts of the case, the foreign defendants were indeed members of the withdrawn employer's controlled group and thus jointly and severally liable for the $4.5 million under ERISA. However, according to the Tenth Circuit, the mere fact that a foreign defendant may have statutory liability is irrelevant if the court lacks personal jurisdiction over it.

The problem for the fund was that the test for personal jurisdiction is more difficult to satisfy than ERISA's controlled group test. Unlike the controlled group test, the personal jurisdiction test follows the general rule of treating a holding or parent company separate from its subsidiary, absent involvement in the subsidiary's "day-to-day" operations. Because the Tenth Circuit found that the facts did not support the conclusion that the foreign defendants were involved in the withdrawn employer's day-to-day business operations, and because the fund failed to establish the "customary markers for personal jurisdiction" with respect to either of the foreign defendants, the court dismissed thefund's otherwise rock-solid claim for $4.5 million against them.

Bottom line: A personal jurisdiction defense can prevent a pension fund from collecting withdrawal liability from a controlled group member, even where that member is unquestionably liable under ERISA. It is therefore necessary to recognize this issue and analyze it before initiating a controlled group action. Otherwise, the pension fund can waste a lot of time and money chasing a claim that is a lost cause. (The legal battle in *Coleridge*, for example, lasted six years and included two trips to the Tenth Circuit, but the fund ultimately collected $0 of the $4.5 million in withdrawal liability from the controlled group members.)

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