



JONES DAY  
**COMMENTARY**

## UK'S PENSIONS REGULATOR ASSERTS POWERS AGAINST US COMPANIES WITH UK AFFILIATES

Since 2005, the UK's Pensions Regulator ("Regulator") has had the power, in certain circumstances, to issue notices against companies (including US companies) affiliated with UK companies sponsoring UK defined benefit pension plans. The Regulator's notices require the companies receiving the notice to make additional contributions to the UK pension plan or plans of the UK affiliate. Following a successful action against a company in Chapter 11 bankruptcy proceedings in Delaware in 2008, the Regulator appears to be becoming more eager to issue these types of notices.

### THE REGULATOR'S POWERS

The Regulator's powers allow it to issue notices requiring payment into UK pension plans by companies and individuals that are not plan sponsors. The recipient of the notice must be a group company or shareholder with one-third or more of common shareholding with the company that sponsors the UK pension plan. Notices can be issued when the plan sponsor is "insufficiently

resourced" for its pension obligations, or when the recipient has taken part in an action which was intended to be, or has had the effect of being, materially detrimental to the standing of the plan as an unsecured creditor of the UK affiliate.

The Regulator's power to issue these notices is valid under UK law. However, the Regulator has uncertain ability to enforce its notices outside the UK, and has had varying success in doing so.

### A SUCCESS AND A FAILURE IN US BANKRUPTCY COURT

In 2006, the Regulator attempted to issue a notice against Sea Containers Limited, a Bermudan company with assets in the US, requiring it to provide financial support to a pension plan sponsored by its UK affiliate. After 18 months of appeal process at the Regulator, an agreement was reached for Sea Containers to provide some funding to the UK plan. Because Sea Containers was in Chapter 11 proceedings when the agreement was reached, the

agreement needed the approval of the Bankruptcy Court for the District of Delaware. The Bankruptcy Court approved the agreement, rejecting an objection by the creditors committee for the parent company that the Regulator's judgments in the UK courts could not be enforced effectively in the US.

A more recent case in the same jurisdiction has had a different outcome to date. Nortel Networks Inc. and Nortel Networks (CALA) Inc., among other affiliates, filed for bankruptcy protection under Chapter 11 in early 2009. The Regulator attempted a similar notice requiring them, along with certain foreign affiliates, to provide financial support for the group's UK pension plans. In early 2010, the debtors successfully obtained an order from the Bankruptcy Court for the District of Delaware enforcing the automatic stay against Nortel Networks UK Pension Trust Limited (the "Trustee") and the board of the UK's Pension Protection Fund (the "PPF"), which provides benefits to employees whose employer has become bankrupt, leaving an underfunded pension plan. The bankruptcy court found that the claims of the PPF and Trustee against the debtors arose prepetition, because the Regulator had issued a warning notice prior to the bankruptcy filing. Additionally, the court ruled that the police powers exception to the automatic stay did not apply because the PPF exercised its powers on behalf of the Trustee, and because the applicable tests for this exception were not met where the government did not have a pecuniary interest in shoring up the private pension plan, and where public policy was not affected, but rather private pension interests.

The court determined that the decision in *Sea Containers* was not controlling on the basis of differing facts. These facts included that the *Sea Containers* decision was in the context of approval of a settlement, while *Nortel* arose from a motion to enforce the automatic stay and object to UK proceedings. Further distinguishing the two cases was the fact that *Sea Containers* was a financial support direction case, where in *Nortel* the Regulator sought not only a UK financial support direction proceeding, but also a UK contribution notice proceeding, which can create an enforceable debt. The court also noted that the Trustee had already filed proofs of claim in the *Nortel* bankruptcy proceedings before looking for the same support in the UK.

Following this decision, the Regulator applied to the bankruptcy court for certification for immediate appeal to the Third Circuit. This application was denied because (1) there was controlling law on this issue, (2) there was no public importance (the importance of balancing creditor needs and having all parties work together in a complex international bankruptcy case weighed heavily against this being a matter of public importance), and (3) putting the interests of PPF and the Trustee ahead of the interests of other creditors did not advance the bankruptcy case.

In May, the Regulator filed an appeal in the District Court for the District of Delaware, and on August 5, 2010, the district court affirmed the bankruptcy court decision. The district court agreed that narrow application of the police power exception is appropriate in the case of foreign entities, and that the public policy and pecuniary purpose tests for an exception to the automatic stay were not met in this case, as the proceedings addressed the monetary amount of a contribution to a private entity rather than the violation of law or public safety. In addition, the district court explicitly agreed with the bankruptcy court's distinction of the facts of the *Sea Containers* case. Finally, the court found that the bankruptcy court decision was not impermissibly based on the issue of prejudice.

## THE REGULATOR: A CHANGE IN ATTITUDE?

The Regulator has been hesitant to use its substantial powers in the past, relying generally on the threat of their use to obtain agreement. However, the Regulator's recent actions suggest an increased willingness to use its powers. It has recently issued a notice against a Belgian company, Michel Van De Wiele NV, subsequent to its pre-agreed acquisition of the business of its UK subsidiary following the subsidiary's insolvency. The Regulator's willingness to pursue Nortel through the US (and also Canadian) bankruptcy courts also suggests a more aggressive position, particularly when dealing with entities whose distressed position renders them less able to negotiate with the Regulator.

## DEALING WITH THE REGULATOR

Although the *Nortel* case indicates that the Regulator will be challenged in its attacks on US companies, its powers should not be treated lightly. For businesses that may wish to trade or hold assets in the UK either directly or through affiliates, it is important to be aware of the Regulator's powers if there are UK pension plans in the corporate group.

Proper planning of actions that may concern the Regulator, such as restructurings, refinancings, business and stock sales, and significant dividends to shareholders, can avoid a significant confrontation. Early involvement of UK benefits counsel, and engagement with the UK plan trustees and the Regulator, can avoid costly litigation. Jones Day's lawyers have wide experience in dealing with these issues and can advise on the Regulator's likely response.

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at [www.jonesday.com](http://www.jonesday.com).

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