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Purchaser Need Not Duplicate Shut-Down Benefits When Mirroring Seller's Pension Plans

By Susan Hoffman

In *Shaver v. Siemens Corporation*, 2012 U.S. App. LEXIS 4081 (3d Cir. Feb. 29, 2012), the U.S. Court of Appeals for the Third Circuit issued a precedent-setting opinion addressing the complex relationship between ERISA's anti-cutback rules and common corporate transactions. This decision is important for employers considering acquiring another employer's assets and workforce because it addressed the employee benefits issues related to the common practice of providing transition benefits under the seller's pension plan after the closing date of an asset purchase.

Background on the Asset Purchase Agreement and Transition Period

On November 17, 1997, Westinghouse Electric Corporation ("Westinghouse") and Siemens Corporation ("Siemens") entered into an Asset Purchase Agreement ("APA") to sell a business unit, but the transaction did not close for another nine months – on August 19, 1998, which was not an unusual delay in a corporate transaction of this size. Under the APA, Siemens was obligated to – and did – hire all affected Westinghouse employees who, on the closing date, were actively at work, on vacation, or on short-term disability. The APA required Siemens to establish a "substantially identical" pension plan for the affected employees and to provide compensation and benefits substantially comparable "in the aggregate" to the Westinghouse compensation and benefits.

The affected employees were covered by a defined benefit plan, which provided for a shutdown benefit if an employee was terminated "because of . . . location closedown" if the employee satisfied age and service requirements, but had not yet reached normal retirement age. The plan defined "Employer" as any Westinghouse affiliate, but did not include a purchaser. The shutdown benefit excluded an employee who "is offered continued employment by . . . a successor employer" and included a sunset provision that no benefit would be provided to an employee who terminated after August 31, 1998.

Even though the closing date for the APA was August 19, 1998, the APA was amended prior to closing to provide that, for the purpose of pensions and benefits, the closing date would be deemed to be September 1, 1998, and that Westinghouse would give the affected employees benefit and service credit for the period between the actual closing and the deemed closing.

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Siemens agreed to reimburse Westinghouse for the actuarial value of a shutdown benefit that might be provided to an employee terminated by Siemens without cause during the transition period.

In accordance with the APA, Siemens adopted substantially identical pension plans to those sponsored by Westinghouse, effective as of September 1, 1998, providing for future benefit accruals. Because the shutdown benefit had a sunset provision that expired on August 31, 1998, the Siemens pension plans did not contain a shutdown benefit. In 1999, Siemens closed a number of acquired facilities and terminated the employment of 227 of the acquired employees. Over 200 of them signed releases in accordance with Siemens' severance plan.

The Siemens pension plans denied claims for shutdown benefits because those plans did not provide any such benefits. The plaintiffs then sued Siemens and the Siemens pension plans for violations of ERISA. The magistrate judge recommended denying the claims of those class members who had signed releases, but granting benefits to the 20 class members who did not execute a release under two alternative theories. The first theory was that, by allowing the Westinghouse employees to remain in the Westinghouse pension plan for the first two weeks of their Siemens employment, Siemens became a sponsor of a transition plan that included the Westinghouse plan provisions and therefore could not cut them back, based on a Third Circuit decision, *Bellas v. CBS*, 221 F.3d 517 (3d Cir. 2000).[1] The second theory was that, by providing for the transition period benefits, there had been a transfer of benefit liabilities subject to ERISA section 208, and therefore the shutdown benefit had to be included in the Siemens plan. The district court agreed with the grant of benefits to the 20 non-releasing plaintiff class members, but held that the question of the validity of the releases was inappropriate for summary judgment. Thus, final judgment was entered in favor of the 20 non-releasing class members, and the questions relating to the others were certified for an interlocutory appeal.

The Circuit Court's Decision

On appeal, the Third Circuit first observed that the Siemens pension plans clearly did not provide for the shutdown benefits. So the only question was whether either of the two theories – relating to the transition period – required those plans to provide the benefits.

Siemens' Agreement to Reimburse Westinghouse for Actuarial Costs Did Not Create an ERISA Plan

Siemens argued that the 13-day transition period could not give rise to a separate, new Siemens pension plan because an ERISA plan must be permanent, not temporary. Moreover, even if it did give rise to a new plan, Westinghouse, not Siemens, was the sponsor and administrator. The court of appeals agreed that the beneficiaries, source of financing, terms and procedures for benefits could be ascertained for the transition period, but found that Siemens had not become a sponsor and did not maintain that plan. According to the Third Circuit, Siemens undertaking to reimburse Westinghouse, but not the Westinghouse pension plan, for certain actuarial costs resulting from a not-for-cause termination, "demonstrates quite clearly that Siemens was not responsible for the pension obligations that came due during this time period under the Westinghouse Plan." The limited obligation to reimburse the actual plan sponsor, which never arose because there were no not-for-cause terminations during the transition period, "cannot possibly be equated with the obligations attendant to establishing or maintaining a plan."

The circuit court quoted extensively from the Supreme Court's opinion in *Fort Halifax Packing Company v. Coyne*, 482 U.S. 1 (1987), to point out the difference between providing a simple benefit (without a plan) and establishing a plan subject to ERISA, which requires an "administrative scheme." Specifically, the circuit court drew the parallel between the Fort Halifax one-time severance payment and Siemens' commitment to reimburse Westinghouse for a contingent plan-related cost. The circuit court also observed that it was Westinghouse that, during the transition period, administered its plan, funded its plan, and "engaged in the extensive financial monitoring and record-keeping that the plan required."[2]

In a cursory analysis, the circuit court also agreed with Siemens that a 13-day period was not long enough to establish an ERISA pension plan.[3] The circuit court's brief discussion may lead to concerns for employers adopting temporary "window-type" severance programs and hoping to make them subject to ERISA – a concern that perhaps could be alleviated by adopting a permanent severance program with temporary window provisions.

Siemens Was Not Required to Provide Shut Down Benefits Under ERISA Sections 204(g) or 208

The second theory, adopted by the district court, was that a transfer of liabilities occurred from the Westinghouse plan to the Siemens plans, and therefore ERISA section 208 required the shutdown benefits to be transferred as well. The APA required Siemens to provide substantially identical pension benefits in effect as of September 1, 1998, and to credit prior service for purposes of eligibility, early retirement eligibility, and

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vesting, so that the aggregate of the Westinghouse benefits and the Siemens benefits would be the same as if the employees had continued in Westinghouse employment. The magistrate judge read this obligation to be "construed to be a transfer of [p]lan liability." But the circuit court read this as imposing a contractual promise to provide the benefits, but not as an assumption of the Westinghouse pension plan liabilities. Because the shutdown benefits had been subject to a shutdown provision at the time of the acquisition, they were not a plan provision that Siemens was required to provide in its own pension plan under the APA.

However, while the prior pension benefits were specifically identified as excluded liabilities in the APA, any early retirement supplements or Westinghouse pension plan shutdown benefits triggered by a Siemens closing were specifically identified as liabilities assigned to Siemens. Thus, the circuit court agreed that Siemens did assume a portion of Westinghouse's pension plan obligations, to the extent of any early retirement supplements or shutdown benefits triggered by Siemens after the acquisition. Accordingly, ERISA section 208 was applicable. The Third Circuit rejected as "unconvincing" the arguments that section 208 was inapplicable because the liabilities were contingent (and did not occur), and no assets were transferred to cover these potential liabilities.

Having concluded there was a transfer of liabilities, but not assets, to Siemens, the question then became whether the failure of the Siemens pension plans to provide the shutdown benefits violated ERISA section 208. ERISA section 208 requires that the affected employees' accrued benefits on the day after the transfer can be no less than the benefits they would have been entitled to had the Westinghouse pension plan terminated on the day prior to the transfer. Pursuant to ERISA section 208, the circuit court was required to explore the nature of the shutdown benefits as of August 31, 1998, when they expired under the terms of the Westinghouse pension plan, at a time when no affected employee had suffered from a shutdown because of their employment by the purchaser, and before the Third Circuit invalidated the sunset provision in *Bellas*.

First, the court recognized that because ERISA section 208 requires a transfer of all benefits that would be provided upon plan termination, any contingent benefits protected by the anti-cutback rules of ERISA section 204(g) had to be included in the transfer, even if they were contingent, based on the fact that ERISA section 204(g) protects both early retirement benefits and retirement-type subsidies from elimination, for any participant who satisfies the requirements for the benefits or subsidies either before or after the amendment, to the extent of benefits accrued prior to the amendment. So if a participant has not, and never can, satisfy the requirements for the benefits or subsidies, ERISA section 204(g) provides no protection and ERISA section 208 does not require that they be transferred. From the perspective of the Westinghouse pension plan, the employees transferred to Siemens never could become eligible for the shutdown benefits, because the Westinghouse pension plan explicitly excluded employees offered employment by a purchaser, and because the Westinghouse pension plan only covered facility closings by an "Employer" (defined as a Westinghouse affiliate that had adopted the Plan) – which did not include Siemens. Therefore, the transferred participants could never satisfy the requirements in the Westinghouse pension plan for a shutdown benefit, and ERISA section 208 did not require that the Siemens pension plan include those benefits for a Siemens shutdown.

Siemens' Agreement to Adopt a Pension Plan with Terms Identical to the Westinghouse Pension Plan Did Not Include an Agreement to Adopt a Similar Shutdown Provision

The magistrate judge's last basis for awarding benefits to certain class members was that, pursuant to the APA's requirement that Siemens adopt a pension plan with terms "identical" to the Westinghouse pension plan, the Siemens pension plans had to include the same benefit. Citing evidence from the record, the circuit court noted that Siemens clearly did not intend to adopt the shutdown benefits, and that because of the sunset, successor employer, and termination by affiliate provisions of the Westinghouse pension plan, Siemens "would have been engaging in a rare, indeed inexplicable act of corporate benevolence as it would have been lifting three preexisting bars to the legacy employees[']" claims for benefits. The circuit court then turned to the recent decision in *Evans v. Sterling Chemicals*, 660 F.3d 862 (5th Cir. 2011), where the court held that an asset purchase agreement promising retiree medical benefits to transferred employees constituted an amendment to the purchaser's retiree medical benefit plan. The circuit court distinguished *Evans* from *Shaver* noting that, even if the APA constituted a valid amendment to the then-non-existent Siemens pension plans, there was no provision within the APA that required Siemens to provide the shutdown benefits to the transferred employees, because the *terms* of the Westinghouse pension plan included the sunset provision.[4]

The Importance of the *Shaver* Decision for Employers

Perhaps the most important aspect of the *Shaver* decision is that relating to the common practice of providing transition benefits under a

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seller's pension plan after the closing date of an asset purchase. If the court had ruled that a purchaser becomes a plan sponsor by allowing the seller to provide such transition benefits, the implementation of benefit plans in transfers would have become significantly more complex. On the other hand, the *dicta* finding a transfer of liabilities as a result of the allocation of responsibility for certain benefits is troublesome, and may require more careful attention in drafting included and excluded liability sections in asset purchase agreements.

The discussion of the *Evans* case in *Shaver* also re-emphasizes the importance of including a provision in an asset purchase agreement to the effect that nothing in the agreement is intended to constitute an amendment of any employee benefit plan.

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[1] In *Bellas*, the Third Circuit examined impact of the anti-cutback rules of section 204(g) on the Westinghouse plan. The court held that some of the shutdown benefits contained in the Westinghouse plan were protected against cutback, while some were not, and therefore the sunset provision was invalid with respect to the protected benefits. Specifically, special pre-retirement payments that extended only to normal retirement age were not protected benefits, but the unreduced early retirement benefit was considered a protected retirement-type subsidy.

[2] The opinion also notes that the fact that the employees worked for Siemens, and not Westinghouse, during the transition period is not an obstacle because Westinghouse can act "indirectly in the interest of an employer" during that period and thereby continue to be the plan sponsor/employer under ERISA.

[3] The court cited 26 C.F.R. section 1.401-1(b)(2) (a plan implies a permanent, rather than temporary, program), and also *Deibler v. United Food Commercial Workers' Local Union 23*, 973 F.2d 206, 209 (3d Cir. 1992) (severance pay).

[4] Even though *Bellas* invalidated the sunset provision, Siemens was only obligated to replicate the terms of the Westinghouse pension plan – even if Westinghouse's "underlying ERISA obligations" invalidated the sunset provision, the fact remains that it was a term of the Westinghouse pension plan and therefore Siemens was not obligated to include the shutdown benefit in its own plan.

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