Fordham Urban Law Journal

Volume 41
Number 3 *Colloquium: Legacy Liabilities and Municipal Financial Distress*

Article 7

March 2016

An Analysis Of The Treatment Of Employees Pension And Wage Claims In Insolvency And Under Guarantee Schemes in OECD Countries: Comparative Law Lessons For Detroit And The United States

Paul M. Secunda
Marquette University Law School

AN ANALYSIS OF THE TREATMENT OF EMPLOYEE PENSION AND WAGE CLAIMS IN INSOLVENCY AND UNDER GUARANTEE SCHEMES IN OECD COUNTRIES: COMPARATIVE LAW LESSONS FOR DETROIT AND THE UNITED STATES

Paul M. Secunda[*]

---

[*] Professor of Law, Marquette University Law School. Parts of this Article were initially prepared as a report requested by the Investment, Insolvency, Competition and Corporate Policy Directorate (IICCPD) of Industry Canada (federal Canadian Ministry of Industry), consistent with Section 42 of the Canadian Wage Earner Protection Program Act (WEPPA), S.C. 2005, c. 47, s. 42, which requires statutory review of WEPPA's administration and operation within five years of its enactment. I presented this Article at the *Fordham Urban Law Journal*'s annual Cooper-Walsh Colloquium on October 11, 2013. I would like to thank the Colloquium participants for their helpful comments. I would also like to thank a number of individuals who have helped me understand the complexity of the treatment of employee pension and wage claims in insolvency and under guarantee schemes in their countries: Gordon Anderson (New Zealand); Ralph Anzivino (USA), Susan Block-Lieb (USA), Ali Cem Budak (Turkey), Rosalind Connor (UK), Israel Goldowitz (USA), Daniel Keating (USA), Kristina Koldinska (Czech Republic), Toomas Kotkas (Finland), Jean-Philippe Lhernould (France), Lilach Lurie (Israel), Pietro Manzella (Italy), Olafur Margeirsson (Iceland), Philippe Martin (France), Pablo Arellano Ortiz (Chile), Frans Penning (Netherlands), Cristina Rosado (Spain), and Felix Welti (Germany). I also owe a debt of gratitude to Harry Arthurs for recommending me for the Canadian project and to Paul Morrison of Industry Canada for assisting me with my preparation of the government report. Finally, I received wonderful research and writing support on this paper from Ryan Session, Marquette University Law School, Class of 2014. Of course, I am solely responsible for all factual matters and opinions laid out in both my report and in this Article. I dedicate this Article to the public employees and retirees of the City of Detroit.

INTRODUCTION

When the City of Detroit filed for bankruptcy protection in the summer of 2013, it was the largest municipal bankruptcy filing in American history.[1] Many critics lay blame for the city's misfortunes on out-of-control employee pension and retiree health legacy costs.[2] Such criticisms were indeed consistent with similar claims concerning the effect of out-of-control legacy costs in the private sector leading to high-profile corporate bankruptcies throughout the world.[3]

Although there is a continuing dispute over whether the Michigan State Constitution provides protections for the pension benefits of Detroit city employees in the ongoing bankruptcy case,[4] to most people it is clear that pension and other wage claims of employees

---

1. *See* David A. Lieb, *Detroit Bankruptcy Tests State Pension Protections*, YAHOO! NEWS (July 24, 2013), http://news.yahoo.com/detroit-bankruptcy-tests-state-pension-protections-065517091.html. It is estimated that Detroit has 700,000 citizens, and that there are some 23,000 pension recipients and 9,000 current public employees. *See* Editorial, *For Detroit Retirees, Michigan's Pension Promise Must Be Kept*, DETROIT FREE PRESS (Aug. 1, 2013), http://www.freep.com/article/20130801/OPINION01/308010019.

2. *See, e.g.*, Richard Summerfield, *Legacy Costs Push Communities to the Brink*, FINANCIER WORLDWIDE (Oct. 2013), http://www.financierworldwide.com/article.php?id=11125 ("While no two cases are ever the same, one of the most common themes running through the majority of insolvent cities and towns is the presence of crippling legacy costs."); *see also* Veronique de Rugy, *What Detroit's Debt Problem Looks Like*, NAT'L REV. ONLINE (July 19, 2013), http://www.nationalreview.com/corner/353917/what-detroits-debt-problem-looks-veronique-de-rugy (illustrating that nearly half of Detroit's debt ($18.5 billion) comes from unfunded pension ($3.5 billion) and retiree health-care obligations ($5.7 billion)).

3. *See* Fiona Stewart, *Benefit Protection: Priority Creditor Rights for Pension Funds* (OECD Working Papers on Ins. & Private Pensions No. 6, 2007), *available at* http://www.oecd.org/pensions/insurance/37977393.pdf; *see also* Andrew B. Dawson, The Impact of Collective Bargaining Agreements on Corporation Reorganizations 1 (manuscript on file with author) ("Labor unions recently have received a considerable amount of blame for the economic failures of their employers.").

4. *See* Lieb, *supra* note 1. The Michigan Constitution states: "The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby." MICH. CONST. art. IX, § 24.

against the City are now very much in jeopardy.[5] This begs the following question: what protections, if any, do these employees have under the U.S. Bankruptcy Code or under any guarantee or insurance scheme when it comes to their employment claims against Detroit? Although the answer to that question is far from clear given the lack of precedent in this largely underdeveloped area of municipal bankruptcy and public employee benefits law,[6] there is a fear that there could be substantial cuts to city employees' and retirees' benefit and wage claims.[7] Even worse, some city employees in Detroit, like police officers and fire personnel, will be placed in an even more precarious position if they lose their pensions as a result of

5. For definitional purposes throughout this Article, "employment claims" in bankruptcy constitute both employee "pension claims" and "wage claims." In turn, "pension claims" refer to any occupational deferred compensation arrangement such as under a defined benefit pension plan or a defined contribution pension plan, whereas "wage claims" is broadly defined to include not only unpaid wages, salaries, and commissions, but other in-kind payments for accrued vacation and holiday pay, sick leave pay, severance pay, and other contracted-for benefits (including health insurance, life insurance, long-term disability insurance, and retiree medical benefits). This definition of wages is consistent with how wages are defined under section 507 of the U.S. Bankruptcy Code. *See* 11 U.S.C. § 507(a)(4) (2012).

6. Lieb, *supra* note 1. Of course, municipal bankruptcies are still a relatively rare phenomenon in the United States. *See* Elizabeth K. Kellar, *Why Municipal Bankruptcy is Rare (and Should Be)*, ICMA (Aug. 29, 2013), http://icma.org/en/icma/newsroom/highlights/Article/103661/Why_Municipal_Bankruptcy_Is_Rare_and_Should_Be ("Over the last five years, only thirteen local governments—less than one percent of all eligible municipalities—have sought bankruptcy protection.").

7. Some have suggested that retirees may lose as much as eighty-three percent of their retirement benefits in the Detroit bankruptcy. *See* Chris Isidore, *Detroit Files for Bankruptcy*, CNNMONEY (July 18, 2013), http://money.cnn.com/2013/07/18/news/economy/detroit-bankruptcy. In the Stockton, California bankruptcy, it is estimated that retirees lost anywhere from thirty to seventy percent of their pension and medical benefits through the restructuring process (though contributions to the California Public Employees' Retirement System (CalPERS) were not touched). *See* Laura Mahoney, *Stockton Poised to Approve Ch. 9 Plan, Ask Bankruptcy Court for Approval*, PENSION & BENEFITS DAILY (BNA) (Oct. 3, 2013), http://news.bna.com/pdln/PDLNWB/split_display.adp?fedfid=36982339&vname=pbdnotallissues&jd=a0e2e0g8b0&split=0. On the other hand, cities like Vallejo, California, that did not touch their pension obligations to CalPERS as part of past bankruptcy processes are again struggling to pay pension costs and are in danger of re-entering the bankruptcy process. *See* Tim Reid, *Two Years After Bankruptcy, California City Again Mired in Pension Debt*, REUTERS, Oct. 1, 2013, *available at* http://www.reuters.com/article/2013/10/01/usa-municipality-vallejo-idUSL2N0HM05C20131001. Part of the problem with interfering with contributions to CalPERS is that the Eleventh Amendment to the U.S. Constitution protects state agencies, including pension agencies, from being haled into federal court against their will by a municipality as part of a Chapter 9 bankruptcy proceeding. *See* Press Release, CalPERS, CalPERS Files Amicus Brief Supporting State Dispute with City of San Bernardino (Nov. 1, 2013), https://www.calpers.ca.gov/index.jsp?bc=/about/newsroom/news/2013/files-brief.xml.

bankruptcy because they are not eligible to receive government pension payments under Social Security.[8]

To put the plight of the Detroit city employees into an international and comparative context when it comes to considering how their pension and wage claims should be treated in bankruptcy, it is instructive to consider how similar employee pension and wage claims would be treated in corporate insolvencies in other countries. It is necessary to focus on corporate insolvencies in other countries as the relevant comparison because in most other countries, municipalities do not have the same financial independence to borrow money and take on debt by participating in the municipal bond market as those in the United States.[9] Additionally, exploring the corporate bankruptcy systems in other countries provides a beneficial way to consider how to approach municipal bankruptcy situations in the United States, especially because corporate and municipal bankruptcies in the United States have a number of features in common when it comes to employee-creditor claims.[10]

Indeed, similar to the situation playing out in Detroit, corporate insolvencies around the world have not only resulted in job losses for

---

8. *See* Editorial, *supra* note 1 ("Among the city's claimants, retirees are the most vulnerable. Their payouts are meager—an average of $30,000 a year for police and fire, $19,000 for other city employees—but absolutely crucial to their survival."); Kellar, *supra* note 6 ("Detroit police and fire personnel are not in the Social Security system, so their city pension may be their only retirement income.").

9. The United States municipal bond market has approximately $3.7 trillion in bonds outstanding, with "annual issuances in excess of $200 billion for the past fifteen years." *See* Christine Sgarlatta Chung, *Municipal Securities: The Crisis of State and Local Government Indebtedness, Systemic Costs of Low Default Rates, and Opportunities for Reform*, 34 CARDOZO L. REV. 1455, 1458 (2013). On the other hand, and to take just one European example, municipalities in the United Kingdom cannot issue their own debt or take out loans in the same way as municipalities in the United States do. *See* Email from Rosalind Conner to Paul M. Secunda (Oct. 1, 2013) (on file with author). The legal entity status of municipalities in the United Kingdom seems more consistent with how municipalities operate in many other parts of the world. *See* Municipal Act, 2001, S.O. 2001, c. 25 § 17 (provincial municipal government act prohibiting municipalities in Ontario from going bankrupt). Additionally, municipalities generally do not have their own pension and employee benefit plans in most advanced economies, but rather cover public employee pensions and benefits through national programs. *See, e.g.*, Email from Jean-Philippe Lhernould to Paul M. Secunda (Oct. 1, 2013) (on file with author) ("[C]ities and local authorities in France do not run any form of pension/benefit funds.").

10. *See* Charles E. Wilson, *The Replacement of Lawful Economic Strikers in the Public Sector in Ohio*, 46 OHIO ST. L.J. 639, 654 n.111 (1985) (suggesting the U.S. Bankruptcy Code permits municipal employers to resort to financial reorganization in bankruptcy under standards and procedures that closely parallel those provided under Chapter 11 for private employers); Note, *Executory Labor Contracts and Municipal Bankruptcy*, 85 YALE L.J. 957, 958 n.7 (1976) (applying Chapter 11 standards to interpret Chapter 9).

employees, but also in losses of significant pension and wage benefits.[11] In turn, employees, who are considered the most vulnerable of company creditors in the insolvency process because of their lack of voice and their lack of ability to diversify their risk,[12] have been forced either to wait for significant periods of time to receive payment while the insolvency process takes its course[13] or to navigate complex insolvency procedures.[14]

This Article therefore undertakes a comparative analysis of the treatment of pension and wage claims in insolvency proceedings and under guarantee schemes in the thirty-four member countries of the Organization for Economic Cooperation and Development (OECD) to understand whether the United States's approach to employee

---

11. *See* GORDON JOHNSON, OECD, INSOLVENCY AND SOCIAL PROTECTION: EMPLOYEE ENTITLEMENTS IN THE EVENT OF EMPLOYER INSOLVENCY 1–2 (2006), *available at* http://www.oecd.org/corporate/ca/corporategovernanceprinciples/38184691.pdf ("Wages generally constitute a significant portion of employees' wealth, leaving them with few options to fall back on in the event of their employer's default.").

12. *See* INT'L INSOLVENCY INST., FIRST DRAFT REPORT BY THE SOCIAL CLAIMS COMMITTEE OF THE INTERNATIONAL INSOLVENCY INSTITUTE ON EMPLOYEE, PENSION AND RELATED SOCIAL CLAIMS IN INSOLVENCY (2009), *available at* http://www.iiiglobal.org/component/jdownloads/finish/560/1828.html (discussing lack of power employees have as creditors).

13. This is mostly true for liquidations. In business reorganizations under Chapter 11, on the other hand, "it is typical for debtors to file a motion on the first day of the case to seek authority to pay all [wage] amounts that would otherwise be priority claims in the ordinary course of business." FRANK VAN DUSEN & TYLER ROGERS, ABA LABOR & EMPLOYMENT SECTION, ON THE HOOK? INDIVIDUAL LIABILITY ON WAGE CLAIMS WHEN AN EMPLOYER FILES FOR BANKRUPTCY 1 n.2 (2010), *available at* http://www.apps.americanbar.org/labor/errcomm/mw/Papers/2010/data/papers/026.pdf. As far as wages owed prior to the bankruptcy filing, employees may also be assisted by the existence of federal and state wage and hour laws that require employees to be paid for all time worked on a specified basis while employed and after a specified time after separation from employment. *See generally* Fair Labor Standard Act of 1938 (FLSA) (codified at 29 U.S.C. §§ 201–219 (2012)) (providing that covered employees be compensated on a salary or hourly basis for time worked); Wisconsin Wage Payment and Collection Law, WIS. STAT. § 109.03(1) (2013) (requiring wages to be paid on at least a monthly basis). Indeed, as Van Dusen and Rogers note, "Several state and federal courts have determined that an employer's bankruptcy will not excuse a corporate officer's personal liability for an employer's violation of wage laws." VAN DUSEN & ROGERS, *supra*, at 1. However, to the extent that employees have filed state wage claims for unpaid wages, such claims will be automatically stayed once the bankruptcy petition is filed, and such claims will have to wait the reorganization or liquidation of the bankruptcy estate with all other claims. *See* RICHARD I. AARON, BANKRUPTCY LAW FUNDAMENTALS 267 (2013) ("Bankruptcy Code § 362(a) imposes an automatic stay from the moment of the filing of any bankruptcy petition.").

14. This is true mostly with regard to filing claims for pension and other benefits. *See infra* Part II.A.1 (describing the process in the United States for employees to recover on pension claims after employer insolvency).

claims in bankruptcy (in both the corporate and municipal context) is consistent with international norms. After completing the comparative analysis (which is comprehensively set out in the Appendix), this Article then highlights common approaches to these issues, as well as important distinctions, presenting several tables to summarize the results.

As an initial matter, there is a distinction in most countries between pre-filing (prior to bankruptcy) employee pension or wage claims and post-filing claims. Whereas pre-filing claims are subject to varying degrees of priority treatment (as discussed below), post-filing claims are generally treated as administrative expenses of the bankruptcy estate and given priority over most other unsecured creditor claims.[15] With regard to pre-filing employment claims, outstanding occupational pension contribution claims (whether based on a defined benefit plan or defined contribution plan scheme) receive some preferential treatment under most of the studied countries' insolvency laws, but are limited to a capped amount for a specified period of time before the filing of the bankruptcy petition.[16] As for claims for unfunded or underfunded occupational pension liability (generally in the defined benefit context), they are treated as unsecured claims.[17] Wage claims, for their part, generally receive some preference in bankruptcy in most of the countries studied, but again only up to a capped amount for a specified period of time before the filing of the bankruptcy petition.[18]

In addition to insolvency schemes, most of the OECD countries have pension and/or wage guarantee schemes to protect employee claims and to complement the existing insolvency system. To the extent that employees receive payment for their claims under these

---

15. Indeed, this is how post-filing wage claims are treated in the United States under section 503 of the Bankruptcy Code. *See* 11 U.S.C. § 503(b)(1)(A) (2012); *see also id.* § 507(a)(1)–(2) (providing administrative priority claims, including wages and benefits paid to employees after bankruptcy filing, with priority over almost all other claims, except for first priority claims relating to domestic support obligations that do not arise in corporate cases). It would be improper to say these post-filing administrative claims have a super priority under the U.S. Bankruptcy Code, as that terminology is reserved for two such super-priorities—for secured creditor's failed adequate protection claims, *id.* § 507(b), and for debtor-in-possession (DIP) lenders, but only if the court orders, *id.* § 364(c)(1).

16. See *infra* Part III.B, Table III.3.

17. As will be discussed below, the unsecured nature of any employee claims in the bankruptcy process means it is less likely that such claims will be satisfied. *See infra* Part I.E. As will also be described in detail below, pension plans can be broadly categorized into defined benefit plans or defined contribution plans based on their funded or unfunded status. *See infra* Part I.B.

18. *See infra* Part III.B, tbl.III.3.

guarantee schemes, the guarantee organizations will often become subrogated to the rights of the employees (including generally to whatever priority these employees might have) in the insolvency proceeding.[19] These types of subrogation rights mean that the guarantee scheme will be acting in the place of employees with more bargaining power because of its ability to put forward a larger overall claim. In turn, this dynamic leads to a larger recovery of employee claims from the insolvent employer and helps ensure the continuing vitality of the guarantee scheme.[20]

In categorizing the various approaches OECD countries apply to employee claims in insolvency, this Article relies to a significant extent on the country models developed by Gordon Johnson. Johnson identified four different systems that countries utilize to address employee entitlements in cases of employer insolvency.[21] This Article employs a slightly modified three-system version to further emphasize similarities in how countries deal with employee protection concerns raised by employer insolvencies. As described in this Article, Model One countries provide bankruptcy priority, but offer little or no insurance or guarantee protections (e.g., Chile and Mexico). Model Two countries adopt a hybrid approach and provide both some form of bankruptcy priority and a guarantee fund for employee claims (e.g., Canada, France, Ireland, Sweden, and the United Kingdom). These Model Two countries are further divided into robust and limited sub-models based on the extent of the bankruptcy priority offered and the extent of the protection offered by the country's guarantee schemes. Finally, Model Three countries provide no bankruptcy priority, but only a guarantee fund approach (e.g., Finland and Germany).

---

19. 11 U.S.C. § 364(c)(1).

20. *See infra* Part IV.A.6.

21. *See* JOHNSON, *supra* note 11, at 4–6. As described below, the fourth category was limited to the pro-employee Chinese system, which is not part of this study. *Id.* at 7–8. All OECD countries provide either a bankruptcy priority, a guarantee scheme, or both. *See infra* Part III.B, tbl.III.3. On the other hand, such priorities and guarantee schemes are generally unheard of in the American state and municipality bankruptcy context (unlike with the existence of state guaranty associations in the insurance context). *See Policyholder Information*, NAT'L ORG. OF LIFE & HEALTH INS. GUAR. ASS'N, http://www.nolhga.com/policyholderinfo/main.cfm ("The guaranty system safety net helps keep the promises of the insurance industry, even when companies fail."). The lack of state guarantee schemes is probably due to the rarity of municipal bankruptcy filings over the years. *See* Jeannette Neumann, *U.S. Cities Grapple with Finances*, WALL ST. J., Oct. 27, 2013, http://online.wsj.com/news/articles/SB10001424052702304799404579157780077670894 ("[J]ust 63 cities, towns and villages, including Detroit, have filed for municipal bankruptcy protection since 1954.").

Of course, even within these country models, there are significant variations relating to: (1) strength of the creditor priority (e.g., absolute priority vs. some lesser priority); (2) capped versus uncapped claims (as far as how much the priority or guarantee fund covers); (3) the length of employee payments covered by the claim (e.g., three months prior to the bankruptcy filing vs. twelve months prior to the bankruptcy filing); (4) whether pensions, wages, both, or neither are covered by the insolvency and guarantee provisions; (5) what constitutes "wages" for purposes of the insolvency and guarantee schemes; and (6) the manner in which the insolvency and guarantee schemes operate separately or complement one another through mechanisms like subrogation.[22]

All in all, most OECD countries are Model Two countries that have adopted hybrid systems that combine some form of priority for both pension and wage claims with some form of guarantee fund to complement the insolvency system. It is especially important to have these guarantee funds in place because insolvency processes can last several years, while the guarantee schemes are more likely to pay employees their claims within weeks or months.[23] Unfortunately, the United States is a limited Model Two country. It provides only limited priorities in most bankruptcy proceedings (and no such wage or pension priorities in Chapter 9 municipal proceedings),[24] a guarantee system under the Pension Benefit Guaranty Corporation (PBGC) that is limited to pension plans, and then only to private-sector defined benefit pension plans.[25] Neither private-sector defined

---

22. *See infra* Part II.B.

23. *See* Stewart, *supra* note 3, at 4.

24. Pension and wage priorities that apply under section 507(a)(4) and (a)(5) of the Bankruptcy Code, 11 U.S.C. § 507(a)(4), (5) (2012), do not apply to Chapter 9 proceedings. *See* 5 WILLIAM L. NORTON, JR. & WILLIAM L. NORTON III, NORTON BANKRUPTCY LAW AND PRACTICE § 90:3 n.5 (3d ed. 2008) ("Examples of some of the significant provisions of the Bankruptcy Code which do not apply in Chapter 9 cases include . . . § 507 (other than § 507(a)(1)) (priorities of claims, except for administrative expenses set forth in § 503(b))."); *see also* Joseph Lichterman, *Protecting Detroit Pensions May Violate Bankruptcy Code–Judge*, REUTERS, Oct. 21, 2013, *available at* http://www.reuters.com/article/2013/10/21/usa-detroit-bankruptcy-idUSL1N0IB1HY20131021 ("The federal judge overseeing Detroit's bankruptcy filing called the city's pension funds 'unsecured creditors' and stated that any special protections for them would violate federal bankruptcy law.").

25. The PBGC is established under Title IV of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1301–1461 (2012); *see* Mark Daniels, *Pensions in Peril: Single Employer Pension Plan Terminations in the Context of Corporate Bankruptcies*, 9 HOFSTRA LAB. L. J. 25, 32 (1991) (providing analysis and critique of treatment of pension plan obligations during corporate bankruptcies).

contribution plans nor public sector pension plans come under a guarantee scheme in the United States.[26]

One possible solution to this current state of affairs is to adopt a legal approach similar to the robust Model Two country schemes found in many other countries with advanced economies. Indeed, one approach to employee claims in both municipal and corporate bankruptcies would be to pass pension and bankruptcy reform laws similar to what Canada enacted in 2008 as part of its Wage Earner Protection Program Act (WEPPA).[27] Unlike the American system, WEPPA provides limited absolute priorities for pension contributions and a broad array of wage claims in insolvency, as well as a robust wage guarantee scheme.[28] As to the policy reasons supporting this approach, it appears that greater emphasis is placed on the need to protect the weakness of employee-creditors in the insolvency process as opposed to focusing on the need to ensure the existence of cheap, accessible credit for companies and governments.[29]

This Article concludes that given the relative vulnerability of employees and the sophistication of most lenders, the United States should balance these interests to provide increased protection for employment claims during insolvency proceedings through giving heightened priority treatment to their pension and wage claims in bankruptcy in tandem with a guarantee scheme for both pension and wages claims.[30] As far as arguing for greater priority rights in

---

26. *See* Susan Tompor, *Pension Safety Net Won't Help City of Detroit Retirees*, DETROIT FREE PRESS, June 27, 2013, http://www.freep.com/article/20130627/COL07/306270021/Detroit-bankruptcy-retirees-PBGC-Susan-Tompor ("For a state or municipal pension, the taxpayer is typically the backstop.").

27. *See* Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1 (Can.). As Mr. Goldowitz aptly comments in his Response to this Article, one of the challenges for such legislation would be jurisdictional, including which committees of Congress would have primary authority to vet it, and then assuming legislation were enacted, which executive branch Departments would have primary authority to administer it. *See* Israel Goldowitz, *Response to Professor Paul Secunda's Comparative Analysis of the Treatment of Employment Claims in Insolvency Proceedings and Guarantee Schemes in OECD Countries*, 41 FORDHAM URB. L.J. 1027, 1034–36 (2014). Additionally, by extending the proposed guarantee scheme to municipal insolvencies, there could be complicated constitutional issues revolving around federalism and comity concerns. I do not attempt to answer any of these important, but tricky, questions here.

28. *See generally* Sylvie Heartfield & David Wink, *The New Wage Earner Protection Program Act: What Does It Mean?* (2008) (on file with author) (describing bankruptcy and guarantee schemes associated with WEPPA).

29. *See* JOHNSON, *supra* note 11, at 7.

30. By proposing to expand the current pension guarantee system beyond private-sector defined benefit pension plans, this Article proposes an addition to the

bankruptcy for both more types of wage claims and for pension contributions, this proposal parrots portions of the Protecting Employees and Retirees in Business Bankruptcies Act of 2013 (H.R. 100), introduced by Representative Conyers in January of 2013.[31] With regard to insisting on a federal response to a broad array of wage claims, including vacation and severance pay, this proposal relies on findings from the Canadian government that pre-WEPPA "unpaid wage claims receive[d] only 13 cents on the dollar" and that, "it [was] estimated that between 10,000 and 20,000 workers [had] unpaid wage claims per year."[32] Although Mr. Israel Goldowitz suggests in his Response to this Article that wage guarantee schemes should be less important in any proposed legal reform in this area,[33] this Article maintains that evidence from Canada and other countries that have similar schemes suggest that the institution of a wage scheme that covers a broad array of wage claims is no less important than the continuation and expansion of the pension guarantee system in the United States.

WEPPA, which currently does not include a pension guarantee scheme. Although Ontario has a Pension Benefit Guarantee Fund (PBGF) established in 1980, there has not been any attempt to establish such funds in other provinces or in the federal sphere. On the other hand, Professor Harry Arthurs chaired the Ontario Expert Pension Commission, which authored a Report on Pension Reform in 2008. *See* H.W. ARTHURS, EXPERT COMM'N ON PENSIONS, A FINE BALANCE: SAFE PENSIONS, AFFORDABLE PLANS, FAIR RULES, (2008), *available at* http://www.fin.gov.on.ca/en/consultations/pension/report/Pensions_Report_Eng_web.pdf. On the section on the future of the PBGF, it notes arguments that such guarantee funds can create moral hazard, and were perhaps redundant given Canada's social safety net. *Id.* at 119 ("One common allegation is that knowing that the benefits are protected by the PBGF, hard-pressed sponsors may be tempted to under-fund their plans, and unions to acquiesce in the risks associated with under-funding, so that money otherwise earmarked for pension contributions can be diverted to business investments or to improving other aspects of the compensation package. The PBGF, in this analysis, creates what is called a 'moral hazard'—an inducement to engage in overly risky behaviour [sic] because the normal risks associated with that behaviour [sic] are mitigated."); *see also id.* at 120 ("[F]or some the PBGF represents a 'belt and suspenders' approach to the risks of plan failure—a redundant form of protection. Workers, they note, are shielded twice from the full impact of the failure of an under-funded plan—once by the PBGF, and a second time by the broader Canadian social security systems.").

31. H.R. 100, 113th Cong. §§ 101, 103, 105, 201, 203, (2013), *available at* http://beta.congress.gov/bill/113th/house-bill/100. Of course, as Mr. Goldowitz suggests in his Response, the political realities of Washington, D.C. in 2013 (with a sixteen-day government shutdown just ended at the time of the writing of this paper) make such a legislative solution unlikely in the near-term. Of course, the luxury of being a law professor is the ability to disassociate from present-day realities and plant seeds for ideas that may flourish in different times and places.

32. Heartfield & Wink, *supra* note 28, at 14-6.

33. *See* Goldowitz, *supra* note 27, at 1032–34.

The comparative analysis in this Article is divided into four parts. Part I provides a cursory background of pension and bankruptcy law so that the treatment of employment claims in the insolvency process is placed in the proper legal context. Part II provides both the manner in which employment claims are presently treated in insolvency and in guarantee schemes in the United States and Canada, while at the same time considering how large international organizations, including the European Union and the Internal Labor Organization (ILO), have addressed these issues over the years. Part II then summarizes the findings of this Article's thirty-four-country comparative study on employee claim treatment in insolvency and guarantee schemes through a series of tables. Part III provides preliminary conclusions concerning this study's findings and urges the United States to adopt legislation similar to the Canadian WEPPA to provide insolvency and guarantee scheme protection for employee pension and wage claims in both the municipal and corporate bankruptcy context.

I. BRIEF INTRODUCTION TO COMPARATIVE EMPLOYEE BENEFITS AND BANKRUPTCY LAW

This Part seeks to achieve six primary objectives in discussing the treatment of pensions and wage claims during insolvency proceedings. First, Part I.A starts by classifying different types of pensions and retirement plans that employees have in most advanced-market economies, distinguishing among the so-called "pillars" of retirement savings. Second, with regard to occupational pension plans, with which this Article is primarily concerned, Part I.B discusses important distinctions between various occupational pension scheme structures and between public sector and private sector plans. Third, Part I.C examines the characteristics of so-called "wage claims." Fourth, Part I.D explores how some occupational pension and wage claims are backed by government-sponsored insurance or guarantee schemes. Fifth, Part I.E sets forth the basic bankruptcy law framework in most countries, discussing the different rights of various creditors and the importance of the priority designation that pension and wage claims receive during the insolvency process. Sixth, and finally, Part I.F surveys arguments for and against providing pension and wage claims with higher priority rights in insolvency proceedings.

A. Government-Provided Pensions vs. Employer-Provided Pensions

Pensions, or retirement saving sources, can be roughly broken down into three pillars: government-provided or state-run pensions (first pillar); company-provided occupational pensions often also partially funded by the employee (second pillar); and individually-purchased pension plans (third pillar).[34] These classifications do not always work well across different countries,[35] but they provide a way to organize the different types of pension provisions provided by various countries. Many advanced-market countries provide some combination of all three types of retirement income schemes, but certainly not all countries do, as will be further elaborated upon below.

Additionally, even among the various pension pillars, there are substantial differences in how these pensions are financed and structured. For instance, in the first pillar, some public social security schemes use a pay-as-you-go (PAYG) financing model based on employee payroll taxes,[36] while other countries finance their public pension systems out of general tax revenues.[37] Moreover, some public schemes are operated as defined benefit plans where citizens are promised defined benefits at a certain age based on a specified formula,[38] whereas other countries have additional or separately

---

34. *See* WORLD BANK, AVERTING THE OLD AGE CRISIS: POLICIES TO PROTECT THE OLD AND PROMOTE GROWTH 15 (1994); John A. Turner, *Book Review*, 48 INDUS. & LAB. REL. REV. 862, 862–63 (1995) (reviewing WORLD BANK, *supra*) (distinguishing origination of pillar system of organization).

35. *See* Gregory N. Filosa, *International Pension Reform: Lessons for the United States*, 19 TEMP. INT'L & COMP. L.J. 133, 139 (2005); Michael K. Stransky, Note, *Mailing It in: European Union Efforts at Pension Reform*, 2 CHI. J. INT'L L. 315, 318 (2001).

36. The United States Social Security System is one such system. *See* Social Security Act, 42 U.S.C. §§ 301–1397 (2012). *See generally* Paul M. Secunda, *Explaining the Lack of Non-Public Actors in the USA Social Insurance System*, *in* NON-PUBLIC ACTORS IN SOCIAL SECURITY ADMINISTRATION: A COMPARATIVE STUDY 234–41 (Frans Pennings et al. eds., 2013) (giving an overview of the operation of the U.S. Social Security System, which is a first pillar, defined benefit pension plan based on PAYG financing mechanism).

37. *See* JANIS SARRA, RECOGNIZING WORKERS' ECONOMIC CONTRIBUTIONS: THE TREATMENT OF EMPLOYEE AND PENSION CLAIMS DURING COMPANY INSOLVENCY, A COMPARATIVE STUDY OF 62 JURISDICTIONS 25 (2008), *available at* http://www.iiiglobal.org/component/jdownloads/finish/572/5379.html.

38. *See* Secunda, *supra* note 36, at 230 & n.3 ("As an initial matter, 'Social Security' in the United States refers primarily to the government-run old age, survival and disability insurance (OASDI) programme [sic] for older and disabled Americans. This programme [sic] is funded on a pay-as-you-go (PAYG) basis and takes the form of a defined benefit pension plan.").

established defined contribution arrangements where the state introduces private retirement accounts into the public social security system.[39]

However, because the focus of this Article is on the treatment of pension and wage claims during company and municipal insolvency proceedings, its emphasis is primarily on the second pillar of retirement savings involving occupational pension plans. Put another way, government-sponsored social security schemes, whether of the defined benefit or defined contribution variety, or whether financed via PAYG or based on general tax revenues, do not have "employee claims" against employers when those employers face liquidations or reorganizations.[40] It is unsurprising that the second pillar occupational pensions affects employers the most during the insolvency process. As will be discussed further below, the countries studied in this Article take a wide variety of approaches to occupational pensions. Some have little or no experience with occupational schemes, a sizeable number have set up statutory occupational schemes which establish the pension fund or insurance scheme separate and apart from the employer, and still other countries (like the United States and Canada) have employer-operated occupational pension plans. Each of these second pillar approaches, in turn, have an impact on how the various countries studied in this Article have established their insolvency systems to deal with employee pension and wage claims.

B. Characteristics of Occupational Pension Plans

All pension plans, regardless of pillar type, can be further broken down into two primary pension schemes. Under traditional defined benefit plans (DB plans), the employer invests funds on a periodic basis on behalf of its employees so that the individual is entitled at retirement to a guaranteed payment (in a lump sum or annuity form) based on some set payment formula related to years of service and

---

39. *See* Filosa, *supra* note 35, at 139–40 (noting the failure of the United States to provide a long-term reform to Social Security); *see also* Secunda, *supra* note 36, at 234–41 (same). The next Part probes deeper into the difference between defined benefit and defined contribution systems in occupational pension plans.

40. Government pension schemes may have other types of claims against employers (like tax claims), which are beyond the scope of this Article. *See* SARRA, *supra* note 37, at 48 (noting that where entirely state operated pension or social welfare schemes exist, the employer's insolvency does not have as substantial an impact upon employees).

salary history.[41] Generally, employers contribute to these DB plans by providing minimum, actuarially-based funding on behalf of each worker and then manage that money, either themselves or through a third party intermediary, to achieve the necessary return to provide the promised benefits to employees during retirement.[42] Some of these DB plans are backed by government insurance schemes in case of company insolvency. In the United States, for example, the PBGC undertakes this role by providing government insurance for terminated private-sector DB plans.[43]

A second kind of occupational pension arrangement has gained prominence in numerous countries over the past few decades. Under defined contribution plans (DC plans), the employer and/or employee make contributions to an employee's individual retirement account and then the employee is responsible, through investment vehicles selected by the employer for the employee to choose from, to manage that money so that he or she will have enough money to last throughout retirement.[44] In other words, whether an employee has sufficient funds for retirement under a DC plan depends greatly on the investment return the employee receives on the funds in his or her individual pension account.[45] These arrangements have been popular in the private sector for a while now, but are starting to become more prevalent in the public sector as well,[46] especially with newly-employed workers.[47]

---

41. JEFFREY M. HIRSCH ET AL., UNDERSTANDING EMPLOYMENT LAW 198–99 (2d ed. 2013).

42. *Id.*

43. *Id.* The PBGC is established under Title IV of ERISA, 29 U.S.C. §§ 1301–1461 (2012), and its operations are discussed in greater detail *infra* Part II.A.

44. *See* HIRSCH ET AL., *supra* note 41, at 199–200.

45. *Id.* at 199.

46. Recently, Detroit's emergency manager has proposed, as part of the Detroit bankruptcy process, to freeze its DB plans and enroll all employees in defined contribution arrangements. *See* Mary Williams Walsh, *A Proposal to Freeze Pensions in Detroit*, N.Y. TIMES, Sept. 27, 2013, at B1 ("The proposed pension freeze for Detroit would halt payments of nonpension benefits to both active workers and retirees. Nor would current retirees continue to receive yearly cost-of-living adjustments. Current city workers would be shifted into new defined-contribution plans, similar to 401(k) plans . . . .").

47. *See* PAULA SANFORD & JOSHUA M. FRANZEL, THE EVOLVING ROLE OF DEFINED CONTRIBUTION PLANS IN THE PUBLIC SECTOR 6 (2012), *available at* http://www.slge.org/wp-content/uploads/2012/10/The-Evolving-Role-of-Defined-Contribution-Plans.pdf ("Many public officials are concerned with the long-term costs of their current defined benefit programs and will continue to redesign these plans and consider alternative retirement arrangements. However, most of the changes implemented to date, including switching to hybrid and core defined contribution plans, usually affect new employees.").

These DC plans, however, are not backed up by government insurance schemes.[48] The other big difference between DB plans and DC plans is that with the former, the risks of inflation, investment return, and employee longevity are placed on the employer, while the employee takes on those risks under the DC plan arrangement.[49] From an employer insolvency perspective, DB plans are more relevant. This is because the two primary types of pension creditor claims—unfunded pension liabilities and outstanding pension contributions—are more likely to lead to larger employee insolvency claims in the DB plan environment, where employer contributions and funding obligations are at the center of the scheme's operation.[50]

On the other hand, with the possible exception of smaller outstanding pension contributions, DC plans are fully-funded.[51] Unfunded pension liability is not an issue in the DC plan context because once an employer makes a contribution to the pension plan, its obligation is at an end.[52] As far as outstanding employer contributions in the defined contribution environment, although these issues arise in the insolvency context, it is less likely to have as large of an impact because such contributions are undertaken on a periodic basis and it is less likely that outstanding contributions will make up a large part of the employee pension claim in insolvency. Nevertheless, as illustrated in the country-by-country section below, when discussing priority creditor rights for outstanding employer pension contributions, the occupational scheme at issue could be of either a DC plan or a DB plan.[53]

A last important distinction in the American occupational pension benefit world, especially for purposes of considering the roots of municipal bankruptcies caused by legacy costs, is that between public pension plans administered by states or municipalities and private-sector pension plans. Governmental plans are generally exempt from

48. *See* HIRSCH ET AL., *supra* note 41, at 199.

49. *Id.* at 198–99.

50. *See* SARRA, *supra* note 37, at 48 (observing that jurisdictions that rely primarily on employer-created and funded pension plans suffer from employers who chronically underfund pension promises when they become financially distressed, especially where the pension plan is a defined benefit plan).

51. *See* Amy B. Monahan & Renita K. Thukral, *Federal Regulation of State Pension Plans: The Governmental Plan Exemption Revisited*, 28 ABA J. LAB. & EMP. L. 291, 316 (2013) ("In part because they are always fully funded, the Code and ERISA regulate defined contribution plans to a lesser degree than defined benefit plans.").

52. *See* HIRSCH ET AL., *supra* note 41, at 199.

53. *See infra* Part III.B.

the Employee Retirement Income Security Act of 1974 (ERISA).[54] Congress saw state and local taxpayers as the primary backstops for those plans, and presumably was also motivated by federalism concerns.[55]

Because they are exempt from ERISA, municipal pension plans are not subject to the same degree of regulation as other types of pension plans. For instance, a pension plan subject to ERISA "must design, structure, and fund its plan in accordance with federal rules," whereas public pension plans "are largely free to structure their pension plans as they see fit and are not subject to any funding requirements other than what state law might impose."[56] The lack of strict funding requirements for municipal pension plans is often blamed for the significantly underfunded state of many public pension plans in the United States today.[57]

More recently, Senator Hatch has introduced new federal legislation—the SAFE Retirement Act of 2013.[58] The SAFE Retirement Act would enable a new form of governmental plan under federal law, "with stable, predictable costs that state and local governments may use to deliver secure pension benefits."[59] By

---

54. 29 U.S.C. § 1003(b)(1) (2012) (general ERISA governmental exemption provision); *id.* § 1002(32) (definition of governmental plan); *id.* § 1321(b)(2) (exemption of governmental plan from PBGC scheme); *see also* I.R.C. §§ 401, 414(d) (2012) (applicable tax code provisions).

55. *See* Monahan & Thukral, *supra* note 51, at 297 (citing H.R. 2, 93d Cong. §§ 101, 201, 301 (introduced Jan. 3, 1973)).

> Ultimately . . . [governmental] plans were exempted, and Congress instead included a provision in ERISA requiring that governmental plans be studied in order for Congress to be more fully informed before taking any action impacting such plans. [29 U.S.C. § 1231]. For many years afterwards, bills were introduced to bring governmental plans within ERISA's purview, but none have been successful.

Id.

56. Monahan & Thukral, *supra* note 51, at 292.

57. *See* Roger Lowenstein, *Broke Town, U.S.A.*, N.Y. TIMES, Mar. 3, 2011, at MM26 (estimating unfunded part of public pension promises to be between $1 trillion and $3.5 trillion); *see also* Andrew Barry, *Munis on the Mend*, BARRON'S (Oct. 14, 2013), http://online.barrons.com/article/SB50001424053111903891504579121802222118332.html#articleTabs_article%3D1 ("What separates most states with strong pension funding from those with deep deficits is a willingness to fund their plans consistently at the actuarially required contribution level.").

58. SAFE Retirement Act of 2013, S. 1270, 113th Cong. (2013), *available at* http://www.govtrack.us/congress/bills/113/s1270/text.

59. *See* Press Release, Orrin Hatch, U.S. Sen., Hatch Unveils Bill to Overhaul Pension Benefit System, Secure Retirement Savings (July 9, 2013), http://www.hatch.senate.gov/public/index.cfm/releases?ID=bb7de6e5-a45f-4851-b17e-2c9c6dce972b.

investing in annuity contracts, these plans would "eliminate[s] pension plan underfunding . . . while delivering lifetime retirement income to employees . . . with a consumer safety net, only minimal involvement by the federal government and no federal taxes."[60] As the writing of this Article, the law has not yet been enacted, and given current political realities, its chances of being enacted are very slim.

C. Characteristics of Wages and Other Employee Benefits

In addition to retirement benefits provided through occupational pension plans, employers also owe their employees various wage-based and other employee benefits upon their insolvency. These wage-based claims may include: unpaid wages, vacation benefits, holiday pay, severance pay, termination pay, travel expenses, and other contracted-for benefits (like health insurance, life insurance, long-term disability insurance, and retiree medical benefits).[61]

These types of employee benefits are distinguished from pension claims in that these claims are due in the present under appropriate conditions and circumstances, whereas pensions are a type of deferred compensation due sometime in the future (for instance, at normal retirement age).[62] These other employee benefits, generically referred to as "wage claims," sometimes are treated the same in the insolvency proceedings as pension benefits, but sometimes can be treated either better or worse depending on a particular country's system.[63] As with pension benefits, there are also significant differences in what wage-related and other employee benefits are even available country-to-country among the OECD members, and to the extent that such benefits exist, how they are treated in bankruptcy.[64]

D. Prevalence of Government Insurance or Guarantee Schemes

A number of the OECD countries studied below either have pension and/or wage insurance schemes, or guarantee associations that protect employee occupational benefits and wage-related benefits in case of employer insolvency. The public policy goal behind such schemes is to provide a more timely method of payment of wages and benefits to employees when their employers become

60. *Id.*
61. SARRA, *supra* note 37, at 9–11.
62. *See* HIRSCH ET AL., *supra* note 41, at 199.
63. *See infra* Part III.B, tbl.III.3.
64. *Id.*

insolvent.[65] Often, it can be years before employees receive some, if any at all, pension or benefit claims through the bankruptcy process.[66] As mentioned above, the PBGC in the United States is a prime example of a pension guarantee scheme,[67] though similar organizations exist in the United Kingdom[68] and the province of Ontario.[69] Also, as with pension benefits, many of the studied OECD countries have guarantee schemes that will help pay for some employee wage-based benefits upon insolvency, at least for a designated period before the insolvency and up to a predetermined capped amount.[70] Canada itself has such a wage-guarantee scheme under its Wage Earner Protection Program (WEPP).[71]

Although government insurance schemes and guarantee schemes act in a complementary fashion to protect pension and other employee benefits in the face of employer insolvency, they also may play an important role in the insolvency process itself. Many times the guarantee organization will take on the pension or wage-related credit claims of employees.[72] This is beneficial because such a guarantee institution becomes a large creditor with correspondingly greater ability to have its concerns met during the insolvency process.[73] To the extent that the guarantee association is unable to secure recovery for employees through the insolvency process, however, the result may be increased financial instability for the association and/or higher premium rates for remaining employers (at least where such schemes are financed through employer contributions).[74]

---

65. *See* SARRA, *supra* note 37, at 23–24.

66. *See* JOHNSON, *supra* note 11, at 7 (noting that one benefit of insurance funds is more immediate payout to employees as opposed to the long drawn out process of making claims during employer liquidation).

67. Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1302 (2012); *see also* SARRA, *supra* note 37, at 61–64 (discussing the role of PBGC in the United States).

68. *See* SARRA, *supra* note 37, at 57.

69. *Id.* at 57–60.

70. *See infra* Part III.

71. *See* Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1.

72. JOHNSON, *supra* note 11, at 5–6.

73. *See* SARRA, *supra* note 37, at 28 (discussing how such funds are better situated than individual employees due to information, resources, and size of claims being sought).

74. *See id.* at 85 (noting that many jurisdictions base the operation of a guarantee fund upon premiums determined through risk analysis of that industry or business practice, thus any unrecovered benefits will likely result in higher premiums).

E. Overview of Insolvency Proceedings and Priority Creditor Rights

Although there are significant differences between the insolvency systems of the different countries studied in this Article, some important commonalties do exist. As an initial matter, most countries seem to recognize different types of corporate insolvency proceedings.[75] The two types of proceedings that most countries recognize are: (1) liquidations in which the company is dissolved and remaining assets are equitably distributed to creditors,[76] and (2) business reorganizations in which the company seeks to reorganize by discharging some existing debts and eventually emerging from the insolvency process.[77] In the municipal context in the United States, cities are not subject to liquidation, but only to restructuring of their debt.[78]

Whether the bankruptcy process involves a liquidation or reorganization process, the objective of the insolvency process is the fair distribution of the company assets to the various creditors of the company.[79] Once the insolvency proceeding commences, the result is immediate protection from most forms of legal action against the company's assets by creditors through the issuance of an automatic stay.[80] In business reorganizations where management continues to operate the business, management is referred to as the debtor-in-possession.[81] The debtor-in-possession has all the powers of the trustee, the title given to the individual or individuals that administers the bankruptcy process.[82]

---

75. This Article does not address consumer/employee bankruptcy issues under Chapter 7-type liquidations.

76. *See* AARON, *supra* note 13, at 25.

77. *Id.* at 33 (discussing the concept of Chapter 11 reorganization as compared to Chapter 7 liquidation).

78. *See* KRISTEN DEJONG & BETH DOGHERTY, NUVEEN ASSET MGMT., MUNICIPAL BANKRUPTCY: A PRIMER ON CHAPTER 9, at 1, (2013), *available at* http://www.nuveen.com/Home/Documents/Viewer.aspx?fileId=48362 ("Unlike corporations, municipalities are perpetual entities that cannot be liquidated through bankruptcy.").

79. AARON, *supra* note 13, at 608 (discussing traditional goal of bankruptcy to distribute the assets of insolvent among the general creditors).

80. *See id.* at 267.

81. *See id.* at 36 ("The parties involved in a Chapter 11 case are quite different from those involved in a liquidating Chapter 7. Management continues to operate the business as a debtor-in-possession. The debtor-in-possession has the powers of a trustee.").

82. *Id.*

Importantly, many pensions and employee benefits are established in trust for the sole benefit of employee participants and their beneficiaries. They are not considered part of the employee's bankruptcy estate and are thus not subject to claims by creditors if the individual participant or beneficiary becomes bankrupt.[83] In other words, such trust-based benefits are inalienable, which is an important protection for employees if they become insolvent.[84] Nevertheless, such trust-based benefit schemes can still be underfunded and short employer contributions, mostly in the defined benefit pension context, and the pension fund or guarantee scheme will need to seek assets from the insolvent company to make up these funding deficiencies.[85]

Creditors of the insolvent employer are notified of the insolvency filing and may file claims with the trustee for satisfaction of the debts owed to them by the employer.[86] The trustee will liquidate some or all of the assets of the company in as expeditious a manner as practicable by paying off the claims of creditors according to a predetermined hierarchy of claims.[87] Creditor claims that are given preference over other creditor claims are said to enjoy a "priority" and are satisfied first among the various claims.[88] The concept of priority is important because of the insolvent employer's limited assets.[89] Only those creditors who have the highest priorities are likely to have any of their claims against the company satisfied.[90] The lower the priority of one's claim, the more likely the creditor will receive little or nothing from the remaining company assets.[91]

---

83. *See* Patterson v. Shumate, 504 U.S. 753, 762–63 (1992) (holding that all ERISA qualified pension plans are excluded from the bankruptcy estate regardless of state law).

84. 29 U.S.C. § 1056(d) (2012) (ERISA anti-alienation provision); *id.* § 401 (qualified plan anti-alienation provision).

85. *See* JOHNSON, *supra* note 11, at 7. Absent the guarantee scheme, the employee or retiree would have to claim the underfunded amount through the insolvency process. However, the guarantee scheme becomes subrogated to the claims of the employees and retirees in bankruptcy once it makes payments to them. *See infra* notes 307–08 and accompanying text.

86. *See* AARON, *supra* note 13, at 28. Chapter 11 reorganizations operate slightly differently with regard to notice to creditors in that a committee is formed from the largest creditors in order to supervise the debtor-in-possession as appointed by the United States Trustee. *See* 11 U.S.C. § 1102(a)(1) (2012).

87. *See* AARON, *supra* note 13, at 29, 35.

88. *Id.* at 429.

89. *See* JOHNSON, *supra* note 11, at 5 (detailing the difficulties that employees have in securing claims from employers' assets even when having priority).

90. *See* AARON, *supra* note 13, at 429.

91. *Id.*

Secured creditors are those who enjoy priority in the event of company default only as it relates to the collateral in which they hold a perfected security interest.[92] Unsecured creditors (or ordinary creditors), on the other hand, are those who have claims not secured by such collateral and who are paid from the general assets of the company.[93] In addition to secured and unsecured creditors, there are many times super-priority (or absolute) claims and preferred (or privileged) claims.[94] Super-priority claims get paid first among unsecured creditor claims and can even outrank secured claims in some countries.[95] Preferred claims, which are still unsecured claims, lie somewhere between secured claims and general unsecured claims.[96]

Generically speaking, at least assuming that there are unsecured assets available for distribution, creditor claims are satisfied in insolvency in this order: (1) super-priority (absolute priority) claims; (2) secured claims; (3) preferred claims; and (4) unsecured claims. Again, the higher a creditor ranks in the hierarchy, the more likely his claim will be satisfied. Thus, if a pension or wage claim is given a relatively low priority among an employer's creditors, there is every chance that the employee will not receive any pension or wage payments for these claims.[97] Thus, legislation that establishes the priority rights of pension and other employee benefit claims is critical in determining whether these employee claims will be satisfied when an employer becomes insolvent.[98]

---

92. *See id.* at 405–06.

93. *See* Elizabeth M. Williams, *Bankruptcy, Business Reorganization*, *in* THE A–Z ENCYCLOPEDIA OF FOOD CONTROVERSIES AND THE LAW 44 (2011) ("Only after priority creditors are paid will the general unsecured creditors be paid. When the liquidation of the assets results in insufficient funds to pay the general unsecured creditors, they may not receive anything in a bankruptcy.").

94. *See* AARON, *supra* note 13, at 454.

95. *See id.* at 293 (discussing the impact of super priority and its placement even above all other administrative expenses); *see also infra* note 298 and accompanying text.

96. *See* SARRA, *supra* note 37, at 83–84. Preferred claims enjoy different levels of priority protection depending upon the individual country's insolvency legislation. *Id.*

97. *See* AARON, *supra* note 13, at 429.

98. *See* Williams, *supra* note 93, at 44. In the context of Chapter 11 reorganizations, the consensual confirmation of plan standards require a plan proponent to commit to pay in full priority claims, though "payment in full" might occur over time and thus with interest. Whether priority claims must be paid in cash and in full on confirmation depends on the type of priority claims involved. *See* 11 U.S.C. § 1129(a)(9) (2012). Even with a priority in place for employee claims, employers may still undertake actions in bankruptcy (such as free and clear sales under section 363 of the Bankruptcy Code), which may allow the employer to evade paying the priority claim. *See* Daniel Keating, Some Lessons for Congress to Ponder

In addition to issues surrounding the type of priority wage and benefit claims received in insolvency, there are also important issues surrounding distinctions between municipal and corporate bankruptcy proceedings in the United States. Insolvencies involving corporate restructurings come under Chapter 11 of the U.S. Bankruptcy Code, while municipal bankruptcies fall under Chapter 9. As already mentioned, municipalities cannot be forcibly liquidated.[99] Additionally, states have to pass legislation providing that they assent to their municipalities seeking bankruptcy protection under Chapter 9.[100] Moreover, even if a state has given such assent,[101] there is a very time-consuming eligibility process where the federal bankruptcy court determines whether a municipality can actually go through the Chapter 9 process.[102] Even if assent and eligibility are present, there are necessarily different considerations at play during a municipal bankruptcy. There are issues of continuing to provide essential public

---

About the Labor-Bankruptcy Intersection 9–10 (2013) (unpublished manuscript) (on file with author) (describing "the ability of a debtor-in-possession to realize its going-concern value through a section 363 sale of assets free and clear of any claims or interests in the assets," and noting that although "the bankruptcy-specific priorities will attach to the proceeds of the sale . . . . the proceeds of the section 363 sale [may be] mostly encumbered by the claims of secured creditors").

99. *See* DEJONG & DOGHERTY, *supra* note 78; *see also* 11 U.S.C. §§ 301, 904 (2012) (prohibiting involuntary bankruptcies of municipalities). Municipalities, however, can still sell off property and a municipality's secured creditors can foreclose against their collateral. *See id.* § 1123(b)(4) (applicable to Chapter 9 proceedings); *see also In re* Jefferson Cnty., Ala., 484 B.R. 427, 462–63 (Bankr. N.D. Ala. 2012) ("A Chapter 9 debtor . . . retains not just full title over its property, it also keeps the same degree of control over it in a bankruptcy case.") (citing 11 U.S.C. § 904 (2012)); W. CLARK WATSON ET AL., NAT'L ASS'N OF BOND LAWYERS, MUNICIPAL BANKRUPTCY: A GUIDE FOR PUBLIC FINANCE ATTORNEYS 61–62, 75–76, 87 (2011), *available at* http://www.nabl.org/uploads/cms/documents/municipal_bankruptcy_a_guide_for_public_finance_attorneys.pdf. States, on the other hand, are not currently eligible for bankruptcy under Chapter 9. *Id.* at 39–40 (noting that 11 U.S.C. § 109 does not list states as entities permitted to seek bankruptcy protection). However, "Congress has recently held public hearings to consider the possibility of making states eligible as debtors under the Bankruptcy Code." *Id.* at 103.

100. *See* 15 MCQUILLIN MUNICIPAL CORPORATIONS § 39:76 (3d ed. 2013); *see also* RANDYE SOREF ET AL., BUSINESS WORKOUTS MANUAL § 35:5 (2013–2014 ed. 2013) (discussing Chapter 9 bankruptcy provisions' recognition of state sovereignty in local affairs per the Tenth Amendment of the U.S. Constitution).

101. *See* Daniel J. Freyberg, Comment, *Municipal Bankruptcy and Express State Authorization to Be a Chapter 9 Debtor: Current State Approaches to Municipal Insolvency—and What Will States Do Now?*, 23 OHIO N.U. L. REV. 1001, 1008–16 (1997) (providing a list of individual state bankruptcy positions).

102. *See generally* Eric W. Lam, *Municipal Bankruptcy: The Problem with Chapter 9 Eligibility—A Proposal to Amend 11 U.S.C. § 109(c)(2) (1988)*, 22 ARIZ. ST. L.J. 625 (1990).

services (like police, fire, sanitation, and utilities),[103] and there are issues concerning municipalities' ability to generate additional revenue through tax levies (as opposed to becoming more profitable through corporate reorganization).[104] Of course, municipalities do have bondholder creditors and other lenders just like private companies.[105]

The other similarity, which is the focus of this Article, is that both private companies and municipalities have employees who have pension and wage pension claims when their employers seek bankruptcy protections. As discussed below,[106] while wage and pension claims receive a priority in Chapter 11, they do not receive a priority under Chapter 9.[107] Unfortunately, this distinction between the treatment of wage and pension claims in corporate versus municipal bankruptcies does not have a ready comparison in other countries, as municipal bankruptcies either cannot occur or are very rare.[108]

F. Arguments for and Against Insolvency Priorities for Employee Claims

Those who favor priority treatment for employee pension and wage claims argue that such an approach is necessitated by both market failures and the lack of risk diversification available for most employee claimants.[109] The market failure argument is that although employees act as creditors of their employers when they enter into these pension, wage, and other employee benefit arrangements, they essentially do not understand the tradeoff they are making.[110] Indeed, most employees do not have the necessary sophistication or information to understand the nature of their pension schemes and/or are unable or incapable of undertaking the type of credit analysis

---

103. *See* Michael W. McConnell & Randal C. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 U. CHI. L. REV. 425, 483–89 (1993) (discussing the extent of a municipality's residual obligations in bankruptcy).

104. *See* Kevin A. Kordana, *Tax Increases in Municipal Bankruptcies*, 83 VA. L. REV. 1035, 1104–06 (1997) (evaluating the effectiveness of tax increases arising out of municipal bankruptcy).

105. *See id.* at 1046 (discussing the status of municipal bondholders in Chapter 9 bankruptcy proceedings); *see also* McConnell & Picker, *supra* note 103, at 429 (comparing creditor claims in private versus public bankruptcies).

106. *See infra* Part II.A.

107. *See supra* note 13 and accompanying text.

108. *See supra* note 9 and accompanying text.

109. *See* SARRA, *supra* note 37, at 6; *see also* JOHNSON, *supra* note 11, at 2.

110. *See* SARRA, *supra* note 37, at 51.

other creditors undertake before lending money to a company.[111] As Jannis Sarra has observed:

> Employees are some of the most vulnerable creditors when firms experience financial distress. Unlike sophisticated creditors who can take steps to register security to protect their credit position and have easier access to information to manage their credit exposure, employees often suffer loss of wages and benefits owed in addition to losing their jobs on a firm's insolvency.[112]

In short, "[employees] rely on payment of their wages for their livelihood and unlike other creditors, they do not agree to extend credit to their employer when they sign a contract of employment."[113]

The diversification argument suggests that even more knowledgeable employees are not able to diversify the risks they face with these benefit arrangements the way most creditors are able to do so through their multiple investments.[114] As Fiona Stewart has commented, "Workers with an occupational pension receive their current and future income from one source, and their pension may be the only substantial financial asset they own."[115] This is not so with other financial creditors. Only employee creditors "are especially exposed to credit risk, particularly if their pension scheme is mandatory, they have life-time employment with one firm or if the pension is funded by book reserves."[116]

On the other side of the debate, some argue that pension and other employee benefit claims should not receive any special treatment during insolvency proceedings and are general unsecured claims. This group points to disruption of the capital markets and the investment climate of the country,[117] and the fact that sophisticated employers will use other bankruptcy mechanisms to evade paying

---

111. *See* JOHNSON, *supra* note 11, at 2.

112. *See* JANNIS SARRA, A BRIEF OVERVIEW OF THE TREATMENT OF EMPLOYEE CLAIMS AND COLLECTIVE AGREEMENTS IN CANADIAN INSOLVENCY LAW 1 (2006), *available at* http://www.iiiglobal.org/component/jdownloads/finish/60/4072.html.

113. Heartfield & Wink, *supra* note 28, at 14-5.

114. *See* Mark Daniels, *Pensions in Peril: Single Employer Pension Plan Terminations in the Context of Corporate Bankruptcies*, 9 HOFSTRA LAB. L.J. 25, 109 (1991); *see also* David A. Skeel, Jr., *Employees, Pensions, and Governance in Chapter 11*, 82 WASH. U. L.Q. 1469, 1478 (2004) (discussing employees' tendency to invest in their own firm over diversifying their portfolio).

115. *See* Stewart, *supra* note 3, at 5.

116. *Id.* Book reserves are a type of direct employer pension promise described further below. *See infra* note 268 and accompanying text.

117. *See* Stewart, *supra* note 3, at 7–8.

such priorities, leaving employees with unsecured claims against sale proceeds largely encumbered by secured claims.[118]

With regard to harming the investing climate of the country, the argument is that by increasing the priority status of employee claims, one increases the credit risk for other unsecured creditors by making capital more expensive for companies to obtain.[119] Super- or absolute priority rights for employee claims over secured claims, which currently do not exist in the United States and rarely exist in other studied countries, could have an even larger impact if the cost of borrowing increases because secured creditors cannot rely on the collateral given in exchange for their lending.[120] Indeed, the World Bank and the United Nations Commission on International Trade Law (UNCITRAL) both argue for a flattened hierarchy of creditor classes consisting of only secured and unsecured claims. That way, the legitimate expectations of creditors can be vindicated and there can be greater predictability in commercial relations through fewer deviations from general priority ranking rules.[121] Some of the argument here appears to be directly related to recent examples of large underfunded pension schemes in the defined benefit context and how such situations have impacted the credit rating of such companies.[122]

This Article tends to concur with those who believe vulnerable and unsophisticated employee creditors deserve increased bankruptcy

---

118. *See* Keating, *supra* note 98, at 13 ("GM and Chrysler cases were not the first examples of debtors-in-possession that bypassed a traditional Chapter 11 plan process in favor of a section 363 sale as a way to circumvent the effects that a large springing priority of retiree medical benefits [under section 1114] would otherwise have had on their ability to reorganize."); *see also id.* ("The retirees' section 1114 unsecured claims to their benefits would have to be asserted against the proceeds of the section 363 sale, but those proceeds were largely encumbered by the claims of secured creditors.").

119. *Id.* at 8. With regard to secured creditors, this would only be a problem to the extent the secured creditors' collateral was not sufficiently valuable to repay the outstanding debt in full. *See* AARON, *supra* note 13, at 39 ("If the secured party is undercollateralized, the result is a secured claim to the extent of the value and an unsecured claim to the balance which would constitute a deficiency.").

120. *See* AARON, *supra* note 13, at 39; *see also* SARRA, *supra* note 112, at 7.

121. *See* WORLD BANK, *supra* note 34, at 4 (discussing the need for an efficient, transparent, and reliable credit system based on distinguishing between secured claims and unsecured claims); *see also* U.N. COMM'N ON INT'L TRADE LAW, LEGISLATIVE GUIDE ON INSOLVENCY LAW 275 (2005), *available at* http://www.uncitral.org/pdf/english/texts/insolven/05-80722.ebook.pdf ("[I]nsolvency law should minimize the priorities accorded to unsecured claims.").

122. *See* Stewart, *supra* note 3, at 9 (noting the impact of underfunded pension schemes on such automotive companies as GM and Ford, as well as German business groups).

protection through heightened creditor priorities, even given the costs and risks outlined above. The impact of such additional priorities for employee claims in insolvency, however, is somewhat blunted in countries where there has been a dramatic shift from DB plans to DC plans (like in the United States).[123] In these countries, concerns about the impact of underfunded pension schemes on the credit rights of other company creditors might be dwindling in importance, simply because unfunded pension liability is no longer as big of an issue or is dealt with outside of the company.[124] Also, there would appear to be less impact on capital and credit markets in giving priorities to pension claims in countries that have underdeveloped occupational pensions markets, since whatever claims stem from these plans in such countries are likely to be relatively small. In short, the priority decision, especially with respect to pension claims, has the biggest impact in countries dependent on defined benefit occupational pension plans.[125]

The United States is in a somewhat unique position in this regard because although corporate occupational pension plans are increasingly DC plans, most public pension plans are still of the DB plan variety.[126] Consequently, it is important to keep in mind that the awarding of heightened priorities in the municipal context may have a different type of impact on the bankruptcy process than if similar measures were taken in the corporate context.

II. COUNTRY-BY-COUNTRY PROFILE OF EMPLOYEE BENEFIT CLAIM TREATMENT IN INSOLVENCY

This Part is dedicated to the study of how the OECD countries currently approach the treatment of employment claims during insolvency and under guarantee schemes. As mentioned above, although the emphasis here is primarily on private-sector pension and wage claims during insolvencies, many of the same lessons learned are applicable to the municipal bankruptcy context in the United States.

The actual country-by-country profile of the thirty-two OECD countries, besides the United States and Canada, is provided in the

---

123. *See* HIRSCH ET AL., *supra* note 41, at 198 (discussing the trend and justifications for employer movement towards defined contribution plans over defined benefit plans).

124. *See also* SARRA, *supra* note 37, at 48 (noting that some countries "have 'superfunds,' which are industry wide pension or superannuation funds, which are not as affected by the insolvency of one company in the sector").

125. *See supra* note 50 and accompanying text.

126. *See supra* note 47 and accompanying text.

Appendix at the back of this Article.[127] What follows in this Part is first a consideration of the US and Canadian systems (as they have similar occupational employee benefit systems which take different approaches to employee claims in insolvency), addressed in Parts II.A and II.B. The purpose is to provide a baseline by which the US and Canadian approach can be compared and contrasted to approaches taken by other OECD countries.

Second, after considering the current state of US and Canadian law, Part II.C considers issues specific to European Union (EU) countries under an EU Directive concerning the treatment of pension and wage claims during insolvencies and an International Labour Organization (ILO) Convention considering similar issues. Third, and finally, a series of tables summarize the findings of this comparative employee benefits and bankruptcy law study.

A. Current Treatment of Pensions and Wage Claims in Insolvency in the United States

1. Pensions

As an initial matter, under the United State Supreme Court decision *Patterson v. Shumate*,[128] all ERISA (private sector) qualified pension plans are excluded from the bankruptcy estate regardless of state law.[129] Similarly, Internal Revenue Code (IRC) Section 401(a)(13)[130] and ERISA section 206(d)[131] both have identical anti-alienation provisions, which provide that a company's other creditors cannot reach all qualified pension benefit plan assets.[132]

Under Chapter 11 of the United States Bankruptcy Code, which deals primarily with corporate reorganizations, outstanding employer

---

127. Within the Appendix, the country profile sections are divided between pensions and other employee benefit (wage) claims in bankruptcy. Both the pension and other employee benefit sections are further broken down into first, a consideration of how employee claims are ranked, or given priority, among the various creditors, and second, whether any guarantee scheme exists to provide protection to those employee claims. Finally, each country section notes whether the guarantee scheme is subrogated to the rights of employees in insolvency.

128. 504 U.S. 753 (1992).

129. *Id.* at 762–63.

130. I.R.C. § 401 (2012).

131. 29 U.S.C. § 1056 (2012).

132. *Compare* I.R.C. § 401(a)(13)(A) ("A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated."), *with* 29 U.S.C. § 1056(d)(1) ("Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.").

contribution to DB plans and DC plans receive a priority.[133] This rule has become more relevant for DC plans (such as 401(k) salary deferral contribution plans), because most employers in the United States do not have defined benefit plans anymore.[134] Combined with wages, these pension claims receive their preferred status up to a capped amount ($12,475 as of April 1, 2013).[135] The employee is entitled to the priority for these amounts due within the 180 days prior to the bankruptcy petition.[136] The pension priority (the fifth priority with other employee benefits under Section 507(a)(5) of the Bankruptcy Code)[137] is only available if the $12,475 cap is not used up by the wage claim (the fourth priority under Section 507(a)(4) of the Bankruptcy Code).[138] In such cases, claims beyond the cap are unsecured.[139] No priority status exists for unfunded or underfunded pension liability.[140]

---

133. *See* 11 U.S.C. § 507(a)(4)–(5) (2012) (assigning "unsecured claims for contributions to an employer benefit plan" fifth priority).

134. *See* HIRSCH ET AL., *supra* note 41, at 198. Or if they have such plans, many of them are frozen and will eventually be terminated through a statutory-sanctioned process known under Title IV of ERISA as a "standard termination." *See* 29 C.F.R. § 4041.21 (2013). This is distinguishable from a distress termination, which can result in either a voluntary or involuntary termination of a defined pension benefit by the PBGC. *See* 29 U.S.C. § 1341 (2012); *Distress Terminations*, PBGC.GOV, http://www.pbgc.gov/prac/terminations/distress-terminations.html (last visited Mar. 9, 2014).

135. *See* Bob Eisenbach, *Going Up: Bankruptcy Dollar Amounts Will Increase on April 1, 2013*, IN THE (RED): THE BUS. BANKR. BLOG (Feb. 26, 2013), http://bankruptcy.cooley.com/2013/02/articles/business-bankruptcy-issues/going-up-bankruptcy-dollar-amounts-will-increase-on-april-1-2013.

136. 11 U.S.C. § 507(a)(4)–(5) (2012); *see* AARON, *supra* note 13, at 444.

137. § 507(a)(5).

138. § 507(a)(4); *see* AARON, *supra* note 13, at 444 (pension priority only available if wage claims do not reach cap).

139. AARON, *supra* note 13, at 444; *see* Skeel, *supra* note 114, at 1471 ("Other than this limited priority, however, individual employees are not given special treatment. They are lumped with the company's other general creditors, and are thus entitled only to 'bankruptcy dollars'—that is, a pro rata share of what they are owed.").

140. *See* Michael Peskin, *Pension Funds and Corporate Enterprise Risk Management*, *in* THE OXFORD HANDBOOK OF QUANTITATIVE ASSET MANAGEMENT 426 (Bernd Scherer & Kenneth Winston eds., 2012) ("Since unfunded pension liabilities are unsecured debts of the corporation and are similar to an unsecured bond, they should be priced at the corporation's unsecured borrowing cost."). As opposed to pension contributions, "unfunded pension liabilities are those that are paid out to company retirees on an ongoing basis, for so long as they live, after they have ceased to work for the company, and the amounts are based on complex actuarial calculations." *See* OFFICE OF WAYNE MARSTON, MP, BACKGROUNDER: AMENDING CANADA'S BANKRUPTCY LAWS (2011), *available at* http://www.usw.ca/admin/union/soar-news/files/Background-Bill-C-331-Pension-Protection-Act.pdf.

Regarding Chapter 9 municipal bankruptcy proceedings, there is not much experience for how employee claims are treated (though in a number of recent municipal bankruptcies, especially in California, pensions have not been cut).[141] What does appear clear is that the wage and pension priorities of Section 507 of the Bankruptcy Code do not apply in Chapter 9.[142] Thus, most people believe that unfunded municipal pension liabilities are unsecured.[143] Finally, it is unclear how collective bargaining contracts should be treated, as far as whether they can be discharged under Section 1113, or whether retiree medical benefit obligations can be discharged under Section 1114, although most commentators and courts appear to agree that another standard applies in municipal bankruptcies to these scenarios.[144]

For defined benefit plans, the PBGC pays benefits in the event of the insolvency of an employer who sponsors a DB plan.[145] DC plans are not subject to PBGC protections and are not guaranteed.[146] The PBGC is funded through annual premiums of $30 per employee, plus 0.9% of the unfunded liability if a plan is under-funded.[147] The PBGC

---

141. *See supra* note 7 and accompanying text.

142. *See supra* note 24 and accompanying text.

143. *See, e.g.*, JAMES E. SPIOTTO, CHAPMAN & CUTLER LLP, UNFUNDED PENSION OBLIGATIONS: IS CHAPTER 9 THE ULTIMATE REMEDY? IS THERE A BETTER RESOLUTION MECHANISM? 6, (2011), *available at* www.sec.gov/spotlight/municipalsecurities/statements072911/spiotto-slides2.pdf ("Pension obligations for municipal workers do not have priority in bankruptcy and no protection for deferred compensation.").

144. At least one court has found that Section 1113 does not apply, and the old, employer-friendly law of labor contract discharge under *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), applies instead. *See In re* City of Vallejo, 403 B.R. 72, 77–78 (Bankr. E.D. Cal. 2009) ("Unexpired collective bargaining agreements are executory contracts subject to rejection under section 365. Congress incorporated section 365 into chapter 9 without restricting or limiting its application to collective bargaining agreements . . . . Section 1113 is not applicable in chapter 9 cases, and a chapter 9 debtor is not required to comply with it in order to reject an executory collective bargaining agreement."); *see also* WATSON ET AL., *supra* note 99, at 81 ("It is important to note that Section 901 *does not* by its terms import Section 1113 with the special rules on rejection of collective bargaining agreements into Chapter 9.").

145. *See* SARRA, *supra* note 37, at 289.

146. *See id.*

147. *See* 29 U.S.C. § 1306(a)(3)(A)(i)–(E)(ii) (2012). Additionally, ERISA provides that controlled group members—eighty-percent commonly owned businesses—are jointly and severally liable for pension contributions, PBGC premiums, and pension underfunding on termination. *See* 29 U.S.C. §§ 1307(e), 1362(a) (2012). ERISA also provides that a former controlled group member remains liable if it disposes of its interest with intent to evade or avoid liability. *See* 29 U.S.C. § 1369(a) (2012).

pays employees a guaranteed amount up to statutory cap.[148] The maximum guarantee is capped at almost $57,500 in 2013 per member and it is paid out in the form of a single-life annuity.[149] The maximum is lower for members retiring at earlier ages.[150] Some employees may have also received benefits in excess of the normal statutory guarantee where the employee has been in pay status as a retiree for three years.[151] Under Section 1344(a) of ERISA, these types of retiree claims take precedence over reimbursing the PBGC for its insurance expenditures.[152]

After the PBGC pays claims to participants in defined benefit claims when such plans are underfunded, the PBGC is subrogated to the rights of the employee in bankruptcy.[153] The PBGC places its claims into the bankruptcy for the amount it believes the plan is underfunded.[154] The PBGC's claim for underfunding can give rise to a lien to the extent of thirty percent of the net worth of the company.[155] Although the PBGC has argued to the contrary in the past,[156] courts generally hold that the PBGC does not have a priority claim and is an unsecured creditor when it comes to minimum contributions owed to the plan by the employer.[157]

---

148. *See* SARRA, *supra* note 37, at 62.

149. *See* 29 U.S.C. § 1322(b)(3) (2012). For 2013, the maximum guarantee for a life annuity with no survivor benefits was $57,477.24 yearly ($4,789.77 monthly) at age 65; $45,407.04 yearly ($3,783.92 monthly) at age 62; and $25,864.80 yearly ($2,155.40 monthly) at age 55. *PBGC Maximum Insurance Benefit Increases for 2013*, PBGC.GOV (Nov. 27, 2012), http://www.pbgc.gov/news/press/releases/pr12-35.html.

150. *See PBGC Maximum Insurance Benefit Increases for 2013*, *supra* note 149.

151. 29 U.S.C. § 1344 (2012) (establishing the order of priority among participant and beneficiaries in the case of the termination of a single-employer plan); *see Priority Categories*, PBGC.GOV, http://www.pbgc.gov/wr/other/pg/priority-categories.html (last visited Mar. 9, 2014) (designating "[p]articipants who retired, or could have retired, 3 years or more before plan termination" as third priority, following voluntary employee contributions and mandatory employee contributions).

152. 29 U.S.C. § 1344(a)(3)(A).

153. *See* SARRA, *supra* note 37, at 62 (noting PBGC will assume "all of the claims under the pension plan members' agreement with the insolvent plan sponsor").

154. *See* Laura Rosenberg, *Understanding PBGC's Role in Bankruptcy: Dealing with the 800-Pound Gorilla*, TURNAROUND MGMT. ASS'N (Aug. 1, 2006), http://www.turnaround.org/Publications/Articles.aspx?objectID=6429.

155. 29 U.S.C. § 1368 (2012). It is rare, but debtor companies may have solvent subsidiaries, and their net worth counts for this purpose. *Id.*

156. *See* ISRAEL GOLDOWITZ & MARC S. PFEUFFER, PENSION BENEFIT GUARANTEE CORPORATION LITIGATION OUTLINE 24 (2010), *available at* http://www.pbgc.gov/docs/PBGCLitigationOutline2010.pdf.

157. *See In re* Chateaugay Corp., 115 B.R. 760, 787 (Bankr. S.D.N.Y 1990) (proposed decision), *adopted*, 130 B.R. 690 (S.D.N.Y. 1991), *vacated by consent of the parties*, 1993 U.S. Dist. LEXIS 21409 (S.D.N.Y. June 7, 1993) (ruling that the

The one exception where the PBGC has a priority is for rare instances where ERISA Section 4068 affords the PBGC a lien for employer-missed contributions if those missed contributions are above $1 million dollars.[158] In such cases, a priority is granted for amounts that exceed the $1 million dollars in missing contributions.[159]

2. Other Employee Benefits

As mentioned above, unpaid wages (including vacation pay, severance pay,[160] and sick leave pay) and pension contribution claims are treated as priority claims, up to a combined capped amount ($12,475 in 2013).[161] The employee is entitled to the priority for the 180 days prior to the bankruptcy petition.[162] Wages have the so-called fourth priority, and other employee benefits (including pensions) have the fifth priority among all the employer's creditors.[163] Pensions only receive the fifth priority if the $12,475 cap is not used up by the wage claims as part of the fourth priority.[164] Beyond this capped amount (and beyond the 180 days prior to the bankruptcy petition being filed), excess pension and wage-related claims are unsecured.[165] Priority claims for wages and other benefits must be asserted by each employee on their own for a specific claim to his/her unpaid wages, contracted-for medical plan contributions, and other post-employee benefits.[166]

PBGC's claim for minimum contributions arose from the service of the debtor's employees pre-petition, and there was no resulting post-petition benefit to the estate and that the PBGC's claim was not entitled to priority status as administrative expense). Although *Chateaugay* was vacated, a number of courts have cited it as precedent for the assertion that minimum contribution claims lack any priority. *See* Jonathan Lewis & Vivek Melwani, *Treatment of Pension Plans When an Employer Is in Bankruptcy*, BENDER'S LAB. & EMP. BULL., Apr. 2006, at 163, 168 ("As a result of *Chateaugay*, the PBGC no longer claims that the entire amount of its unfunded benefit liabilities claim is entitled to administrative priority.").

158. 29 U.S.C. § 1368; I.R.C. § 430(k) (2012).

159. 29 U.S.C. § 1368; I.R.C. § 430(k).

160. A well-known Second Circuit case still followed by some courts held that post-petition severance pay may result in an administrative priority claim. *See* Straus-Duparquet, Inc. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 386 F.2d 649, 651 (2d Cir. 1967); *see also* Matson v. Alarcon, 651 F.3d 404, 409 (4th Cir. 2011) (reaching a similar conclusion for pre-petition severance payments under Section 507(a)(4)).

161. *See* AARON, *supra* note 13, at 444.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *See* Skeel, *supra* note 114, at 1471 ("For individual employees who are not covered by a collective bargaining agreement, Chapter 11 looks quite different. Not only are there few restrictions on the company's ability to lay off employees, but

The PBGC has no role with regard to wage claims, and there is no wage guarantee fund in the United States if an employer becomes insolvent[167] (except for a more general unemployment compensation scheme, run by the individual states, that applies to all employees who become unemployed through no fault of their own and provide prospective wage payments as opposed to already-earned wages).[168] There is also a statutory scheme, the Work Adjustment and Retraining Notification Act (WARN),[169] which provides sixty days of notice and/or severance pay for employees working for employers with 100 or more workers who close their businesses[170] (the law is riddled with exceptions, however, so WARN does not always provide benefits in these instances).[171]

B. Canada's Current Treatment of Pensions and Wage Claims in Insolvency

1. Pensions

Canada's insolvency system stems from two statutes: the Bankruptcy and Insolvency Act (BIA)[172] and the Companies' Creditor Arrangement Act (CCAA).[173] While the BIA sets out the general bankruptcy framework for commercial and consumer

---

employees are not even guaranteed that they will receive the full amount the company owed them as of bankruptcy."). Unions, on the other hand, will seek to bring claims for active members under collective bargaining agreements, although it is unclear whether unions have a formal role to play in the Chapter 11 bankruptcy process. *See generally* Dawson, *supra* note 3. It is even less clear what formal role public unions have in municipal liabilities. Detroit's public employee unions, however, are playing a high-profile role in seeking to ensure the employee benefits of its members through challenges to the validity of the Chapter 9 bankruptcy process. *See* Joseph Lichtman & Bernie Woodall, *Detroit Union Files Challenge to City's Bankruptcy Petition*, REUTERS, Aug. 19, 2013, *available at* http://www.reuters.com/article/2013/08/19/us-usa-detroit-idUSBRE97I0WC20130819 ("The American Federation of State, County and Municipal Employees Council 25 said Detroit . . . has not proven it is insolvent and has not negotiated in good faith with its creditors . . . . [T]he union said it was also challenging the constitutionality of Chapter 9 of the federal bankruptcy code . . . arguing that it encroaches on states' rights.").

167. *See* SARRA, *supra* note 37, at 61–62 (noting PBGC's coverage is limited to defined benefit pension plans and does not extend to other unvested benefits).

168. For a general explanation of the unemployment compensation system in the United States, see generally HIRSCH ET AL., *supra* note 41, at 133–91.

169. *See* 29 U.S.C. §§ 2101–2109 (2012).

170. *See* § 2102.

171. *See* § 2103 (detailing specific exemptions from WARN Act).

172. Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

173. Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

bankruptcies (involving both liquidations and restructurings),[174] the CCAA focuses on the process of corporate reorganizations.[175] Whether a Canadian company proceeds under the BIA or CCAA depends to some degree on the amount of debt the company has, with only companies with debts in excess of $5M eligible for reorganization under the CCAA.[176]

In Canada, the federal and provincial governments both regulate occupational pension plans to some degree.[177] Federal jurisdiction exists for the banking, transportation, and telecommunications industries, all industries that have an inter-provincial orientation,[178] and their pension plans come under the Pension Benefits Standards Act 1985 (PBSA).[179] Only ten percent of all occupational pension plan assets are part of the federal system.[180] All other pension plans are regulated by provincial legislation.[181]

Pension obligations are now specifically addressed in the priority-ranking scheme in bankruptcy proceedings after enactment of the Wage Earner Protection Program Act (WEPPA) in 2008.[182] Under this scheme, the BIA now grants a super-priority in bankruptcies for outstanding current pension contributions, ranking behind the employee wage priority discussed below, but otherwise with the same type of priority.[183] This super-priority for pension contributions extends to all assets, not just current assets, and is unlimited.[184] More specifically, this priority includes: (1) pension contribution amounts deducted from an employee's pay;[185] (2) amounts required from the employer under a defined contribution provision;[186] and (3) "normal cost" amounts (the amounts required to be paid in a given year to

---

174. *See* Stewart, *supra* note 3, at 11.

175. *Id.*

176. *Id.*

177. *Id.*

178. Pension Benefits Standards Act, R.S.C. 1985, c. 32, § 4 (2d Supp.).

179. *Id.*

180. *See* Stewart, *supra* note 3, at 11.

181. *See id.* Examples of provincial pension legislation includes two pieces of Ontario legislation discussed in some detail in Paul M. Secunda, *Lessons from the Ontario Expert Commission on Pensions for U.S. Policymakers*, 28 ABA J. LAB. & EMP. L. 87, 92 (2012).

182. *See* Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1.

183. *See* SARRA, *supra* note 37, at 54; Stewart, *supra* note 3, at 11.

184. *See* Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, at 81.5; *see also* MILLER THOMSON, LLP, BUSINESS LAWS OF CANADA § 25:80 (2013).

185. *See* Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, at 81.5; *see also* SARRA, *supra* note 37, at 54; Stewart, *supra* note 3, at 11–12.

186. *See* Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, at 81.5.

fund benefits).[187] This priority applies to both federally and provincially-regulated pensions.[188] Unfunded pension liabilities remain unsecured.[189]

On the other hand, occupational pensions are established in trust for the sole benefit of pension plan participants and their beneficiaries, and exist separate and apart from other company assets.[190] As such, the occupational pension plan assets are excluded from the bankruptcy estate and not subject to the claim of other creditors.[191] Yet, as with a similar scheme in the United States, this does not mean that such pension plans do not have unfunded pension liability or have missing employer pension contributions.[192]

Unlike the United States, Canada still has mostly defined benefit occupational pension schemes,[193] meaning that pension underfunding and employer outstanding contributions can potentially play a large role in the insolvency process. On the other hand, with the exception of Ontario, no other Canadian province has established a guarantee scheme to protect occupational pension plan benefits in the face of employer insolvency.[194] Even the Ontario Pension Benefits Guarantee Fund (PBGF) offers only very limited protection for occupational pension benefits up to a comparatively low fixed statutory cap.[195] It applies only to single employer plans (as opposed to multiemployer plans)[196] and individual coverage is limited to a monthly maximum of CAD $1000 plus a proportion of benefits owed.[197]

---

187. *Id.*

188. *See* Stewart, *supra* note 3, at 12.

189. *See* SARRA, *supra* note 37, at 54; Stewart, *supra* note 3, at 11.

190. *See* SARRA, *supra* note 37, at 48–49.

191. *Id.* at 49.

192. *Id.*

193. *See* Jay Cooper, *Canadian Pension Plans Take the Risk-Shedding Route*, PROF. PENSIONS (Apr. 6, 2011), http://www.professionalpensions.com/global-pensions/feature/2040750/canadian-pension-plans-risk-shedding-route#ixzz1xMP1c6oU ("Towers Watson senior consultant, Janet Rabovsky estimated that 94% of all pension assets in Canada are still in defined benefit plans."). The current funding status of these Canadian DB plans is excellent: "Canada's corporate plans had an average funded ratio of 88% at the end of the third quarter of 2010, compared to 82% for US companies, 85% for the United Kingdom and 66% for Continental Europe." *Id.*

194. *See* SARRA, *supra* note 37, at 115.

195. *See* FINANCIAL SERVICES COMMISSION OF ONTARIO, PENSION BENEFITS GUARANTEE FUND (PBGF), https://www.fsco.gov.on.ca/EN/PENSIONS/PBGF/Pages/default.aspx (last visited Mar. 9, 2014).

196. *Id.*

197. *See* SARRA, *supra* note 37, at 12.

2. Other Employee Benefits

Canada categorizes employee benefits claims and treats them differently as far as the priority they receive. The 2008 amendments to the BIA provide an employee of a bankrupt employer with a limited super-priority claim against the employer's current assets for unpaid wages and vacation pay (but not for severance or termination pay).[198] It is limited because the priority applies only to current assets—cash, accounts receivable, and inventory.[199] This charge will secure unpaid wages and vacation pay for the six-month period prior to bankruptcy, up to a maximum of CAD $2000 per employee.[200]

Prior to these amendments, wages and vacation pay were subordinate in priority to secured creditors' claims.[201] Under this previous regime, it was estimated that unpaid wage claims received only thirteen cents on the dollar, and were only made at the conclusion of the bankruptcy process which could take up to three years to complete.[202] With the new limited priority, the hope is that up to fifty cents on the dollar will be recoverable, though no definitive figures are available since the scheme went into effect.[203]

In addition to priority rights, there is also a wage guarantee scheme funded from general tax revenues (estimated to cost a maximum of CAD $50 million per year).[204] The Minister of Labor is responsible for the Wage Earner Payment Program (WEPP) and Service Canada is the delivery agent.[205] Under the WEPP, an employee whose employer has become bankrupt on or after July 7, 2008, is entitled to receive payments from the federal program on account of any outstanding wages that were earned in the six months immediately prior to bankruptcy in an amount not to exceed the greater of CAD $3646 (as of 2013), or equal to four times the maximum weekly

---

198. *Id.* at 45.

199. *Id.*

200. Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, at 81.3.

201. *See* SARRA, *supra* note 37, at 45.

202. *See* Heartfield & Wink, *supra* note 28, at 14-6.

203. *Id.* at 14-17 ("[I]t is estimated that the [Canadian] Government will recover up to 50 cents on the dollar with the new limited super-priority.").

204. *Id.* at 14-16; *see Wage Earner Protection Program: What Does It Mean for Employees of Bankrupt Companies?*, HOYES & MICHALOS, http://www.hoyes.com/bill-c-12-wage-earner-protection-pogram.htm (last visited Feb. 9, 2014).

205. *See* Heartfield & Wink, *supra* note 28, at 14-8.

insurable earnings under the Employment Insurance Act.[206] This government wage fund pays for unpaid wages, vacations, severance, and termination pay, and is estimated to satisfy ninety-seven percent of wage claims in full.[207] To the extent that wage payments are made to employees, the WEPP is subrogated to any claims for wages an employee may have against the bankrupt employer and with the benefit of the same priority that the employee would have had.[208]

One last interesting observation concerning the Canadian treatment of employment claims in insolvency: although termination and severance payments receive little protection in the bankruptcy process, they receive better and similar protection to other wage-related benefits under the wage guarantee scheme.

C. Treatment of Employee Claims in Insolvency Under EU and ILO Law

This section highlights that out of the thirty-four OECD countries discussed in this report, twenty-one countries are also members of the European Union.[209] This is important because Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 concerns the protection of employees in the event of the insolvency of their employer and is binding on all EU Members.[210] This directive sets a minimum standard in all EU countries (through a transposition by a national law or a decree), but it does not prevent higher protection for employee claims in these situations.[211] It also requires Member States to set up an institution to guarantee some or all of these employee claims.[212]

---

206. *See Wage Earner's Protection Program*, CANADA'S ECON. ACTION PLAN, http://actionplan.gc.ca/en/initiative/wage-earner-protection-program-0 (last visited Mar. 9, 2014).

207. *See* Heartfield & Wink, *supra* note 28, at 14-6.

208. *See* Allan Nackan, *Lenders Beware—New Canadian Legislation Puts Employee Wages First*, ACCUVAL (Sept. 2008), http://www.accuval.net/insights/featuredarticle/detail.php?ID=22.

209. Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. Norway and Switzerland, although European OECD countries, are not EU Countries. *List of Member States of the EU*, EUROPEAN UNION, http://europa.eu/about-eu/countries/index_en.htm (last visited Mar. 9, 2014).

210. *See generally* Council Directive 2008/94, 2008 O.J. (L 283) 36 (EC) ("On the Protection of Employees in the Event of the Insolvency of Their Employer").

211. *Id.*

212. *Id.*

Additionally, the ILO has a convention that concerns the protection of workers claims during an employer's insolvency. Only nine OECD countries are signatories to any part of ILO Convention C173: Protection of Workers Claims (Employer's Insolvency) Convention, 1992.[213]

This Part is divided into three sections. The first two sections focus on the EU Directive and cases interpreting that Directive, while the last section focuses on the ILO Convention.

1. Discussion of EU Directive and Scope

The EU Directive on the protection of employees in the event of the employer's insolvency (2008/94/EC) is the main piece of EU legislation in this area.[214] Complementary EU legislation has focused on increasing the funding levels of pensions so that the insolvency issue does not arise in the first place (particularly the Solvency II Directive and the IORPs Directive).[215] The 2008/94/EC directive is actually a restatement of a directive from 1980 (1980/987/EEC),[216] which requires "protection" of employees and their benefits on the employer's insolvency.[217]

By its terms, Directive 2008/94/EC states that EU Member States should establish a body that guarantees payment of the outstanding employee claims when their employer becomes insolvent.[218] Payments are guaranteed for pension and wage claims. Article 1(1) of the Directive, in this regard, covers all, "employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency."[219]

---

213. *See C173—Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173)*, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312318 (last visited Mar. 9, 2014) [hereinafter *ILO Convention*] (showing that only nine OECD countries have ratified this convention: Australia, Austria, Finland, Mexico, Portugal (as of 2012 but it is not in force), Slovakia, Slovenia, Spain, and Switzerland).

214. *See* Council Directive 2008/94, 2008 O.J. (L 283) 36 (EC); *see also* SARRA, *supra* note 37, at 30, 150 (referring to the directive as the EU policy on the matter of protecting employee rights through insolvency).

215. *See* Council Directive 2009/138, 2009 O.J. (L 335) 1 (EC) ("On the Taking-up and Pursuit of the Business of Insurance and Reinsurance (Solvency II)"); Council Directive 2003/41, 2003 O.J. (L 235) 10 (EC) ("On the Activities and Supervision of Institutions for Occupational Retirement Provision").

216. *Compare* Council Directive 2008/94, 2008 O.J. (L 283) 36 (EC), *with* Council Directive 80/987, 1980 O.J. (L 283) (EC).

217. Council Directive 80/987, 2008 O.J. (L 283) 36 (EC), art. 3(1).

218. Council Directive 2008/94, 2008 O.J. (L 283) 36 (EC), pmbl.

219. *Id.* art. 1(1).

In most EU countries, this protection is offered by the provision of a guarantee fund or scheme (like the United Kingdom's Pension Protection Fund (PPF)).[220] These institutions provide pensions, or other types of wage-related benefits, for those whose employer becomes insolvent.[221] Such guarantees are usually limited to a certain period of time before the employer becomes insolvent and up to a statutory cap on amounts to be paid (generally indexed from one year to another to take account of inflation).[222]

2. *EU Court of Justice Case Law Interpretations of Employer Insolvency Directive*

In a recent EU Court of Justice case (involving Ireland), *Hogan v. Minister of Social and Family Affairs*,[223] the court found that Directive 2008/94/EC applied to occupational pension schemes and set quantitatively the minimum level of protection for employees when their employer becomes insolvent.[224] More specifically, this Directive was "interpreted as meaning that it applies to the entitlement of former employees to old-age benefits under a supplementary pension scheme set up by their employer,"[225] and that employees must "receive in excess of 49% of the value of their accrued old-age pension benefits under their occupational pension scheme."[226] Because Ireland's scheme did not meet this standard, it was found to be in serious breach of its Member State obligations.[227]

The decision in *Hogan* was based in part on a previous European Court of Justice Decision, *Robins v. Secretary of State for Work & Pensions*.[228] In that case, the ECJ held that where the employer is

---

220. *See* SARRA, *supra* note 37, at 55, 60 (noting how the majority of countries have such guarantee funds or schemes and providing analysis of the UK model with PPF).

221. *See* JOHNSON, *supra* note 11, at 7.

222. *Id.* at 7, 8 (discussing the methodology for guarantee schemes as well as the viability of providing a cap or limit to the payout structure to help limit costs of fund for viability purposes).

223. Case C-398/11, Hogan v. Minister of Soc. & Family Affairs, Apr. 25, 2013, http://curia.europa.eu/juris/celex.jsf?celex=62011CJ0398&lang1=en&type=NOT&ancre=.

224. *See id.* ¶¶ 27, 44–46 (determining that Directive 2008/94 must be applied to such occupational pension schemes and establishing that a minimum level of protection is necessary to protect employees' rights).

225. *Id.* ¶ 27.

226. *Id.* ¶ 53.

227. *Id.*

228. *See* Case C-278/05, Robins v. Sec'y of State for Work & Pensions, 2007 E.C.R. I-01053.

insolvent and the assets of the supplementary pension scheme are insufficient, accrued pension rights need not necessarily be funded by Member States themselves or be funded in full.[229] The words of Article 8 of the Directive give Member States some latitude as to the means to be adopted for purposes of protection of employees' occupational pensions whose employers have become insolvent.[230] This means that Member States may impose "an obligation on employers to insure or provide for the setting up of a guarantee institution in respect of which it will lay down the detailed rules for funding, rather than providing for funding by the public authorities."[231] Importantly however, "[w]ith regard to the degree of protection required by the Directive," this decision also requires that, "the measures necessary to protect employees in the event of their employer's insolvency are to be adopted 'while taking account of the need for balanced economic and social developments in the Community.'"[232]

In addition to protecting employee rights to occupational pensions under Articles 8, 3 and 4 of Directive 2008/94/EC concern the minimum guarantee of outstanding claims relating to pay.[233] In *Francovich v. Italian Republic*, under the 1980 predecessor Directive, the ECJ considered claims for pay by an Italian citizen against his insolvent company.[234] Article 3 requires that guarantee institutions be established to pay employee outstanding claims relating to pay for the period prior to a given date.[235] Directive 2008/94/EC allows Member States to choose one of three dates relating to insolvency or the discontinuance of the employment relationship.[236] It also gives Member States the option of limiting the liability of the guarantee institution.[237]

Under Article 4, if the Member State has chosen the period from when the insolvency commenced, the guarantee institution must ensure payment of outstanding claims relating to pay for at least the last three months of the contract of employment occurring within a period of six months preceding the date of the employer's

229. *Id.* ¶ 46.
230. *Id.* ¶ 36.
231. *Id.* ¶ 37.
232. *Id.* ¶ 38.
233. *See* Joined Cases C-6 & C-9/90, Francovich s v. Italian Republic, 1991 E.C.R. I-5403, ¶ 15.
234. *Id.* ¶ 6.
235. *Id.* ¶ 15 (discussing the interpretation of directive).
236. *Id.*
237. *Id.* ¶ 21.

insolvency.[238] There was no issue that Francovich was entitled to unpaid wages on the insolvency of his employer under Directive 2008/94/EC.[239] The only issue was whether he could bring a claim against Italy, which had failed to implement a wage guarantee fund at that point.[240] The ECJ concluded that Italy was required to make good the loss and damage caused to Francovich by the country's failure to transpose Directive 80/987/EEC into its national laws.[241]

3. ILO Convention 173: Protection of Workers' Claims (Employer's Insolvency), 1992

Some of the same European countries subject to Directive 2008/94 have also ratified Convention 173 of the International Labor Organization (ILO) that also addresses the protection of workers claims when their employer becomes insolvent.[242] This convention updated a previous Protection of Wages Convention from 1949 (and in particular, Article 11 of that Convention, which concerns the treatment of employee claims during an employer insolvency).[243]

Article 3 of Convention 173 states that, "A Member which ratifies this Convention shall accept either the obligations of Part II, providing for the protection of workers' claims by means of a privilege, or the obligations of Part III, providing for the protection of workers' claims by a guarantee institution, or the obligations of both Parts."[244] Thus, the Convention envisions that employee claims in employer insolvency will either be protected through some priority status in bankruptcy, a state-sponsored guarantee scheme, or both.[245]

With regard to providing the workers' claim a privilege or priority, Articles 5 and 6 explain the scope of this priority. Article 5 states that such a claim "shall be protected by a privilege so that they [the employee] are paid out of the assets of the insolvent employer before non-privileged creditors can be paid their share."[246] In other words, for covered claims, employees are given a preference over other creditors. Article 6 states that this priority at a minimum must cover: (1) claims for wages for at least three months prior to the insolvency,

---

238. *Id.* at ¶ 16; *see also* Council Directive 1980/987, 1980 O.J. (L283) 23 (EC).
239. Joined Cases C-6 & 9/90, *supra* note 232, at ¶ 2.
240. *Id.* at ¶ 7(1).
241. *Id.* at ¶ 46.
242. *See ILO Convention*, *supra* note 213.
243. *Id.* pmbl.
244. *Id.* art. 3(1).
245. *See id.*
246. *Id.* art. 5.

(2) claims for holiday pay, (3) claims for other types of paid absence, and (4) claims for severance pay.[247] Interestingly, outstanding pension contributions do not appear to be covered and the Convention largely focuses on wage-related claims in bankruptcy. Also of interest, where the claim is protected by a guarantee scheme, the wage claim may be given less of a priority in the insolvency proceeding than it would otherwise receive.[248]

With regard to provisions concerning guarantee institutions or schemes, Article 9 of Convention 173 provides that, "[t]he payment of workers' claims against their employer arising out of their employment shall be guaranteed through a guarantee institution when payment cannot be made by the employer because of insolvency."[249] Again, this protection is limited to wage-related claims. Article 12 delimits the type of wages guaranteed: (1) "the workers' claims for wages relating to a prescribed period, which shall not be less than eight weeks, prior to the insolvency;" (2) "workers' claims for holiday pay; "(3) "workers' claims for amounts due in respect of other types of paid absence;" and (4) "severance pay due to workers upon termination of their employment."[250] These wage guarantee schemes do not appear to require pension contributions to be protected.

Although ILO Convention C173 entered into force on June 8, 1995, only twenty-one countries have ratified it.[251] Of the countries studied in this report: (1) Australia has accepted only the priority scheme; (2) Austria has accepted only the guarantee scheme; (3) Finland has accepted only the guarantee scheme; (4) Mexico has accepted only the priority scheme; (5) Portugal has accepted both the priority and guarantee scheme (though the ratification is currently (as of November 2012) not in force); (6) Slovakia has accepted only the priority scheme; (7) Slovenia has accepted only the guarantee scheme; (8) Spain has accepted, with some exceptions, both the priority and guarantee schemes; and (9) Switzerland has accepted both the priority and guarantee schemes.[252] Thus, only a little more than one quarter of OECD countries have ratified any part of this ILO Convention, and it appears the Convention has had a relatively minor

---

247. *Id.* art. 6.
248. *Id.* art. 8(2).
249. *Id.* art. 9.
250. *Id.* art. 12.
251. *See ILO Convention*, *supra* note 213.
252. *Id.* (with the priority scheme being Part II and guarantee scheme being Part III).

impact on increasing the protection for employee claims for wages during a company insolvency.

Importantly, some of the largest OECD economies (including the United States, Canada, Germany, France, and the United Kingdom) have not ratified the Convention in its almost twenty years of existence. One possibility, at least as far as EU countries are concerned, is that the adoption of the EU Directive on the protection of workers in the case of employer insolvency has led to countries to believe that they do not need to also ratify ILO Convention 173.[253] For instance, whereas the EU Directive addresses both wage-related claims and occupational pensions, the ILO Convention only addresses wage-related ones.[254] On the other hand, some have argued that the Convention provides protections beyond what the EU Directive provides and should be separately ratified by more countries.[255]

III. PRESENTATION OF THE RESULTS OF OECD COMPARATIVE ANALYSIS OF EMPLOYMENT CLAIM TREATMENT IN INSOLVENCY AND GUARANTEE SCHEMES

This Part is divided into two major subparts. Part III.A seeks to identify trends among the OECD countries as far as treatment of pension and wage claims in insolvency, whether as part of the insolvency process and/or as part of a guarantee fund or scheme. Part III.B, drawing upon the Appendix of OECD country treatment of employment claims in insolvency, seeks to use tables created by the author to categorize the treatment of these employee claims in insolvency to show how the United States and Canada's approach to these issues aligns with other OECD countries.

A. Trends in Treatment of Pensions and Employee Benefits Claims In Insolvency Proceedings Across OECD Countries

In discussing trends in the treatment of pension and employee benefit claims in insolvency proceedings among OECD Countries, a couple of findings are clear. Most OECD countries (and this might be because a majority of OECD countries are EU countries covered by the employee insolvency Directive) have a system that provides

---

253. *See* BRANDUSA BARTOLOMEI, EMPLOYEES' CLAIMS IN THE EVENT OF EMPLOYER INSOLVENCY IN ROMANIA: A COMPARATIVE REVIEW OF NATIONAL AND INTERNATIONAL REGULATIONS 35 (Cristina Mihes & Verena Schmidt eds., 2011).

254. *Compare* Council Directive 2008/94, 2008 O.J. (L283) 36 (EC), *with ILO Convention*, *supra* note 213.

255. *See* BARTOLOMEI, *supra* note 253, at 35.

some priorities to pensions and wages in bankruptcy[256] and also provides guarantee schemes for pensions and/or wages in employer insolvency scenarios (though more commonly just wage guarantees).[257] The devil is in the details, and distinctions between country treatments of employment claims in insolvency often relate to the way various benefit systems are established or structured. This sub-Part is further broken down into seven preliminary findings based on the OECD analysis, each of which is discussed in turn.

1. *State-Run Pension Schemes vs. Statutory Pensions vs. Employer-Operated Pensions*

This section primarily discusses different approaches adopted by countries to the provisions of pensions and how the choice of approach impacts employees when their companies become insolvent. This Section concludes by also considering different approaches to the provision of other employee benefits and how those choices impact employees during employer insolvency.

a. Pensions

With regard to pension benefits, there is an important distinction between countries with regard to the provision of occupational pension benefits. First, a number of countries have little or no occupational pension scheme, relying instead on state-run social security schemes or voluntary, employee-based contributory schemes.[258] The seven countries in this first category include: Chile, Czech Republic, Estonia, Greece, Hungary, Slovakia, and Turkey.[259] Countries that rely primarily on non-occupational pension systems have little need for priorities in insolvency for employee claims or for pension guarantee schemes, as employer insolvency has little impact

---

256. *See* U.N. COMM'N ON INT'L TRADE LAW, *supra* note 121, at 272 ("In a majority of States, workers' claims (including claims for wages, leave or holiday pay, allowances for other paid absence and severance pay) constitute a class of priority claims in insolvency.")

257. *See* JOHNSON, *supra* note 11, at 5–6.

258. *See, e.g.*, Kayra Üçer et al., *Employment and Employee Benefits in Turkey: Overview*, PRACTICAL L., http://uk.practicallaw.com/8-383-1562?service=pensions#a172331 (last visited Mar. 9, 2014) (noting that any pension contributions are made solely through standard social security contributions rather than an occupational pension scheme); *Social Insurance System in Slovakia*, SOCIÁLNA POISTOVNA, http://www.socpoist.sk/social-insurance-system-in-slovakia/24533s (last visited Mar. 9, 2014) (providing overview of Slovakia's purely social insurance system-based pension scheme).

259. *See infra* Appendix.

on the provision of pensions.[260] Not surprisingly, there are few pension priorities in insolvency and no pension guarantee schemes in these countries.[261]

Second, a large group of mostly EU countries follows a statutory-based occupational pension model, under which the pension fund is established as separate and independent from the company.[262] Employers make contributions to these pension funds (or insurance companies) in most cases, but that is the extent of their funding obligation.[263] The twenty countries that fall into this second category include: Australia, Belgium, Denmark, Finland, France, Iceland, Israel, Italy, Japan, Republic of Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovenia, Spain, and Switzerland.[264] Similar to the first category discussed above, there is little impact on these companies when the employer becomes insolvent, except perhaps for outstanding pension contributions due these external pension funds.[265] As a result, bankruptcy priorities only at most concern outstanding contributions (not unfunded pension liability) and there are few pension guarantee schemes.[266] Indeed, pensions are only guaranteed to the extent they are treated like wages.[267]

Third, a smaller group of countries, of which the United States and Canada are a part, have employer-operated occupational pension plans based either on a book reserve model (like Germany and Austria) or defined benefit plan funding model (though a number of

---

260. *See* SARRA, *supra* note 37, at 48.

261. *Id.* at 84.

262. *See, e.g.*, FRESHFIELDS BRUCKHAUS DERINGER LLP, PENSIONS AND INSOLVENCIES ACROSS EUROPE 6, 8, 11, 15 (2010), *available at* http://www.rln.lv/lv/pdf/PensionsAndInsolvency.pdf (providing examples of countries that focus upon a statutory based occupational pension model that is separate and independent from businesses).

263. *Id.* at 6 (providing an example through Finland, an EU country, of having mandatory employer contributions to the statutory system with the option—but not the requirement—of additional pension arrangements).

264. *See infra* Appendix.

265. *See* ROSALIND CONNOR, INTERNATIONAL PENSION GUIDE 16 (2013) (noting that when there is a separate pension funding scheme, employer's insolvency is not as significant of a concern for defined contribution plans due to shelter from creditor claims against the employer contributions, whereas defined benefits plans bring the risk of underfunding).

266. *See, e.g.*, *infra* Appendix.

267. *See, e.g.*, *infra* Appendix nos. 3 (noting that in Belgium outstanding pension claims are treated through the country's wage guarantee fund), 6 (noting that pension contributions are treated as a type of wage claim in Denmark), 13 (noting that in Iceland outstanding pension contributions are treated as wages and protected under the country's wage guarantee fund).

these countries are witnessing a dramatic shift to defined contribution plan schemes like the United States).[268] In a number of these countries (like the United States, Canada, and the United Kingdom), such pension assets are held in trust or ring-fenced so that they are not subject to other creditor claims.[269] Nevertheless, in these schemes an employer's insolvency has the biggest impact on employee pension claims because of employer funding responsibilities.[270] Not only do pension contributions have to be addressed, but there also might exist unfunded or underfunded pension liability on employer insolvency.[271] There are seven countries in this third category: Austria, Canada, Germany, Ireland, Sweden, the United Kingdom, and the United States.[272] These countries tend to have both priorities for pension claims (with Germany being a notable counter-example)[273] within the insolvency processes, as well as some form of pension guarantee scheme (at least for pensions that are funded on a defined benefit basis).[274]

It should be pointed out that these three categories of pension plans (illustrated in Table III.1) are not as well defined as they first appear. A number of countries straddle the lines between two different pension categories. For instance, both Austria and Sweden use a combination of externally funded pension funds and direct pension promises based on the book reserve method.[275] Similarly,

---

268. A book reserve is a direct pension commitment made by the company that is funded through allocations on a company's balance sheet, as opposed to funded through external insurance schemes or pension funds. *See* MIKA VIDLUND ET AL., FINNISH CENTRE FOR PENSIONS, THE STRUCTURE OF PENSION PROVISION AND THE SIGNIFICANCE OF OCCUPATIONAL PENSIONS IN DIFFERENT COUNTRIES 17–20, (2012) *available at* http://www.etk.fi/en/gateway/PTARGS_0_2712_459_770_3439_43/http%3B/content.etk.fi%3B7087/publishedcontent/publish/etkfi/en/julkaisut/reviews/the_structure_of_pension_provision_and_the_significance_of_occupational_pensions_in_different_countries_7.pdf (providing an overview of both the U.S. and German examples of employer-funded pension systems).

269. *Id.* at 31 tbl.5 (noting both the U.S. and U.K. systems' reliance upon trusts as vehicles for occupational pensions); *see also* James M. Lukenda & Kimberly A. Wittrock, *Underfunded Pension Plans: A Looming Crisis for Corporate America?*, 22 AM. BANKR. INST. J. 20, 22 (2003).

270. VIDLUND ET AL., *supra* note 268 at 15.

271. *See* SARRA, *supra* note 37, at 50 (noting the increased risk for defined benefit contribution plans due to risks of underfunding, or, in the example of the United States, the failure of the company to diversify stock for those plans leading to even greater risk).

272. *See infra* Table III.1.

273. *See* FRESHFIELDS BRUCKHAUS DERINGER LLP, *supra* note 262, at 1, 9, 19, 21 (providing examples of these countries' utilization of this hybrid scheme).

274. *See id.*

275. *See infra* Appendix.

Mexico has some externally funded pensions, but most employees appear to rely solely on the state-run pension system.[276] And other examples abound. Nevertheless, viewing countries' pension plans through this lens explains why there is either more or less insolvency and guarantee fund protection for employee pension claims in some countries versus others. It can be said with some confidence that most countries in this study have statutory models with external pension funds established separate and apart from the employer, and this has an impact on how insolvency priorities and guarantee schemes (to the extent that they exist) operate in those countries. Where external pension funds exist, employees are less exposed to pension losses when their employers become insolvent and consequently, there exists less need for bankruptcy priorities and guarantee schemes.[277]

b. Other Employee Benefits

Wage-related benefits, unlike pensions, are not usually funded and/or sponsored by employers. Thus, similar distinctions between statutory and employer-operated benefit schemes tend to matter much less.[278] The United States is one example of a country, however, that primarily relies on employer-sponsored welfare plans[279] to provide a number of wage-related benefits, such as health insurance, long-term disability insurance, life insurance, and retiree health benefits.[280]

---

276. *See* JOHNSON, *supra* note 11, at 5.

277. *See supra* notes 270–72 and accompanying text.

278. *See, e.g.*, Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1 (Can.) (providing examples of international, organizational, and country-sponsored wage-related benefit systems); Council Directive 2008/94, 2008 O.J. (L283) 36 (EC); *ILO Convention*, *supra* note 213.

279. As far as the provision of health insurance in the United States, 53.5% have employer-sponsored health insurance, 19.5% of Americans are uninsured, 17.6% are covered by Medicaid, 6.4% have individual coverage, and 3.0% have Medicare. *See* CHAPIN WHITE & JAMES D. RECHOVSKY, GREAT RECESSION ACCELERATED LONG-TERM DECLINE OF EMPLOYER HEALTH COVERAGE 2 (2012), *available at* http://www.nihcr.org/Employer_Coverage.pdf; *see also* Secunda, *supra* note 36, at 230–31 ("With the exception of those who are poor and chronically ill that are eligible for the federal Medicaid programme [sic] or those who are 65 or older or disabled that are eligible for the federal Medicare programme [sic], most Americans receive their health coverage through private employer-provided health plans.").

280. HIRSCH ET AL., *supra* note 41, at 205. The number of employers providing retiree health benefits, however, continues to shrink at a significant rate. *See* Susan E. Cancelosi, *The Bell is Tolling: Retiree Health Benefits Post-Health Reform*, 19 ELDER L.J. 49, 51 (2011) ("Despite their importance to covered individuals, retiree health benefits have sharply declined over the past two decades. Struggling to handle

2. *The Uncomfortable Place of Employee Creditors in the Insolvency System*

The literature makes much about providing employee pension and wage claims some form of priority in the insolvency system.[281] Scholars fear that unless the pension or wage claims receive a super-priority or preferred priority, no recovery will be made.[282] Certainly there is truth to this observation, and technically the provision of such priority should permit employees to recover a good portion of their claims during the insolvency process (although perhaps not in the timeliest of manners).[283]

As a practical matter, whether talking about pension or wage claims, the problems associated with employees recovering sums from their employers through priorities in the insolvency process are related to insufficient information and lack of voice.[284] This is true even where unions represent employees. Indeed, unions often do not have defined roles within the insolvency process as far as claim-filing.[285] Employees are less likely, given the amount of money involved, the complexity of the process, and their lack of knowledge, to take advantage of whatever priority they receive for their employment claims.[286] Not only that, but even if employees do manage to negotiate the process, file a timely claim, and receive a fairly large portion of what they are owed, they will likely not receive it for many years given how long it takes the bankruptcy process to be completed.[287] Thus, if the aim of the social protection system is to protect already-earned employees' pension, wages, and other

---

rapidly escalating health care costs and preserve active employee insurance, employers often have chosen to terminate retiree coverage.").

281. *See generally* JOHNSON, *supra* note 11; SARRA, *supra* note 37; Stewart, *supra* note 3.

282. *See* JOHNSON, *supra* note 11, at 10; SARRA, *supra* note 37, at 9 (both describing precarious position employees are in during employer insolvency and emphasizing need to provide increased or specialized recovery methods).

283. *See* Stewart, *supra* note 3, at 4–5.

284. *See* JOHNSON, *supra* note 11, at 2.

285. *See* Dawson, *supra* note 3 at 28 ("There are certainly reasons to doubt that, practically, union representation translates to employee participation in bankruptcy governance, even when the union is a member of the creditors' committee. Employees, even if represented on the committee, may have their particular interests overridden by the conflicting interests of other creditors.").

286. *See* JOHNSON, *supra* note 11, at 7.

287. *See id.* (noting the long, drawn-out nature of liquidation in bankruptcy where even employees who have priority rights will still be subject to drawn out wait for their claim to be realized, as opposed to guarantee schemes where there can be immediate payment while the guarantor—who is better situated to handle the time delay—is subrogated to insolvency claim).

employee benefits when their employer becomes insolvent in a more timely and efficient manner, the granting of a priority alone may not be the best method for doing so.

This circumstance is why the existence of guarantee funds, both for pensions and wages, is so important for providing employees the social protection they need when their employer becomes insolvent. Employees would appear to receive much better protection through the ability to file claims with pension and wage guarantee funds, without the worry of having to negotiate the insolvency process and compete for limited funds with better-financed and better-informed company creditors.[288] Although the payments available under such guarantee funds are limited to certain amounts for specified time periods prior to the insolvency filing,[289] they do provide a timelier and surer method for protecting the already-earned pension and wage claims of employees.[290]

3. Growing Prominence of Guarantee Funds

Given the reality of insolvency systems in most countries, perhaps the growing use of guarantee schemes to provide some protection for pensions, wages, and other employee benefits when an employer becomes insolvent is unsurprising. Although EU countries where some form of guarantee institution is mandated by law have largely driven this development, other countries have similar systems—with much variation in coverage.

---

288. *See* Heartfield & Wink, *supra* note 28, at 14-5 ("Workers are amongst the most vulnerable parties in business bankruptcies and receiverships, because they do not have the financial means at their disposal to forego payment of their wages. They rely on payment of their wages for their livelihood and unlike other creditors, they do not agree to extend credit to their employer when they sign a contract of employment."); *see also* JOHNSON, *supra* note 11, at 2 ("Unlike creditors who can factor such defaults into their pricing or lending rates, employees typically are left with no recourses . . . . Regular trade creditors . . . have access to financial and economic data of the debtor and can . . . set their terms of trade to reflect their assumed risk.").

289. *See, e.g.*, 11 U.S.C. § 507(a)(4)–(5) (2012) (U.S. limitation upon claims to within 180 days of insolvency through PBGC); Council Directive 2008/94, 2008 O.J. (L283) 36 (EC), art. 3 (noting the member countries ability to designate the applicable period for claims under the guarantee funds); *ILO Convention*, *supra* note 213, art. 12 (providing specific limitations upon guarantee schemes payment to eight weeks prior to an employer's insolvency); *Italy: Wage guarantee fund, solidarity agreements, bilateral bodies and wage guarantee fund in derogation*, EUROFOUND, http://www.eurofound.europa.eu/emire/ITALY/WAGESGUARANTEEFUNDCIG-IT.htm (last updated Aug. 14, 2009) (Italy providing up to eighty percent of lost pay under Cass Intergrazione Guadagni (CIG) fund).

290. *See* JOHNSON, *supra* note 11, at 7.

For instance, most countries with guarantee funds (although the United States is a big exception to the rule) provide some protection for wage claims, and most countries define wages broadly to include vacation pay, holiday pay, severance pay, termination pay, and even travelling expenses.[291] Such claims are usually capped and limited to a certain period before the employer filed for insolvency.[292]

On the other hand, pension guarantee funds tend to be few and far between. This may be because the majority of countries studied either have no occupational pensions or have statutory systems where pension assets are kept separate and apart from the employer.[293] In such cases, there is less impact on the employee when insolvency is declared and less need for a pension guarantee fund.[294] This state of affairs may also be related to whether a country primarily relies on DB plans, where the employer has the responsibility to ensure that the pension is not underfunded, as opposed to countries that rely primarily or exclusively on DC plans, where the employer is only responsible for a contribution or withholding employee contributions and has no obligation beyond that.[295] The amount at stake in the DC plan context may not be considered significant enough to require the institution of a guarantee fund since the outstanding employer contributions due will likely not be a significant percentage of the pension amounts the employee is due, given that contributions in defined contribution schemes are meted out in fairly frequent increments.[296] On the other hand, pension guarantee schemes are more necessary in the DB plan context where the employer is responsible for contributions and the continual funding of the plan to pay out benefits to employees upon retirement and thereafter.[297] It is probably not surprising, then, that countries and provinces that have pension guarantee funds (like the United States, United Kingdom, and Ontario) limit their coverage to DB plans and do not cover DC plans.[298]

---

291. *See infra* Appendix.

292. *See e.g.*, Nackan, *supra* note 208 (discussing the impact of the Canadian Wage Earner Protection Program (WEPP) as well as its limitation of approximately a $3000 guarantee).

293. *See generally supra* Part III.A.

294. *See* SARRA, *supra* note 37, at 48.

295. *See* HIRSCH ET AL., *supra* note 41, at 201–02.

296. *See id.* at 203. On the other hand, to say that defined contribution plans are always fully-funded and do not require a guarantee scheme does not take into account that employer contributions to the fund may be outstanding at the time of the bankruptcy.

297. *See* VIDLUND ET AL., *supra* note 268, at 35.

298. *See supra* Parts II.A (United States), II.B (Canada); *infra* Appendix.

4. Distinction Between Priorities Given Different Pension Claims

Although countries that rely on DC plans do not make this distinction, countries that still hold the bulk of occupational pension assets in DB plans do continue to make a distinction between the priority in insolvency given to outstanding pension contributions as opposed to unfunded or underfunded pension liabilities.[299] As a general matter, outstanding pension contributions (whether for DB plans or DC plans) are given a preference in bankruptcy in the studied countries.[300] The preference can be in the form of a super-priority that outranks most secured claims (Canada) or it can be a preference that merely outranks some other unsecured creditors (United States).[301] Such priorities can be without caps and for unlimited duration,[302] but are more likely to be for a certain capped amount and for certain periods of time before the insolvency filing.[303] Any amounts beyond the cap limit or beyond the protected time period are treated as unsecured claims.[304]

Unfunded, or underfunded, pension liabilities, mostly in the DB plan context, are generally unsecured debts in the insolvency process (this is true in the United States, United Kingdom, and Canada).[305] The lack of preference for such claims seems to be based on the notion that these are less like wage claims that usually receive

---

299. *See* SARRA, *supra* note 37, at 49.

300. *Id.* at 51; *see* U.N. COMM'N ON INT'L TRADE LAW, *supra* note 121, at 272.

301. *See* U.N. COMM'N ON INT'L TRADE LAW, *supra* note 121, at 272 ("In a number of cases those [workers'] claims rank higher than most other priority claims, specifically tax and social security claims, and in a few cases, as noted above, above secured claims.").

302. *See, e.g.*, *infra* Appendix nos.

303. *See* JOHNSON, *supra* note 11, at 7 (describing necessity of making capped or specified time restrictions when establishing employee benefit claims systems to keep cost burdens within operational range).

304. For an example, consider the United States' treatment of pre-petition wage and pension claims that exceed statutory cap amount. *See supra* notes 137–39 and accompanying text.

305. *See, e.g.*, 11 U.S.C. § 507(a)(5) (2012); *supra* notes 194–97 and accompanying text (Canada); *infra* Appendix. There also might be less political will to address unfunded pension liabilities in insolvency that resulted from companies running up millions (even billions) of dollars in future liabilities without anyone having felt the pain at the time they were promised. *See* Keating, *supra* note 98, at 26 ("It was easy enough for employers to offer generous defined-benefit pension plans and retiree health benefits back in the days when pension plans did not have to be pre-funded and when retiree medical benefits obligations did not even need to be shown on an employer's balance sheet. In those days, the ability to make these type of promises to employees in lieu of higher current wages was like an unlimited unsecured line of credit for employers, if not a de facto Ponzi scheme on the backs of the workers to whom the future benefits were promised.").

priority.[306] It also could be based on the fact that the size of unfunded liability claims has a more dramatic impact on the claims of other creditors and on capital markets more generally.[307]

5. Distinctions Between the Scope of Protection for Wage-Related Benefit Claims

All OECD countries that provide priorities and/or guarantee fund protection for wage claims do so for unpaid wages (at least up to a certain capped amount for a certain period of time before the insolvency filings).[308] Countries differ on what constitutes wages for purposes of these payments. Some countries have broad definitions of wages and include vacation pay, holiday pay, severance pay, termination pay, and travel expenses (again limited to certain amounts and time periods).[309] Other countries have narrow definitions and may either define wages to include only unpaid wages or only include unpaid wages and vacation pay (but exclude severance and termination pay).[310]

Interestingly, sometimes countries characterize outstanding pension contributions as a type of wage.[311] Where pensions are treated like wages, such pension claims get the advantage of whatever wage claim priority exists within the insolvency process, as well as being treated as part of the wage guarantee fund.[312] In such countries, there is no need for a separate pension guarantee fund.

6. Subrogation Rights of Guarantee Funds

When wage or pension guarantee funds pay benefits to employees of insolvent employers, employees are not also permitted to continue to pursue their insolvency claim at the same time (as that would provide them a double-recovery or windfall).[313] Instead, in most countries, the guarantee fund becomes subrogated to the claims of the

---

306. *See* Stewart, *supra* note 3, at 2.
307. *Id.* at 8–9.
308. *See, e.g.*, *infra* Appendix.
309. *See, e.g.*, *infra* Appendix (noting that Japan, Luxembourg. Switzerland, and the United Kingdom recognize vacation pay as preferential). *But see infra* Appendix no. 20 (noting Mexico's refusal to recognize vacation pay as a wage claim).
310. With regard to its priorities for wages in bankruptcy, Canada is a prime example that excludes termination pay and severance pay from the definition of "wages." *See supra* note 198 and accompanying text.
311. *See, e.g.*, *infra* Appendix.
312. *See, e.g.*, *infra* Appendix.
313. *See* JOHNSON, *supra* note 11, at 7.

employees and stands in their place during the insolvency proceeding.[314]

This subrogation dynamic shows two significant points. First, usually, but not always, the guarantee institution receives the same priority that the employee would have received if they had pursued the claim in insolvency themselves.[315] There are some notable exceptions (e.g., Denmark, Sweden, and Switzerland) where the fund must proceed as an unsecured creditor even where individual employees would have some priority.[316] Perhaps the lack of priority given to the fund in subrogation is in recognition that the employee claim has become less important once the employees have received some payment through the guarantee scheme.

Second, the guarantee fund is likely to have more success in recouping the employment claim in insolvency than individual employees, both because of its institutional knowledge of insolvency procedure and because of the much larger relative size of its claim (by bringing the claims owed to all employees it has become subrogated to as a whole) in relation to the size of the claim of other creditors.[317] Thus, the use of the guarantee fund not only makes it more likely that employees will receive their pension and wage claims on a timely basis, but also makes it more likely that the insolvent employer will satisfy some of these claims by reimbursing the guarantee fund for its payments to employees (this is especially true if the guarantee fund assumes a preferred claim in the insolvency process).[318] Of course, to help fund the guarantee scheme's operations, it is important that the guarantee scheme recoup pension and wage monies through the bankruptcy process.[319]

---

314. *See id; see also, e.g.*, Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 36(1) (Can.) (noting the right of the Canadian government to be subrogated to any rights of employee for amounts distributed by Wage Earner Protection Program).

315. *See, e.g.*, *infra* Appendix no. 8 (noting that in Finland "[u]nder this pay security system, the state is subrogated to the claims of the employees in insolvency with the same priority").

316. *See infra* Appendix.

317. *See* SARRA, *supra* note 37, at 28 (discussing how such funds are better situated than individual employees due to information, resources, and the size of claims being sought).

318. *See* JOHNSON, *supra* note 11, at 7.

319. *See supra* note 72 and accompanying text.

7. *Overall Treatment in Insolvency of Pension vs. Wage Claims and Country Models*

As early as 2006, Gordon Johnson identified four different systems and variations on models utilized by different countries to address employee entitlements in cases of employer solvency.[320] I borrow from that approach and use a slightly modified three-model version in this Article to emphasize similarities in the overall treatment of employee pension and other wage claims within the OECD countries.[321]

Model One Countries provide bankruptcy priority but little or no insurance or guarantee protections.[322] The four Model One countries are: Chile, Mexico, New Zealand, and Turkey.

Model Two Countries adopt a hybrid approach and provide both some form of bankruptcy priority and at least one type of guarantee fund for employee claims.[323] Here, to focus on a significant difference in approaches among this large group of countries, I introduce a further dichotomy between Robust Model Two Countries and Limited Model Two Countries. The basic difference is that Robust Model Two Countries have priorities and guarantees for both pension and wage claims, while Limited Model Two Countries generally have priorities and guarantees either for wage claims alone or are otherwise missing priorities or guarantee schemes.

The eleven Robust Model Two Countries include: Belgium, Canada, Denmark, Iceland, Ireland, Israel, Italy, Norway, Sweden, Switzerland, and the United Kingdom. The Limited Model Two approach is the one adopted by most OECD countries (15) and includes: Australia, Czech Republic, France, Greece, Hungary, Japan, Republic of Korea, Luxembourg, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, and the United States.

---

320. *See* JOHNSON, *supra* note 11, at 4–6.

321. More specifically, I expand what Johnson refers to as "Model three" countries to recognize various hybrid systems, and eliminate his "Model one: Pro-employee approach," as it refers to an insurance system utilized by China, a country not studied in this paper. *See id.* Of course, there are an infinite number of ways to sort countries in different categories based on how they treat employment claims in insolvency or in guarantee schemes. To give just one other example, Professor Sarra describes seven different types of priorities or preferences for wages and related claims. *See* SARRA, *supra* note 37, at 15.

322. Johnson refers to these countries as his "Model two" countries. *See* JOHNSON, *supra* note 11, at 5.

323. Under Johnson's system, these countries are labeled "Model three" countries. *Id.* at 5–6

Finally, Model Three Countries provide no bankruptcy priority at all, but only guarantee systems.[324] The four Model Three Countries are: Austria, Estonia, Finland, and Germany.

Of course, even among these four enumerated models, there are significant overlaps and variations relating to: (1) strength of the creditor priority (e.g., super-priority vs. some lesser form of priority); (2) capped versus uncapped claims (as far as monetarily how much the priority or guarantee fund covers); (3) the length of payment covered by the claim prior to the insolvency filing (post-filing claims are generally given super-priority in most countries and are not considered separately here); (4) what constitutes "wages" for purposes of insolvency and guarantee schemes (including some countries treating pension contributions as wages); and (5) the manner in which subrogation operates to place the guarantee institution in the place of the employee in the insolvency process (and then with or without the same priority). The tables in the next section summarize these differences.

B. Tables on OECD Country Treatment of Pensions and Wages in Insolvency and Under Guarantee Schemes

There are five tables in total summarizing the results of this comparative study. Throughout the tables, Canada and the United States are highlighted so their treatment of employee pension and wage claims during insolvency can be readily compared to other countries in the tables.

Table 1 divides the countries based on whether they have little or no occupational pension system, an externally funded occupational pension system, or an employer-based pension system. Table 2 sets out the various models that OECD countries have adopted as far as their overall treatment of pension and wage claims in insolvency (i.e., Model One Countries, Robust Model Two Countries, Limited Model Two Countries, and Model Three Countries). Table 3 sets out in detail the variations that countries have adopted in their treatment of employee pension and wage claims (including their approach to subrogation). Table 4 organizes the countries by the type of preferences pension and wage claims receive during the insolvency process. Table 5 organizes the countries by the nature of the guarantee fund they have for pension and/or wage claims in the event of employer insolvency.

---

324. These are "Model four" countries under Johnson's scheme. *Id.* at 6.

All in all, as illustrated through these Tables, most OECD countries, including the United States and Canada, are Model Two Countries, which have adopted, at least to some degree, hybrid systems that combine an insolvency priority for at least some employee claims in tandem with some form of guarantee fund to cover employee pension and/or wage-related payments as soon as possible after the insolvency has occurred. As noted above, however, even among Model Two countries, there are substantial and important differences between the nature of bankruptcy protection and the availability of guarantee schemes.

Differences between Canada and the United States in this regard provide a ready example. Canada provides super-priorities for pension contribution and some wage claims in insolvency in tandem with a national wage guarantee scheme (WEPPA).[325] On the other hand, the United States provides a much less robust preference in bankruptcy for employee claims (with some priority over unsecured claims for a period time for wages and pension contributions before the bankruptcy petition is filed and up to a combined capped amount), a limited pension guarantee scheme (under the PBGC for DB plans only), no national wage guarantee scheme (unless one counts the partial protection provided by unemployment compensation, which does not cover already-earned and owing wage and pension claims), and statutes like WARN (which applies to mass layoffs and plant closing by employers with 100 or more employees and provides sixty-day notices to covered employees).[326]

325. *See supra* Part III.B.
326. *See supra* Part III.A.

TABLE III.1: SUMMARY OF OECD COUNTRIES' TREATMENT OF PENSION CLAIMS DURING INSOLVENCY BY TYPE OF PENSION PLAN[327]

Category	OECD Countries (34 Total)
Category One Little or No Occupational Pension System	Chile, Czech Republic, Estonia, Greece, Hungary, Slovakia, and Turkey (7)
Category Two Statutory, External Pension Funds	Australia, Belgium, Denmark, Finland, France, Iceland, Israel, Italy, Japan, Republic of Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovenia, Spain, Switzerland (20)
Category Three Employer-Operated or Book Reserve Model	Austria, Canada, Germany, Ireland, Sweden, United Kingdom, United States (7)

327. The following Tables are compiled from information contained in the Appendix, *infra*.

TABLE III.2: SUMMARY OF OECD COUNTRIES' TREATMENT OF WAGE AND PENSION CLAIMS DURING INSOLVENCY BY COUNTRY MODEL

Country Model Number	OECD Countries (34 Total)
Country Model One (Bankruptcy Priority, Little or No Guarantee)	Chile, Mexico, New Zealand, Turkey (4)
Country Model Two (Robust) (Hybrid, Bankruptcy Priority and Guarantee for Both Pension and Wages)	Belgium, Canada, Denmark, Iceland, Ireland, Israel, Italy, Norway, Sweden, Switzerland, United Kingdom (11)
Country Model Two (Limited) (Hybrid, Bankruptcy Priority and Guarantee for Either Pension or Wages)	Australia, Czech Republic, France, Greece, Hungary, Japan, Republic of Korea, Luxembourg, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, United States (15)
Country Model Three (No or Limited Bankruptcy Priority, But Some Form of Guarantee)	Austria, Estonia, Finland, Germany (4)

TABLE III.3: VARIATIONS AMONG OECD COUNTRIES IN TREATMENT OF EMPLOYEE PENSION AND WAGE CLAIMS AFTER EMPLOYER INSOLVENCY

Country	Insolvency Pension	Insolvency Wages	Guarantee Pensions	Guarantee Wages	Subrogate
1. Canada	**Super-priority: contributions (unlimited in amount on all assets); unsecured: unfunded liability**	**Super-priority; wages and vacation, not severance or termination pay**	**Ontario only—PBGF—limited coverage**	**WEPP—wages for 6 months, up to 4X max weekly insurable earnings**	**Yes, with same priority**
2. Australia	Preferred for contributions (unlimited in time and duration)	Preferred for wages, vacation, severance, and termination pay	None	GEERS—3 months wages; 16 weeks wages, vacation, severance, termination	Yes, with same priority
3. Austria	No preference, but employees preferential creditors for 50% of benefits accrued (so like being held in trust)	Limited preference, only outranking unsecured creditors	Yes, up to amount owed, but limited to 24 months for book reserve	Yes, including broad wage definition	Yes, with same lack of preference
4. Belgium	Preference for contributions limited to moveable assets	Preference for wages limited to moveable assets; capped	Some pension guarantee	Closure Fund for certain wage payments	Yes, with same priority
5. Chile	Few occupational pensions	Preferred up to fixed amount	None	None	N/A
6. Czech Republic	No occupational pensions	Super-priority on 30% of employer assets, capped	None	Yes, capped	Yes, but not preferred
7. Denmark	Preferred for contributions	Preferred—6 months—broad wage definition	Protected as wage	Yes, capped	Yes, but without privilege

8. Estonia	Primarily state-run, no preferences for occupational plans	No preference	No, only for state-run pensions	No, only covered under unemployment scheme	N/A
9. Finland	No preference	No preference	Yes, capped	Yes, capped	Yes and without preference
10. France	Unpaid contribution to statutory scheme—privileged	Super-priority under labor code for 60 days; regular priority under civil code for 6 months	None	AGS, broad definition of wages, capped	Yes, with same priorities
11.Germany	No preference	No preference	PSVaG, capped	IAF, wages up to 3 months	Yes & w/o preference
12. Greece	Unsecured for occupational pensions	Yes, third priority for most wages, 2 years pre-filing	None	Yes, 3 months wages; no termination pay	Yes, with same priority or lack of priority
13. Hungary	Few occupational pensions; mostly state-run pensions	Priority, not capped; severance to 6 months; limited wages	None	100% unpaid wages, up to 6 months for severance	Yes, with same priorities
14. Iceland	Priority for outstanding pension contributions—limited to last 18 months	Super-priority—wages, termination and vacation all capped at 18 months	Treated as wages and protected under wage fund, capped	Yes, wages & termination pay up to 3 months	Could not find pertinent data

15. Ireland	3rd priority for pension contributions; no priority for unfunded pension liabilities	3rd priority—wages 4 months capped; holiday, severance, termination (no limit)	Yes, up to 12 months pre-filing	Yes, with broad definition of wages	Yes, with same priority
16. Israel	Preference limited to twice average salary	Yes, first priority, but after secured creditors, before floating interest secured creditors	Treated like wages: limited to 2X average salary	Yes, wage definition broad, capped and 12 months pre-filing	Yes, with same priority
17. Italy	Preference on moveable property	Priority on moveable priority applies to most wages	Yes, for missed contribs.	Yes, up to 3 months pre-filing	Yes, with same priority
18. Japan	Different pensions treated differently; EPF (public/private hybrid pension) some priority	Priority up to 3 months pre-filing	PFA guarantees only EPF pensions	Yes, wages, retirement allowances up to 6 months, capped	Yes, at least as far as wage guarantee; not clear on PFA
19. Republic of Korea	No preference	Super-priority for wage and retirement allowance up to 3 months	Deposit insurance for fund insolvency but no employee scheme	Yes, wages and retirement allowances up to 3 months capped	Yes, with the same priority
20. Luxembourg	No preference	Super-priority for broad wage definition, up to 6 months, and capped	None	Yes, same as wage priority—6 months and capped	Yes, with same priority for wages
21. Mexico	No preferences	Super-priority for wages, capped, 2 years pre-filing	None	None	N/A

22. Netherlands	Preference for contributions	Treated as estate debts with super-priority	None, but unemploym ent pays for 12 months	UWV—wages for 13 weeks, holidays for 12 months	Yes, with same priorities
23. New Zealand	Contributions to Kiwisaver preferred without cap	Preferred for most wages, 4 months pre-file, capped	None	None	N/A
24. Norway	Super-priority for contributions up to 6 months	Super-priority up to 6 months for most wages	2X basic amount; combined wages & pensions	2X basic amount; combined wages & pensions	Yes, with same priority
25. Poland	Priority for pension contributions	Priority for most wages—not limited in amount or time	None	Most wages up to 3 months, capped	Yes, with same priority
26. Portugal	Priority for pension contributions	Priority for wages, termination pay, and injury pay	None	Yes, 4 months for most wages, capped	Yes, with same priority
27. Slovakia	Occupational pensions illegal	Preferred up to 3 months—ranked after secured claims	None	Most wages for 3 months	Yes, with same priority
28. Slovenia	No preference	Super-priority on most wages as cost of bankruptcy, 3 months without limit on amount	None	Most wages for 3 months, capped	Yes, with same priority
29. Spain	No preference	Super-priority for most wages, 30 days pre-filing, capped	None	Most wages for 120 days, severance up to 12 months, capped	Yes, with same priority

30. Sweden	Preference for contributions; 6 months limit for direct pension promises under book reserve model	Preference for wages and holiday pay	FPG—limited to white collar; other treated like wages	Most wages, including pensions, up to 3 months; holiday pay for current & past year	No priority on wages, but may be secured creditor under FPG scheme
31. Switzerland	Priority for pension fund, not employee	Most wages for 6 months, not capped	Yes, capped	Yes, past 4 months, capped	Yes, but no priority for pension claims, only wages
32. Turkey	No occupational pensions, but contributions to voluntary pensions preferred, 1 year	Preference for one year pre-filing	None	Only within unemploym ent fund—3 months wages only	Could not find pertinent data
33. United Kingdom	Preference for outstanding contributions, one year back (both DB and DC plans and NEST); unsecured: unfunded pensions, including FSDs	Preference for most wages, 4 months back, capped	PPF—DB plans only	NIF: 8 weeks wages; 6 weeks holiday; 12 weeks severance; 30 weeks termination pay; capped	Yes, PPF unsecured creditor for pensions; NIF with same priority for wages
34. United States	Preference for both DB and DC plans up to 90 days back with combined cap with wages	Preference for wages up to 90 days back with combined cap with pensions (though wages outrank pensions)	PBGC: DB plans only; capped	None, except more general unemploym ent scheme and WARN notice scheme	Yes, PBGC subrogate d but without any priority in most cases

TABLE III.4: PREFERENCE TYPE IN INSOLVENCY FOR PENSION AND WAGE CLAIMS BY COUNTRY

Claim	Treatment	Countries
Wages	Super-priority	Netherlands, Slovenia
	Capped Super-priority	**Canada**, Czech Republic, France, Iceland, Japan, Republic of Korea, Luxembourg, Norway, Mexico, Spain
	Preferred	Austria, Australia, Hungary, Italy, Israel, Poland, Portugal, Sweden
	Capped Preferred	Belgium, Chile, Denmark, Greece, Ireland, New Zealand, Slovakia, Switzerland, Turkey, United Kingdom, **United States**
	Unsecured	Austria, Estonia, Finland, Germany
Pension—Outstanding contribution	Super-priority	**Canada**, Japan (only EPF)
	Capped Super-priority	Norway
	Preferred	Australia, Denmark, Ireland, Italy, Netherlands, New Zealand, Poland, Portugal, Switzerland
	Capped Preferred	Belgium, Iceland, Israel, Sweden, Turkey, United Kingdom, **United States**
	Unsecured	Austria, Czech Republic, Chile, Estonia, Finland, France, Germany, Greece, Hungary, Republic of Korea, Japan (non-EPF), Luxembourg, Mexico, Slovakia, Slovenia, Spain
Pension—Unfunded Pension Liability	Super-priority	None
	Capped Super-priority	None
	Preferred	Japan
	Capped Preferred	Norway, **United States**

	Unsecured	Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Republic of Korea, Luxembourg, Mexico, Netherlands, New Zealand, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom

TABLE III.5: NATURE OF GUARANTEE FUND FOR PENSION AND WAGE CLAIMS IN EVENT OF EMPLOYER INSOLVENCY AMONG OECD COUNTRIES

Guarantee Schemes	Type of Payment	Countries
Pension Guarantee Scheme	Unfunded Pension Liabilities	**Canada (Ontario only)**, Japan (EPF only), United Kingdom (PPF only), **United States (PBGC)**
	Pension Contributions	Belgium, Italy, Sweden (FPG only)
	Capped Pension Contributions	Austria, **Canada (Ontario only)**, Estonia, Finland, Germany, Ireland, Switzerland, United Kingdom (PPF), **United States (PBGC)**
	Paid Through Unemployment Compensation System	Netherlands
	Treated as Wage Under Wage Guarantee	Denmark, Iceland, Israel, Norway, Sweden (non-FPG)
	No Scheme	Australia, Chile, Czech Republic, France, Greece, Hungary, Japan (non-EPF), Republic of Korea, Luxembourg, Mexico, New Zealand, Poland, Portugal, Slovakia, Slovenia, Spain, Turkey
Wage Guarantee Scheme	Broad Wage Claims	Ireland, Italy, Slovakia, Sweden
"Broad" means covers unpaid wages and at least three other categories of wage claims (vacation, holiday, severance, termination, travel, etc.)	Capped Broad Wage Claims	Australia, **Canada**, Czech Republic, Denmark, Finland, France, Germany, Israel, Japan, Republic of Korea, Luxembourg, Netherlands, Poland, Portugal, Slovenia, Spain, Switzerland, United Kingdom
"Narrow" means covers unpaid wages and less than three other categories of wage claims	Narrow Wage Claims	Greece, Hungary, Iceland
	Capped Narrow Wage Claims	Belgium, Norway

	Unemployment Compensation Scheme Substitute	Austria, Estonia, Turkey, United States
	No Scheme	Chile, Mexico, New Zealand

CONCLUSION

In light of current realities surrounding the economic difficulties that many employers face in the global economy, both in the private and public sector, and the fact that many employers find themselves in perilous financial conditions in large part because of the past wage and pension promises they have made to their labor forces, it is important to consider how these employment claims should be legally treated when their employers become insolvent. This consideration is especially important given that employees are so dependent on the payment of these claims for their future economic well-being.

This comparative study of the international treatment of pension and wage claims in insolvency proceedings by the thirty-four members of the OECD shows that most countries provide some form of preference or priority in insolvency proceedings for both pension and wage claims (though most exclude unfunded pension liability and certain types of wages from this priority). The strength of this preference can vary, as can the limits on amounts recoverable and the periods of time before the insolvency proceeding in which claims can be advanced. Although such priority treatment would indicate a measure of protection for employee claims, empirical and anecdotal evidence suggest that individual employees may have a hard time negotiating the insolvency process and filing successful claims given their relative lack of knowledge and their inability to wait out the long insolvency process.

Most countries studied also have a guarantee fund in place to pay some portion of employee claims on employer insolvency.[328] Not only does this system provide an easier method for employees to recoup their pension and wage claims, but it places the guarantee fund in the place of employees during the insolvency process, making it more likely that insolvent employers will designate part of their remaining assets to employee claims through reimbursement of these guarantee funds. This hybrid approach (Country Model Two) of bankruptcy priorities and guarantee funds working in tandem seems to be becoming the dominant approach to the international treatment of wage and pension claims during employer insolvency. Yet, significant

328. *See supra* Part III.B, tbl.III.5.

variation still exists in how robust or limited these guarantee schemes are based primarily on the type of pension system the country has and whether the country has a wage guarantee system at all.[329] For instance, countries with little or no history of occupational pensions, or countries with statutory schemes that set up external pension funds, are much less likely to have, or need, pension guarantee schemes. On the wage guarantee side of the equation, a number of countries, like the United States, appear to still prefer running whatever system they have through their unemployment compensation system, which does not cover already-earned and owing pension or wage claims.[330]

This development of insolvency priorities working in tandem with guarantee schemes should be applauded as protecting involuntary and vulnerable employee creditors. Although some may argue that this arrangement is inconsistent with the development of predictable and affordable credit markets, the comparative vulnerability and lack of sophistication of employee creditors make a balancing of relevant interests come out squarely on the employee side of the balance. The risk should be shifted to the state and the employers, who are better able to bear such risk.

One possible way to provide greater protection for public sector or private sector employees when their employers become insolvent is illustrated by the application of the Canadian Wage Earner Protection Program Act (WEPPA) of 2008 in tandem with Canadian bankruptcy law. This hybrid approach provides robust protection for most employment claims during employer insolvency in a way that the American system currently does not. More specifically, this type of system permits impacted employees to receive more timely payments from the guarantee fund and then subrogates the guarantee fund in the place of the employees in the bankruptcy process. Indeed, one of the primary conclusions from the comparative study completed in this Article is that Canada's current treatment of pension and employee benefit claims in insolvency proceedings is well within the mainstream of how most other OECD countries treat similar claims in insolvency, while the United States is trailing other advance economies in providing protection to pension and other wage claims (including retiree health insurance claims) when their employer becomes insolvent. In the United States, this is true in both the public and private sector.

329. *See supra* Part III.B, tbl.III.3.
330. *See supra* Part III.B, tbl.III.3.

Based on these findings, the United States Congress should undertake a study of the Canadian bankruptcy laws and Wage Earner Protection Plan Act to start the process of providing the necessary legal and social protection to employee creditors during municipal and corporate bankruptcies. To jump-start that process, I outline below potential legislation for the American Congress to consider.

In my mind, such legislation would have four main provisions concerning: (1) pension priorities; (2) wage priorities; (3) a pension guarantee scheme; and (4) a wage guarantee scheme. As far as pension and wage priorities, the law would enact a limited super-priority for unpaid wage claims and employer pension contributions, ahead of secured creditors with regard to current assets (cash, accounts receivable and inventory), up to a limit of $2000 per claim (consistent with WEPPA).[331] With regard to the pension guarantee scheme, I would expand the PBGC to also cover pension contributions and public pension plans, and base this expanded scope upon the best insurance practices, all of this being done in a government revenue neutral way. For the wage guarantee scheme, it would require the establishment of another body like the PBGC that works at arm's length with a number of executive departments, most importantly, the Department of Labor. The wage scheme would provide for the payment of unpaid wages, earned vacation pay, and other wage payments owed to employees whose employers became insolvent.[332] The payments, based on what WEPPA currently provides, would grant payments up to a maximum of $3000 per individual. The wage scheme would be financed through employer contributions based on a uniform premium and an assessment based on the risk that they (the employers) could become insolvent based

---

331. I agree that providing a priority for underfunded pension plans or unfunded retiree health benefits would cause too great of a moral hazard problem given the ability of employers to promise these benefits in the present without much thought to the future. A pension guarantee, however, could be established in accordance with best practices established by the OECD: (1) benefit coverage should be limited so that potential beneficiaries share some of the risk; (2) pricing or levies should be risk-based; (3) the guarantee fund should have in place accurate and consistent funding rules and should operate under prudent asset–liability management; and (4) the system must have adequate powers to avoid moral hazard. *See* ARTHURS, *supra* note 30, at 121. One way to reduce the chances of moral hazard in such a scheme would be to require that payment of unfunded benefits agreed to within five years prior to the plan sponsor's insolvency be postponed until all other benefits under the plan are satisfied. *See id.* at 122.

332. WEPPA does not cover severance payments, *see* Wage Earners Protection Program Act, S.C. 2005, c. 47, s. 2(1) (Can.), but such payments should be covered under the proposed legislation as long as these payments were not entered into as a way to game the insolvency process for certain employees.

on their financial health. This outline of what such a law would look like is admittedly very rough, but provides a starting point for more serious discussions about such legislation.

This approach would have the advantage of providing timely payments of already earned pension and wage claims to employees, while at the same time establishing an effective legal mechanism through which employee claims could be combined and brought as a single claim by the guarantee institution. This guarantee scheme could be revenue neutral based on the scheme's ability to be subrogated, with the same heightened priority, to the pension and wage claims of employees in the bankruptcy proceedings. Additionally, revenue neutrality could be based on the scheme being "built up through a process of sophisticated risk-assessment and paid for by sponsors who have every reason to expect that in the normal course, their contributions will be adequate to the task at hand."[333]

In sum, my proposed scheme would provide heightened priorities to both pension contribution claims in the defined benefit and defined contribution context and to a broad range of wage claims in both corporate and municipal bankruptcies. Along with these bankruptcy priorities, a federal pension and wage guarantee fund (covering both public and private employees) would be established to immediately settle worker claims for covered pension and wage benefits up front. Such a scheme would be funded by both insurance premiums placed on employers based on both risk assessments and the scheme's ability to be subrogated to the rights of the employees in the bankruptcy process. Although there will certainly be critics of this guarantee fund approach as placing greater cost burdens on employers, the argument here is that the risk of insolvency should be placed through an insurance fund on employers prior to an insolvency rather than on employees and other general creditors afterward an insolvency has already occurred.

---

333. *See* ARTHURS, *supra* note 30, at 124. More specifically, I recommend a guarantee scheme governed by the financing principles Arthurs recommends in his Ontario Expert Commission on Pensions report: (1) the Fund should be self-financing; (2) it should not receive government grants or subsidies in order to meet its obligations; (3) it should be allowed to borrow funds from the government on a commercial basis, for defined purposes and at defined times; and (4) the terms on which the Fund itself should be deemed insolvent, and the effects of such insolvency, should be clearly set out. *Id.*

APPENDIX

Analysis of OECD Countries' Treatment of Pensions and Employment Benefit Claims in Insolvency and Guarantee Schemes (Canada and the United States Excluded)

The following thirty-two OECD country sections (with the exception of the United States and Canada, which were explored in the main body of the Article) discuss the treatment of pension, wage, and other employee benefit claims when employers become insolvent. In addition to considering whether such claims receive a priority or preference under the country's bankruptcy provisions, the country sections also consider whether guarantee schemes exist for pension and/or wage claims.

With regard to the priority analysis below, unless otherwise indicated, the information below is limited to pre-filing claims. This is because most post-filing pension and wage claims are given top priority status in most countries as administrative claims of the bankruptcy estate.[334] This report also assumes that although insolvency processes work differently in some countries, employee contracts are terminated instantly in the event of employer liquidation. The report also uses the terms "preference" and "privilege" interchangeably to describe a claim in insolvency, which outranks unsecured claims.

Finally, a necessary disclaimer. Because of the complexity of the subject matter, and its rapidly changing nature, some sources relied upon for this analysis may contradict one another. Where possible, I have attempted to provide the most current understanding of the law concerning treatment of employee claims in insolvency, but inevitably, some discrepancies remain (especially as a result of the unavailability of English translations of law or legal commentary).

---

334. *See supra* note 15 and accompanying text.

1. Australia[335]

Pensions

In Australia, the term "superannuation" refers to savings specifically dedicated to the provision of financial support in retirement. The term is preferred to "pension" for historical reasons (largely because of the long-standing preference for lump-sum benefits rather than annuity income streams). Under the Superannuation Guarantee (Administration) Act 1992, a minimum of 9.25% (as of July 1, 2013) of an employee's gross wage is deducted and remitted to an approved superannuation fund. The minimum obligation required by employers is set to increase to twelve percent gradually, stepping annually from 2013 to 2020. If an employer fails to provide the amount, then a tax is levied on the employer to cover the shortfall and this is known as the "superannuation guarantee charge."

With regard to liquidating companies, section 556(1) of the Corporations Act of 2001 provides a hierarchy of claims that are prioritized over other unsecured claims. The highest-ranking class of claims relate to the administration and process expenses surrounding the insolvency. Next, there are four classes of employee claims set out in section 556(1)(e)–(h): (1) wages, superannuation contributions and superannuation guarantee charges; (2) injury compensation; (3) amounts due for leaves of absence; and (4) retrenchment payments (severance). Retrenchment payments are defined in section 556(2) to be amounts payable by virtue of termination of the employment, or in other words, a type of termination or severance payment.

In examining the order of priorities under the Corporations Act, wages, superannuation contributions, and superannuation guarantee

---

335. The pension and wage information for this country derives from the following primary and secondary materials: *Corporations Act 2001*, ss 556, 560, *available at* http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172; *Superannuation Guarantee (Administration) Act 1992*, *available at* http://www.comlaw.gov.au/Details/C2013C00394; SARRA, *supra* note 37; Stewart, *supra* note 3; Industry Canada, International Comparison of Priority Status of Employee Claims (2010) (unpublished manuscript) (on file with author); *General Employee Entitlements and Redundancy Scheme (GEERS)*, AUSTRALIAN GOV'T DEP'T OF EMP., http://employment.gov.au/general-employee-entitlements-and-redundancy-scheme-geers (last visited Mar. 9, 2014); *Australia: Protection of Rights*, INT'L SOC. SECURITY ASS'N, http://www.issa.int/country-details?countryId=AU&regionId=ASI&filtered=false (follow "Pensions (mandatory)" hyperlink; then select "Protection of Rights") (last updated Jan. 1, 2013).

charges outrank injury compensation, which outranks leave of absence pay, which outranks retrenchment payments.

In sum, outstanding pension contributions and charges are provided preferred status for all unpaid amounts, meaning that employees enjoy priority over ordinary unsecured creditors with no monetary or time limits.

There is no government-provided benefit guarantee for pensions, which is not unusual for countries that have adopted the occupational defined contribution plan model.

Other Employee Benefits

As discussed above, wage claims, including those for workers' compensation, leaves of absence, and retrenchment (severance), are preferred in insolvency proceedings over unsecured creditors for all unpaid amounts under the Corporations Act.

Although no guarantee fund exists for pensions, a government fund, called the General Employee Entitlements and Redundancy Scheme (GEERS), pays up to three months unpaid wages and up to sixteen weeks for vacation pay, retrenchment (severance) pay, and termination pay. It is administered by the Federal Department of Employment and Workplace Relations (DEWR) and is funded through general tax revenues.

The State is subrogated to the claims of employees in Australia to the extent those claims have been satisfied by the GEERS scheme. In such circumstances, the effect of section 560 of the Corporations Act is that DEWR has the same right of priority of payment in respect of the money advanced as the person who received the payment would have had if the payment had not been made.

2. Austria[336]

Pensions

Pensions are not granted any preference under Austrian insolvency law. However, Austria allows employees to be "preferential creditors" for fifty percent or more of benefits accrued, which means that the assets are essentially held in trust and are not accessible to other creditors. Additionally, occupational pension contribution claims are treated as wage claims and protected by the wage guarantee scheme described below.

Nevertheless, Austria does have a pension guarantee scheme for different types of pensions under its Insolvency Remuneration Fund (Insolvenz-Entgelt-Fonds). The Insolvency Remuneration Fund will pay employer contributions to the pension fund or insurance arrangement and then the Fund can seek to recover this amount from the employer. On the other hand, the Insolvency Remuneration Fund will provide limited protection in relation to direct pension promises (book reserves) by employers. It will pay twenty-four monthly pension payments directly to the employees. The Fund will then have direct recourse through access to the employer's protected securities, which are the assets that the employer holds on a segregated basis as a reserve against its pension obligations.

Other Employee Benefits

Austria does have limited wage priorities with respect to employee wage claims that have arisen prior to the opening of bankruptcy proceedings over the assets of the employer. These claims only outrank unsecured creditors.

Austria has a wage protection fund called the "Insolvenz-Ausfallgeld-Fonds" (IAF). The IAF is funded primarily through annual unemployment insurance contribution premiums. The following claims resulting from an employment relationship are protected by the IAF: (1) wage claims, include claims for unpaid

---

336. The pension and wage information for this country derives from the following primary and secondary materials: CONNOR, supra note 265; EUROPEAN FOUND. FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS, RESTRUCTURING IN BANKRUPTCY: RECENT NATIONAL CASE EXAMPLES (2009), *available at* http://www.eurofound.europa.eu/docs/erm/tn0908026s/tn0908026s.pdf [hereinafter EUROPEAN FOUND.]; FRESHFIELDS BRUCKHAUS DERINGER LLP, *supra* note 262; SARRA, *supra* note 37; Industry Canada, *supra* note 335.

wages, termination payments, vacation payments, and corporate pension contribution claims; and (2) damage claims, which include claims for compensation if the employment relationship was unlawfully terminated. The IAF is subrogated to the insolvency claims of employees at the same priority level.

3. Belgium[337]

Pensions

In Belgium, occupational pensions are generally set up though an insurance contract, or through a pension fund. With regard to pension funds, the latter is a separate legal entity different from the employer set up in the form of an Organization for Financing Pensions (OFP). As such, with the exception of outstanding pension contributions, there are generally no pension-related claims in insolvency because these benefits are not provided through employer assets.

The main protection against employer insolvency in Belgium is through the external financing requirement for occupational pensions. This makes it less likely that employer insolvency will be detrimental to an employee's occupational pension entitlements. If an employer has not actually funded a pension plan to a sufficient level, an employee's pension entitlement will be reduced and the state Closure Fund (the state wage guarantee fund discussed below) may intervene.

To the extent that a pension plan is underfunded, an employee's pension entitlements under the plan may be reduced. Employees can make a claim against an insolvent company to recover any loss suffered as a consequence of the underfunding. These employee claims, including claims in relation to the funding of a pension scheme, have priority in insolvency proceedings. However, this priority relates only to an employer's "movable assets" (such as stock, inventory, and cash accounts).

Other Employee Benefits

There is a priority right for employees' wage claims on the movable goods of the bankrupt company. These priority wage-related claims include: (1) pre-filing wages, indemnities and benefits (including vacation and severance pay), up to EUR 7500 (as of 2008); (2)

---

337. The pension and wage information for this country derives from the following primary and secondary materials: EUROPEAN FOUNDATION, *supra* note 336; FRESHFIELDS BRUCKHAUS DERINGER, *supra* note 262; SARRA, *supra* note 37; Industry Canada, *supra* note 335; *Fonds tot Vergoeding van de in Geval van Sluiting van de Onderneming Ontslagen Werknemers*, EUROFUND, http://www.eurofound.europa.eu/emire/BELGIUM/REDUNDANCYPAYMENTSFUND-BE.htm (last updated Aug. 14, 2009).

termination pay up to EUR 7500 (as of 2008 and adjusted every two years); and (3) old-age indemnities for workers sixty years and older. Excluded from benefits cap are the indemnity because of termination, the indemnity because of an abusive dismissal, and the indemnity because of a dismissal of a protected employee. Wage claims excluded from the priority rights include: holiday pay (which has a lesser priority than other wage claims, but still ranked above other unsecured creditors), the additional indemnity for occupational diseases or employment accidents, and indemnities that are paid in surplus to the social security payments.

Additionally, there exists a government wage fund (Closure Fund), *Fonds tot vergoeding van de in geval van sluiting van de ondernemingen ontslagen werknemers—Fonds pour l'indemnisation des travailleurs licenciés en cas de fermeture d'enterprise*, which makes certain payments to workers whose place of work has closed. Under the Closure Fund, if the employer is unable to make wage payments within fifteen days of an insolvency filing, the Fund commences payment to the employees. The Fund also pays wages for blue-collar employees up to a year before and after the employer closes, and for white-collar workers up to eighteen months before and after the closure. It is funded through employer and government contributions. To the extent that the Fund makes payment to employees, the state is subrogated to the claims of the employees in the insolvency proceeding with the same priority that the employee would have had.

4. CHILE[338]

Pensions

Occupational pensions, for the most part, do not exist in Chile. Instead, Chile is a prominent example of the introduction of private accounts into a public social security system. This privatized social security system has mandatory private individual accounts funded primarily by employee contributions (of at least ten percent), administered by large fund management companies. These fund management companies are, in turn, independent from the employer and the government (at least in theory). Consequently, when an employer goes bankrupt in Chile, there are not general employee occupational pension claims against the company.

As of 2008, Chile has experimented with occupational pension plans of the defined contribution salary-deferral variety. However, there are very few such plans in the country as of 2013 and no experience with employers who use these plans becoming insolvent.

At the present time, the only obligations that employers might have to employees as far as pension claims in bankruptcy concern employer insurance payments required for the disability and survivorship aspects of the pension program. Employers are also responsible for deducting employee contributions from their pay and sending these contributions to the first pillar pension fund companies. To the extent that the company owes these pension insurance payments or has failed to make the required contributions to the pension fund companies, the Chilean bankruptcy system does provide for a super-priority for these amounts during the insolvency process. But again, these are not employee claims in the traditional sense, but rather government claims for employer contributions to the social security program.

Chile does not have a pension payment guarantee fund or guaranteed insurance for pension claims during insolvency, which is unsurprising given the lack of occupational pensions and defined benefit pension plans.

---

338. The pension and wage information for this country derives from the following primary and secondary materials: CÓD. TRAB., art. 61 (Spanish only); CÓD. CIV. 2472 (Spanish only); Section 148 of Chile's Bankruptcy Act (Spanish only); SARRA, *supra* note 37; Industry Canada, *supra* note 335; Email from Pablo Arellano Ortiz, Profesor de Derecho del Trabajo y Seguridad Social, Austral Univ. of Chile, to Paul M. Secunda, Professor of Law, Marquette Univ. Law Sch. (July 12, 2013) (on file with author).

Other Employee Benefits

Unpaid wages, severance-type payments, and other wage-related claims in Chile are given preferred treatment up to a capped amount during the insolvency process. Pursuant to Chile's Civil Code (Section 2472, as amended), first class preferred credits consist of: (1) employees' remuneration, wages, and family allowances; (2) social security contributions of employees withheld from such remunerations and wages; and (3) severance pay accrued in favor of employees as of the date of the claim, up to a maximum of 3 months wages per year and up to ten years (approximately $11,330 USD as of July 2013) per employee. Employees are unsecured creditors for any amounts in excess of this total. Vacation pay claims also have a preference in insolvency without restriction.

These first class preferred credits may be paid with the proceeds of the bankruptcy estate without any need for the holders of such credits to file their claims in the bankruptcy proceedings (Section 148 of Chile's Bankruptcy Act).

As far as other employee benefits, the bankruptcy system does not appear to recognize additional preferences for other wage-related claims. Such claims for lost employee benefits as a result of employer insolvency are instead handled through a private-public joint employment insurance/unemployment compensation arrangement.

Chile does not have a government guarantee scheme for wage-related employee claims after an employer's insolvency.

5. Czech Republic[339]

Pensions

The Czech Republic does not have an occupational pension system. There are some elements, however, of occupational social security within the individual pension system (i.e., the employer may contribute to the individual pension of one's own employees). Not even the recently introduced system of pension savings (Zákon č. 426/2011 Sb.) is a true occupational pension system, as it is up to the insured to decide whether to use up to three percent of the obligatory first pillar pension contributions for this new system. Individuals may then also add a further two percent of salary from their own money. Under this system, the employer has no legally established obligation to pay any further contributions for one's own employees.

As far as a first pillar pension system, if pension contributions to the social security scheme are not paid by the employer due to its insolvency, the Czech Social Security Administration becomes one of the creditors within the bankruptcy process regulated by the Zákon č. 182/2006 Sb., Bankruptcy and Settlement (Insolvency Procedure). This is not an employee claim, but a government claim, so is beyond the scope of this report.

Because occupational pensions largely do not exist in the Czech Republic, there is also no pension guarantee scheme in the Czech Republic.

Other Employee Benefits

If insolvency of an employer occurs, the wage of the employees is protected by Zákon č. 118/2000 Sb., on protection of employees with

339. The pension and wage information for this country derives from the following primary and secondary materials: Zákon č. 426/2011 Sb. (System of Pension Savings), *available at* http://portal.gov.cz/app/zakony/zakon.jsp?page=0&nr=426~2F2011&rpp=15#seznam (no English version available); Zákon č. 182/2006 Sb. (Insolvency Procedure), *available at* http://portal.gov.cz/app/zakony/zakon.jsp?page=0&nr=182~2F2006&rpp=15#seznam (no English version available); Zákon č. 118/2000 Sb. (Protection of Employees by Insolvency of Employer), *available at* http://www.mpsv.cz/ppropo.php?ID=z118_2000o (no English version available); CONNOR, supra note 265; EUROPEAN FOUND., *supra* note 336; Industry Canada, *supra* note 335; Email from Kristina Koldinska, Professor of Law, Charles Univ., Czech Republic, to Paul M. Secunda, Professor of Law, Marquette Univ. Law Sch. (Aug. 2, 2013) (on file with author); Email from Kristina Koldinska, Professor of Law, Charles Univ., Czech Republic, to Paul M. Secunda, Professor of Law, Marquette University Law School (June 26, 2013) (on file with author).

employer insolvency. Employees only have a restricted absolute priority, in that they are paid preferentially only for a percentage of wage-related claims owed to them. Specifically, secured creditors are paid preferentially out of seventy percent of the insolvent employers' assets, and then thirty percent of the estate must be set aside for employee claims on a super-priority basis against the insolvent employer.

Additionally, a part of the wage owed to employees can be paid by the Czech Labour Office as part of a wage guarantee arrangement. This payment is capped as three months of pay and severance pay is limited to three times the average amount paid. The Czech Labour Office then takes the place of the employee as a creditor in the insolvency proceeding.

6. Denmark[340]

Pensions

Many people in Denmark are covered by a company pension or a collective pension scheme as a part of their employment contract. Collective pension schemes are also very common in the public sector, where workers pay 17.1% of their salary before tax to a pension savings scheme. The employer pays two-thirds of this pension contribution, whereas the final third is deducted from the employee's pay. In the private sector, companies usually offer a pension scheme to which the company pays a contribution of about ten percent of the employees' salaries, and employees contribute about five percent of their salaries. These pension schemes are run by an external pension fund, which is a separate legal entity from the employer. Thus, when an employer becomes insolvent, as with other countries with external pension funds, the most important issue becomes whether the employer still has outstanding contributions owing to the pension fund.

Ranking of unsecured creditors in Denmark is governed by sections 93 to 98 of the Danish Bankruptcy Act (*Bekendtgørelse af Konkursloven*). Employees with pension and salary claims are ranked after secured and certain other preferential creditors. Employee claims are considered privileged in that they outrank general unsecured claims.

Pension contributions are treated as a type of wage in Denmark, so the wage protection fund, described below, also protects pension contributions.

Other Employee Benefits

According to section 95 of The Danish Bankruptcy Act, wage claims, just like pension claims, have a preferential status in case of bankruptcy. Section 95 provides priorities for: (1) Claims for wages/salaries, which has fallen due within the period from six months prior to the date of insolvency notice; (2) Claims for compensation as

---

340. The pension and wage information for this country derives from the following primary and secondary materials: Danish Bankruptcy Act §§ 93–98 (*Bekendtgørelse af Konkursloven*) (summarized at www.practicallaw.com/2-502-0073); Lovbekendtgørelse 2005-10-28 nr. 1043 om Lønmodtagernes Garantifond (no English version available); EUROPEAN FOUND., *supra* note 336; SARRA, *supra* note 37; Industry Canada, *supra* note 335.

a result of discontinuation of the employment relationship (severance pay); (3) Claims for compensation for dismissal or termination of the employment relationship that have occurred within the last six months prior to the date of insolvency notice; and (4) Claims for holiday pay. The bankruptcy court may refuse to give priority where such a priority would not seem reasonably justified under the terms of payment and employment.

There is also a wage protection fund, Lønmodtagernes Garantifond (the Employees' Guarantee Fund) for wage claims (including pension contributions as noted above). The Guarantee Fund was established in 1972 and is employer-funded. The law creating and governing the Fund is called the Lovbekendtgørelse 2005-10-28 nr. 1043 om Lønmodtagernes Garantifond. There is a cap on the amount that can be paid out from the Guarantee Fund of approximately EUR 15,000. The Fund is subrogated to the claims of employees in insolvency, but without the same preference that employees would have had.

7. Estonia[341]

Pensions

Estonia primarily has a state-run pension system. To the extent there exists occupational pension schemes (fairly uncommon), they exist as defined benefit plans and are run by management companies separate and apart from employers. An employer's insolvency thus does not affect an employee's right to receive pension benefits under the Estonian pension system because the right to receive a pension is generally not related to the employer. As a result, pension contributions do not have any priority in insolvency proceedings.

A pension guarantee fund does exist for the state-run pension scheme and compensates members of these pension funds to a specified level when their employer goes bankrupt. The Guarantee Fund compensates in full for losses up to EUR 10,000 and covers ninety percent of any losses exceeding EUR 10,000.

Other Employee Benefits

Estonia does not provide a priority for wages during the insolvency process. Although Estonia does not have a wage guarantee scheme, it handles some of the same issues that arise as far as loss of wages and related benefits upon insolvency under its Unemployment Insurance Act. Under the Act, wages, vacation pay, severance pay, and termination pay are all protected up to a certain specified amount. Under section 44 of the Unemployment Insurance Act, on insolvency of an employer, the state becomes in bankruptcy proceedings the creditor regarding unemployment insurance premiums not received from the employer. The amounts collected during bankruptcy are then transferred to the account of the unemployment fund in order to pay employees' wage-related claims.

341. The pension and wage information for this country derives from the following primary and secondary materials: Unemployment Insurance Act § 44 (Est.), *available at* https://www.riigiteataja.ee/en/eli/518112013008/consolide; EUROPEAN FOUND., *supra* note 336; FRESHFIELDS BRUCKHAUS DERINGER LLP, *supra* note 262; SARRA, *supra* note 37.

8. Finland[342]

Pensions

Bankruptcy and other insolvency problems of an employer affect an employee's right to wages or occupational pension to only a small degree in Finland. Already earned wages and pensions are protected by the Finnish Constitution (Section 15 on the Protection of Property).

In regard to pensions, the occupational pension scheme is mandatory and covers the entire labor force. The administration of this scheme is decentralized to various authorized old-age pension providers. In regard to private sector employees, the management of pensions is divided between authorized private pension insurance companies (sixty-nine percent of all the insured in 2012), company pension funds (one percent of all the insured in 2012) and industry-wide pension funds (one percent of all the insured in 2012). The management of pensions of public sector employees is, in turn, with a public pension institution called Keva (twenty-eight percent of all the insured in 2012).

If a private sector employer goes bankrupt, it does not affect employees' right to pensions because the operations of all pension providers are separate from employers. Not even a bankruptcy of a pension provider would affect the employees' right to already earned pensions because of their joint responsibility. According to section 181 of the Employees' Pensions Act (395/2006), if a pension remains fully or partially unsecured due to the bankruptcy of a pension provider, other pension providers are jointly liable for these benefits in proportion to the earnings insured with the relevant pension provider.

---

342. The pension and wage information for this country derives from the following primary and secondary materials: FINLAND CONSTITUTION ch. 1, § 15, *available at* http://www.servat.unibe.ch/icl/fi00000_.html; Employees' Pensions Act (395/2006) § 181, *available at* http://www.finlex.fi/en/laki/kaannokset/2006/20060395; Pay Security Act (866/1998), *available at* http://www.finlex.fi/en/laki/kaannokset/1998/19980866; EUROPEAN FOUND., *supra* note 336; FRESHFIELDS BRUCKHAUS DERINGER LLP, *supra* note 262; SARRA, *supra* note 37; VIDLUND ET AL., *supra* note 268; Industry Canada, *supra* note 335; *Finnish Pension Security*, FINNISH CENTRE FOR PENSIONS, http://www.etk.fi/en/service/the_pension_system/1399/the_pension_system (last visited Mar. 9, 2014); Email from Toomas Kotkas, Professor of Law, Univ. of E. Finland, to Paul M. Secunda, Professor of Law, Marquette Univ. Law Sch. (Aug. 1, 2013) (on file with author); Email from Toomas Kotkas, Professor of Law, Univ. of E. Finland, to Paul M. Secunda, Professor of Law, Marquette Univ. Law Sch. (June 24, 2013) (on file with author).

In addition to the mandatory pension schemes, there are voluntary private pension schemes paid by employers. These pension insurance policies are sold by private insurances companies, and are increasingly of the DC plan variety. Because the mandatory pension system places no income ceilings for the accumulation of pensions, the voluntary private pension schemes are undeveloped and still form only about five percent of the total pension expenditure in Finland. The voluntary private pension schemes are a kind of "bonus pension" used by employers to recruit new employees.

If an employer who has taken a voluntary pension policy for its employees goes bankrupt, an insured employee is either entitled to a paid-up policy or can continue the pension policy as a private policy by paying the premiums. So, even with these bonus pension schemes, an employer's bankruptcy has only a limited effect on the voluntary pension. To the extent that there are outstanding pension contribution claims under these schemes, they are unsecured. The pension insurance companies (and not the employees), however, are responsible for lodging claims for these unpaid pension contributions and therefore bear the risk of the bankruptcy estate not being able to make the payments.

Endowment insurance, voluntary pension insurance, and capital redemption contract do not have statutory guarantee funds in the same way as banks have the deposit guarantee fund to cover savings deposits. Rather, the financial interests of policyholders are safeguarded by various means, such as by monitoring the financial status of life insurance companies. The provisions of the Insurance Companies Act safeguard the customers' interests in cases of an insurance company's winding up or bankruptcy. These provisions relate, for example, to the transfer of insurance portfolio to another company and the priority of the claims on the insurer.

It would appear that the State is subrogated to the pension claims of employees in any subsequent insolvency proceeding, but similarly without preferences.

Other Employee Benefits

Finland does not grant a preference to employee wage claims during insolvency. Holiday pay, severance pay, and termination pay claims are also unsecured.

However, if an employer goes bankrupt or cannot pay the wages or any other employment related claims, the employees' claims are secured through the Pay Security Act (866/1998), which sets up a wage guarantee fund. The government will pay as pay security any unpaid claims up to a ceiling of EUR 15,200 per employee (section 9 of the Act). The average monthly wage in Finland in 2012 was EUR 3100.

Under this pay security system, the state is subrogated to the claims of the employees in insolvency with the same priority.

9. FRANCE[343]

Pensions

This is not a central topic in France, because most pensions and other "social security" benefits are provided by statutory schemes. Therefore, risks related to insolvency are marginal and concern a very limited part of the overall pensions granted. Private occupational pension plans, provided by employers, are not developed in France.

There is no equivalent state guarantee for pension benefits as there is for wages as described below. Nevertheless, some occupation pension schemes are offered to the employees, either by the effect of collective agreements or by a unilateral contract by the employer. Except in some exceptional cases, those schemes are externalized, which means that they are managed by private insurers.

The legal configuration is usually a triangular one: the pension scheme is set by a collective agreement or a unilateral decision of the employer that commits the employers towards his employees; the contributions and the benefits are managed under a "group insurance contract" signed between the employer and an insurance company. The French statutory law contains some provisions about the duties of the employers and of the insurers to make sure that the benefits will be paid.

In case the employer's insolvency in these situations, French courts admit that the benefits which are due to the employees will be paid—to a certain extent—by the AGS (the compulsory system of insurance covering the wages in cases of insolvency described below). But the courts do not require the AGS to cover the contributions that have not been paid to the insurer by the employer in case of insolvency.

Unpaid contributions to the statutory schemes have a privileged status in insolvency. By contrast, unpaid contributions to external pension funds are not privileged.

---

343. The pension and wage information for this country derives from the following primary and secondary materials: SARRA, *supra* note 37; Industry Canada, *supra* note 335; *Garantie des Salaires Après Redressement ou Liquidation Judiciaire* SERVICE-PUBLIC.FR, http://vosdroits.service-public.fr/particuliers/F2337.xhtml (last updated Jan. 1, 2014) (French version only); Email from Jean-Philippe Lhernould to Paul M. Secunda (June 11, 2013) (on file with author); Email from Philippe Martin, Professor of Economics, SciencesPo, to Paul M. Secunda (June 27, 2013) (on file with author); Email from Philippe Martin, Professor of Economics, SciencesPo, to Paul M. Secunda (June 17, 2013) (on file with author).

Other Employee Benefits

As far as how wage claims are treated during insolvency proceedings, both the French Civil Code and Labor Code have applicable provisions. Under the priority (privilège) instituted by the Civil Code, employees can apply it against the employer, even if no bankruptcy proceedings have been started. This priority covers the last six unpaid months (wages, severance pay, and damages for unfair dismissal). The Labor Code institutes a "super-priority" (super-privilège), whereby employees' wages claims are paid before even tax claims. This priority only covers the last sixty days before a bankruptcy case is opened, up to EUR 6172. This scheme under the Labor Code also includes some termination pay (notice period in case of permanent contracts; severance pay in case of fixed term contract). The scheme also covers vacation pay up to a special cap (thirty days' wages).

The Assurance Garantie des Salaires (AGS), the French wage guarantee scheme, covers a wide range of wages claims, including termination pay, severance pay, damages for unfair dismissal and other claims that can be related to the contract of employment (for instance some benefits due to the employees under a private plan contracted by the employer), either due to the employees *before* the bankruptcy proceeding is opened and during the bankruptcy procedure. The AGS insures wage claims up to 74,064 EUR and it is subrogated to the employees' rights in the insolvency proceeding, and it can avail itself of both the Civil Code "privilège" and of the Labor Code "superprivilège."

10. Germany[344]

Pensions

Pension claims receive no priority or preferences under the German Bankruptcy Code. Germany has adopted a flattened hierarchy of creditors where they are only either secured or unsecured creditors, and there are no exceptions for special groups like employees. The Insolvency Code of 1994 abolished all preferences.

A statutory insolvency insurance system administered by a mutual insurance association called the Pension Guarantee Fund (*Pensions-Sicherungs-Verein Versicherungsverein aG-PSVaG*) (PSVaG) that protects current and future beneficiaries in the event of employer insolvency. The PSVaG is financed via annual insurance premiums paid by employers who provide occupational retirement provisions. In 2006, the financing mechanism of the PSVaG was changed from a partially funded contribution model to a system of full capital coverage. The insolvency insurance covers pensions in payment and vested rights. The PSVaG is not required to pay monthly pensions in excess of EUR 7875 (figure for 2012). Certain rights (such as benefit increases granted in the two years immediately prior to insolvency) are excluded from the insolvency insurance coverage if it is considered that the aim of granting those rights was to pass the cost to the PSVaG. Insolvenzgeld (insolvency payments) are not paid by government, but by the Federal Labour Agency, financed by contributions and managed in a tripartite system of self-government.

The PSVaG replaces all beneficiaries as creditors of the employer and becomes a major creditor. In return, any securities or funds that are linked to the protected pension obligations are transferred to the PSVaG by virtue of law.

---

344. The pension and wage information for this country derives from the following primary and secondary materials: Sozialgesetzbuch [Social Code], Mar. 24, 1997 [SGB], §§ 165–172, *available at* http://www.gesetze-im-internet.de/sgb_3; Insolvenzordnung [Insolvency Statute], Oct. 5, 1994 [BGBl], *available at* http://www.gesetze-im-internet.de/inso; Gesetz zur Verbesserung der Betrieblichen Altersversorgung [BETRIEBSRENTENGESETZ—BetrAVG] [Occupational Pensions Law], Dec. 19, 1974 [BGBl], §§ 7–15, *available at* http://www.gesetze-im-internet.de/betravg; CONNOR, supra note 265; EUROPEAN FOUND., *supra* note 336; FRESHFIELDS BRUCKHAUS DERINGER LLP, *supra* note 262; SARRA, *supra* note 37; Stewart, *supra* note 3; Industry Canada, *supra* note 335; Email from Felix Welti, Professor, Univ. of Kassel, Germany, to Paul M. Secunda, Professor of Law, Marquette Univ. Law Sch. (June 16, 2013) (on file with author).

Occupational pension insolvency is regulated by sections 7–15 of the Gesetz zur Verbesserung der betrieblichen Altersversorgung. Occupational pensions are protected because employers are obliged to have insurance in case of insolvency.

Other Employee Benefits

As with pensions, there are no preferences or priorities granted for wage claims (vacation, severance, or termination pay).

There is a wage guarantee government fund called the *Insolvenz-Ausfallgeld-Fonds*. The government wage guarantee fund, sourced by employer premiums, pays last three month of wages. Having paid the "insolvency money," the Federal Labour Agency is subrogated to the claims of employees, but without any preference (just like the employee claims).

11. Greece[345]

Pensions

Only state-run pension claims in relation to the Social Security Foundation (the largest of the public and semi-public pension funds in existence) have priority. Such claims rank sixth in priority according to Article 154 of Law 3588/2007 (the Insolvency Code). As with wages discussed below, these claims are limited to amounts arising within the two years before insolvency. All other pension claims, including those owed to occupational pension funds, are unsecured.

Greece does not have a pension payment guarantee fund or guaranteed insurance for pension claims during insolvency.

Other Employee Benefits

According to Article 154 of Law 3588/2007, employee wage claims (including severance, termination, and vacation pay) are ranked third among preferred creditors in Greece. Wage claims arising in the two years prior to commencement of proceedings, including vacation, severance and termination pay, are preferred. However, claims for compensation due to termination of employment relations are not subject to any durational restriction.

Greece has established the Fund for the Protection of Employees from Employer's Non-Reliability for the protection of wage claims. The Fund is financed by compulsory contributions made by employers (0.15% on employees' wages) and state funds, and is self-funded by proceeds from investments of Fund-owned assets. The Fund provides for a maximum benefit of three months wages payable for the six-month period before insolvency. Claims deriving from termination of the employment contract are excluded. The State is subrogated to the same claims that employees have in insolvency proceedings.

---

345. The pension and wage information for this country derives from the following primary and secondary materials: Nomos (2007:3588) [Insolvency Code], 2007, art. 154 (no English version available); EUROPEAN FOUND., *supra* note 336; SARRA, *supra* note 37; Industry Canada, *supra* note 335.

12. Hungary[346]

Pensions

Pension claims are not generally given priority in Hungary because there are no private pensions. There is only one common pension system, which is partly state-owned, and the pension funds are fully state guaranteed.

At the start of the insolvency procedure, the assets belonging to the pension fund must be transferred immediately to the liquidator. These assets must be handled separately, and can be used to fulfill other liabilities only after fulfilling obligations in respect of members and survivors.

Membership in the Hungarian Pension Guarantee Fund (GF) is mandatory for all pension funds. The GF is a statutory body financed by mandatory quarterly contributions from all pension funds in the range from 0% to 0.4% of the contributions paid by the pension fund members.

The GF is responsible for the protection of the accumulated benefits in the case of liquidation of a pension fund. The guarantee to beneficiaries covers their total benefit amount, while the guarantee to contributing members is limited to the capital accumulated before the start of the liquidation process.

Other Employee Benefits

Employee wage claims have a limited priority over other insolvency claims under the law of Act LXVI of 1994 on the Wage Guarantee Fund (1994. évi LXVI. törvény a Bérgarancia Alapról). The preference, which outranks only unsecured claims, extends to wages and the severance pay of employees who have given notice by the time of liquidation. There is no restriction on the wages that can be claimed, but severance pay is limited to six months' wages. There is no priority for vacation pay, termination pay, or traveling and other expenses.

---

346. The pension and wage information for this country derives from the following primary and secondary materials: 1994. évi LXVI. törvény a Bérgarancia Alapról (Act LXVI of 1994 on the Wage Guarantee Fund) (no English version available); CONNOR, supra note 265; EUROPEAN FOUND., *supra* note 336; SARRA, *supra* note 37; Industry Canada, *supra* note 335.

Additionally, a government wage guarantee fund (F város Kormányhivatala Munkaügyi) pays unpaid wages. The fund covers 100% of wages, as well severance pay equivalent to six months' wages. Employees receive compensation out of the fund if the liquidator is unable to pay for the employees' claims by the time of liquidation. The State is subrogated to the claims of employees in insolvency with the same priority as employees. The fund is funded both by employer taxes and government contributions.

13. Iceland[347]

Pensions

Iceland's pension scheme is based on two laws: Act No. 129 on Mandatory Pension Insurance and the Activities of Pension Funds, 1997, and Act No. 78 on Occupational Retirement Funds, 2007. Iceland's occupational pension is mandatory with all employees having twelve percent of their wages contributed to funds run by pension managing companies, with eight percent of this contribution coming from the employer. These mandatory occupational pension funds are the dominant feature of the Icelandic pension system and mostly exist in the DC plan form.

Because the pension funds exist separate and apart from the employer, the employer's insolvency only impacts the pension fund to the extent that there are outstanding employer pension contributions owed to the fund by the employer. Article 112 of the Icelandic Bankruptcy Act of 1991 provides that pension contributions receive a priority during insolvency proceedings for the eighteen months immediately preceding the reference date (the insolvency filing). In any event, because pension contributions are paid monthly, most often there are no significant pension contributions to be paid to a pension fund when a corporation goes bankrupt.

Although Iceland does not have a separate pension guarantee fund or scheme, outstanding pension contributions are treated as wages and protected under the Wage Guarantee Fund Act described below. Pension funds' claims for pension premiums that have fallen due during the liability period are covered by this scheme. Liability is restricted to the twelve percent minimum contribution.

---

347. The pension and wage information for this country derives from the following primary and secondary materials: Act Respecting Occupational Retirement Funds of 2007, *available at* http://eng.fjarmalaraduneyti.is/media/laws_regulations/Act_no_78_2007.pdf; Wage Guarantee Fund Act of 2003, *available at* http://eng.velferdarraduneyti.is/acts-of-Parliament/nr/3698; Pension Act of 1997, *available at* http://eng.fjarmalaraduneyti.is/legislation/nr/817; Act on Bankruptcy of 1991, art. 12, *available at* http://eng.innanrikisraduneyti.is/laws-and-regulations/english/nr/6570; MARIANNA JONASDOTTIR, THE ICELANDIC PENSION SYSTEM, ICELANDIC MINISTRY OF FINANCE (2007), *available at* http://eng.fjarmalaraduneyti.is/media/Lifeyrismal/The_Icelandic_Pension_System_032007.pdf; OECD, *Pension Country Profile: Iceland*, *in* OECD PRIVATE PENSIONS OUTLOOK 2008, at 210 (2009), *available at*, http://www.oecd.org/finance/private-pensions/42566195.pdf; Industry Canada, *supra* note 335; Email from Olaf Margeirsson, Ph.D. Candidate, Univ. of Exeter, United Kingdom, to Paul M. Secunda, Professor of Law, Marquette Univ. Law Sch. (July 19, 2013) (on file with author).

Other Employee Benefits

Like pension contributions, various wage claims receive a top priority under Article 112 of the Bankruptcy Act. The priority covers: (1) claims for wages that have become due during the eighteen months immediately preceding the reference date; (2) claims for compensation for termination of an employment agreement during the same eighteen month period; and (3) claims for vacation payments or vacation wages earned during the eighteen month period.

Iceland does have a wage guarantee fund. The Wage Earners' Guarantee Fund (Tryggingarsjóður launa), which was established by the Wage Guarantee Fund Act, No. 88/2003, guarantees salaried employees wages where the employer goes bankrupt. Specifically, the following wage claims are guaranteed: (1) claims by employees for wages for their last three months of employment in the service of the employer; (2) claims for compensation for lost wages for up to three months due to the termination of an employment contract; and (3) claims for holiday pay.

The Fund's liability is dependent on the condition that the employee wage claims has been recognized as priority claims under Article 112 of the Bankruptcy Act. It is unclear whether the fund is subrogated to the claims of employees in insolvency.

14. Ireland[348]

Pensions

Section 285 of the Irish Companies Act of 1963 provides priority status (the third priority after fixed charges and administrative fees) to any payments due by the company pursuant to a scheme to provide superannuation benefits. Therefore, outstanding pension contributions are granted a preferred status. On the other hand, unfunded pension liabilities are unsecured.

Under the Insolvency Payment Scheme, if an employer is insolvent and contributions remain unpaid, the Protection of Employees (Employers' Insolvency) Act of 1984 provides for the payment of unpaid contributions to a pension plan by a statutory fund administered by the Department of Enterprise, Trade, and Employment. The amount that can be claimed from this statutory fund is the unpaid employer contributions and employee contributions not paid into the scheme for the twelve months preceding the insolvency or the deficit in the plan, whichever is the lesser amount.

Where the Insolvency Payment Scheme makes a payment for unpaid pension contributions, the government is subrogated to the rights of the employees as a preferential creditor.

Other Employee Benefits

Wage-related claims receive the same priority as unpaid pension contributions. Specifically, the following claims receive a preference: (1) wages and salaries for the employees in the four months before the relevant date, subject to a maximum of EUR 3174; (2) all accrued holiday pay with no money or time limit; (3) all compensation payable to an employee on termination of employment where the statutory minimum notice of termination has not been given; (4)

348. The pension and wage information for this country derives from the following primary and secondary materials: Protection of Employees (Employers' Insolvency) Act, 1984 (Act No. 21/1984), *available at* http://www.irishstatutebook.ie/1984/en/act/pub/0021/index.html; Companies Act, 1963 (Act No. 33/1963), § 285, *available at* http://www.irishstatutebook.ie/1963/en/act/pub/0033/sec0285.html; EUROPEAN FOUND., *supra* note 336; Industry Canada, *supra* note 335; Stewart, *supra* note 3; *Employer Representative Guide to the Insolvency Payments Scheme, Protection of Employees (Employers' Insolvency) Acts 1984 to 2006*, IRISH DEP'T SOC. PROTECTION (Oct. 2011), http://www.welfare.ie/en/Pages/Employer-Representative-Guide-to-the-Insolvency-Payments-Sch.aspx.

statutory redundancy lump-sums; and (5) compensation awarded by the Employment Appeals Tribunal in respect to unfair dismissals.

The same Insolvency Payment Scheme provides for the payment of certain outstanding entitlements relating to the pay of an employee where employment has been terminated because of an employer's insolvency. Payments are made from the Social Insurance Fund. The Scheme covers unpaid wages, holiday pay, pay in lieu of statutory notice, and a range of other entitlements that might be owed to employees by the employer. These include awards made under employment rights legislation covering such issues as unfair dismissal, discrimination, working time, and minimum wage.

Where the Insolvency Payment Scheme makes a payment for wage-related claims, the government is subrogated to the rights of the employees as a preferential creditor.

15. Israel[349]

Pensions

According to section 184 of the National Insurance Law, and according to the Company Ordinance and the Bankruptcy Act, pension fund payments are given preferential treatment during insolvency proceedings in Israel. The preference is limited to twice the average salary.

Insolvency of the employer, however, tends not to be relevant because the pension assets are held by pension funds separate and apart from the employer. Nonetheless, in some cases of insolvency of these pension funds, the employer has not set aside adequate funds for a long period of time. In such cases, the law imposes strict obligations on the pension fund to notify the employee and to sue the employer. The pension fund might be responsible itself for the payments if it does not recoup the missing funds.

The National Insurance Law established the National Insurance Institute (NII), which is a national fund for social claims. According to section 184 of the National Insurance Law, pensions, like wages, are also protected by a guarantee scheme. Under this scheme, in case of an employee whose employer did not deposit in the pension fund the employer's funds or deduct the appropriate funds from the employee's salary, the National Insurance Institute will pay these funds to the employee's pension fund. The National Insurance Institute will transfer to the pension fund the amount of the debt plus indexation differentials (e.g. cost of living adjustments) from the day the debt was made to the day of the actual payment, up to the maximum amount set by the law, which is twice the average base salary, NIS 16,974 (as of January 1, 2013). The NII is then subrogated

---

349. The pension and wage information for this country derives from the following primary and secondary materials: Wage Protection Law 5718-1958, arts. 19–19A, http://www.moital.gov.il/NR/rdonlyres/763192A1-4853-490C-AC7D-08E98CC382C3/0/16.pdf; Bankruptcy Ordinance 5740-1980, art. 78 (Hebrew version only); Companies Ordinance, art. 354 (Hebrew version only); National Insurance Law, § 184 (Hebrew version only); Severance Pay Law of 1963, §§ 4, 17 (Hebrew version only); Lilach Lurie, *Can Unions Promote Employability? Senior Workers in Israel's Collective Agreements*, 42 INDUS. L.J. 249 (2013); OECD, REVIEW OF RECENT DEVELOPMENTS AND PROGRESS IN LABOUR MARKET AND SOCIAL POLICY IN ISRAEL: SLOW PROGRESS TOWARDS A MORE INCLUSIVE SOCIETY (2013); SARRA, *supra* note 37; Email from Lilach Lurie, Professor of Law, Bar-Ilan Univ., to Paul M. Secunda, Professor of Law, Marquette Univ. Law Sch. (June 25, 2013) (on file with author).

to the employee's claim in insolvency, having the same priority as employees.

Other Employee Benefits

In the event of insolvency, Article 354(A)(1)(A) of the Companies Ordinance places employee wages as the first priority among other guaranteed creditors of the company. Additionally, according to section 4 of the Severance Pay Law of 1963, an employee whose employment is terminated due to an event of liquidation is entitled to severance payment as if he or she was dismissed by the company. Section 27 of the Severance Law adds that such severance pay shall be deemed as wages payable in precedence to all other debts.

Under the Israeli Wage Protection Law of 1958, Article 19, an employee whose employer went bankrupt or whose company underwent liquidation is entitled to receive a benefit from the NII that includes payments, owed by the employer, up to the maximum amount set by the law, for wages (including vacation pay) and severance pay. The payment, for a maximum period of twelve months, may not be less than the minimum wage to which the employee is entitled under the Minimum Wage Law.

In the event of insolvency, if payment is made by the liquidator under the Severance Law, the amount of severance pay and wages cannot in the aggregate exceed 150% of the cap. However, if payment is made by the NII (meaning that the liquidator does not have the ability to make these payments) then the resulting super priority is limited to ten times the average salary in the market. The NII is then subrogated to the claims of employees in insolvency with the same priority.

16. Italy[350]

Pensions

Pension funds in Italy are typically independent legal entities or pools of assets separate from the sponsoring employer. Pension fund assets are not, therefore, involved in insolvency proceedings normally.

Regardless, Article 2116 of the Italian Civil Code guarantees that the employee will receive their pension payments. Therefore employees will not lose their pension or have a reduced pension because their employer breached its obligation to pay contributions. The risk of an employer breaching its obligations does not fall on the employees.

Moreover, under article 2751, the claim of the employees for damages suffered in relation to the failure by the employer to remit social contributions, including pension contributions, has a general privilege on movable property of the employer. This claim ranks after the expenses of the insolvency that rank first, but at the same level with wages and claims for unlawful dismissal.

As far as guarantee schemes for pension contributions, it appears there is a right to claim pension contributions due in the event of insolvency. More specifically, Article 5 of Legislative Decree No. 80 of 27 January 1992 grants the worker the right to resort to a special guarantee fund set up by the National Social Welfare Institution if, due to insolvency, the employer fails to pay the contributions either in part or in whole. The Institution is then subrogated to the rights of employees in insolvency.

Other Employee Benefits

Pursuant to Article 2751 of the Italian Civil Code, a general privilege on movable property is granted to claims relating to

---

350. The pension and wage information for this country derives from the following primary and secondary materials: Articles 2116 and 2751 of the Italian Civil Code (Italian version only); Decreto Legislativo 5 dicembre 2005 n. 252, *available at* http://www.camera.it/parlam/leggi/deleghe/05252dl.htm; Decreto Legislativo 27 gennaio 1992, n. 80, art. 5 *available at* http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto:1992;80!vig=; EUROPEAN FOUND., *supra* note 336; FRESHFIELDS BRUCKHAUS DERINGER LLP, *supra* note 262; SARRA, *supra* note 37; Industry Canada, *supra* note 335; Email from Pietro Manzella, Postdoctoral Research Fellow at the Marco Biagi Dep't of Economics, the Univ. of Modena and Reggio Emilia, Italy, to Paul M. Secunda, Professor of Law, Marquette Univ. Law Sch. (June 25, 2013) (on file with author).

remuneration due, at the time of the opening of the insolvency procedure, in any form, to employees. Thus, a priority is given to unpaid wages, vacation, severance and termination pay, and other employment expenses (like traveling) that are subject only to costs of administering the insolvency. Neither the length of employment nor the amounts due affect the enforcement of the claim.

Italy has a wage protection fund, the *Fondo di garanzia*, which is managed by the INPS, the Italian National Authority for Social Security Contributions. This government fund pays–within fifteen days–the whole severance pay, wages, and benefits owed for the last three months before insolvency. The fund is sourced through employer premiums. After the payments, the *Fondo di garanzia* is subrogated to the claims of employees towards the employer with the same priority.

17. Japan[351]

Pensions

Pension claims in insolvency are treated differently in Japan based on the specific type of pension scheme at issue. An occupational pension plan of the defined benefit variety gets little protection in the bankruptcy process and pension claims are unsecured. On the other hand, pension funds that are set up separate and apart from the employer do not generally become impacted by employer insolvency, except when the employer has failed to make the necessary contributions on behalf of employees to the pension fund. In that case, the claim that the pension fund or employees have is also unsecured.

Another type of pension scheme in Japan is the employee pension fund (EPF) structure, which provides private pension benefits but also manages a portion of the public pension scheme (the Employee Pension Insurance (EPI)). This public pension portion of the EPF is called the "Substitution Component." As far as priority rights in the EPF context, EPFs have priority claims over employer contributions, the Pension Fund Association (the guarantee scheme for EPFs described below) has a priority claim over the Substitution Component, and EPFs have a non-priority claim for uncollected contributions due. If an EPF converts into one of the defined benefit plans mentioned above, it loses these priority rights.

As far as a pension guarantee scheme, there is only a guarantee for EPFs. When the employer sponsoring an EPF goes bankrupt, the pensions of the employees are protected by the Pension Fund Association (PFA), which administers a compulsory insolvency insurance scheme. EPFs make contributions to this insurance scheme in an amount that varies according to the statistical likelihood of insolvency and the unfunded liability if the plan were to be wound up. The PFA guarantee does not apply to other forms of occupational pension arrangements in Japan. It is unclear whether the PFA is subrogated to the claims of the EPF in insolvency.

---

351. The pension and wage information for this country derives from the following primary and secondary materials: MINPŌ [MINPŌ] [CIV. C.] arts. 306, 308, *available at* http://archive.org/stream/cu31924025028303/cu31924025028303_djvu.txt; SARRA, *supra* note 37; Stewart, *supra* note 3; Industry Canada, *supra* note 335; *Guide for Replacement Payment of Unpaid Wages*, JAPAN LABOUR HEALTH & WELFARE ORG., http://www.rofuku.go.jp/Portals/0/data0/kinrosyashien/pdf/tatekae_seido_english.pdf (last visited Mar. 9, 2014).

Other Employee Benefits

Japan grants a wage preference to employee claims arising during insolvency. These claims are on a priority basis over unsecured claims and, in certain cases, over secured claims. A claim of an employee is treated as a statutory lien (Sakidori Tokken) according to Article 306 and Article 308 of the Japanese Civil Code. Claims for wages arising during the three months prior to the beginning of the bankruptcy procedure are treated as super-priority claims.

Japan has a wage guarantee scheme called the *Replacement Payment of Unpaid Wages*. Contributions to the fund are paid by employers as part of the premiums for Labour Injured Insurance. Unpaid wages subject to replacement payment are the unpaid regular wages and retirement allowance which were due during the period between the day six months prior to the date of retirement and the day preceding the date of filing a claim for replacement payment. The actual replacement payment amount is eighty percent of the total amount of unpaid wages, up to a statutory maximum. These wage payments include vacation pay. However, severance and termination pay are considered retirement payments.

The guarantee scheme becomes subrogated to the rights that the employee would have had in the insolvency proceeding.

18. Korea, Republic of[352]

Pensions

There is no legislation in Korea that provides for the priority of retirement pension claims under the Retirement Pension Plan. This lack of legislation is because the occupational pension fund is not established inside the company structure but instead by financial institutions outside the company, which means there is little to no risk of retirement pensions not being paid due to the employer's bankruptcy. To the extent that claims do exist, unfunded or under-funded pension liabilities are treated as general unsecured liabilities in insolvency.

Although there is no pension guarantee scheme, there is guaranteed insurance for pension claims during insolvency. On June 6, 2009, the Korean Deposit Insurance Corporation (KDIC) expanded its jurisdiction by introducing a protection system for the payment of pensions. Under this insurance scheme, if a pension fund company which manages employee pension funds becomes insolvent, employees will be protected in their pensions up to a capped amount of KRW 50 million (about $47,000 USD). This system works much like depositor insurance for banks, but it is not a traditional pension guarantee fund for employees.

Other Employee Benefits

Article 37 of the Labour Standards Act of Korea (LSAK) provides for preferential treatment of employee wage claims. These claims enjoy a super-priority in the sense that wages from the three months prior to insolvency are entitled to preference over secured claims by pledges or mortgages, taxes/public charges, and other claims. These claims are limited in the amount paid.

Additionally, as far as the insolvency process, there is priority given to severance pay for amounts of up to three months' salary, but these

---

352. The pension and wage information for this country derives from the following primary and secondary materials: Wage Claim Guarantee Act of Korea (WCGAK), Act No. 5513, Feb. 20, 1998, *translation available at* http://www.koilaf.org/KFeng/engLaborlaw/laborlaw/WAGECLAIMGUARANTEEACT.pdf; Labor Standards Act of Korea (LSAK), Act No. 5309, Mar. 13, 1997, art. 37, *translation available at* http://www.ilo.org/dyn/natlex/docs/WEBTEXT/46401/65062/E97KOR01.htm; SARRA, *supra* note 37; Industry Canada, *supra* note 335; Stewart, *supra* note 3.

severance pay claims only receive a preferred claim status. Only retirement allowances for the last three years are entitled to super-priority status. On the other hand, there is no priority for vacation pay, termination pay, or traveling and other expenses.

The Wage Claim Guarantee Act of Korea (WCGAK) guarantees payment of employees' wage claims covered as preferential claims in the insolvency process. Only wages of the last three months, accident compensation allowance, and retirement allowance (severance pay) for the last three years (amounts equal to an average wage of ninety days) are guaranteed by the fund. There is a cap on the guaranteed amount in terms of the type of wages and the age of the worker. Under the current cap, the maximum amount guaranteed is 10,200,000 Korean Won (about $6500 USD). This fund is financed by recovered amounts by the exercise of a subrogation right by the Minister of Labour for employee insolvency claims, charges from employers, borrowings from financial institutions, and profits accruing from the management and operation of the fund.

As far as the retirement allowance, this is not a pension, but a separate legal entitlement that requires employers to pay a retirement allowance equal in amount to at least thirty days of average wages to employees who have worked for a period of one full year.

19. Luxembourg[353]

Pensions

Retirement pensions (*pensions de retraite*) are entirely paid by the government to retired employees. As their former employers are not liable for the payment of pensions, there is no priority for this type of employee claim in insolvency proceeding.

If the employer sets up a separate occupational pension plan, they can be internally financed by the employer (book reserves) or externally financed through an insurance company or pension fund. If internally financed, such commitments must be backed by the employers' purchase of insolvency insurance. With external financing, no such arrangements are required and if the employer goes bankrupt, the pension amount remains outside the bankruptcy estate.

Because occupational pensions are subject to these insurance requirements regardless of their funding, there is no pension guarantee fund set up in Luxembourg.

Other Employee Benefits

Under Article 2101 of the Luxembourg Civil Code and Article 545 of the Luxembourg Commercial Code, wage claims (including vacation pay, severance pay, termination pay, and traveling and other expenses) benefit from (i) a super-priority together with (ii) a general privilege for the remainder of claims that are not covered by the super-priority. Wage claims are limited to the last six months of work before the insolvency filing, as well as employees' claims relating to amounts of any nature whatsoever arising from the termination of an employment contract, up to a maximum amount that is equal to six times the social reference minimum salary as of March 2008 (EUR 9657.18). Beyond that amount, a general preference applies.

Wage claims (including vacation pay, severance pay, termination pay, and traveling and other expenses) are guaranteed by the Employment Fund (*Fonds pour l'Emploi*) within certain limits. The

353. The pension and wage information for this country derives from the following primary and secondary materials: Luxembourg Civil Code, art. 2101; Luxembourg Commercial Code, art. 545; EUROPEAN FOUND., *supra* note 336; SARRA, *supra* note 37; Industry Canada, *supra* note 335; *Restructuring and Insolvency in Luxembourg: Overview*, PRACTICAL L., http://us.practicallaw.com/6-501-9478 (last visited Mar. 9, 2014).

Fund is sourced through employer contributions and various forms of taxes. It guarantees wages and other amounts owed for the last six months of work arising from the termination of the employment contract. The same cap exists on these amounts as discussed for the super-priority for wage claims in insolvency proceedings. After paying the guaranteed amount, the Fund is subrogated to the claims of employees in the insolvency proceedings at the same priority level as the employee's original claim.

20. Mexico[354]

Pensions

Mexican occupational pensions are exempt from the bankruptcy estate because they are part of a mandatory private pension fund, separate and apart from the employer. Thus, pensions are generally not considered during bankruptcy proceedings. However, there is one line of thinking that employee claims to pension funds may be regarded as an indemnity in favor of the workforce and thus, may be treated like other wage claims with a super-priority.

To the extent that the insolvent employer has failed to make all pension contributions to the pension fund at the time of the bankruptcy, however, the employees' claims for such amounts are treated as non-preferred claims. Additionally, unfunded or under-funded pension liabilities are treated as non-preferred claims in insolvency.

There is also no pension guarantee fund in Mexico.

Other Employee Benefits

Article 123 of the Mexican Constitution provides a constitutional preference or super-priority for workers regarding unpaid salaries during insolvency, up to three months of salary. Additionally, "seniority" payments are mandatory, and accrue after fifteen years of service under Article 162 of the Federal Labour Law. Workers are entitled to receive twelve days' salary per year of employment for this seniority bonus. These seniority payments receive a similar super-priority. Seniority payments and wages receive a super-priority for those amounts that have accrued in the two years of employment prior to the insolvency. There is also a priority for severance pay up to a maximum of three months' salary. There is no priority for vacation pay outstanding.

Mexico also has no wage protection fund or guaranteed insurance for wage claims during insolvency.

---

354. The pension and wage information for this country derives from the following primary and secondary materials: Constitución Política de los Estados Unidos Mexicanos [C.P.], Diario Oficial de la Federación [DO], 5 de Febrero de 1917, art. 123; Ley Federal del Trabajo [LFT] [Federal Labor Law], Diario Oficial de la Federación, art. 162; SARRA, *supra* note 37; Industry Canada, *supra* note 335.

21. Netherlands[355]

Pensions

Under Dutch law, occupational pension schemes are administered and managed by a pension fund or by an insurance company. The majority of these schemes are DB plans (only about five percent are DC plans). Company and pensions funds must be kept strictly separated, and pension funds are legally and financially independent from the companies. Pension funds are therefore not directly affected if the company becomes insolvent, except to the extent that the employer owes outstanding contributions to the pension funds.

Moreover, the supervising authorities, including the Dutch Central Bank and Dutch Authority for the Financial Markets, constantly monitor whether the fund is still able to meet its future obligations and enforce measures on the fund (including cutting pension benefits) if this is not the case. In the case where an employer fails to pay the pension contributions due to the pension fund because of insolvency, those contributions due for last twelve months (maximum) are paid by the unemployment benefit fund directly to the pension fund (see discussion of the Uwv below). Pensions deriving from the employment contract that fell due before the bankruptcy was filed have a general preference.

The Netherlands does not operate a pension insurance scheme. The funding rules alluded to above provide the main protection measure for pension beneficiaries in the Netherlands.

355. The pension and wage information for this country derives from the following primary and secondary materials: Faillissementswet [Fw] art. 40 (Dutch Bankruptcy Code), *translation available at* http://www.dutchcivillaw.com/legislation/bankruptcyact022.htm; DUTCH ASS'N OF INDUS.-WIDE PENSION FUNDS & DUTCH ASS'N OF CO. PENSION FUNDS, THE DUTCH PENSION SYSTEM: AN OVERVIEW OF THE KEY ASPECTS, *available at* http://www.pensioenfederatie.nl/Document/Publicaties/English%20publications/Nederlandse_pensioensysteem_Engelstalige_versie.pdf (last visited Feb. 9, 2014); EUROPEAN FOUNDATION, *supra* note 336; FRESHFIELDS BRUCKHAUS DERINGER LLP, *supra* note 262; Norma Cohen & Matthew Steinglass, *Yawning Deficits Force Dutch Pension Funds to Cut Payouts*, FINANCIAL TIMES (May 27, 2013), http://www.ft.com/intl/cms/s/0/ae66abba-9e07-11e2-9ccc-00144feabdc0.html#axzz2WgZaOnVC; Industry Canada, *supra* note 335; Stewart, *supra* note 3; Email from Frans Penning to Paul M. Secunda (Aug. 12, 2013) (on file with author); Email from Frans Penning to Paul M. Secunda (June 19, 2013) (on file with author).

Other Employee Benefits

Under Article 40 of the Dutch Bankruptcy Act concerning employment agreements, the wages and premiums relating to the employment agreement that become indebted as of the day of the declaration of bankruptcy are estate debts. Estate debts give the creditor a preferential claim (estate claim) that must be satisfied first from the assets of the bankruptcy estate.

Additionally, in the case of employer insolvency, the Dutch Employee Insurance Agency (Uitvoeringsinstituut Werknemersverzekeringen, or Uwv) will take over some of the employer's financial obligations towards the employees, including: (1) the payment of salary and benefits over a maximum of thirteen weeks (including overtime and expenses); and (2) holiday allowance and pension contributions that have remained unpaid over a maximum of one year. Pension contributions are not paid to the employee, but directly to the pension fund. Wage claims in the Netherlands do not include notice or termination pay, because such statutory payments do not exist under Dutch law.

The Uwv will have a preferred claim in the bankruptcy process for the amounts it paid to employees and third parties like a pension fund.

22. New Zealand[356]

Pensions

There is no express protection for pension claims in insolvency. Most superannuation schemes in New Zealand are registered under the Superannuation Schemes Act 1989. Registration under that Act involves compliance with various requirements, such as trust and reporting requirements that protects employer superannuation schemes from any employer insolvency.

In 2007, New Zealand introduced a new occupational pension scheme known as Kiwisaver. The scheme requires employees who opt-in into the scheme to contribute a certain percentage of their salary to pension funds. These "approved savings schemes," which have varying degrees of expected risk and return, are operated independently of the employer, so employer insolvency should not affect an employee's Kiwisaver claims. Since April 2013, the minimum contribution rate for employers and employees has increased from two percent or wages to three percent of gross salary (employees can also choose to contribute four or eight percent). To the extent that an insolvent employer fails to make an employer contribution, these contributions are preferred without cap in insolvency.

There is no guarantee fund or insurance system for superannuation schemes, though pension contributions deducted from an employee's wages are protected in the same manner as wage claims in insolvency (as set out below).

Other Employee Benefits

Under Section 312 and Schedule 7 of the New Zealand Companies Act, employees of an insolvent employer receive the following preference: (1) wages for the four months preceding liquidation, (2) holiday pay, (3) redundancy (i.e., severance and terminations)

---

356. The pension and wage information for this country derives from the following primary and secondary materials: Section 312 and Schedule 7 of the Companies Act 1993, *available at* http://www.legislation.govt.nz/act/public/1993/0105/latest/DLM319570.html; Superannuation Schemes Act 1989, *available at* http://www.legislation.govt.nz/act/public/1989/0010/latest/DLM143292.html; SARRA, *supra* note 37; Industry Canada, *supra* note 335; Email from Gordon Anderson, Professor of Law, Victoria Univ. of Wellington, to Paul M. Secunda, Professor of Law, Marquette Univ. Law Sch. (Sept. 19, 2013) (on file with author).

entitlements, (4) deductions from wages, and (5) various other payments, up to an aggregate maximum of NZD $16,420 (as of 2008). These costs must be paid before other unsecured creditors. More specifically, these employee claims rank in priority to security interests over inventory and accounts receivable except for security interests that are duly perfected purchase money security interests over inventory or that are perfected security interests arising from the transfer of an account receivable for new value.

There is no wage protection fund or state insurance for wage claims in New Zealand.

23. Norway[357]

Pensions

Norway has had a mandatory occupational pension scheme since 2007, whereby employers must contribute at least two percent of employee salary to a pension fund (OTP). Pension contributions during employer insolvencies have a super-priority under Section 9-3 of the Norwegian Satisfaction of Claims Act. Pension claims are limited to a period of up to six months before the insolvency was filed.

If the assets of the estate are insufficient to cover pensions, Section 1 of the Act Relating to the State Guarantee for Wage Claims in the Event of Bankruptcy provides a state guarantee for pensions. The Guarantee is financed by employer contributions. The Guarantee is limited to an amount equal to two times the "basic amount." The "basic amount" is determined annually (as of May 2013, the basic amount is NOK 85,245 per year).

Other Employee Benefits

Under the Norwegian Satisfaction of Claims Act, Section 9-3, claims for wages and other remuneration, just like pensions, are granted a super-priority claim in insolvency. Similarly, wage claims are limited to a period of up to six months before the insolvency was filed. Holiday pay earned during the last twenty-four months before the filing date is treated as a preferred claim.

Under section 1 of Wage Guarantee Scheme, wages and other remuneration are provided a state guarantee. Wage and pension claims come under the same state guarantee claim, and the cap of two times the basic amount applies to both wage and pension claims combined. The Wage Guarantee Scheme is then subrogated to the rights of the employees in insolvency, with the same priority that the employees would have had.

---

357. The pension and wage information for this country derives from the following primary and secondary materials: Act Relating to Creditors' Rights to Satisfaction of Claims (June 8, 1984) § 9-3, *translation available at* http://www.ub.uio.no/ujur/ulovdata/lov-19840608-059-eng.pdf; Act of Dec. 14, 1973 Relating to the State Guarantee for Wage Claims in the Event of Bankruptcy, § 1, *translation available at* http://www.ub.uio.no/ujur/ulovdata/lov-19731214-061-eng.pdf; EUROPEAN FOUND., *supra* note 336; SARRA, *supra* note 37; Industry Canada, *supra* note 335.

24. Poland[358]

Pensions

Occupational pension plans are maintained separately from the employer, and they tend not to be affected by the insolvency of the employer, unless the employer fails to make required contributions. Under the Polish system, the employer funds the pension promise through contributions, and the employee may also make contributions.

To the extent that the employer fails to make the required contributions to the pension fund, Polish bankruptcy law gives first ranking to claims arising from retirement pension contributions. This is not a super-priority claim. Pension claims receive a priority ranking similar to the costs of bankruptcy proceedings, ranking first after the satisfaction of secured claims such as those secured with mortgages, registered pledges and pledges. This is because under Articles 345–346 of the Polish Insolvency and Bankruptcy Act, only the excess left after satisfaction of the secured claims is included in the bankruptcy estate.

Although there is a guarantee fund (discussed below) that provides protection for first pillar social security payments, it does not do so for pension contributions for occupational pension plans.

Other Employee Benefits

Claims arising from employment relationships (wage claims including vacation, severance, and termination pay) receive a similar priority to pensions in the insolvency process. Severance pay and damages related to the termination of the contracts of employment constitute "costs of bankruptcy proceedings" under Article 230 of the Bankruptcy Act and, therefore, receive a priority. The preferential

---

358. The pension and wage information for this country derives from the following primary and secondary materials: Polish Insolvency and Bankruptcy Act, arts. 230, 345–46, *available at* http://isap.sejm.gov.pl/DetailsServlet?id=WDU20091751361 (Polish version only); Employee Claims Protection Act of July 13, 2006 (discussed in *Protection of Employee Claims in Case of Employer Insolvency (15-04-2010)*, EUROPEAN LABOUR L. NETWORK, http://www.labourlawnetwork.eu/national_labour_law_latest_country_reports/national_legislation/legislative_developments/prm/109/v__detail/id__954/category__27/index.html (last visited Mar. 9, 2014); CONNOR, supra note 265; EUROPEAN FOUND., *supra* note 336; SARRA, *supra* note 37; Industry Canada, *supra* note 335.

treatment of employment-related claims under Polish insolvency law is not limited as to amount or duration of employment.

A Guaranteed Employees' Claims Fund (*Fundusz Gwarantowanych Świadczeń Pracowniczych, FGŚP*) has been established to guarantee wage claims, which includes vacation, holiday, severance, and termination pay. The Fund is regulated by the Employee Claims Protection Act. The Fund receives financing from industry, costs to the system, employer taxes, and general taxes. Upon the employer's insolvency, the Fund pays wage claims for up to three months, as long as the termination did not occur later than nine months before insolvency. The total amount paid to the employee may not exceed three times the national average wage from the previous quarter as announced by the Central Statistical Office (in 2013 approx. PLN 10,500).

The Fund is subrogated to the claims of the employee in the amount of those paid claims during the insolvency procedure, and it also maintains the employee's preferential status.

25. Portugal[359]

Pensions

In Portugal, occupational pension schemes are established through a pension or insurance contract. As these plans are established independent of the employer, employer insolvency only has an impact if these funds become underfunded through unpaid contributions by employers. Portuguese law grants employees privileges regarding their labour credits, including for outstanding pension contributions.

If under-funding of pension schemes occurs because the employer does not pay the contributions needed to meet the minimum sums required by law, pension fund legislation stipulates that the pension fund manager is under an obligation to propose that the sponsor correct the situation and if no suitable funding plan has been drawn up within one year, the pension fund must be wound up. In that case, the pension fund assets will be applied to guarantee pension rights in the following order: fund expenses, individual accounts if applicable, pensioners, employees retirement age or higher, vested ex-employees, vested rights of employees, and finally an increase in benefits for pensioners.

Portugal does not have a national pension benefit guarantee scheme in cases of employer insolvency.

Other Employee Benefits

Wage claims in insolvency receive priority under the Portuguese Bankruptcy Code. Wage claims include unpaid wages, seniority subsidies, compensation for unfair dismissal, and compensation in respect to employee injuries. Employees who lose their jobs as a result of their employer's insolvency are entitled to statutory compensation equal to one month's base remuneration (plus seniority subsidy, if applicable) for each year of service and it may not be less than three months' base salary (plus seniority subsidy, if applicable). Portuguese law grants the employees creditor privileges regarding these labour payments in insolvency.

The Salary Guarantee Fund (*Fundo de Garantia Social*) protects employees in case of insolvency. The fund is run by the state and the

---

359. The pension and wage information for this country derives from the following primary and secondary materials: EUROPEAN FOUND., *supra* note 336; Industry Canada, *supra* note 335; Stewart, *supra* note 3.

social partners, and is financed by employers. The fund covers all amounts due to workers in the six months preceding the company filing for insolvency. In addition to unpaid wages, the fund also covers holiday and redundancy pay. The guarantee is limited to a maximum of four months' wages and cannot exceed three times the minimum wage.

The Fund is then subrogated to the claims of employees in the company insolvency proceeding, with the same priority that employees would have had.

26. Slovakia[360]

Pensions

Slovakia has external pension funds that administer occupational pensions called Pension Asset Management Companies (PAMCs). Indeed, company pension funds are not permitted under Slovakian law.

Like Germany, Slovakia does not give preferred status to pension claims. Nevertheless, insolvency should be less of a concern because occupational pensions are both funded and held separately from the employer. This means the pension funds should be protected in the event of insolvency.

Due to the defined contribution nature of this scheme, there is no guarantee institution behind the scheme and under-funding is generally not possible.

Other Employee Benefits

The claims of workers for unpaid wages, holiday pay, redundancy pay, termination pay, and travel costs, are given preferred status in Slovakia. Wage claims receive priority before floating security interests, but rank below secured creditors (so not a super-priority). This preference is for wages accumulated within three months preceding the declaration of the bankruptcy.

These wage claims are also protected under the Social Insurance Agency's Guarantee Insurance Scheme when an employer becomes insolvent. Employees are entitled to up to three months' pay based on the eighteen months of their employment prior to the insolvency filing. The Social Insurance Agency then recoups these costs from the bankruptcy trustees (i.e., they are subrogated to these claims).

---

360. The pension and wage information for this country derives from the following primary and secondary materials: CONNOR, supra note 265; EUROPEAN FOUND., *supra* note 336; Industry Canada, *supra* note 335; *Social Insurance System in Slovakia*, *supra* note 258.

27. Slovenia[361]

Pensions

There is no preference for pension claims under Slovenian law. Occupational pensions, generally of the voluntary, defined contribution plan variety, are kept separate and apart from employer assets. Thus, employer insolvency should have a little impact on the operation of these external pension funds. Moreover, because pension management companies are under an obligation to form a coverage fund, which must be sufficient to cover all guaranteed returns in any accounting period, under-funding of the schemes is not possible.

Nevertheless, unpaid contributions by employers to these pension funds do not receive priority in bankruptcy proceedings and there is no regulation on late payment of contributions. If there are overdue and unpaid contributions, employees have the same rights as other creditors, which is to say they are unsecured.

There is no guarantee institution for pensions in the case of employer insolvency.

Other Employee Benefits

Slovenia has a type of super-priority claim for wage claims in insolvency. Under the Law on Compulsory Settlement, Bankruptcy and Liquidation, Articles 160/2 and 4, the priority is for the basic wages determined in the collective agreement plus unpaid wages owed for the period three months prior to the commencement of the bankruptcy proceeding, with no cap on the amount. As of 2007, these wages and related compensation (including termination pay) up to 100% are treated as a cost of bankruptcy and given super-priority in insolvency.

Slovenia also has a Special Fund for the payment of social claims. This Special Fund provides employees: (1) unpaid wages for last three

---

361. The pension and wage information for this country derives from the following primary and secondary materials: EUROPEAN FOUNDATION, *supra* note 336; MIODRAG DORDEVIC, WORLD BANK, COMMERCIAL ENFORCEMENT AND INSOLVENCY SYSTEM (2003), *available at* http://siteresources.worldbank.org/GILD/ConferenceMaterial/20157436/Slovenia%20-%20CR2.pdf); OECD, SLOVENIA: REVIEW OF THE PRIVATE PENSION SYSTEM (2011), *available at* http://www.oecd.org/finance/private-pensions/49498109.pdf; SARRA, *supra* note 37.

months before the termination of employment; (2) unpaid compensation for wages for paid absence for last three months before the termination of employment; (3) compensation for wages for unused leave of absence for last year; and (4) compensation money under conditions of the labor relations law. These payments are restricted to maximum amounts relating to the minimum wage. The system, managed by the Public Guarantee and Maintenance Fund, is financed by contributions from the employees, the State and the Fund itself.

28. Spain[362]

Pensions

Pensions do not receive any preference under Spanish bankruptcy law. Pension funds (which exist in the DB plan and DC plan varieties) must be established separate and apart from the company and so company insolvency does not generally have an impact on these pension funds. In the event of bankruptcy or liquidation of the company, insurance policies and pension funds maintain the capital built up and owned by the workers and guarantee payment of the pensions generated. Outstanding contributions to these pension funds do not receive any preference and are uncommon claims in insolvency proceedings in any event.

There is no pension guarantee fund in Spain.

Other Employee Benefits

According to Article 84.2.1 of the Spanish Bankruptcy Code, a super-priority is given to wage claims (including vacation, severance, and termination pay) arising in the last thirty days of employment before insolvency over all claims. Wage claims outside of this limitation period are given a general preference over unsecured claims under Article 91.1. These claims are restricted to amounts no more than three times the minimum wage.

Spain's wage guarantee fund is called the *Fondo de Garantía Salarial* (FOGASA). FOGASA receives industry funding and is regulated by the *Real Decreto 505/1985 de 6 de marzo sobre organización y funcionamiento del Fondo de Garantía Salarial*. The fund provides for the payment of wages (together with any compensation for dismissal), up to 120 days, and for the payment of severance pay and up to twelve months, limited to three times the minimum wage. FOGASA is subrogated to employee claims in insolvency with the same priority.

---

362. The pension and wage information for this country derives from the following primary and secondary materials: Spanish Insolvency Act, arts. 84.2.1, 91.1 (B.O.E. 2003, 13813), *available at* http://www.boe.es/boe/dias/2003/07/10/pdfs/A26905-26965.pdf (Spanish version only); Real Decreto 505/1985 de 6 de marzo sobre organización y funcionamiento del Fondo de Garantía Salarial (B.O.E. 1985, 6029), *available at* http://noticias.juridicas.com/base_datos/Laboral/rd505-1985.html (Spanish version only); EUROPEAN FOUND., *supra* note 336; FRESHFIELDS BRUCKHAUS DERINGER LLP, *supra* note 263; SARRA, *supra* note 37; Industry Canada, *supra* note 335.

29. Sweden[363]

Pensions

Occupational pensions in Sweden can be a direct promise (book reserves) from the employer or can be held separate and apart from the company in pension funds or as part of life insurance contracts. Rules concerning book reserves and pension funds are laid down in the Securing of Pension Obligations Act. The predominant model for pension now is that monthly payments are made for each employee to an insurance company, which undertakes liability to make future pension payments to the employees. Thus, companies do not generally carry any pension liability on their balance sheets. Outside of the FPG guarantee system (discussed below), pension funds receive preferred status for their claims for outstanding contributions.

Claims relating to direct pension commitments (book reserves) from six months before the petition for bankruptcy to six months after the petition have priority. Claims relating to other pension benefits have priority from three months before the petition for bankruptcy until one month after the order for bankruptcy and are limited to ten price base amounts (approximately SEK 425,000 for 2010).

Occupational pensions for white-collar workers in Sweden are protected by a guarantee fund—the Pension Guarantee Mutual Insurance Company (FPG). To the extent that the FPG pays out funds to employees, it generally does not become a preferential creditor in bankruptcy proceedings, except for a five percent maximum of the total amount due for pension rights earned three months before bankruptcy. Nevertheless, the FPG can require collateral from companies for the privilege of being part of the FPG system, and to that extent, the FPG becomes a secured creditor in bankruptcy proceedings.

In the event of the employer's insolvency, if the employer has to pay an occupational pension directly to the employee (book

---

363. The pension and wage information for this country derives from the following primary and secondary materials: LÖNEGARANTILAG (Wage Guarantee Act) (Svensk författningssamling [SFS] 1992:497), *available at* http://www.government.se/sb/d/5807/a/104977; 12 § FÖRMÅNSRÄTTSLAG (Rights of Priority Act) (Svensk författningssamling [SFS] 1970:979) (discussed in *Changes in the Rights of Priority Act*, WORLD SERVICES GROUP, http://www.worldservicesgroup.com/publications.asp?action=article&artid=2849 (last visited Mar. 9, 2014)); EUROPEAN FOUND., *supra* note 336; FRESHFIELDS BRUCKHAUS DERINGER LLP, *supra* note 262; SARRA, *supra* note 37; Industry Canada, *supra* note 335; Stewart, *supra* note 3.

reserves), the employee's claim is covered by the wage guarantee to the same extent as other claims that are covered by the guarantee, since the Wage Guarantee Act applies to pension claims by virtue of Section 12(6) of the Rights of Priority Act. If the employer is under an obligation to pay contributions to an employee's private pension insurance, in accordance with a contract between the employer and the employee, the claim falls within the scope of Section 12(1) of the Rights of Priority Act instead. This means that a claim related to the obligation to pay contributions is considered as a claim regarding pay and, therefore, is also covered by the wage guarantee. Pension benefits are covered for a maximum of twelve months and are capped at approximately SEK 170,000 for 2010.

The State, as well as the pension insurance company, may seek to recover in the insolvency process from the employer the amounts paid by the state and pensions insurance company to cover contributions that the employer failed to pay, but such claims do not receive any priority.

Other Employee Benefits

Wage claims (including holiday pay claims) accruing prior to the insolvency filing receive preferred status under the Swedish bankruptcy system.

Employees have 'salary guarantees' (*statlig lönegaranti*), which is compensation paid by the state if a bankrupt company does not have sufficient assets to meet their claims. The state guarantee fund covers wages, which are earned up to three months prior to the petition for bankruptcy or reorganization, as well as wages for the first month subsequent to the District Court's decision to grant a petition for bankruptcy or reorganization. The amount of payment is capped. The wage guarantee also covers wages during a notice of termination period and holiday pay claims that have accrued during the current and previous holiday year.

If wage payments are covered by the wage guarantee fund, the state's claim is not prioritized in the same way as the employee's claim would have been in the insolvency.

30. Switzerland[364]

Pensions

Occupational pensions are established independently from employers by pension insurance institutions. Employers contribute to these insurance institutions on behalf of their employees. If the employer does not pay pension contributions and is insolvent, the insurance institution has a priority claim pursuant to Article 219 of the Swiss Debt Enforcement and Bankruptcy Law. Employees, however, do not themselves have any claim against either the employer or against the insurance institution. The entire amounts of unpaid contributions are entitled to a preference.

To the extent that the insolvency process does not cover the pension claims, the joint guarantee fund of the supplementary pension funds (*Sicherheitsfonds BVG-LOB* Guarantee Fund) is used to ensure payment capacity, but compensation is also paid from the guarantee fund to pension funds where the age structure of the insured is considered unfavorable. The guarantee fund is maintained through contributions paid by the pension providers. The fund ensures benefits up to a set maximum limit. When calculating the compensable benefit, the maximum amount of earnings that are taken into account is 125,280 Swiss francs in 2011.

This guarantee fund is subrogated to the rights of the employees as a creditor in the bankruptcy proceedings, but receives no priority.

Other Employee Benefits

Article 219 of the Swiss Debt Enforcement and Bankruptcy Law sets up three different classes of unsecured creditors for the distribution out of the proceeds of the entire remainder of the

---

364. The pension and wage information for this country derives from the following primary and secondary materials: BUNDESGESETZ ÜBER SCHULDBETREIBUNG UND KONKURS [Federal Statute on Debt Enforcement and Bankruptcy], SYSTEMATISCHE SAMMLUNG DES BUNDESRECHTS [SR] Apr. 11, 1889, SR 281.1, art. 219, *revised as of* Dec. 16, 1994, *available at* www.admin.ch/ch/d/sr/c281_1.html (full text in German, French or Italian only); BUNDESGESETZ ÜBER DIE OBLIGATORISCHE ARBEITSLOSENVERSICHERUNG UND DIE INSOLVENZENTSCHÄDIGUNG [Swiss Federal Act on the Compulsory Unemployment Insurance and the Insolvency Compensation], SYSTEMATISCHE SAMMLUNG DES BUNDESRECHTS [SR] June 25, 1982, SR 837.0, arts. 51, 54, *available at* http://www.admin.ch/opc/de/classified-compilation/19820159/index.html (full text in German, French, or Italian only); SARRA, *supra* note 37; Industry Canada, *supra* note 335; Stewart, *supra* note 3.

bankrupt estate. First class preferred claims include unpaid claims of employees that arose or became due not more than the six months prior to the opening of bankruptcy proceedings (including unpaid wages, termination pay, severance pay, and vacation pay), but not exceeding (currently) 126,000 Swiss francs.

In addition to the bankruptcy preference for wage and termination pay, according to Article 51 of the Swiss Unemployed and Insolvency Insurance Law, employees of an insolvent employer are eligible to receive from a public insurance fund payment of their past four months unpaid wages, after termination of their employment agreement. This fund is sourced through employee and employer contributions, and employee contributions are deducted from wages. Employees are not entitled to be paid more than four times 8900 Swiss Francs (current wage amount for these purposes).

Under Article 54 of the Swiss Unemployment and Insolvency Insurance Law, the public insurance fund is subrogated to the rights of the employees in insolvency proceedings, with the same priority.

31. Turkey[365]

Pensions

As of 2001, Turkey has established a system of fully funded, voluntary DC plans, which permit individuals to take out contracts with one or more pension companies. Employers are permitted to contribute to the personal pension accounts of their employees, but are not required to do so. There are currently around seventeen pension companies in the system. As a third pillar system, employers do not play a large role.

There is no additional second pillar pension scheme available beyond the PAYG defined-benefit first pillar system, which is financed by public social security funds. Indeed, the voluntary private pension system serves as a third pillar, and not as a second pillar, unlike in many other countries.

Voluntary contributions that employers make to these voluntary pension plans receive a priority under the bankruptcy code as "other sums due to employees" under section 206 of the Turkish Enforcement and Bankruptcy Code. This priority is for contributions made up to one year prior to the filing of the bankruptcy petition.

With regard to these pension schemes, there is no pension guarantee fund or insurance scheme.

Other Employee Benefits

As discussed above, under section 206 of the Turkish Enforcement and Bankruptcy Code, wages and other sums due employees are granted a priority for the period of one year before the opening of the bankruptcy.

---

365. The pension and wage information for this country derives from the following primary and secondary materials: Code of Civil Enforcement and Bankruptcy, art 206 (on file with author); Labor Act of Turkey, § 33 (enacted May 22, 2003), *available at* http://www.ilo.org/public/english/region/eurpro/ankara/download/labouracturkey.pdf; OECD, *Pension Country Profile: Turkey*, *in* OECD PRIVATE PENSIONS OUTLOOK 2008, at 287 (2009), *available at* http://www.oecd.org/finance/private-pensions/42575085.pdf; Stephen Baister & Elif Altınsoy, The Bankruptcy Law of the Republic of Turkey, (April 2009) (unpublished manuscript), *available at* www.altinsoy.av.tr/doc/bankruptcy.doc; *Employment and Employee Benefits: Turkey*, PRACTICAL LAW CO. (Nov. 2013), http://uk.practicallaw.com/8-383-1562?service=pensions; Email from Ali Cem Budak, Professor of Law, Istanbul Univ., Turkey, to Paul M. Secunda, Professor of Law, Marquette Univ. Law Sch. (July 25, 2013) (on file with author).

Section 33 of the Turkish Labor Law establishes a wage guarantee fund within the Unemployment Insurance Fund, which is funded by one percent of the employer contributions to the unemployment compensation system. The fund covers the last three months of salary of the employees before their employer filed for insolvency. It does not appear that this fund covers other forms of wages outside salary, like vacation pay, termination pay, or severance pay. It also does not appear that that the wage guarantee fund has any subrogation rights in insolvency if it pays out benefits to employees.

32. United Kingdom[366]

Pensions

The United Kingdom has both occupational DB plans and DC plans. The plans assets are established in trust and are not accessible to other company creditors. Under auto-enrollment provisions, the employer must pay minimum contributions into some pension arrangement, and can choose either NEST (a DC plan described below) or another scheme.

As far as employee pensions claims under the British bankruptcy system are concerned, outstanding pension contributions are treated as preferred (behind secured creditors under Category 4 of the Insolvency Act 1986, Schedule 6), while unfunded or underfunded pension liabilities (so-called section 75 debt) are unsecured. Any due but unpaid contributions to any UK pension plan (DC or DB, trust based or contract based) become a preferential debt, and thus rank ahead of everyone except secured creditors. This preference system is only for one year's worth of unpaid contributions.

The Pensions Act 2008 introduced new duties on employers to provide access to a workplace pension scheme for most workers. If employers choose a defined contribution scheme under the National Employment Savings Trust (NEST), which went into effect in October 2012, they need to pay a minimum contribution. If an insolvent employer is unable to make the promised contributions to

---

366. The pension and wage information for this country derives from the following primary and secondary materials: Pensions Act, 2008, *available at* http://www.legislation.gov.uk/ukpga/2008/30/contents; Pensions Act, 2004, *available at* http://www.legislation.gov.uk/ukpga/2004/35/contents; Enterprise Act 2002, c.40, § 251, *available at* http://www.legislation.gov.uk/ukpga/2002/40/contents; Employment Rights Act 1996, § 184, *available at* http://www.legislation.gov.uk/ukpga/1996/18/contents; Insolvency Act, 1986, c. 45, §§ 175, 386, sch. 6, *available at* http://www.legislation.gov.uk/ukpga/1986/45/contents; MARC ABRAMS, INT'L INSOLVENCY INST., THE NORTEL EXPERIENCE: TENSIONS IN CROSS-BORDER INSOLVENCIES—THE U.K. PENSIONS PERSPECTIVE (2010), *available at* http://www.iiiglobal.org/component/jdownloads/viewdownload/103/3887.html; CONNOR, supra note 265; EUROPEAN FOUND., *supra* note 336; FRESHFIELDS BRUCKHAUS DERINGER LLP, *supra* note 262; SARRA, *supra* note 37; Industry Canada, *supra* note 335; Stewart, *supra* note 3; Renee Dailey & Mark Dedinger, *UK Supreme Court Throws Out the Nortel and Lehman Pension Baby Claims with the Bathwater*, BRACEWELL & GIULIANI (July 26, 2013), http://www.jdsupra.com/legalnews/uk-supreme-court-throws-out-the-nortel-a-22587; Email from Rosalind Connor to Paul M. Secunda (July 30, 2013) (on file with author); Email from Rosalind Connor to Paul M. Secunda (July 29, 2013) (on file with author); Email from Rosalind Connor to Paul M. Secunda (June 26, 2013) (on file with author).

the NEST scheme, the same preferential priority (for one year prior to the insolvency) applies that applies to all other unpaid contributions to any United Kingdom pension plan.

As far as pension guarantee funds, the Pension Act 2004 established the Pension Protection Fund (PPF) for purposes of providing payment to employees in occupational defined benefit plans for both unpaid contributions and unfunded liabilities where the sponsoring employer became insolvent. The PPF is sourced through annual statutory levies on all occupational defined benefit pension schemes (it does not guarantee DC plans). Payments are subject to statutory cap and a limited to only a proportion of their accrued pension benefits under the PPF. A 100% level of compensation, however, is available for individuals who have reached the plan's normal retirement age when the PPF becomes involved. Ninety percent of compensation is paid for those who have retired, but have not yet reached normal retirement age under the pension plan. The PPF, to the extent it has claims against an insolvent employer because of the payments it has made to employees, stands in the place of employees as an unsecured creditor.

The Pension Act 2004 sets up the Pension Regulator. The Pension Regulator may, among other things, issue Financial Support Directives against any entity connected with an employer in an underfunded pension scheme. The Financial Support Direction requires the targeted entity to provide indication of how it will supply financial support to eliminate the pension scheme's funding deficit (e.g., by making payment into the scheme to ensure that there are assets to meet the liabilities on the basis of buying them out with an insurance company (section 75 buy-out debt)). If the recipient of the Direction fails to provide the financial support to the pension fund, the Pension Regulator can then issue a Contribution Notice, which imposes a statutory liability on the entity to pay a specified sum to cure the pension's deficit. This issue is important for pension claims in insolvency because the recent Nortel litigation concerns the priority of Financial Support Directives under U.K. insolvency law. At issue is whether these pension instruments have a super-priority as a cost of administration of the estate that outranks all other creditors, including secured bank lenders and bondholders. The U.K. Supreme Court recently held that such Directives should be treated as general unsecured claims because such claims involve unfunded pension liability. This decision overturned lower court decisions to the contrary.

Other Employee Benefits

Wages (including vacation pay), up to a capped maximum (currently set at 800 pounds per employee), are considered preferential debts for the four months prior to the filing of the insolvency. Unpaid holidays are treated as wages for these purposes and receive preference for the twelve months before the insolvency filing. These priorities exist under the Insolvency Act 1986, Section 386 and Schedule 6, as amended by Enterprise Act 2002, Section 251. Additionally, section 175(2)(a) of the Insolvency Act provides that to the extent the company is not able to meet the preferential claims in full, those debts must be paid out of any property comprised in, or subject to, a floating charge. Accordingly, these preferential wage debts are payable in priority to claims secured by any floating charge. Any wage claim that exceeds the capped amount is treated as an unsecured claim.

As far as wage guarantee schemes, a separate statutory scheme directs payments to employees of an insolvent employer from the National Insurance Fund (NIF), under Section 184 of the Employment Rights Act 1996. The NIF is sourced by costs to the system, employer taxes, and general taxes. The NIF pays: up to eight weeks of wages, up to six weeks holiday pay, one weeks' notice pay (i.e., severance pay) for each complete year of service up to a maximum of twelve weeks, a tribunal's basic award for unfair dismissal, repayment of apprentice fees, and redundancy pay (i.e., termination pay), which is based on length of service in certain age bands, up to a maximum of thirty weeks of pay. All of these payments are capped at the statutory limit, which as of 2013 was 450 pounds per week, or up to 13,500 pounds for up to thirty weeks for unfair dismissal pay.

The NIF then becomes a preferential creditor in the insolvency proceedings in the group action brought against the employer, subrogated to the claims of the employees with the same priority that the employee would have had.