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The Interplay Between the Foreign Sovereign Immunities Act and ERISA: The Effects of *Gates v. Victor Fine Foods*

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CASE NOTE

THE INTERPLAY BETWEEN THE FOREIGN SOVEREIGN IMMUNITIES ACT AND ERISA: THE EFFECTS OF *GATES v. VICTOR FINE FOODS*¹

I.	INTRODUCTION	576
II.	<i>GATES v. VICTOR FINE FOODS</i>	578
III.	THE HISTORY OF THE FSIA AND CONGRESS' INTENT	581
	A. <i>What Constitutes a "Foreign State" Under the FSIA</i>	581
	B. <i>The Commercial Activities Exception and the Nexus Requirement</i>	583
	C. <i>The Eastern District of California's FSIA Nexus Analysis Under COBRA</i>	585
IV.	A BRIEF HISTORY OF ERISA	587
	A. <i>Past Abuses ERISA Was Enacted to Prevent</i>	587
	B. <i>COBRA</i>	588
	C. <i>Remedies Available Under ERISA for Noncompliance with COBRA</i>	588
	D. <i>Plans Not Covered by ERISA or COBRA</i>	589
	1. <i>Government Plans</i>	589

1. *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995).

2. Foreign Plans.....	589
V. CONCLUSION.....	591

I. INTRODUCTION

Foreign direct investors spent an all time high of \$80.5 billion in 1996 to acquire or establish business in the United States.² The 1996 outlay was up \$23.3 billion from 1995.³ It is estimated that U.S. affiliates of foreign-owned corporations employ over four million American citizens.⁴

Due to the attractiveness of health care benefits to prospective employees, employers have been inclined to offer health care packages to their employees.⁵ However, as the costs of health-care continue to rise, more and more employers are attempting to cut back on their health care costs.⁶ At the same time, Congress is looking for ways to require employers to increase the availability of health care to their employees, leading to more regulation of health benefits.⁷

The increasing numbers of foreign employers and the growing importance of health care have caused two pieces of U.S. legislation to clash, namely, the Foreign Sovereign Immunities Act (FSIA),⁸ which governs the jurisdiction of U.S. courts over foreign-government-owned corporations, and the Employee Retirement Income Security Act (ERISA),⁹ which governs employee benefits.

2. Mahnaz Fahim-Nader & William J. Zeile, U.S. DEPT. OF COMMERCE, BUREAU OF ECONOMIC ANALYSIS, *Foreign Direct Investment in the United States: New Investment in 1996 and Affiliate Operations in 1995* <<http://www.bea.doc.gov/bea/ai/0697iid/maintext.htm>>.

3. *Id.*

4. U.S. DEPT. OF COMMERCE, ECONOMICS AND STATISTICS ADMINISTRATION, BUREAU OF ECONOMIC ANALYSIS, *FOREIGN DIRECT INVESTMENT IN THE UNITED STATES, OPERATIONS OF U.S. AFFILIATES OF FOREIGN COMPANIES, PRELIMINARY 1995 ESTIMATES* (1997).

5. MICHAEL J. CANAN & WILLIAM D. MITCHELL, *EMPLOYEE FRINGE AND WELFARE BENEFIT PLANS* § 10.1 (1997).

6. *Id.*

7. *Id.*

8. 28 U.S.C. §§ 1330, 1602-1611 (1994) [hereinafter FSIA].

9. 29 U.S.C. §§ 1001 - 1461 (1994) [hereinafter ERISA].

In a recent Ninth Circuit opinion, *Gates v. Victor Fine Foods*,¹⁰ a Canadian corporation successfully utilized the FSIA to avoid any liability to its employees under certain provisions of ERISA after its subsidiary closed a plant in California. Allegedly, the employer did not comply with two provisions of ERISA: (1) 29 U.S.C. §§ 1161-1168,¹¹ which requires notice to plan participants of the opportunity to continue their health care coverage, and (2) 29 U.S.C. § 1140,¹² which prevents interference with employees' rights protected by Title I of ERISA (i.e., the employees' right to obtain pre-plan termination and continuation of their health care coverage benefits). The Ninth Circuit based its opinion solely on the FSIA without examining the merits of the employees' claims under ERISA.¹³

This Case Note analyzes the implications of the Ninth Circuit's expansive use of the FSIA on the facts of *Gates* and the Ninth Circuit's rejection of the district court's analysis of the FSIA in conjunction with certain provisions of ERISA. The Case Note concludes that if other circuits follow the Ninth Circuit's opinion, the misuse of the FSIA by foreign-owned corporations will defeat Congress' intent when enacting ERISA, thereby taking away health care benefits afforded U.S. employees.

Part II of this Case Note examines the facts and courts' analyses of *Gates v. Victor Fine Foods*¹⁴ under the FSIA at both the trial and appellate levels. Part III provides a brief history of the FSIA including the current conflicts over what constitutes a "foreign state" and when sovereign immunity no longer applies due to the foreign state's commercial activities. Part IV reviews Congress' intent when enacting ERISA and the amendments under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), as well as the remedies available for noncompliance, and plans not covered by ERISA. This Case Note concludes with suggested amendments to the FSIA which would clarify the limitations of sovereign immunity placed on a government conducting business in the United States.

10. *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995).

11. 29 U.S.C. §§ 1161-1168 (1994) is the Consolidated Omnibus Budget Reconciliation Act of 1985 enacted into law in 1986, which Act expanded Title I of ERISA [hereinafter COBRA].

12. 29 U.S.C. § 1140 is part of ERISA. See *supra*, note 9.

13. *Gates*, 54 F.3d at 1457.

14. *Id.*

II. *GATES V. VICTOR FINE FOODS*

In *Gates v. Victor Fine Foods*,¹⁵ former employees of Golden Gate Fresh Foods d/b/a Victor Fine Foods brought a class action suit against their employer alleging various violations of COBRA.¹⁶ Golden Gate Fresh Foods (Golden Gate), a pork processing plant located in California, was owned by Fletcher's Fine Foods (Fletcher's), a subsidiary of Alberta Pork, a Canadian corporation. All three entities (Golden Gate, Fletcher's, and Alberta Pork) were included as defendants in the employees' suit.

In the district court, Alberta Pork and Fletcher's moved to dismiss the action under the FSIA for lack of subject matter jurisdiction.¹⁷ The district court did not opine as to whether Alberta Pork and Fletcher's were entities protected under the FSIA.¹⁸ The court assumed that they were protected but that they were engaging in a commercial activity by employing U.S. citizens in the United States and that this activity negated their immunity.¹⁹ The district court further analyzed the defendants' corporate structure under COBRA and determined that Alberta Pork and Fletcher's were "employers" under COBRA's definition of "employer"²⁰; thus, the court had subject matter jurisdiction

15. *Id.*

16. The employees alleged as follows:

(2) [V]iolation of the continuation rules of the Consolidated Omnibus Budget Reconciliation Act of 1985 ... for failure to give the Plan participants notice of entitlement to, and actual opportunity to convert to, continuation health care coverage upon their terminations from employment; (3) breach of Plan obligations for failure to pay benefits for covered health care services rendered before the Plan was terminated; (4) breach of fiduciary duty for failure to cause the Plan to pay covered pre-Plan-termination benefits and to give notice of, and make available, continuation health care coverage; (5) and violation of section 510 of the Employee Retirement Income Security Act ... for interfering with the ...employees' opportunities to obtain pre-Plan-termination and continuation health care coverage benefits by terminating the Plan.

Id. at 1459.

17. *Id.*

18. *Id.*

19. *Gates v. Victor Fine Foods*, No. Civ. S-92-095 LKK, at 30 (E.D.Ca. May 24, 1993).

20. 26 U.S.C. § 1563(a)(1) (1994), quoted in *Gates*, 54 F.3d at 1463 as follows:

(1) *Parent-subsidiary control group*. One or more chains of corporations connected through stock ownership with a common parent corporation if

(A) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of each of the corporations,

over a foreign sovereign's commercial activity of employment of U.S. citizens in the United States. Alberta Pork and Fletcher's appealed the Eastern District's decision to the Ninth Circuit.²¹

The Ninth Circuit approached the problem in a different way. It sought to determine whether or not each defendant was a foreign sovereign subject to immunity under the FSIA, and then it analyzed whether the commercial activities exception²² applied. The Ninth Circuit determined that Alberta Pork was a marketing board for hog producers authorized "to issue regulations requiring producers, among other things, to produce according to quotas,...to furnish information relating to the production and marketing of specified products,...and to pay service charges."²³ Secondly, it noted that Alberta Pork was supervised by the governmental body called the Alberta Agricultural Products Marketing Council, and as a member of that council Alberta Pork was immune under Canadian law from liability for acts performed in good faith in carrying out its duties. These factors led the court to hold that Alberta Pork was an agency or instrumentality of the Province of Alberta.²⁴ Finally, the court rejected the employees' claims that even if Alberta Pork was considered an agency or instrumentality of Canada, its employment of U.S. citizens constituted commercial activities under the FSIA making immunity inapplicable.²⁵

The appellate court came to the opposite conclusion with respect to Fletcher's. The FSIA provides that in order for an entity to be entitled to immunity, the entity must be a foreign state which includes "a political subdivision of a foreign state or an agency or instrumentality of a foreign state."²⁶ An agency or instrumentality is defined as "an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other

except the common parent corporation, is owned ... by one or more of the other corporations; and

(B) the common parent corporation owns ... stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of at least one of the other corporations, excluding, in computing such voting power or value, stock owned directly by such other corporations.

21. *Gates*, 54 F.3d at 1459.

22. For an explanation of the commercial activities exception see *infra*, Part III.B.

23. *Gates*, 54 F.3d at 1461.

24. *Id.*

25. *Id.* at 1459.

26. 28 U.S.C. § 1603(a) (1994).

ownership interest is owned by a foreign state or political subdivision thereof."²⁷ Despite the fact that Fletcher's was completely owned by Alberta Pork, an agency or instrumentality of the Province of Alberta, the court denied immunity to Fletcher's by drawing a distinction between an "agency or instrumentality" and a "political subdivision thereof."²⁸

The Ninth Circuit found the district court's analysis under COBRA unpersuasive.²⁹ The appellate court opined that the district court had placed the "substantive cart before the jurisdictional horse."³⁰ The appellate court then rejected the district court's use of COBRA's definition of "employer" to decide the FSIA question by providing a nexus between the employees' claims of COBRA violations and the employer's commercial act of employing U.S. citizens. COBRA was not used by the district court solely to determine jurisdiction but also to clarify the nexus between the commercial activity and the employees' claims as required under the FSIA. The district court merely bypassed the foreign sovereign analysis because the corporations were engaging in a commercial activity in the United States. Under the district court's analysis, because the corporations fell under the commercial activities exception of the FSIA, a foreign sovereign analysis was unnecessary.

This Case Note asserts that the Ninth Circuit erred in rejecting the district court's analysis, and that in employee benefits litigation involving foreign-government-owned corporations, the FSIA should be read in conjunction with ERISA to create the

27. 28 U.S.C. § 1603(b)(2) (1994) (emphasis added).

28. *Gates*, 54 F.3d at 1462 ("[Fletcher's Fine Foods] is wholly owned by an agency or instrumentality of a foreign state; however, [Fletcher's Fine Foods] is not owned by 'a foreign state or political subdivision thereof,' as required by the statute.").

29. *Id.* at 1464. The case primarily relied on by the Ninth Circuit in rejecting the district court's analysis under COBRA was *NYSA-ILA Pension Trust Fund v. Garuda Indonesia*, 7 F.3d 35 (2d Cir. 1993). In *NYSA-ILA*, a pension fund that was having problems collecting on a judgment entered against an Indonesian shipping company for ERISA violations, sued other Indonesian corporations under the "parent-subsidary control group" provisions of ERISA. *NYSA-ILA*, 7 F.3d at 37-38. The Second Circuit did not find a sufficient nexus between these corporations' activities and the pension fund's claim. *Id.* at 39. The facts of *NYSA-ILA* are clearly distinguishable from *Gates*. In *Gates*, the employees were suing the parent and its subsidiaries, which were performing the same commercial activities in the United States. *Gates*, 54 F.3d at 1459. However, in *NYSA-ILA*, the pension fund was trying to find a deep pocket in other Indonesian corporations that were performing different activities (banking and operating a commercial airlines) completely unrelated to the commercial activities of the Indonesian company originally found liable. *NYSA-ILA*, 7 F.3d at 38-39.

30. *Gates*, 59 F.3d at 1464.

necessary nexus between employment-based claims of employees and the employment activity of the corporation. Without this analysis, the employees' claims will not be "based on" the employer's commercial activity as required by the FSIA.³¹

III. THE HISTORY OF THE FSIA AND CONGRESS' INTENT

Although at one time recognition of sovereign immunity was commonplace, during this century, a number of countries have modified that position.³² Several countries have adopted the "restrictive theory" of sovereign immunity, which limits sovereign immunity to purely public acts and excepts commercial activities.³³ The United States, through its Department of State, officially adopted the restrictive theory of sovereign immunity in 1952.³⁴ However, the determination of whether immunity was applicable to a foreign sovereign still remained in the hands of the State Department.³⁵ This put the United States at odds with most other countries, which gave to their judiciaries the authority to make the determination of whether or not sovereign immunity applied.³⁶ To bring the United States in line with other countries, internal studies of possible sovereign immunities legislation developed in the mid-1960s, and in 1976, the "restrictive theory" of sovereign immunity was incorporated in the FSIA, which left its applicability to be determined by the courts.³⁷

A. *What Constitutes a "Foreign State" Under the FSIA?*

The language of the statute does not provide any insight in determining what constitutes a "foreign state" in the corporate arena. Under the language of the FSIA, an agency or instrumentality of a foreign state is an entity a "majority of whose shares

31. See *infra* Part III.B.

32. H.R. REP. NO. 94-1487 at 8-9 (1976), available in 1976 WL 14078 (Leg.Hist.) [hereinafter House Report].

33. *Id.*

34. Letter from Jack B. Tate, Acting Legal Advisor to the Department of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), reprinted in 26 DEP'T STATE BULL. 984 (1952).

35. House Report, *supra* note 32, at 8-9.

36. *Id.* at 9.

37. *Id.* at 12.

or other ownership interest *is owned by a foreign state or political subdivision* thereof.”³⁸ Because this provision of the FSIA does not specifically reference interest owned by an “agency or instrumentality,” courts have disagreed over what corporate structures satisfy the ownership requirements under Section 1603(b)(2).³⁹

In *Gates*, the Ninth Circuit held that the ability to claim immunity does not extend beyond the first tier of ownership.⁴⁰ Under that view, if a foreign government owns a corporation operating in the United States and that corporation owns another corporation or has a subsidiary, the parent corporation is protected under the FSIA but its subsidiary is not. However, the Seventh Circuit has held that foreign governments may “pool” or “tier” their ownership in a corporation thereby enabling their subsidiaries to come under the umbrella of the FSIA.⁴¹ Contrary to the Ninth Circuit’s holding in *Gates*, the Seventh Circuit permitted a foreign corporation, which was entirely owned by an agency or instrumentality of a foreign sovereign, to claim immunity.⁴²

The Seventh Circuit referred to the legislative history of the FSIA⁴³ in determining Congress’ intent and affirmed the lower court’s decision to not follow the *Gates*’ interpretation.⁴⁴ Once an

38. 28 U.S.C. 1603(b)(2) (1994) (emphasis added).

39. Michael Baylson & Clare Ann Fitzgerald, *Courts Disagree on the Extent to which the Foreign Sovereign Immunities Act Permits Pooling of Interests and Tiering of Subsidiaries by Foreign Governments*, NAT’L L.J., Feb. 3, 1997, at B7.

40. *Corporacion Mexicana de Servicios Maritimos v. M/T Respect*, 89 F.3d 650, 655 (9th Cir. 1996); *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995).

41. *In re Air Crash Disaster near Roselawn, Indiana* on Oct. 31, 1994, 909 F. Supp. 1083, 1097 (N.D.Ill. 1995), *aff’d*, 96 F.3d 932 (7th Cir. 1996).

42. *Id.*

43. *See generally* House Report, *supra* note 32.

44. *In re Air Crash Disaster near Roselawn*, 909 F. Supp. at 1095-96. The district court stated:

We respectfully do not agree, however, that this superfluous reference to political subdivisions compels the conclusion that the term foreign state as used in § 1603(b)(2) was intended by Congress to refer to only the sovereign states themselves and not their agencies or instrumentalities. Such a conclusion flies in the face of both the plain language of § 1603(a) as well as the House Report’s analysis of § 1603(a), wherein the House Judiciary Committee observed: ‘Subsection (a) defines the term foreign state as used in all provisions of chapter 97 [the “Jurisdictional Immunities of Foreign States” chapter of the United States Code] The *Gates* court’s suggestion that the term foreign state as used in § 1603(b)(2) refers only to the sovereign state itself cannot be reconciled with this clear statement of legislative intent, nor

entity has been found to constitute a "foreign state," the FSIA's doctrine of sovereign immunity applies, and the court lacks jurisdiction over the foreign corporation unless the corporation's activities fall under an exception.⁴⁵

B. The Commercial Activities Exception and the Nexus Requirement

The most widely litigated exception to the FSIA is the commercial activities exception:⁴⁶

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case...*(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.*⁴⁷

The statute, however, does not define what constitutes a "commercial activity." Even the House Report fails to provide a definitive list of specific acts that are classified as commercial activities. In fact, the House Report specifically grants the judiciary great leeway in determining what actually constitutes a foreign government's "commercial activity."⁴⁸ The freedom given

the language of the statute itself.

Id.

45. *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) ("Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state.").

46. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992) ("The most significant of the FSIA's exceptions ...is the 'commercial' exception of §1605(a)(2)"); William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?* 65 TUL. L. REV. 535, 575 (1991) (characterizing the commercial exception of § 1605(a)(2) as the most commonly invoked exception).

47. 28 U.S.C. § 1605(a)(2) (1994) (emphasis added).

48. House Report, *supra* note 32, at 16 ("The courts would have a great deal of latitude in determining what is a 'commercial activity' for purposes of this bill."). The House Report does list a few examples, e.g., a foreign government's sale of a service or a product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation, but this list is not all inclusive. *Id.*

to the judiciary has led to confusion on what will actually be deemed a "commercial activity." One such example is the commercial activity of employing U.S. citizens.

Even though the House Report on the FSIA clearly indicates that the employment of American citizens is to be considered "commercial in nature,"⁴⁹ a foreign government's employment of American citizens has not been determined to be a commercial activity per se.⁵⁰ That the employee is an American citizen is not enough to render the activity commercial. The courts will also review the employment activities to determine if those activities are commercial in nature.⁵¹ In *Holden v. Canadian Consulate*,⁵² the Ninth Circuit denied immunity to the Canadian government when a female U.S. citizen sued for employment discrimination when the Canadian Consulate in California closed its offices and fired her but retained a younger male employee.⁵³ The Ninth Circuit reviewed the U.S. Supreme Court's interpretation of "commercial activity" in *Saudi Arabia v. Nelson*.⁵⁴ "A foreign sovereign engages in commercial activity when it exercises 'only those powers that can also be exercised by private citizens,' versus those 'powers peculiar to sovereigns.'"⁵⁵ The Ninth Circuit acknowledged that Holden was an American citizen but also reviewed the activities she performed as an employee at the Canadian consulate. "The nature of Holden's work, promotion of products, is regularly done by private persons. As such, her employment was seen as a commercial activity, and thus the Consulate was not entitled to sovereign immunity under the FSIA."⁵⁶

The Ninth Circuit's analysis of the commercial activities exception and the required nexus in *Gates* is contrary to the later

49. *Id.* at 16 ("Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens...by the foreign state in the United States.") (emphasis added).

50. *Holden v. Canadian Consulate*, 92 F.3d 918, 921 (9th Cir. 1996) (citing *Segni v. Commercial Office of Spain*, 835 F.2d 160, 165 (7th Cir. 1987)).

51. 28 U.S.C. § 1603(d) (1994) ("A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. *The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.*") (emphasis added).

52. *Holden*, 92 F.3d at 918.

53. *Id.* at 920.

54. *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993).

55. *Holden*, 92 F.3d at 920 (citing *Nelson*, 507 U.S. at 360).

56. *Id.* at 922.

analysis in *Holden*. Both *Holden* and *Gates* were employment-related causes of action that resulted from terminations of employment. However, in *Holden* the Ninth Circuit permitted the nexus to be between the employment and the commercial activity being performed by the employee, thereby satisfying the FSIA's requirements that the claim be based upon the employer's commercial activities. Contrary to its *Holden* analysis, the Ninth Circuit's interpretation of the commercial activities exception and the required nexus in the *Gates* opinion does not allow the nexus to be between employment and the commercial activity being performed. Under *Gates* an employee will virtually never be able to connect her employment-based claim on the corporation's commercial activity.⁵⁷ In *Gates*, the Ninth Circuit clearly misconstrued the commercial activity exception and the required nexus to the employees' claims.

C. The Eastern District of California's FSIA Nexus Analysis Under COBRA

Due to the fact that the employees in *Gates* worked for a subsidiary of Alberta Pork and Fletcher's (contrary to the facts in *Holden*), the *Gates* court had to also determine whether the ownership of the subsidiary was commercial in nature and sufficiently connected to the employees' claims under the FSIA. To decide this issue, the Eastern District of California's opinion interpreted the FSIA in conjunction with ERISA as Congress had intended when it enacted both pieces of legislation, i.e., negating a foreign sovereign's immunity when it performs a commercial activity and protecting employees' rights in their welfare benefit plans provided by employers. Because the FSIA's commercial activities exception requires analysis of an employee's duties, the district court in *Gates* analyzed the FSIA's question in the context of ERISA's definition of "employer."⁵⁸ The district court pre-

57. *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1466 (9th Cir. 1995).

Although the United States has enacted the restrictive principle of sovereign immunity, whereby foreign states do not enjoy immunity over claims based on their commercial activities, a foreign state does not lose its immunity under the Foreign Sovereign Immunities Act merely by engaging in some commercial conduct no matter how unrelated to the cause of action in question.

Id. (emphasis added).

58. *Gates v. Victor Fine Foods*, No. Civ. S-92-095 LKK, at 30 (E.D.Ca. May 24, 1993). In the district court's order determining subject matter jurisdiction, the court dis-

sumed that Alberta Pork and Fletcher's were protected under the FSIA and looked to whether the commercial activities exception applied.⁵⁹ The court deemed the matters sued upon "commercial in character" and, therefore, the entities were not immune from suit.⁶⁰ Pursuant to the legislative history giving the judiciary great latitude in determining what constitutes a commercial activity under the FSIA,⁶¹ the district court adhered to the language in the House Report and held that the employment of U.S. citizens constituted a commercial activity.⁶²

The Court then looked to ERISA, specifically the provisions of COBRA defining "employer," to satisfy the required nexus between the employees' claims and the commercial activity.⁶³ The district court held that Alberta Pork and Fletcher's were "employers" under COBRA.⁶⁴ Therefore, the employees' COBRA claims were based on Alberta Pork's and Fletcher's commercial activities of employing U.S. citizens in the United States.⁶⁵

The district court's analysis maintained both the restrictive theory of the FSIA by refusing to permit a foreign sovereign's commercial activity to be immune from jurisdiction⁶⁶ and Congress' intent when enacting ERISA—"to protect...the interests of participants in employee benefit plans...by providing appropriate remedies, sanctions, and ready access to the Federal courts."⁶⁷ In so doing, the court sought to protect those employee interests that Congress sought to protect when enacting ERISA.

cussed all the aspects of the employees' motions for summary judgment under ERISA and then discussed jurisdiction under the FSIA and ERISA. *Id.* Even though not specifically mentioned in the Ninth Circuit's opinion, if the jurisdictional determination had been placed at the beginning of the order, the district court's argument might have been given the true consideration that it deserves.

59. *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018, 1021 (9th Cir. 1987), cited in *Gates v. Victor Fine Foods*, No. Civ. S-92-095 LKK, at 27 (E.D. Ca. May 24, 1993).

60. *Gates*, No. Civ. S-92-095 LKK at 27.

61. See *supra* text accompanying note 48.

62. *Gates*, No. Civ. S-92-095 LKK at 30.

63. *Id.*

64. See *supra* text accompanying note 20.

65. *Gates*, No. Civ. S-92-095 LKK at 30 ("The FSIA provides this court with jurisdiction over the 'commercial activity' and not over 'the claim.' Because plaintiffs' claims are all based on defendants' status as an employer, the court has jurisdiction over all the causes of action.")

66. House Report, *supra* note 32, at 14.

67. Arnold & Porter Legislative History of P.L. 93-406, available in WESTLAW, A&P PL 93-406, 1974 H.R. 2 at *5.

IV. A BRIEF HISTORY OF ERISA

ERISA was enacted to protect employees' rights with regard to pension and welfare benefit plans.⁶⁸ Pension plans provide employees with income after retirement,⁶⁹ and welfare benefit plans provide employees with other benefits such as health care coverage, disability insurance, group life insurance programs, supplemental unemployment benefit plans, and severance pay.⁷⁰ Since *Gates* specifically involves a health care benefit plan, this Part will focus on the provisions of ERISA relating to health care that are contained in sections added by the COBRA.⁷¹

A. Past Abuses ERISA Was Enacted to Prevent

Prior to ERISA, employers often mismanaged funds to the point where employees would lose their accumulated benefits due to inadequate funding.⁷² ERISA was designed as a regulatory mechanism to end employer abuses by providing standards and safeguards to insure the financial stability of pension plans. In addition, ERISA requires that employees be provided with information about their pension and benefit plans⁷³—such information as being able to continue the employee's health care coverage after employment terminates⁷⁴ or being advised that the employee has a right to convert the existing group insurance policy to an individual policy.⁷⁵

68. *Id.* ("It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans ... by requiring the disclosure and reporting to participants ... of financial and other information ...").

69. 29 U.S.C. § 1002(2)(A) (1994).

70. 29 U.S.C. § 1002(1)(A) (1994).

71. 29 U.S.C. §§ 1161-68 (1994).

72. Stephen E. Ehlers, *ERISA and Employee Benefit Plans—An Overview for the General Practitioner*, 64-OCT N.Y. ST. B.J., 38 (1992).

73. See *supra* text accompanying note 68.

74. 29 U.S.C. §§ 1162(3), 1164(1) (1994).

75. 29 U.S.C. § 1162 (1994). In a District of Columbia case, an employer was held liable for the out-of-pocket medical expenses incurred by an employee when the employee was not informed that he was able to convert his group policy into an individual policy with the same coverage. *Eddy v. Colonial Life Insurance Co.*, 919 F.2d 747 (D.C. Cir. 1990). The Circuit Court determined that the agent breached his fiduciary duty under ERISA when he did not completely inform the employee of his options under the group policy. *Id.* at 748.

B. COBRA

Congress enacted COBRA in 1986 to provide employees with continuing access to medical care if certain events occur⁷⁶ that cause their employer to discontinue their coverage.⁷⁷ COBRA affords employees an opportunity to continue their insurance coverage after the termination of their employment for virtually any reason except gross misconduct.⁷⁸ However, if the employer terminates all health care coverage, it is not required to provide continued coverage after termination.⁷⁹

C. Remedies Available Under ERISA for Noncompliance with COBRA

If a court finds that the statutory notice requirements of COBRA⁸⁰ have not been complied with, it may impose a statutory fine of up to \$100 per day for the noncompliance period⁸¹ as well as attorney's fees.⁸² Courts have also held plan administrators liable for all medical bills incurred during the statutory period for which the continuation coverage is to apply.⁸³ In addi-

76. 29 U.S.C. § 1161(a) (1994). Termination of the covered employee's employment is one such "qualifying event". *Local 217, Hotel & Restaurant Employees Union v. MHM, Inc.*, 976 F.2d 805, 809 (2d Cir. 1992).

77. H.R. REP. NO. 99-300 (1985), reprinted in 1986 U.S.C.A.N. 756 ("The Committee is concerned with reports of the growing number of Americans without any health insurance coverage...In an effort to provide continued access to affordable private health insurance...the Committee has adopted... provisions....").

78. 29 U.S.C. § 1163 (1994).

79. 29 U.S.C. § 1162(2)(B) (1994).

80. *Local 217, Hotel & Restaurant Employees Union*, 976 F.2d at 809 (citing 29 U.S.C. §§ 1165, 1166 as follows:

Upon the happening of a qualifying event, ... an employer must notify the plan administrator of the occurrence of that event. The administrator must then notify the qualified beneficiaries of their rights under COBRA within fourteen days of the date on which the administrator is notified.... The qualified beneficiary may elect continuation coverage within sixty days of the qualifying event or of notice of the qualifying event, whichever is later.

81. 29 U.S.C. §§ 1132(c)(1) & (c)(3) (1994), cited in James S. Ray, *Overview of ERISA Title I Enforcement: Procedural Aspects*, C793 ALI-ABA 439, 445-46 (1993).

82. 29 U.S.C. § 1132(c)(1) (1994), cited in Sarah Rudolph Cole, *Continuation Coverage Under COBRA: A Study in Statutory Interpretation*, 22 J. LEGIS. 195, 198 n.20 (1996).

83. Cole, *supra* note 82 (citing *Phillips v. Riverside, Inc.*, 796 F. Supp. 403 (E.D. Ark. 1992) (holding the pension administrator liable for all medical bills incurred during the 18-month period following the qualifying event for failure to provide notice of con-

tion, ERISA § 502(a)(3) authorizes the court to grant other equitable relief as the court deems appropriate for the type of violation.⁸⁴

D. Plans Not Covered by ERISA or COBRA

Interestingly, ERISA's coverage is limited in two ways relevant to the *Gates* scenario. First, ERISA specifically exempts government plans⁸⁵; and second, it limits coverage of foreign plans.⁸⁶

1. Government Plans

Government plans relate specifically to the U.S. federal government, any state government or political subdivision or any agency or instrumentality thereof.⁸⁷ However, even though governmental plans are excluded from coverage under ERISA, COBRA amendments to the Public Health Service Act⁸⁸ require governmental entities to provide similar continuation coverage as that required by COBRA.⁸⁹

2. Foreign Plans

Foreign plans are those plans "established and maintained outside of the United States primarily for the benefit of individuals substantially all of whom are nonresident aliens"⁹⁰ Some foreign plans have been deemed nonexempt from ERISA if U.S. citizens are the primary participants. The determining factor seems to be whom the plan was principally designed to benefit. This "primarily adopted" provision of ERISA has not been extensively litigated, so it is not clear what percentage of Ameri-

tinuation coverage)).

84. Ray, *supra* note 81, at 492.

85. 29 U.S.C. § 1003(B)(1) (1994).

86. 29 U.S.C. § 1003(B)(4) (1994).

87. 29 U.S.C. § 1003(B)(1), *cited in* Kathleen Bicek Bezdichek, *Constructions and Application of § 4(B) of Employee Retirement Income Security Act of 1974 (ERISA) 29 U.S.C.A. § 1003(B), Which Provides that Particular Employee Benefit Plans are not Covered by ERISA*, 135 A.L.R. FED. 533 (1996).

88. 42 U.S.C.A. § 300bb-2 (West 1998).

89. *Williams v. New Castle County*, 970 F.2d 1260 (3rd Cir. 1992), *cited in* CANAN & MITCHELL *supra* note 5, at § 10.3.

90. 29 U.S.C. § 1003(B)(4) (1994).

can employees must be covered before the plan is considered "primarily adopted" for the benefit of U.S. citizens.

For example, in *Lefkowitz v. Arcadia Trading Co. Benefit Pension Plan*,⁹¹ the Second Circuit held that ERISA applied to a defined benefit pension plan developed by a Hong Kong corporation for the benefit of a U.S. citizen—its only participant.⁹²

However, where plans cover both U.S. and foreign employees, the result can be different. For example, in *Pitstick v. Potash Corp. of Saskatchewan Sales, Ltd.*,⁹³ the Southern District of Ohio reached the opposite conclusion. In *Pitstick*, a Canadian corporation with its principal place of business in the United States established a severance pay plan that applied, inter alia, to its U.S. employees.⁹⁴ Because the plan was adopted primarily for the benefit of its Canadian employees, however, the court applied ERISA's exemption for foreign plans.⁹⁵ The Southern District of Ohio based its determination on a Department of Labor Opinion Letter⁹⁶ wherein the Department of Labor determined that a pension plan was not covered by ERISA when only 257 out of 2700 employees were U.S. citizens or residents and only 154 out of 1564 plan participants were U.S. citizens or residents.⁹⁷

Although ERISA's statutory language specifically exempts foreign and governmental plans, the courts and Congress have provided exceptions to ERISA's complete exemption. These exceptions can be analogized to the provisions of the FSIA wherein certain activities of a foreign government operating in the United States will exempt it from sovereign immunity.

By solely relying on the FSIA, the *Gates* appellate court clearly established an exception for foreign plans, which is broader than the exception enacted by Congress in ERISA. The district court's analysis, on the other hand, clearly maintained the integrity of both pieces of legislation enabling them to co-

91. *Lefkowitz v. Arcadia Trading Co. Benefit Pension Plan*, 996 F.2d 600 (2d Cir. 1993).

92. *Id.* at 602.

93. *Pitstick v. Potash Corp. of Saskatchewan Sales, Ltd.*, 698 F. Supp. 131 (S.D. Ohio 1988).

94. *Id.* at 133.

95. *Pitstick*, 698 F. Supp. at 133-34.

96. D.O.L. Opinion Letter No. 82-038A (Aug. 2, 1982), available in LEXIS, 1982 ERISA LEXIS 31.

97. *Pitstick*, 698 F. Supp. at 131.

exist in employment litigation. However, as evidenced by the Ninth Circuit's reversal, interpretation of the FSIA's commercial activities exception in employee benefits litigation is not clear-cut. In order to assist the courts with this dilemma, legislative attention should be directed to specific provisions in the FSIA.

V. CONCLUSION

Due to its jurisdictional purpose, the FSIA trumps ERISA.⁹⁸ The FSIA will be reviewed initially for a court to determine whether it has jurisdiction over the foreign sovereign before the court will reach the merits of the case. The jurisdictional implications of the FSIA require a clarification of what constitutes an agency or instrumentality and when that agency or instrumentality will no longer be immune due to its commercial activities.

It is evident from the tension between the Seventh and Ninth Circuits that the courts are not clear how far to extend the FSIA immunity provisions. To eliminate this confusion, the FSIA must include specific language detailing how far down the corporate structure a foreign sovereign will be protected. In addition, there should be more detail in the statute regarding who can actually claim immunity in litigation—the foreign sovereign directly or the foreign sovereign through its corporation. In the cases thus far, the corporation has been permitted to allege immunity based on the FSIA, and the burden is then shifted to the employee to prove that immunity does not apply or that an exception is implicated by the activities of the corporation.

More importantly, the FSIA should clarify its intent in applying the commercial activities exception. The FSIA should be amended to provide that any act that can be performed by a private enterprise with a profit motive should be deemed a commercial activity. This would eliminate any problem in determining the "nature" of the commercial activity and would alleviate the ambiguity currently in the legislative history.

Although all of the suggested amendments would greatly enhance an employee's ability to "have her day in court" and obtain a remedy against her foreign-government-owned employer, the benefit of affording that protection has to be weighed against

98. *Argentina v. Weltover*, 504 U.S. 607, 611 (1992) ("The FSIA thus provides the 'sole basis' for obtaining jurisdiction over a foreign sovereign in the United States.").

the burden placed on foreign governments investing in the United States. The increased responsibility placed on the foreign-government-owned employer may result in less foreign investment. If the laws and requirements are too complex, transaction costs will increase and foreign governments may look elsewhere. In the long run, the face of a foreign dollar may look more attractive to Congress than the increased protection of its U.S. citizens employed by foreign governments.

Foreign governments should be very thankful to the Ninth Circuit because the *Gates* decision virtually eliminated the FSIA's commercial activities exception in employee benefits litigation. Under *Gates* it will be difficult for an employee to prove the required nexus between her benefit-related claim and her employer's commercial activity. Thus, foreign governments will be able to entice American employees with great benefit packages, knowing full well that the employees will have no recourse when those benefits are not managed in accordance with ERISA.

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