

**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**

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I. 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 fortunes 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 concerning whether the Michigan State Constitution provides protections for the pension benefits of Detroit city employees in the on-going bankruptcy

* 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) of 2008, S.C. 2005, c. 47, s. 1, which required statutory review of WEPPA's administration and operation within five years of its enactment. In addition to the helpful comments received from many participants at the Annual Cooper-Walsh Symposium where this paper was presented on October 11, 2013, at the Fordham Law School, I would also like to thank a number of individuals who have helped me through their counsel to understand the complexity of the treatment of employee pension and wage claims in insolvency and under guarantee schemes in their countries: 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.

¹ See David A. Lieb, *Detroit Bankruptcy Tests State Pension Protections*, AP (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 Promises Must Be Kept*, DETROIT FREE PRESS (Aug. 1, 2013), <http://www.freep.com/article/20130801/OPINION01/308010019/> (last visited Oct. 25, 2013).

² See, e.g., Richard Summerfield, *Legacy Costs Push Communities to the Brink*, FINANCIER WORLDWIDE.COM (October 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*, NATIONAL REVIEW 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 Fiona Stewart, *OECD Working Papers on Insurance and Private Pensions*, No. 6 BENEFIT PROTECTION: PRIORITY CREDITOR RIGHTS FOR PENSION FUNDS 8-9 (2007), <http://dx.doi.org/10.1787/267415864801>. 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.").

case,⁴ what is clear to most people is that pension and other wage claims of employees against the city are now very much in jeopardy.⁵ This begs the question: what protections, if any, do these employees have under the United States 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 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 most other countries do not have government

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.

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).

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.org (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 13 local governments--less than 1 percent of all eligible municipalities--have sought bankruptcy protection.").

⁷ Some have suggested that employees may lose as much as 83% of their retirement benefits in the Detroit bankruptcy. See Chris Isidore, *Detroit Bankruptcy Largest in the Public Sector, Could Slash Pensions*, CNNMoney (July 18, 2003), <http://wtvr.com/2013/07/18/detroit-bankruptcy-largest-in-public-sector-could-slash-pensions/>. In the Stockton, California bankruptcy, it is estimated that retirees lost anywhere from 30% to 70% 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*, BNA PENSION AND BENEFITS DAILY (Oct. 2, 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), <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 11th Amendment to the federal Constitution protects state agencies, including its 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 Files Amicus Brief Supporting State Dispute with City of San Bernardino*, CALPERS (Nov. 1, 2013), <http://www.calpers.ca.gov/index.jsp?bc=/about/press/pr-2013/nov/files-brief.xml>.

⁸ See 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."); 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.").

systems in which municipalities have the same financial independence to borrow money and take on debt as municipalities do in the United States as part of the municipal bond market.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 since 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 employees, but also loss of significant pension and wage benefits.¹¹ In turn, employees, 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

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, 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 Ontario Municipal Act, s. 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, 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).

¹¹ See Gordon Johnson, *Insolvency and Social Protection: Employee Entitlements in the Event of Employer Insolvency* 2, OECD.ORG (April 2006), <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 International Insolvency Institute, *Draft Report of the Social Claims Committee of the International Insolvency Institute on Employee, Pension and Related Social Claims in Insolvency* (June 9, 2009), <http://www.iiiglobal.org/component/jdownloads/finish/560/1828.html> (last visited Oct. 29, 2013) (discussing lack of power employees have as creditors).

have either been forced to wait for significant periods of time to receive payment while the insolvency process takes its course¹³ and/or must negotiate 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 of Economic Cooperation and Development (OECD) to understand whether the United States' approach to employee 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 Country-by-Country Appendix at the end of this paper), this article then highlights common approaches to these issues, as well as important distinctions, setting up a number of tables to summarize the results.

As far as the study's findings, and as an initial matter, there is a distinction in most countries made 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 essentially the top 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. As for claims for unfunded or underfunded occupational pension liability (generally in the defined benefit context), they are

¹³ This is mostly truly 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." See Frank Van Dusen & Tyler Rogers, *On the Hook? Individual Liability on Wage Claims When an Employer Files For Bankruptcy* 1 n.2, ABA LABOR AND EMPLOYMENT SECTION, EMPLOYEE RIGHTS AND RESPONSIBILITIES COMMITTEE, WORKER DISLOCATION SUBCOMMITTEE (March 26, 2010), <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCsQFjAA&url=http%3A%2F%2Fapps.americanbar.org%2Flabor%2Ffercomm%2Fmw%2Fpapers%2F2010%2Fdata%2Fpapers%2F026.pdf&ei=OehOUtvbKsLPqgHpiIDYAQ&usg=AFQjCNGs4D1iLf-zV6hzeoFkuVltLIMGkQ&bvm=bv.53537100,d.aWM>. 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), 29 U.S.C. § 201 et seq. (providing that covered employees be compensated on a salary or hourly basis for time worked); Wisconsin Wage Payment and Collection Law, WI. STAT. § 109.03(1) (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." *Id.* 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 III.A.1 (describing process in United States for employees to recover on pension claims after employer insolvency).

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). See also *id.* at §§ 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 (11 U.S.C. § 507(b)), and for debtor-in-possession (DIP) lenders, but only if the court orders (11 U.S.C. § 364(c)(1)).

treated as unsecured claims.¹⁶ 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.

In addition to insolvency schemes, most of the OECD countries also 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 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. Such subrogation rights mean that the guarantee scheme will be acting in the place of employees with more bargaining power because of their 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 to insure the continuing vitality of the guarantee scheme.

In categorizing the various approaches OECD countries take to employee claims in insolvency, this article relies to a significant extent on the country models developed by Gordon Johnson. He identified four different systems utilized by countries to address employee entitlements in cases of employer insolvency.¹⁷ This article utilizes a slightly modified three-system version to further emphasize similarities in how countries deal with employee protection concerns raised by employer insolvencies. Model One countries provide bankruptcy priority, but provide 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).

Of course, even within these various country Models, there exists 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

¹⁶ 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 II.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 II.B.

¹⁷ 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. See *infra* note 316. All OECD countries provide either a bankruptcy priority, a guarantee scheme, or both. 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*, National Organization of Life and Health Insurance Guaranty Associations (NOLGHA), <http://www.nolgha.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 STREET JOURNAL (Oct. 28, 2013), <http://stream.wsj.com/story/latest-headlines/SS-2-63399/SS-2-365534/> (last visited) (“[J]ust 63 cities, towns and villages, including Detroit, have filed for municipal bankruptcy protection since 1954.”).

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.¹⁸

All in all, most OECD countries are Model Two countries that have adopted hybrid systems which combine both some form of priority for both pension and wage claims, as well as 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 for years, while the guarantee schemes are more likely to pay employees their claims within weeks or months.¹⁹ Unfortunately, the United States is a limited Model Two country, providing only limited priorities in most bankruptcy proceedings (and no such wage or pension priorities in Chapter 9 municipal proceedings),²⁰ 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.²¹ Neither private-sector defined contribution plans nor public sector pension plans come under a guarantee scheme in the United States.²²

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).²³ 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.²⁴ As to the policy reasons supporting this approach, it appears that greater emphasis is placed on the need to protect the weakness of

¹⁸ See *infra* Part III.B

¹⁹ See Stewart, *supra* note 3, at 4.

²⁰ Pension and wage priorities that apply under Section 507(a)(4) and (a)(5) of the Bankruptcy Code, 11 USC § 507(a)(4),(5), do not apply to Chapter 9 proceedings. See Norton Bankruptcy Law and Practice 3d, § 90:3. Overview of Chapter 9, n. 5 (“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), <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.”).

²¹ The PBGC is established under Title IV of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1301 et seq.; 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).

²² 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.”).

²³ See Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1. As Mr. Goldowitz aptly comments in his Response to this paper, 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. 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.

²⁴ 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).

employees creditors in the insolvency process as opposed to focusing on the need to ensure the existence of cheap, accessible credit for companies and governments.²⁵

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.²⁶ As far as arguing for greater priority rights in bankruptcy for both more types of wage claims and for pension contributions, this proposal parrots parts of The Protecting Employees and Retirees in Business Bankruptcies Act of 2013 (“H.R. 100”), introduced by Representative Conyers in January of 2013.²⁷ 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.”²⁸ Although Mr. Goldowitz suggests in his Response to this paper that wage guarantee schemes should be less important in any proposed legal reform in this area, 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.

Mr. Goldowitz also helpfully suggests in his paper that I set out more formally (and I agree that it is a good idea if only as a thought experiment) what such legislation might actually look like. 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

²⁵ See Johnson, *supra* note 11, at 7.

²⁶ By proposing to expand the current pension guarantee system beyond private-sector defined benefit pension plans, this article proposes an addition to the 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 entitled: *A Fine Balance: Safe Pensions, Affordable Plans, Fair Rules*, Report on the Ontario Expert Commission on Pensions (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 because the normal risks associated with that behaviour 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.”).

²⁷ H.R. 100 §§ 101, 103, 105, 201, and 203, 113th Cong. (2013), <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 16-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.

²⁸ Heartfield and Wink, *supra* note 24, at 14-6.

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).²⁹ 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 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.³⁰ 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 (employers) could become insolvent based on their financial health. This is admittedly a very rough outline of what such a law would look like, 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."³¹

My comparative analysis in this article is divided into four parts. Part II 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 III provides both the manner in which employment claims are presently treated in insolvency and in guarantee schemes in the United

²⁹ 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. However, a pension guarantee 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 26, 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.

³⁰ WEPPA does not cover severance payments, *see* WEPPA, subsection 2(1), 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.

³¹ *See* Arthurs, *supra* note 26, 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.*

States and Canada, while at the same time considering how large international organizations, including the European Union and the International Labor Organization (ILO), have addressed these issues over the years. Part III then summarizes the findings of this article's 34-country comparative study on employee claim treatment in insolvency and guarantee schemes through a series of tables. Part IV provides preliminary conclusions concerning this study's findings and urges the United States to adopt legislation similar to the Canadian WEPPA in order to provide insolvency and guarantee scheme protection for employee pension and wage claims in both the municipal and corporate bankruptcy context.

II. BRIEF INTRODUCTION TO COMPARATIVE EMPLOYEE BENEFITS AND BANKRUPTCY LAW

This background section seeks to achieve six primary objectives in discussing the treatment of pensions and wage claims during insolvency proceedings. First, it 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, which this paper is primarily concerned with, it discusses important distinctions between various occupational pension scheme structures and between public sector and private sector plans. Third, it examines the characteristics of so-called "wage claims." Fourth, it explores how some occupational pension and wage claims are backed by government-sponsored insurance or guarantee schemes. Fifth, it 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, this Part 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).³² These classifications do not always work well across different countries,³³ but it is one 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

³² See WORLD BANK, *AVERTING THE OLD AGE CRISIS: POLICIES TO PROTECT THE OLD AND PROMOTE GROWTH* 15 (1994); John A. Turner, Book Note, 48 *INDUS. & LAB. REL. REV.* 862, 862-63 (1995) (reviewing WORLD BANK, *AVERTING THE OLD AGE CRISIS: POLICIES TO PROTECT THE OLD AND PROMOTE GROWTH* (1994)) (distinguishing origination of pillar system of organization).

³³ 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, *Mailing It in: European Union Efforts at Pension Reform*, 2 *CHI. J. INT'L L.* 315, 318 (2001).

schemes use a pay-as-you-go (PAYG) financing model based on employee payroll taxes,³⁴ while other countries finance their public pension systems out of general tax revenues.³⁵ 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,³⁶ whereas other countries have additional or separately established defined contribution arrangements where the state introduces private retirement accounts into the public social security system (more discussion of the difference between defined benefit and defined contribution systems in occupational pension plans can be found in the next section).³⁷

However, because the focus of this article is on the treatment of pension and wage claims during company and municipal insolvency proceedings, the 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 PAYG or based on general tax revenues, do not have “employee claims” against employers when these employers face liquidations or reorganizations.³⁸ It is not surprisingly the second pillar occupational pensions that most affect employers 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 salary history.³⁹ Generally, employers contribute to these DB plans by

³⁴ The United States Social Security System is one such system. Social Security Act, 42 U.S.C. § 301 et seq. (2006). 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 234-241 (Pennings, Erhag, Stendahl Eds.) (Wolters Kluwer 2013) (describing operation of U.S. Social Security System).

³⁵ See Janis Sarra, *Recognizing Workers' Economic Contributions: The Treatment of Employee and Pension Claims During Company Insolvency, A Comparative Study of 62 Jurisdictions*, University of British Columbia National Center for Business Law 25 (May 21, 2008), <http://www.iiiglobal.org/component/jdownloads/finish/572/5379.html>

³⁶ See Secunda, *supra* note 34, 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 for older and disabled Americans. This programme is funded on a pay-as-you-go (PAYG) basis and takes the form of a defined benefit pension plan.”).

³⁷ See Filosa, *supra* note 33, at 141 (noting privatization of Social Security failed in United States). See also Secunda, *supra* note 34, at 234-41 (same).

³⁸ 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 35, 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).

³⁹ JEFFREY M. HIRSCH ET AL., UNDERSTANDING EMPLOYMENT LAW 198-99 (2nd Ed. 2013).

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.⁴⁰ Some of these defined benefit plans are backed by government insurance schemes in case of company insolvency. In the United States, for example, the Pension Benefit Guaranty Corporation (PBGC) undertakes this role by providing government insurance for terminated private-sector defined benefit plans.⁴¹

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 they will have enough money to last throughout retirement.⁴² 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.⁴³ 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,⁴⁴ especially with newly-employed workers.⁴⁵

However, these DC plans are not backed-up by government insurance schemes.⁴⁶ 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.⁴⁷ 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.⁴⁸

⁴⁰ *Id.*

⁴¹ *Id.* The PBGC is established under Title IV of ERISA, 29 U.S.C. § 1301 et seq. (2006), and its operations are discussed in greater detail *infra* Part III.A.

⁴² See HIRSCH ET AL, *supra* note 39, at 199-200.

⁴³ *Id.* at 199.

⁴⁴ Recently, Detroit's emergency manager has proposed, as part of the Detroit bankruptcy process, to freeze its defined benefit plans and enroll all employees in defined contribution arrangements. See Mary Williams Walsh, *A Proposal to Freeze Pensions in Detroit*, NY Times (Sept. 26, 2013), http://dealbook.nytimes.com/2013/09/26/detroit-manager-seeks-to-freeze-pension-plan/?_r=0 ("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.")

⁴⁵ See Paula Sanford & Joshua M. Franzel, *The Evolving Role of Defined Contribution Plans in the Public Sector* 6, CENTER FOR STATE AND LOCAL GOVERNMENT EXCELLENCE (Sept. 2012), <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.")

⁴⁶ See HIRSCH ET AL, *supra* note 39, at 199.

⁴⁷ *Id.* at 198-99.

⁴⁸ See Sarra, *supra* note 35, 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).

On the other hand, with the possible exception of smaller outstanding pension contributions, defined contribution plans are fully-funded.⁴⁹ 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.⁵⁰ As far as outstanding employer contributions in the DC 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 will be 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 or DB plan.⁵¹

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 the Employee Retirement Income Security Act of 1974 (ERISA).⁵² Congress saw state and local taxpayers as the primary backstops for those plans, and presumably was also motivated by federalism concerns.⁵³

By being exempt from ERISA, municipal pension plans are not subject to the same degree of regulation. 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.”⁵⁴ 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.⁵⁵

More recently, federal legislation has been introduced by Senator Hatch, the SAFE Retirement Act of 2013,⁵⁶ which would enable a new form of governmental plan under federal law, “with stable,

⁴⁹ 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.”).

⁵⁰ See HIRSCH ET AL, *supra* note 39, at 199.

⁵¹ See *infra* Part IV.B.

⁵² 29 U.S.C. §§ 1003(b)(1) (general ERISA governmental exemption provision); 1002(32) (definition of governmental plan); 1321(b)(2) (2006) (exemption of governmental plan from PBGC scheme). See also I.R.C. §§ 401, 414(d) (2006) (applicable tax code provisions.)

⁵³ See Monahan & Thukral, *supra* note 49, at 292 (citing H.R. 2, 93d Cong. §§ 101, 201, 301 (introduced Jan. 3, 1973), reprinted in 1 Subcomm. on Labor of the Comm. on Labor and Pub. Welfare, Legislative History of the Employee Retirement Income Security Act of 1974 at 14-15, 51-52, 58-59 (1976); *Gualandi v. Adams*, 385 F.3d 236, 242-44 (2d Cir. 2004)). “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.* at 297.

⁵⁴ See Monahan & Thukral, *supra* note 49, at 292.

⁵⁵ See Roger Lowenstein, *Broke Town, U.S.A.*, NY Times (March 3, 2011), http://www.nytimes.com/2011/03/06/magazine/06Muni-t.html?_r=1& (estimating unfunded part of public pension promises between \$1 trillion and \$3.5 trillion). See also Andrew Barry, *Munis on the Mend*, BARRON’S (Oct. 14, 2013), at 28 (“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.”).

⁵⁶ S. 1270: SAFE Retirement Act of 2013, 113th Cong. (2013), <http://www.govtrack.us/congress/bills/113/s1270/text>.

predictable costs that state and local governments may use to deliver secure pension benefits.”⁵⁷ By 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.”⁵⁸ As the writing of this article, the law has not 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).⁵⁹

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).⁶⁰ These other employee benefits, generically referred to as “wage claims,” sometimes are treated the same in the insolvency proceedings as pension benefits, but sometimes they can be treated either better or worse depending on a particular countries’ system. 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.⁶¹

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 which 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 insolvent.⁶² Often, it can be years before employees receive some, if any at all, pension or benefit claims through the bankruptcy process.⁶³ As mentioned above, the PBGC in the United States is a prime example of a pension guarantee scheme,⁶⁴ though similar organizations exist in

⁵⁷ See *Hatch Unveils Bill to Overhaul Pension Benefit System, Secure Retirement Savings*, <http://www.hatch.senate.gov/public/index.cfm/releases?ID=bb7de6e5-a45f-4851-b17e-2c9c6dce972b>.

⁵⁸ *Id.*

⁵⁹ Sarra, *supra* note 35, at 9.

⁶⁰ See HIRSCH ET AL., *supra* note 39, at 198.

⁶¹ See *infra* Part IV.

⁶² See Sarra, *supra* note 35, at 23-24.

⁶³ See Johnson, *supra* note 11, at 7 (noting that one benefit of insurance funds is more immediate payout to employees as opposed to long drawn out process of making claims during employer liquidation).

⁶⁴ Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1302 (2012). See also Sarra, *supra* note 35, at 61-62 (for a discussion on role of PBGC in United States).

the United Kingdom⁶⁵ and the province of Ontario.⁶⁶ Also, as with pension benefits, many of the studied OECD countries have guarantee schemes which 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.⁶⁷ Canada itself has such a wage-guarantee scheme under its Wage Earner Protection Program (WEPP).⁶⁸

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.⁶⁹ 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.⁷⁰ However, to the extent that the guarantee association is unable to secure recovery for employees through the insolvency process, 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).⁷¹

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 paper, there does appear to be some important commonalities. As an initial matter, most countries seem to recognize different types of corporate insolvency proceedings.⁷² 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,⁷³ and (2) business reorganizations in which the company seeks to reorganize by discharging some existing debts and by eventually emerging from the insolvency process.⁷⁴ In the municipal context in the United States, cities are not subject to liquidation, but only to restructuring of their debt.⁷⁵

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.⁷⁶ 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

⁶⁵ See Sarra, *supra* note 35, at 57.

⁶⁶ *Id.* at 60-61.

⁶⁷ See *infra* Part IV.

⁶⁸ See Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1.

⁶⁹ Johnson, *supra* note 11, at 5-6.

⁷⁰ See Sarra, *supra* note 35, at 28 (discussing how such funds are better situated than individual employees due to information, resources, and size of claims being sought).

⁷¹ See *id.* at 85 (noting that many jurisdictions base operation of guarantee fund upon premiums determined through risk analysis of that industry or business practice, thus any unrecovered benefits will likely result in higher premiums).

⁷² This paper does not address consumer/employee bankruptcy issues under Chapter 7-type liquidations.

⁷³ See AARON, *supra* note 13, at 25.

⁷⁴ *Id.* at 33 (discussing concept of Chapter 11 reorganization as compared to Chapter 7 liquidation).

⁷⁵ See *Municipal Bankruptcy: A Primer on Chapter 9* 1, NUVEEN ASSET MANAGEMENT (August 2013), <http://www.nuveen.com/Home/Documents/Viewer.aspx?fileId=48362> (“Unlike corporations, municipalities are perpetual entities that cannot be liquidated through bankruptcy.”).

⁷⁶ AARON, *supra* note 13, at 608 (discussing traditional goal of bankruptcy to distribute the assets of insolvent among the general creditors).

automatic stay.⁷⁷ In business reorganizations where management continues to operate the business, they are referred to as the debtor-in-possession.⁷⁸ The debtor-in-possession has all the powers of the trustee, the title given to the individual or individuals that administers the bankruptcy process.⁷⁹

Importantly, many pensions and employee benefits are established in trust for the sole benefit of employee participants and their beneficiaries, and 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.⁸⁰ In other words, such trust-based benefits are inalienable and this is an important protection for employees if they should become insolvent.⁸¹ Nevertheless, such trust-based benefit schemes can still be underfunded and be 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.⁸²

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.⁸³ 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.⁸⁴ Creditor claims which are given preference over other creditor claims are said to enjoy a "priority" and are satisfied first among the various claims.⁸⁵ The concept of priority is important because of the limited assets of the insolvent employer.⁸⁶ Only those creditors who have the highest priorities are likely to have any of their claims against the company satisfied.⁸⁷ The lower the priority of one's claim, the more likely the creditor will receive little or nothing from the remaining company assets.⁸⁸

Secured creditors are those who enjoy priority in the event of company default only as relates to the collateral in which they hold a perfected security interest.⁸⁹ Unsecured creditors (or ordinary creditors), on the other hand, are those who have claims not secured by such collateral and who

⁷⁷ See *id.* at 267.

⁷⁸ 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.").

⁷⁹ *Id.*

⁸⁰ 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).

⁸¹ 29 U.S.C. § 1056(d) (ERISA anti-alienation provision); 26 U.S.C. § 401 (qualified plan anti-alienation provision).

⁸² 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 306-07 and accompanying text.

⁸³ 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).

⁸⁴ See *AARON*, *supra* note 13, at 29, 35.

⁸⁵ *Id.* at 429.

⁸⁶ See *Johnson*, *supra* note 11, at 5 (detailing difficulties employees have in securing claims from employers' assets even when having priority).

⁸⁷ See *Aaron*, *supra* note 13, at 429.

⁸⁸ *Id.*

⁸⁹ *Id.* at 405-06.

are paid from the general assets of the company.⁹⁰ In addition to secured and unsecured creditors, there are many times super-priority (or absolute) claims and preferred (or privileged) claims.⁹¹ Super priority claims get paid first among unsecured creditor claims and can even out-rank secured claims in some countries.⁹² Preferred claims, which are still unsecured claims, lie somewhere between secured claims and general unsecured claims.⁹³

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 their 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.⁹⁴ 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.⁹⁵

In addition to issues surrounding the type of priority wage and benefit claims receive in insolvency, there are also important issues surrounding distinctions between municipal and corporate bankruptcies 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.⁹⁶ Additionally,

⁹⁰ 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.").

⁹¹ *Id.* at 454.

⁹² See *id.* at 293 (discussing impact of super priority and its placement even above all other administrative expenses). See also *infra* note 296.

⁹³ See Sarra, *supra* note 35, at 84. Preferred claims enjoy different levels of priority protection depending upon the countries' insolvency legislation. *Id.*

⁹⁴ See AARON, *supra* note 13, at 429.

⁹⁵ See Williams, *supra* note 90, 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). 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, *Ten Lessons for Congress to Ponder About the Labor-Bankruptcy Intersection*, 21 AM. BANKR. INST. L. REV. xx (2013) (manuscript at 9-10) (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 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.").

⁹⁶ See *supra* note 75 and accompanying text. See also 11 U.S.C. §§ 301, 904 (prohibiting involuntary bankruptcies of municipalities). Municipalities, however, can still sell off property and a municipality's secured creditors can foreclose against their collateral. See 11 U.S.C. §1123(b)(4) (applicable to Chapter 9 proceedings); *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). See also *Municipal Bankruptcy: A Guide for Public Finance Attorneys*, NATIONAL ASSOCIATION OF BOND LAWYERS (Oct. 2011), at 61-62, 75-76, 87, http://www.nabl.org/uploads/cms/documents/municipal_bankruptcy_a_guide_for_public_finance_attorneys.pdf.

states have to pass legislation providing that they assent to their municipalities seeking bankruptcy protection under Chapter 9.⁹⁷ Moreover, even if a state has given such assent,⁹⁸ 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.⁹⁹ 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 services (like police, fire, sanitation, and utilities),¹⁰⁰ and there are issues concerning the ability of municipalities to generate additional revenue through tax levies (as opposed to becoming more profitable through corporate reorganization).¹⁰¹ Of course, municipalities do have bondholder creditors and other lenders just like private companies.¹⁰²

The other similarity, which is the focus of this paper, is that both private companies and municipalities have employees who have pension and wage pension claims when their employers seek bankruptcy protections. Whereas, as discussed below,¹⁰³ wage and pension claims receive a priority in Chapter 11, they do not receive a priority under Chapter 9.¹⁰⁴ 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.¹⁰⁵

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.¹⁰⁶ The market failure argument is that although employees are acting as creditors of their employers when entering into these pension, wage, and other employee benefit

States, on the other hand, are not currently eligible for bankruptcy under Chapter 9. *Id.* at 39 (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.

⁹⁷ See MCQUILLIN’S LAW OF MUNICIPAL CORPORATIONS § 39:76 (3d ed. 2013); See also BUSINESS WORKOUTS MANUAL § 35:5 (2012) (discussing Chapter 9 bankruptcy provisions recognition of state sovereignty in local affairs per 10th Amendment of the federal Constitution).

⁹⁸ See Daniel J. Freyberg, *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, 1008-12 (1997) (providing list of individual state bankruptcy positions).

⁹⁹ See generally Eric W. Lam, *Municipal Bankruptcy: The Problem with Chapter 9 Eligibility-A Proposal to Amend 11 U.S.C. S 109(c)(2)* (1988), 22 ARIZ. ST. L.J. 625 (1990).

¹⁰⁰ See Michael W. McConnell & Randal C. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 U. CHI. L. REV. 425, 483-489 (1993) (discussing extent of municipality’s residual obligations in bankruptcy).

¹⁰¹ See Kevin A. Kordana, *Tax Increases in Municipal Bankruptcies*, 83 VA. L. REV. 1035, 1058-67, 1104-06 (1997) (providing evaluation of effectiveness of tax increases arising out of municipal bankruptcy).

¹⁰² See *id.* at 1046 (discussing status of municipal bondholders in Chapter 9 bankruptcy proceedings); McConnell & Picker, *supra* note 100, at 429 (comparing creditor claims in private versus public bankruptcies).

¹⁰³ See *infra* Part III.A.

¹⁰⁴ See *supra* note 13 and accompanying text.

¹⁰⁵ See *supra* note 9 and accompanying text.

¹⁰⁶ See Sarra, *supra* note 35, at 6; Johnson, *supra* note 11, at 2.

arrangements, they essentially do not understand the tradeoff they are making.¹⁰⁷ This is because 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 other creditors undertake before lending money to a company.¹⁰⁸ 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.¹⁰⁹

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.”¹¹⁰

The diversification argument suggests that even more knowledgeable employees are not able to diversify the risks they face with these benefit arrangements as most creditors are able to do through their multiple investments.¹¹¹ As Fiona Stewart has commented, “[w]orkers 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.”¹¹² Not so with other financial creditors. It is only employee creditors who “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.”¹¹³

On the other side of the debate are those who 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,¹¹⁴ and the fact that sophisticated employers will use other bankruptcy mechanism to evade paying such priorities, leaving employees with unsecured claims against sale proceeds largely encumbered by secured claims.¹¹⁵

¹⁰⁷ See Sarra, *supra* note 35, at 51.

¹⁰⁸ See Johnson, *supra* note 11, at 2.

¹⁰⁹ See JANNIS SARRA, A BRIEF OVERVIEW OF THE TREATMENT OF EMPLOYEE CLAIMS AND COLLECTIVE AGREEMENTS IN CANADIAN INSOLVENCY LAW 1 (2006).

¹¹⁰ Heartfield & Wink, *supra* note 24, at 14-5.

¹¹¹ 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); David A. Skeel, Jr., *Employees, Pensions, and Governance in Chapter 11*, 82 WASH. U. L.Q. 1469, 1478 (2004) (discussing employee's tendency to invest in their own firm over diversifying their portfolio).

¹¹² See Stewart, *supra* note 3, at 5.

¹¹³ *Id.* Book reserves are a type of direct employer pension promise described further below. See *supra* note 265 and accompanying text.

¹¹⁴ See Stewart, *supra* note 3, at 7-8.

¹¹⁵ See Keating, *supra* note 95, at 13 (describing how “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.”).

With regard to harming the investing climate of the country, the argument goes that by increasing the priority status of employee claims, one is increasing the credit risk for other unsecured creditors by making capital more expensive for companies to obtain.¹¹⁶ 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.¹¹⁷ 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 so that legitimate expectations of creditors can be vindicated and there can be greater predictability in commercial relations through fewer deviations from general priority ranking rules.¹¹⁸ Some of the argument here appears to be directly related to recent examples of large underfunded pension schemes in the DB context and how such situations have impacted the credit rating of such companies.¹¹⁹

This article tends to concur with those who believe vulnerable and unsophisticated employee creditors deserve increased bankruptcy protection through heightened creditor priorities, even given the costs and risks outlined above. However, the impact of such additional priorities for employee claims in insolvency is somewhat blunted in countries where there has been a dramatic shift from DB plans to DC plans (like in the United States).¹²⁰ In these countries, concerns about the impact of underfunded pension schemes on the credit rights of other company creditors may be becoming less important, simply because unfunded pension liability is no longer as big of an issue or is dealt with outside of the company.¹²¹ 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.¹²²

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

¹¹⁶ *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.").

¹¹⁷ See *id.* See also Sarra, *supra* note 109, at 7.

¹¹⁸ See World Bank, *supra* note 32, at 4 (discussing need for an efficient, transparent, and reliable credit system based on distinguishing secured from unsecured claims); United Nations Commission on International Trade Law (UNCITRAL), *Legislative Guide on Insolvency Law* 275 (2004), http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html ("The insolvency law should minimize the priorities accorded to unsecured claims.").

¹¹⁹ Stewart, *supra* note 3, at 9 (noting impact of underfunded pension schemes on such automotive companies as GM and Ford, as well as German business groups).

¹²⁰ See Hirsch, *supra* note 39, at 198 (discussing trend and justifications for employer movement towards defined contribution plans over defined benefit plans).

¹²¹ See also Sarra, *supra* note 35, 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).

¹²² See *supra* note 48 and accompanying text.

DB variety.¹²³ 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.

III. 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 can also be applied 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 an Appendix at the back of this article.¹²⁴ What follows in this section 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). 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, the next section 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 Labor Organization (ILO) Convention considering similar issues. Third, and finally, a series of tables will be presented to 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*,¹²⁵ all ERISA (private sector) qualified pension plans are excluded from the bankruptcy estate regardless of state law.¹²⁶ Similarly, Internal Revenue Code (IRC) Section 401(a)(13)¹²⁷ and ERISA Section

¹²³ See *supra* note 44 and accompanying text.

¹²⁴ In that Appendix, the country profile sections are divided between pensions and other employee benefit (wage) claims in bankruptcy. Both the pension and other employee benefit section 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 these employee claims. Finally, each country section notes whether the guarantee scheme is subrogated to the rights of employees in insolvency.

¹²⁵ 504 U.S. 753 (1992).

¹²⁶ *Id.* at 762-63.

¹²⁷ 26 U.S.C. § 401 (2010).

206(d)¹²⁸ both have identical anti-alienation provisions which provide that all qualified pension benefit plan assets cannot be reached by a company's other creditors.¹²⁹

As far as Chapter 11 of the United States Bankruptcy Code, dealing primarily with corporate reorganizations, outstanding employer contribution to DB and DC plans receive a priority.¹³⁰ This has become more relevant for DC plans (such as 401(k) salary deferral contribution plans) as most employers in the United States do not have defined benefit plans anymore.¹³¹ Combined with wages, these pension claims receive their preferred status up to a capped amount (\$12,475 as of April 1, 2013).¹³² The employee is entitled to the priority for these amounts due within the 180 days prior to the bankruptcy petition.¹³³ The pension priority (the fifth priority with other employee benefits under Section 507(a)(5) of the Bankruptcy Code)¹³⁴ 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).¹³⁵ In such cases, claims beyond the cap are unsecured.¹³⁶ No priority status exists for unfunded or underfunded pension liability.¹³⁷

As far as 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).¹³⁸ What does appear clear is that the wage and pension priorities of Section 507 of the Bankruptcy Code do not apply in Chapter 9.¹³⁹ This means that

¹²⁸ 29 U.S.C. § 1056 (2013).

¹²⁹ Compare 26 U.S.C. § 401 (“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 (“Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated”).

¹³⁰ 11 U.S.C. § 507(a)(4), (a)(5) (2010).

¹³¹ See Hirsch, *supra* 39, 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. This is to be distinguished 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.

¹³² See Bob Eisenbach, *Going Up: Bankruptcy Dollar Amounts Will Increase on April 1, 2013*, IN THE RED: THE BUSINESS BANKRUPTCY 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/>.

¹³³ See AARON, *supra* note 13, at 444.

¹³⁴ 11 U.S.C. § 507(a)(5).

¹³⁵ *Id.* at § 507(a)(4). See AARON, *supra* note 13, at 444 (pension priority only available if wage claims do not reach cap).

¹³⁶ AARON, *supra* note 13, at 444. See also David A. Skeel, Jr., *Employees, Pensions, and Governance in Chapter 11*, 82 WASH. U. L.Q. 1469, 1471 (2004) (“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.”).

¹³⁷ See Michael Peskin, *Pension Funds and Corporate Enterprise Risk Management*, in THE OXFORD HANDBOOK OF QUANTITATIVE ASSESSMENT 426 (Scherer & Winston eds. 2011) (“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 *Backgrounder: Amending Canada's Bankruptcy Laws*, Office of Wayne Marston, MP (Oct. 18, 2011), <http://www.usw.ca/admin/union/soar-news/files/Background-Bill-C-331-Pension-Protection-Act.pdf>.

¹³⁸ See *supra* note 7.

¹³⁹ See *supra* note 20 and accompanying text.

most people believe that unfunded municipal pension liabilities are unsecured.¹⁴⁰ 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.¹⁴¹

For defined benefit plans, the Pension Benefit Guaranty Corporation (PBGC) pays benefits in the event of the insolvency of an employer who sponsors a defined benefit plan.¹⁴² DC plans are not subject to PBGC protections and are not guaranteed.¹⁴³ The PBGC is funded through annual premiums of \$19 per employee, plus 0.9% of the unfunded liability if a plan is under-funded.¹⁴⁴ The PBGC pays employees a guaranteed amount up to statutory cap.¹⁴⁵ 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.¹⁴⁶ The maximum is lower for members retiring at earlier ages.¹⁴⁷ Some employees may have also received benefits in excess of the normal statutory guarantee where the employee has been in pay status as retirees for three years.¹⁴⁸ Under Section 1344(a) of ERISA, these type of retiree claims take precedence over reimbursing the PBGC for its insurance expenditures.¹⁴⁹

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.¹⁵⁰ The PBGC

¹⁴⁰ See, e.g., James E. Spiotto, *Unfunded Pension Obligations: Is Chapter 9 the Ultimate Remedy? Is There a Better Resolution Mechanism?* 6, Chapman & Cutler, LLP (June 2011), 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.”);

¹⁴¹ 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, 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 *Guide for Public Finance Attorneys*, *supra* note 96, 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.”).

¹⁴² See Sarra, *supra* note 35, at 289.

¹⁴³ *Id.*

¹⁴⁴ See 29 U.S.C. § 1306(a)(3)(A)(i) (2000). Additionally, ERISA provides that controlled group members—80-percent commonly owned businesses—are jointly and severally liable for pension contributions, PBGC premiums, and pension underfunding on termination. 29 U.S.C. §§ 1307(e), 1362(a). ERISA also provides that a former controlled group member remains liable if it disposes of its interest with intent to evade or avoid liability. 29 U.S.C. § 1369(a).

¹⁴⁵ See Sarra, *supra* note 35, at 62.

¹⁴⁶ See 29 U.S.C. § 1322(b)(3); See also Pension Benefit Guar. Corp., *Fact Sheets: PBGC's Pension Guarantees*, at <http://www.pb.gc.gov/res/factsheets/page/guar-facts.html> (last visited Oct. 6, 2013) (“For 2013, the maximum guarantee for a life annuity with no survivor benefits is \$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.”).

¹⁴⁷ See PBGC’s Pension Guarantees, *supra* note 146.

¹⁴⁸ 29 U.S.C. § 1344 (2013) (order of priority among participant and beneficiaries in the case of the termination of a single-employer plan). See PBGC’s Pension Guarantees, *supra* note 145 (“If the plan has enough assets, some participants—most often those who retired (or could have retired) three years before the date the guarantees take effect—may receive benefits above the guarantee limits.”).

¹⁴⁹ 29 U.S.C. § 1344(a)(3)(A).

¹⁵⁰ See Sarra, *supra* note 35, at 62 (noting PBGC will assume “all of claims under the pension plan member’s agreement with the insolvent plan sponsor.”)

places its claims into the bankruptcy for the amount it believes the plan is underfunded.¹⁵¹ The PBGCs claim for underfunding can give rise to a lien to the extent of 30% of net worth of the company.¹⁵² Although the PBGC has argued to the contrary in the past,¹⁵³ it is generally now held 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.¹⁵⁴

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 and those missed contributions are above \$1 million dollars.¹⁵⁵ In such cases, a priority is granted for amounts that exceed the \$1 million dollars in missing contributions.¹⁵⁶

2. Other Employee Benefits

As mentioned above, unpaid wages (including vacation pay, severance pay,¹⁵⁷ and sick leave pay) and pension contribution claims are treated as priority claims, up to a combined capped amount (\$12,475 in 2013).¹⁵⁸ The employee is entitled to the priority for the 180 days prior to the bankruptcy petition.¹⁵⁹ Wages have the so-called fourth priority and other employee benefits (including pensions) have the fifth priority among all the employer's creditors.¹⁶⁰ 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.¹⁶¹ Beyond this capped amount (and beyond the 180 days prior to the bankruptcy petition being filed), excess pension and wage-related claims are unsecured.¹⁶² Priority claims for wages

¹⁵¹ See Laura Rosenberg, *Understanding PBGC's Role in Bankruptcy Dealing with the 800-Pound Gorilla*, <http://www.turnaround.org/Publications/Articles.aspx?objectID=6429> (last visited Oct. 2, 2013).

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

¹⁵³ See ISRAEL GOLDOWITZ & MARC S. PFEUFFER, PENSION BENEFIT GUARANTEE CORPORATION LITIGATION OUTLINE 24 (2010), available at http://www.pb.gc.gov/docs/PBGC_Litigation_Outline2010.pdf.

¹⁵⁴ See *In re Chateaugay Corp.*, 115 B.R. 760 (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 PBGC's claim for minimum contributions arose from the service of the debtor's employees prepetition, 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 itself vacated, a number of courts have cited it as precedent for the lack of any priority for minimum contribution claims. See Jonathan Lewis & Vivek Melwani, *Treatment of Pension Plans When An Employer Is In Bankruptcy*, 6 BENDER'S LABOR AND EMPLOYMENT BULLETIN 163, 168 (April 2006) ("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.").

¹⁵⁵ 29 U.S.C. § 1368; IRC §430(k).

¹⁵⁶ *Id.*

¹⁵⁷ A well-known Second Circuit case that is still followed by some courts held that post-petition severance pay may result in an administrative priority claim. See *Staus-Duparquet, Inc. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, AFL-CIO (In re Straus-Duparquet, Inc.)*, 386 F.2d 649, 651 (2d Cir. 1967). See also *Matson v. Alarcon (In re LandAmerica Fin. Group, Inc.)*, 651 F.3d 404, 409 (4th Cir. 2011) (reaching a similar conclusion for pre-petition severance payments under Section 507(a)(4)).

¹⁵⁸ See AARON, *supra* note 13, at 444.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

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.¹⁶³

The PBGC has no role with regard to wage claims and there is not a wage guarantee fund in the United States if an employer becomes insolvent¹⁶⁴ (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).¹⁶⁵ There is also a statutory scheme, the Work Adjustment Retraining and Notice Act (WARN),¹⁶⁶ which provides 60 days of notice and/or severance pay for employees working for employers with 100 or more workers who close their businesses¹⁶⁷ (however, the law is riddled with exceptions and so WARN does not always provide benefits in these instances).¹⁶⁸

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)¹⁶⁹ and the Companies' Creditor Arrangement Act (CCAA).¹⁷⁰ Whereas the BIA sets out the general bankruptcy framework for commercial and consumer bankruptcies (involving both liquidations and restructurings),¹⁷¹ the CCAA focuses on the process of corporate reorganizations.¹⁷² 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.¹⁷³

¹⁶³ See Skeel, *supra* note 136, 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 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. Even less clear is what formal role public unions have in municipal liabilities. However, Detroit's public employee unions 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 Challenges to City's Bankruptcy Petition*, REUTERS (Aug. 19, 2013), <http://news.yahoo.com/detroit-union-files-challenge-citys-bankruptcy-petition-203101634.html> ("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.").

¹⁶⁴ See Sarra, *supra* note 35, at 61-62 (noting PBGC's coverage limited to defined benefit pension plans and does not extend to other unvested benefits).

¹⁶⁵ For a general explanation of the unemployment compensation system in the United States, see generally HIRSCH, *supra* note 39, at 133-91.

¹⁶⁶ See 29 U.S.C. § 2101 (2013).

¹⁶⁷ See *id.* at § 2102.

¹⁶⁸ See *id.* at § 2103 (detailing specific exemptions from WARN Act).

¹⁶⁹ Bankruptcy and Insolvency Act R.S.C., 1985, c. B-3.

¹⁷⁰ Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36.

¹⁷¹ See Stewart, *supra* note 3, at 11.

¹⁷² *Id.*

¹⁷³ *Id.*

In Canada, the federal and provincial governments both regulate occupational pension plans to some degree.¹⁷⁴ Federal jurisdiction exists for the banking, transportation, and telecommunications industries, all industries that have an inter-provincial orientation,¹⁷⁵ and their pension plans come under the Pension Benefits Standards Act 1985 (PBSA).¹⁷⁶ Only 10 percent of all occupational pension plan assets are part of the federal system.¹⁷⁷ All other pension plans are regulated by provincial legislation.¹⁷⁸

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 2008.¹⁷⁹ 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.¹⁸⁰ This super-priority for pension contributions extends to all assets, not just current assets, and is unlimited.¹⁸¹ More specifically, this priority includes: (1) pension contribution amounts deducted from an employee's pay;¹⁸² (2) amounts required from the employer under a defined contribution provision;¹⁸³ and (3) "normal cost" amounts (the amounts required to be paid in a given year to fund benefits).¹⁸⁴ This priority applies to both federally and provincially-regulated pensions.¹⁸⁵ Unfunded pension liabilities remain unsecured.¹⁸⁶

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.¹⁸⁷ As such, the occupational pension plan assets are excluded from the bankruptcy estate and not subject to the claim of other creditors.¹⁸⁸ 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.¹⁸⁹

Unlike the United States, Canada is a country that still has mostly defined benefit occupational pension schemes,¹⁹⁰ meaning that pension underfunding and employer outstanding contributions

¹⁷⁴ *Id.*

¹⁷⁵ Pension Benefits Standards Act, 1985, R.S.C., 1985, c. 32, § 4 (2nd Supp.) (Can.).

¹⁷⁶ *Id.*

¹⁷⁷ See Stewart, *supra* note 3, at 11.

¹⁷⁸ 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).

¹⁷⁹ See Wage Earner Protection Program Act, *supra* note 10.

¹⁸⁰ See Sarra, *supra* note 35, at 54; Stewart, *supra* note 3, at 11.

¹⁸¹ See Bankruptcy and Insolvency Act R.S.C., 1985, c. B-3, at 81.5. See also BUSINESS LAWS OF CANADA § 25:79 (2012).

¹⁸² *Id.* See also Sarra, *supra* note 35, at 54; Stewart, *supra* note 3, at 11.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ See Stewart, *supra* note 3, at 12.

¹⁸⁶ See Sarra, *supra* note 35, at 54; Stewart, *supra* note 3, at 11.

¹⁸⁷ See Sarra, *supra* note 35, at 49.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ See Jay Cooper, *Canadian Pension Plans Take the Risk-Shedding Route*, GLOBAL PENSIONS (Apr. 6, 2011), available at <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

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.¹⁹¹ 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.¹⁹² It applies only to single employer plans (as opposed to multiemployer plans)¹⁹³ and individual coverage is limited to a monthly maximum of CAD \$1,000 plus a proportion of benefits owed.¹⁹⁴

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).¹⁹⁵ It is limited because the priority applies only to current assets—cash, accounts receivable, and inventory.¹⁹⁶ This charge will secure unpaid wages and vacation pay for the six month period prior to bankruptcy up to a maximum of \$2,000 per employee.¹⁹⁷

Under the law prior to these amendments, wages and vacation pay were subordinate in priority to secured creditors' claims.¹⁹⁸ Under this previous regime, it was estimated that unpaid wage claims received only 13 cents on the dollar, and were only made at the conclusion of the bankruptcy process which could take up to three years to complete.¹⁹⁹ With the new limited priority, the hope is that up to 50 cents on the dollar will be recovered, though no definitive figures are available since the scheme went into effect.²⁰⁰

In addition to priority rights, there is also a wage guarantee scheme funded from general tax revenues (estimated to cost a maximum of \$50 million per year).²⁰¹ The Ministry of Labor is responsible for the Wage Earner Payment Program (WEPP) and Service Canada is the delivery agent.²⁰² Under the WEPP, an employee whose employer has become bankrupt on or after July 7,

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.

¹⁹¹ See Sarra, *supra* note 35, at 115.

¹⁹² 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 Sept. 19, 2013).

¹⁹³ *Id.*

¹⁹⁴ See Sarra, *supra* note 35, at 12.

¹⁹⁵ *Id.* at 45.

¹⁹⁶ *Id.*

¹⁹⁷ Bankruptcy and Insolvency Act R.S.C., 1985, c. B-3, at, at 81.3.

¹⁹⁸ See Sarra, *supra* note 35, at 45.

¹⁹⁹ See Heartfield, *supra* note 24, at 14-6.

²⁰⁰ *Id.* at 14-7 (noting that, “it is estimated that the [Canadian] Government will recover up to 50 cents on the dollar with the new limited super-priority.”).

²⁰¹ *Id.* at 14-6. See also *Wage Companies? Earner Protection Program: What Does It Mean for Employees of Bankrupt*, HOYES & MICHALOS, <http://www.hoyes.com/bill-c-12-wage-earner-protection-pogram.htm> (last visited on Oct. 8, 2013).

²⁰² See Heartfield & Wink. *supra* note 24, at 14-8.

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 \$3,646 (as of 2013), or equal to four times the maximum weekly insurable earnings under the Employment Insurance Act.²⁰³ This government wage fund pays for unpaid wages, vacations, severance, and termination pay, and is estimated to satisfy 97% of wage claims in full.²⁰⁴ 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.²⁰⁵

One last interesting observation concerning the Canadian treatment of employment claims in insolvency: whereas 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 34 OECD countries discussed in this report, 21 countries are also members of the European Union (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).²⁰⁶ 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.²⁰⁷ 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.²⁰⁸ It also requires Member States to set up an institution to guarantee some or all of these employee claims.²⁰⁹

Additionally, the International Labor Organization (ILO) has a convention which 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, 1992.²¹⁰

²⁰³ See *Canada's Economic Action Plan: Wage Earner's Protection Program*, SERVICE CANADA, <http://actionplan.gc.ca/en/initiative/wage-earner-protection-program-0> (last visited Oct. 8, 2013).

²⁰⁴ See Heartfield & Wink, *supra* note 24, at 14-16.

²⁰⁵ See Alan Nackan, *Lenders Beware – New Canadian Legislation Puts Employee Wages First*, ACCUVAL (September 2008), <http://www.accuval.net/insights/featuredarticle/detail.php?ID=22>.

²⁰⁶ EUROPEAN UNION LIST OF MEMBER STATES OF THE EU, http://europa.eu/about-eu/countries/index_en.htm (last visited Sept. 20, 2013).

²⁰⁷ See generally Council Directive 2008/94, 2008 O.J. (L 283/36) (EC) (entitled "On the protection of employees in the event of the insolvency of their employer").

²⁰⁸ *Id.* at (3).

²⁰⁹ *Id.*

²¹⁰ International Labor Organization, Convention concerning the Protection of Workers' Claims in the event of the Insolvency of their Employer, June 23, 1992, Protection of Workers Claims Convention No. 173, Geneva, 79th ILC session. *But see* International Labor Organization, Ratifications of C173-Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173),

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 insolvency of their employer (2008/94/EC) is the main piece of EU legislation in this area.²¹¹ 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).²¹² The 2008/94/EC directive is actually a restatement of a directive from 1980 (1980/987/EEC),²¹³ which requires "protection" of employees and their benefits on the employer's insolvency.²¹⁴

By its terms, Directive 2008/94/EC states that EU Member States should establish a body which guarantees payment of the outstanding employee claims when their employer becomes insolvent.²¹⁵ 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."²¹⁶

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)).²¹⁷ These institutions provide pensions, or other types of wage-related benefits, for those whose employer becomes insolvent.²¹⁸ 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).²¹⁹

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, Ireland* (25 April 2013),²²⁰ the court found that Directive 2008/94/EC applied to occupational pension schemes and set quantitatively the minimum level of protection for

http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312318 (last visited Sept. 20, 2013) (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) [hereinafter ILO Convention].

²¹¹ See Council Directive 2008/94, *supra* note 207. See also Sarra, *supra* note 35, at 30, 150 (referring to the directive as the EU policy on the matter of protecting employee rights through insolvency).

²¹² 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 41, 2003 O.J. (L 235/10) (EC) ("on the activities and supervision of institutions for occupational retirement provision").

²¹³ Compare Council Directive 2008/94, *supra* note 207 with Council Directive 1980/987, 1980 O.J. (L 283) (EEC).

²¹⁴ Council Directive 1980/987, art. 3(1), 1980 O.J. (L 283) (EEC).

²¹⁵ Council Directive 2008/94, *supra* note 207, at (3).

²¹⁶ *Id.* at art. 1(1) (L 283/37).

²¹⁷ See Sarra, *supra* note 35, at 55, 60 (noting how majority of countries have such guarantee funds or schemes and providing analysis of the UK model with Pension Protection Fund (PPF)).

²¹⁸ See Johnson, *supra* note 11, at 7.

²¹⁹ *Id.* at 7, 8 (discussing methodology for guarantee schemes as well as viability of providing cap or limit to payout structure to help limit costs of fund for viability purposes).

²²⁰ Case C-398/11, *Hogan v. Minister of Social and Family Affairs*, (April 25, 2013), <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-398/11>.

employees when their employer becomes insolvent.²²¹ 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,”²²² and that employees must “receive in excess of 49% of the value of their accrued old-age pension benefits under their occupational pension scheme.”²²³ Because Ireland’s scheme did not meet this standard, it was found to be in serious breach of its Member State’s obligations.²²⁴

The decision in *Hogan* was based in part on a previous European Court of Justice Decision, *Robins and Others* (25 January 2007).²²⁵ In that case, the ECJ held that where the employer is 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.²²⁶ 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.²²⁷ 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.”²²⁸ Importantly however, with regard to the degree of protection required by the Directive, this decision also requires that any measures taken to protect employees also account for the need to have balanced economic and social developments in the European Community...²²⁹

In addition to protecting employee rights to occupational pensions under Article 8, Articles 3 and 4 of the Directive concern the minimum guarantee of outstanding claims relating to pay.²³⁰ In *Francovich*, under the 1980 predecessor Directive, the ECJ considered claims for pay by an Italian citizen against his insolvent company.²³¹ Article 3 provides that guarantee institutions be established to pay employee outstanding claims relating to pay for the period prior to a given date.²³² The Directive allows Member States to choose one of three dates relating to insolvency or the discontinuance of the employment relationship.²³³ It also gives Member States the option of limiting the liability of the guarantee institution.²³⁴

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

²²¹ See *id.* at 27, 44-46 (determining that Directive 2008/94 must be applied to such occupational pension schemes and establishing that minimum level of protection is necessary to protect employees’ rights).

²²² *Id.* at 27.

²²³ *Id.* at 53.

²²⁴ *Id.*

²²⁵ See Case C-278/05, *Robins and Others v. Sec’y of State for Work and Pensions*, 2007 E.C.R. I-01053.

²²⁶ *Id.* at 46.

²²⁷ *Id.* at 36.

²²⁸ *Id.* at 37.

²²⁹ *Id.* at 38-39.

²³⁰ See Joined Cases C-6 & 9/90, *Francovich and Others*, 1991 E.C.R. I-05357, 18-20.

²³¹ *Id.* at 6.

²³² *Id.* at 15 (discussing the interpretation of directive).

²³³ *Id.*

²³⁴ *Id.* at 21.

the date of the employer's insolvency.²³⁵ There was no issue that Francovich was entitled to unpaid wages on the insolvency of his employer under the Directive.²³⁶ The only issue was whether he could bring a claim against Italy which had failed to implement a wage guarantee fund at that point.²³⁷ 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.²³⁸

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.²³⁹ 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).²⁴⁰

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."²⁴¹ Thus, the Convention envisions that employee claims in an employer insolvency will either be protected through some priority status in bankruptcy, a state-sponsored guarantee scheme, or both.²⁴²

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."²⁴³ 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, (2) claims for holiday pay, (3) claims for other types of paid absence, and (4) claims for severance pay.²⁴⁴ 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.²⁴⁵

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

²³⁵ *Id.* at 16. *See also* Directive 1980/987, *supra* note 213.

²³⁶ Joined Cases C-6 & 9/90, *Francovich and Others*, 1991 E.C.R. I-05357, 18-20 at 2.

²³⁷ *Id.* at 7(1).

²³⁸ *Id.* at 46.

²³⁹ *See* ILO Convention, *supra* note 210.

²⁴⁰ *Id.* at pmbl.

²⁴¹ *Id.* at art. 3(1).

²⁴² *See id.*

²⁴³ *Id.* at art. 5.

²⁴⁴ *Id.* at art. 6.

²⁴⁵ *Id.* at art. 8(2).

employment shall be guaranteed through a guarantee institution when payment cannot be made by the employer because of insolvency.”²⁴⁶ 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.”²⁴⁷ Pension contributions do not appear to be required to be protected by these wage guarantee schemes.

Although ILO Convention C173 entered into force on June 8, 1995, it has only been ratified by 21 countries.²⁴⁸ 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.²⁴⁹ 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 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 173.²⁵⁰ For instance, whereas the EU Directive addresses both wage-related claims and occupational pensions, the ILO Convention only address wage-related ones.²⁵¹ 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.²⁵²

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

This Part is divided into two major sections. The first section 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. The second section, drawing upon the Appendix of OECD country treatment of employment claims in insolvency, seeks to use

²⁴⁶ *Id.* at art. 9.

²⁴⁷ *Id.* at art. 12.

²⁴⁸ See International Labor Organization, Ratifications of C173, *supra* note 210.

²⁴⁹ *Id.* (with the priority scheme being Part II and guarantee scheme being Part III)

²⁵⁰ 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., ILO Decent Work Technical Support Team and Country Office for Cent. and Eastern Eur. 2011).

²⁵¹ Compare Directive 2008/94, *supra* note 207 with ILO Convention, *supra* note, 210.

²⁵² See Bartolomei, *supra* note 250, at 35.

tables 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 both a system which provides some priorities to pensions and wages in bankruptcy²⁵³ and also provides guarantee schemes for pensions and/or wages in employer insolvency scenarios (though more commonly just wage guarantees).²⁵⁴ The devil is in the details and distinctions between country treatments of employment claims in insolvency often has to do with the way various benefit systems are established or structured.

This section is further broken down into seven preliminary findings based on the OECD analysis.

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

With regard to pension benefits, there is an important distinction between countries with regard to the provision of occupational pension benefits. First, there are a number of countries that have little or no occupational pension scheme, relying instead on state-run social security schemes or voluntary, employee-based contributory schemes.²⁵⁵ The seven countries that fall into this first category include: Chile, Czech Republic, Estonia, Greece, Hungary, Slovakia, and Turkey.²⁵⁶ 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 on the provision of pensions.²⁵⁷ Not surprisingly, there are few pension priorities in insolvency and no pension guarantee schemes in these countries.²⁵⁸

Second, there are a large group of mostly EU countries that follow a statutory-based occupational pension model, under which the pension fund is established separate and independent from the

²⁵³ See UNCITRAL Legislative Guide on Insolvency Law, *supra* note 118, 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.”).

²⁵⁴ See Johnson, *supra* note 11, at 5-6.

²⁵⁵ See e.g., Elvan Aziz and Selen Terzi Özsoylu, Paksoy, *Employment and employee benefits in Turkey: Overview*, <http://uk.practicallaw.com/8-383-1562?service=pensions#a172331> (last visited Sept. 25, 2013) (noting that any pension contributions are made solely through standard social security contributions rather than occupational pension scheme); Social Insurance System in Slovakia, <http://www.socpoist.sk/social-insurance-system-in-slovakia/24533s> (last visited Sept. 25, 2013) (providing overview of Slovakia’s purely social insurance system-based pension scheme).

²⁵⁶ See Appendix *infra* at 52, 53, 55, 59, 72, 76.

²⁵⁷ See Sarra, *supra* note 35, at 48.

²⁵⁸ *Id.* at 84.

company.²⁵⁹ Employers make contributions to these pension funds (or insurance companies) in most cases, but that is the extent of their funding obligation.²⁶⁰ The twenty countries that fall into this second category include: Australia, Belgium, Denmark, Finland, France, Iceland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovenia, Spain, and Switzerland.²⁶¹ 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.²⁶² As a result, bankruptcy priorities only at most concern outstanding contributions (not unfunded pension liability) and there are few pension guarantee schemes.²⁶³ Indeed, pensions are only guaranteed to the extent they are treated like wages.²⁶⁴

Third, there are a smaller group of countries, of which the United States and Canada are a part, which 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 these countries are witnessing a dramatic shift to defined contribution plan schemes like the United States).²⁶⁵ Even though in a number of these countries (like the US, 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,²⁶⁶ it is with these schemes that an employer insolvency has the biggest impact on employee pension claims because of employer funding responsibilities.²⁶⁷ Not only do pension contributions have to be addressed, but there also might exist unfunded or underfunded pension

²⁵⁹ See e.g., FRESHFIELDS, BRUCKHAUS, & DERINGER, PENSIONS AND INSOLVENCIES ACROSS EUROPE, 6, 8, 11, 15 (May 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).

²⁶⁰ *Id.* at 6 (providing an example through Finland, an EU country, having mandatory employer contributions to the statutory system with the option—but not necessity—of additional pension arrangements).

²⁶¹ See Appendix *infra* at 49, 51, 54-55, 57, 60, 62-73, 75.

²⁶² See ROSALIND CONNOR, INTERNATIONAL PENSION GUIDE 16 (Taylor Wessing 2013) (noting that when there is separate pension funding scheme, employer's insolvency not as significant concern for defined contribution plans due to shelter from creditor claims against the employer contributions whereas defined benefits plans bring the risk of underfunding).

²⁶³ See e.g., Appendix *infra*, Australia Country Section, at 49; Portugal Country Section, at 71; Spain Country Section, at 73.

²⁶⁴ See e.g., Appendix *infra*, Belgium Country Section, at 51 (noting that outstanding pension claims are treated through the country's wage guarantee fund); Denmark Country Profile, at 54 (noting that pension contributions are treated as a type of wage claim in Denmark); Iceland Country Section, at 60 (noting that outstanding pension contributions are treated as wages and protected under the country's wage guarantee fund).

²⁶⁵ 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 scheme or pension funds. See Elina Lappalainen et al., *The structure of pension provision and the significance of occupational pensions in different countries*, Finnish Centre for Pensions 17-20, (Jan. 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 US and German examples of employer-funded pension systems).

²⁶⁶ *Id.* at 35 (table 5 noting both the US and UK 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?*, AM. BANKR. INST. J. 20, 22 (2003).

²⁶⁷ *Id.* at 16.

liability on employer insolvency.²⁶⁸ There are seven countries in this third category and they include: Austria, Canada, Germany, Ireland, Sweden, the United Kingdom, and the United States.²⁶⁹ These countries tend to have both priorities for pension claims (with Germany being a notable counter-example)²⁷⁰ 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).²⁷¹

It should be pointed out that these three categories of pension plans (illustrated in Table 1 below in Section B) are not as well-defined as might first appear. There are a number of countries that 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.²⁷² Similarly, Mexico has some externally funded pensions, but most employees appear to rely solely on the state-run pension system.²⁷³ And other examples abound. Nevertheless, viewing pension plans in countries 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. What can be said with some confidence is 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.

b. Other Employee Benefits

Wage-related benefits, unlike pensions, tend not to be funded and/or sponsored by employers, thus similar distinctions between statutory and employer-operated benefit schemes tend to matter much less.²⁷⁴ The United States is one example of a country, however, that primarily relies on employer-sponsored welfare plans²⁷⁵ to provide a number of wage-related benefits, such as health insurance, long-term disability insurance, life insurance, and retiree health benefits.²⁷⁶

²⁶⁸ See Sarra, *supra* note 35, 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).

²⁶⁹ See Table 2 *infra* p. 35.

²⁷⁰ See Freshfields, Bruckhaus, & Deringer, *supra* note 258, at 1, 9, 19, 21 (providing examples of these countries utilization of this hybrid scheme).

²⁷¹ See *e.g.*, ERISA § 4002, 29 U.S.C. § 1302 (1988).

²⁷² See Appendix *infra* at 50, 74.

²⁷³ See Johnson, *supra* note 11, at 5.

²⁷⁴ See *e.g.*, Directive 2008/94, *supra* note 207; ILO Convention, *supra* note 210; Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1 (providing examples of international, organizational, and country-sponsored wage-related benefit systems).

²⁷⁵ 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*, National Institute for Health Care Reform (March 2012), at http://www.nihcr.org/Employer_Coverage.pdf. See also Secunda, *supra* note 34, at 230-31 (“With the exception of those who are poor and chronically ill that are eligible for the federal Medicaid programme or those who are 65 or older or disabled that are eligible for the federal Medicare programme, most Americans receive their health coverage through private employer-provided health plans.”).

²⁷⁶ HIRSCH ET AL., *supra* note 39, at 205. Although the number of employers providing retiree health benefits continues to shrink at a significant rate. See Susan E. Cancelosi, *The Bell is Tolling: Retiree Benefits Post-Health*

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

Much is made in the literature about providing employee pension and wage claims some form of priority in the insolvency system.²⁷⁷ The fear being that unless the pension or wage claims receive a super-priority or preferred priority, no recovery will be made.²⁷⁸ Certainly, there is much 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 matters).²⁷⁹

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.²⁸⁰ This is true even where unions represent employees, since many times unions do not have defined roles within the insolvency process as far as claim-filing.²⁸¹ Employees are less likely, given the amount of money involved, the complexity of the process, and their lack of knowledge, to the necessary claims to take advantage of whatever priority they receive for their employment claims.²⁸² Not only that, but even if they 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 a number of years given the length of time it takes the bankruptcy process to be completed.²⁸³ Thus, if the aim of the social protection system is to protect already-earned employees' pension, wages, and other 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 is why the existence of guarantee funds, both for pensions and wages, are 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.²⁸⁴

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

²⁷⁷ See generally Stewart, *supra* note 3; Johnson, *supra* note 11; Sarra, *supra* note 35.

²⁷⁸ See Johnson, *supra* note 11, at 10; Sarra, *supra* note 18, at 9 (both describing precarious position employees are in during employer insolvency and emphasizing need to provide increased or specialized recovery methods).

²⁷⁹ See Stewart, *supra* note 3, at 4-5.

²⁸⁰ See Johnson, *supra* note 11, at 2.

²⁸¹ See Dawson, *supra* note 3 (“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.”).

²⁸² See Johnson, *supra* note 11, at 7.

²⁸³ See *id.* (noting long, drawn-out nature of liquidation in bankruptcy where even employees that 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 guarantor—which is better situated to handle the time delay—is subrogated to insolvency claim).

²⁸⁴ See Heartfield & Wink, *supra* note 24, 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

Although the payments available under such guarantee funds are limited to certain amounts for specified time periods prior to the insolvency filing,²⁸⁵ they do provide a timelier and surer method for protecting the already-earned pension and wage claims of employees.²⁸⁶

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 this development is largely driven by EU countries where some form of guarantee institution is mandated by law, other countries also have similar systems. However, there is much variation in coverage.

For instance, most countries with guarantee funds (with the United States being 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. Such claims are usually capped and limited to a certain period before the employer filed for insolvency.²⁸⁷

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.²⁸⁸ In such instances, there is less impact on the employee when insolvency is declared and less need for a pension guarantee fund.²⁸⁹ 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.²⁹⁰ 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

(“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.”).

²⁸⁵ See e.g., Council Directive 2008/94, *supra* note 207, at art. 3 (noting the member countries ability to designate the applicable period for claims under the guarantee funds); ILO Convention, *supra* note 210, at art. 12 (providing specific limitations upon guarantee schemes payment to eight weeks prior to an employer’s insolvency); 11 U.S.C. § 507(a)(4), (a)(5) (United States limitation upon claims to within 180 days of insolvency through PBGC); Eurofund, *Italy: Wage guarantee fund, solidarity agreements, bilateral bodies and wage guarantee fund in derogation* (2009) available at <http://www.eurofound.europa.eu/emire/ITALY/WAGESGUARANTEEFUNDICIG-IT.htm> (Italy providing up to 80% of lost pay under Cass Intergrazione Guadagni (CIG) fund).

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

²⁸⁷ See e.g., Nackan, *supra* note 205 (discussing impact and of Canadian Wage Earner Protection Program (WEPP) as well as its limitation of approximately a \$3,000 guarantee).

²⁸⁸ See generally *supra* Part IV. A.

²⁸⁹ See Sarra, *supra* note 35, at 48.

²⁹⁰ See HIRSCH ET AL., *supra* note 39, at 198-200.

in DC schemes are meted out in fairly frequent increments.²⁹¹ 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.²⁹² It is probably not surprising, therefore, 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.²⁹³

4. Distinction Between Priorities Given Different Pension Claims

Although countries that rely on defined contribution plans do not make this distinction, countries that still hold the bulk of occupational pension assets in defined benefit 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.²⁹⁴ As a general matter, outstanding pension contributions (whether for DB plans or DC plans) are given in the studied countries a preference in bankruptcy.²⁹⁵ 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).²⁹⁶ Such priorities can be without caps and for unlimited duration,²⁹⁷ but are more likely to be for a certain capped amount and for certain periods of time before the insolvency filing.²⁹⁸ Any amounts beyond the cap limit or beyond the protected time period are treated as unsecured claims.²⁹⁹

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).³⁰⁰ The lack of preference for such claims seems to be based on the notion that these are

²⁹¹ *Id.* at 199. 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.

²⁹² See Lappalainen et al., *supra* note 264, at 35.

²⁹³ See Part III. A (United States), III. B (Canada); Appendix *infra*, United Kingdom Country Section, at 76.

²⁹⁴ See Sarra, *supra* note 35, at 49.

²⁹⁵ *Id.* at 51. See also UNCITRAL Legislative Guide on Insolvency, *supra* note 118, at 272.

²⁹⁶ See UNCITRAL Legislative Guide on Insolvency, *supra* note 118, at 272 (“In a number of cases [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.”).

²⁹⁷ See e.g., Appendix *infra*, New Zealand Country Section, at 68; Slovenia Country Section, at 72.

²⁹⁸ See Johnson, *supra* note 11, at 8 (describing necessity of making capped or specified time restrictions when establishing employee benefit claims systems to keep cost burdens within operational range).

²⁹⁹ For an example, see the United States treatment of pre-petition wage and pension claims that exceed statutory cap amount. See *supra* note 136 and accompanying text.

³⁰⁰ See e.g., 11 U.S.C. section 507(a)(5) (United States); *supra* note 186 and accompanying text (Canada); Appendix *infra*, United Kingdom Country Section, at 76. 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 have felt the pain at the time they were promised. See Keating, *supra* note 95, 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.”).

less like wage claims which usually receive priority.³⁰¹ 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.³⁰²

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).³⁰³ 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).³⁰⁴ 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).³⁰⁵

It is also interesting that sometimes countries characterize outstanding pension contributions as a type of wage.³⁰⁶ 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.³⁰⁷ 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).³⁰⁸ Instead, in most countries, the guarantee fund becomes subrogated to the claims of the employees and stand in their place during the insolvency proceeding.³⁰⁹

Two significant points can be made here based on this subrogation dynamic. First, usually, but not always, the guarantee institution receives the same priority that the employee would have received

³⁰¹ See Stewart, *supra* note 3, at 2.

³⁰² *Id.* at 8-9.

³⁰³ See e.g., Appendix *infra*, Australia Country Section, at 49; Belgium Country Section, at 51; Denmark Country Section at 54.

³⁰⁴ See e.g., Appendix *infra*, at 64, 66, 75-76 (noting Japan, Luxembourg, Switzerland, and the United Kingdom recognize vacation pay as preferential). *But See* Appendix *infra*, at 67 (noting Mexico's refusal to recognize vacation pay as a wage claim).

³⁰⁵ 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 195 and accompanying text.

³⁰⁶ See e.g., Appendix *infra*, Denmark Country Profile, at 54; Iceland Country Section, at 60-61; Ireland Country Section, at 61-62.

³⁰⁷ See e.g., Appendix *infra*, Belgium Country Section, at 51; Denmark Country Profile, at 54; Iceland Country Section, at 60-61.

³⁰⁸ See Johnson, *supra* note 11, at 7.

³⁰⁹ See *id.* See e.g., Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 36(1) (noting right of Canadian government to be subrogated to any rights of employee for amounts distributed by Wage Earner Protection Program).

if they had pursue the claim in insolvency themselves.³¹⁰ 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.³¹¹ 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.³¹² 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).³¹³ 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.³¹⁴

7. Overall Treatment in Insolvency of Pension Versus 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.³¹⁵ I borrow from that approach and use a slightly modified three model version in this article in order to emphasize similarities the overall treatment of employee pension and other wage claims vary within the OECD countries.³¹⁶

Model One Countries provide bankruptcy priority, but provide little or no insurance or guarantee protections.³¹⁷ The four Model One countries include: 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.³¹⁸ Here, in order to focus on significant difference in approaches among this large group of countries, I introduce a further dichotomy between Robust Model 2 Countries and Limited Model 2 Countries. The basic difference is that Robust Model 2 Countries have priorities and guarantees for both pension and

³¹⁰ See e.g., Appendix *infra*, Finland Country Section, at 50 (noting that “[u]nder this pay security system, the state is subrogated to the claims of the employees in insolvency with the same priority”)

³¹¹ See Appendix *infra*, at 54, 74-75 (Denmark, Sweden, and Switzerland Country Sections, respectively).

³¹² See Sarra, *supra* note 35, at 28 (discussing how such funds are better situated than individual employees due to information, resources, and the size of claims being sought).

³¹³ See Johnson, *supra* note 11, at 7-8.

³¹⁴ See *supra* note 71 and accompanying text.

³¹⁵ See Johnson, *supra* note 11, at 4-6.

³¹⁶ 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.* at 4-5. 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 in her study described seven different types of priorities or preferences for wages and related claims. See Sarra, *supra* note 35, at 15.

³¹⁷ Johnson refers to these countries as his “Model two” countries. See Johnson, *supra* note 11, at 5.

³¹⁸ Under Johnson’s system, these countries are labeled “Model three” countries. *Id.* at 5-6

wage claims, while Limited Model 2 Countries generally have priorities and guarantees either for wage claims alone or are otherwise missing priorities or guarantee schemes.

The eleven Robust Model 2 Countries include: Belgium, Canada, Denmark, Iceland, Ireland, Israel, Italy, Norway, Sweden, Switzerland, and the United Kingdom. The Limited Model 2 approach is the one adopted by most OECD countries (15) and includes: Australia, Czech Republic, France, Greece, Hungary, Japan, Korea, Luxembourg, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, and the United States.

Finally, Model Three Countries provide no bankruptcy priority at all, but only guarantee systems.³¹⁹ The four Model Three Countries are: Austria, Estonia, Finland, and Germany.

Of course, even among these four enumerated models, there are significant overlap 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 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.

All in all, as will be illustrated through these Tables, most OECD countries, including the United States and Canada, are Model Two Countries, who have adopted, at least to some degree, hybrid systems which 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. However, as noted above, even among Model Two

³¹⁹ These are “Model four” countries under Johnson’s scheme. *Id.* at 6.

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. Whereas Canada provides super-priorities for pension contribution and some wage claims in insolvency in tandem with a national wage guarantee scheme (WEPPA),³²⁰ 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 defined benefit plans only), and 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 60 days notices to covered employees).³²¹

Table 1. Summary of OECD Countries' Treatment of Pension Claims During Insolvency By Type of Pension Plan

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, 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)

Table 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, Korea, Luxembourg, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, United States (15)

³²⁰ See *supra* Part III. B.

³²¹ See *supra* Part III. A.

Country Model Three (No or Limited Bankruptcy Priority, But Some Form of Guarantee)	Austria, Estonia, Finland, Germany (4)
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Table 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: wages, vac., severance, and termination pay	None	GEERS – 3 mos wages; 16 wks. wages vac., sev., term.	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 mos. 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 mos.	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 mos. 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 information
15. Ireland	3 rd Priority for pension contributions; no priority for unfunded pension liabilities	3 rd 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 creds.	Treated like wages: limited to twice avg. 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 mos., capped	Yes, at least as far as wage guarantee; not clear on PFA
19. 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 mos. 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 unemployment pays for 12 mo.	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 unemployment fund – 3 months wages only	Could not find pertinent information
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 wks. wages; 6 wks. holiday; 12 wks 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 unemployment scheme and WARN notice scheme	Yes, PBGC subrogated but without any priority in most cases

Table 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, 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, 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, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom

Table 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), 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, 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,

V. CONCLUSION

This comparative study of the international treatment of pension and wage claims in insolvency proceedings by the thirty-four members of the Organization of Economic Cooperation and Development (OECD) makes clear 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. 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 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, though there is still significant variation with 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.

One possibility to provide greater protection to public sector or private sector employees when their employers becomes insolvent is illustrated by the operation of the Canadian Wage Earner Protection Program Act (WEPPA) of 2008 in tandem with Canadian bankruptcy law. This hybrid approach appears to provide robust protection for most employment claims during employer insolvency in a way that the American system currently does not. 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 advanced economies in providing protection to employee pension and other wage claims (including retiree medical benefit claims) when employers becomes insolvent.

The best option at this point would be for the United States Congress to undertake a study of the Canadian bankruptcy laws and WEPPA 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, this article outlines potential legislation for the American Congress to consider.

This scheme would provide heightened priorities to both pension contribution claims in the defined benefit plan and defined contribution plan context and to a broad range of wage claims in both corporate and municipal bankruptcies. In tandem 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 to a predetermined amount, and for a specified period of time before the insolvency filing. Such a scheme would be funded by both insurance premiums placed on employers based on risk assessments, as well as based on 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 risk of insolvency should be placed through an insurance fund on employers prior to an insolvency than on employees and other general creditors after an insolvency has already occurred.

DRAFT

APPENDIX

ANALYSIS OF OECD COUNTRIES TREATMENT OF PENSIONS AND EMPLOYMENT BENEFIT CLAIMS IN INSOLVENCY AND GUARANTEE SCHEMES

(CANADA AND 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 paper) 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. This report also assumes that although insolvency processes work differently in some countries, employee contracts are terminated instantly in the event of employer liquidations. 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. When 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).

1. Australia

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 12% 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 the liquidation of companies, section 556(1) of the Corporations Act 2001 provides a hierarchy of claims that are given priority 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.

As far as the order of priorities under the Corporations Act, wages, superannuation contributions and superannuation guarantee charges outrank injury compensation, which outranks leave of absence pay, which outrank retrenchment payments.

In all, 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, the *General Employee Entitlements and Redundancy Scheme (GEERS)*, pays up to 3 months unpaid wages and up to 16 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

Pensions

Pensions are not granted any preference under Austrian insolvency law. However, Austria allows employees to be "preferential creditors" for 50% 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 24 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 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

Pensions

In Belgium, occupational pensions are generally set up through 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 7,500 (as of 2008); (2) termination pay up to EUR 7,500 (as of 2008 and adjusted every two years); and (3) old-age indemnities for workers 60 years and older. Excluded from the cap on benefits is 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 het geval van sluiting van ondernemingen ontslagen werknemers-Le fonds d'indemnisation des travailleurs licenciés en cas de fermeture d'entreprise*, 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 15 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

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 10%), 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.

More recently as of 2008, Chile has experimented with occupational pension plans of the DC 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.

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 2,472, 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

Pensions

The Czech Republic does not have an occupational pension system. However, there are some elements 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 (Act No. 426/2011 Coll.) is a true occupational pension system, as it is up to the insured to decide whether to use up to 3 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, there is no legally established obligation of the employer 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 Act No. 182/2006 Coll.,

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 Act No. 118/2000 Coll., on protection of employees with insolvency of employer. 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 70% of the insolvent employers' assets and then 30% 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 Labor office then takes the place of the employee as a creditor in the insolvency proceeding.

6. Denmark

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 2/3 of this pension contribution, whereas the final 1/3 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 employee salary and employees contribute about five percent of their salary. 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 (*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 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

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 90 per cent 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.

8. Finland

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 (69% of all the insured in 2012), company pension funds (1% of all the insured in 2012) and industry-wide pension funds (1% of all the insured in 2012). The management of pensions of public sector employees is, in turn, with a public pension institution called Keva (28% 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.

In addition to the mandatory pension schemes, there are voluntary private pension schemes paid by employers. These pension insurance policies are sold by private insurance 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 5% 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, the bankruptcy of an employer 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. However, the pension insurance companies (and not the employees) 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 15,200 Euros per employee (Section 9 of the Act). The average monthly wage in Finland in 2012 was 3,100 Euros.

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

9. France

Pensions

This is not a central topic in France, since 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 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.

So 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 in order to make sure that the benefits will be paid.

In case of insolvency of the employer 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.

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 6 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 60 days before a bankruptcy case is opened, up to 6,172 euros. 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); it also covers vacation pay up to a special cap (30 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

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*) 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 7,875 (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.

Occupational pension insolvency is regulated by §§ 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 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

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 6th in priority according to Article 154 of Law 3588/2007. As with wages discussed below, these claims are limited to amounts arising in 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 (the Insolvency Code), 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.

12. Hungary

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 percent to 0.4 percent 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 6 months' wages. There is no priority for vacation pay, termination pay, or traveling and other expenses.

Additionally, a government wage guarantee fund (Főváros 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

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 12% of their wages contributed to funds run by pension managing companies, with 8% 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 insolvency of the employer only has an impact on 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 12% minimum contribution.

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

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' (Employer's 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 12 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 €3,174; (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) 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

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

Other Employee Benefits

In the event of insolvency, section 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 12 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 10 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

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 which 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 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 15 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

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 DB variety gets little protection in the bankruptcy process and pension claims are unsecured. On the other hand, pension funds which 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, that provide private pension benefits, but also manage 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 which 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.

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 80% 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

Pensions

There is no legislation in Korea that provides for the priority of retirement pension claims under the Retirement Pension Plan. This 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 severance pay claim only receive a preferred claim status. Only retirement allowances for the last 3 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 90 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 30 days average wages to their employees who have worked for a period of 1 full year.

19. Luxembourg

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= € 9,657.18. 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 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 that arise 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

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.

However, to the extent that the insolvent employer has failed to make all pension contributions to the pension fund at the time of the bankruptcy, 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.

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 12 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 month salary. There is no priority for vacation pay outstanding.

There is no wage protection fund or guaranteed insurance for wage claims during insolvency.

21. Netherlands

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 5% 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 12 months (maximum) are paid by the unemployment benefit fund directly to the pension fund (see discussion of the UvV 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 are the main protection measure for pension beneficiaries in the Netherlands.

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 UvV) 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 13 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, since such statutory payments do not exist under Dutch law.

The UvV 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

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. Starting April 2013, the minimum contribution rate for employers and employees is increasing from 2% of gross salary or wages to 3% (employees can also choose to contribute 4% or 8%). 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 4 months preceding liquidation, (2) holiday pay, (3) redundancy (i.e., severance and terminations) entitlements, (4) deductions from wages, and (5) various other payments, up to an aggregate maximum of \$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

Pensions

Norway has a mandatory occupational pension scheme since 2007, whereby employers must contribute at least 2% 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 24 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.

24. Poland

Pensions

Occupational pension plans are maintained separate and apart 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 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 Article 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 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 insolvency of the employer, 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

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 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 to be subrogated to the claims of employees in the company insolvency proceeding, with the same priority that employees would have had.

26. Slovakia

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 month's pay based on the 18 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).

27. Slovenia

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 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

Pensions

Pensions do not receive any preference under Spanish bankruptcy law. Pension funds (which exist in the DB 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 30 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 12 months, limited to three times the minimum wage.

FOGASA is subrogated to employee claims in insolvency with the same priority.

29. Sweden

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 10 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 5% 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 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

Pensions

Occupational pensions are established independent of 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* (“SDBL”) sets up three different classes of unsecured creditors for the distribution out of the proceeds of the entire remainder of the 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, with employee contributions being 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

Pensions

As of 2001, Turkey has established a system of fully funded, voluntary DC account 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 17 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.

Section 33 of the Turkish Labor Law establishes a wage guarantee fund within the Unemployment Insurance Fund, which is funded by 1 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 the wage guarantee fund has any subrogation rights in insolvency if it pays out benefits to employees.

32. United Kingdom

Pensions

With both occupational defined benefit and defined contribution 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, outstanding pension contributions are treated as preferred (behind secured creditors under Category 4 of the Insolvency Act 1986, Schedule 6), whereas 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, so rank ahead of everyone except secured creditors. This 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 the NEST scheme, the same preferential priority (for one year prior to the insolvency) applies that applies to all other unpaid contributions to any UK 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. However, a 100% level of compensation 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, which among other things, may 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 is an important issue for pension claims in insolvency because the recent Nortel litigation concerns the priority of Financial Support Directives under UK 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 UK 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 holiday are treated as wages for these purposes and receive preference for the 12 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 week wages, up to six weeks holiday pay, one week's notice pay (i.e., severance pay) for each complete year of service up to a maximum of 12 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 30-week pay. All these payments are capped at the statutory limit which, as of 2013, was 450 pounds per week or up to 13,500 pound for up to 30 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.