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# Recent Case Highlights Split of Authority on Whether Corporate Agreements Can Amend Employee Benefit Plans

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The U.S. Court of Appeals for the Fifth Circuit recently held that a paragraph in an asset purchase agreement qualified as an amendment to an employee benefit plan, highlighting a split between circuits of the U.S. Courts of Appeal.

In ***Sterling Chemicals v. Evans,*** **t**he U.S. Court of Appeals for the Fifth Circuit found that a paragraph in an asset purchase agreement satisfied the technical requirements for an employee benefit plan amendment, though it did not state it was intended to amend the plan. Nonetheless, the Fifth Circuit held that the purchase agreement language did, in fact, serve to amend the benefit plan. While this decision is consistent with a prior Fifth Circuit decision, the First and Sixth Circuits have held that a corporate agreement cannot amend an employee benefit plan without explicitly setting forth the intent to do so. Last month, the Supreme Court of the United States declined to review the *Sterling* decision, so the question of whether and how a corporate agreement may amend an employee benefit plan will continue to be an issue that employers must consider when drafting and reviewing corporate agreements.

In *Sterling*, the buyer in an asset sale offered employment to certain of the seller's employees. In the asset purchase agreement (APA), the buyer agreed to provide the acquired employees with retiree health care benefits at set benefit and premium levels that could only be changed with the seller's prior written consent. The buyer enrolled the acquired employees in its health plan and provided benefits and collected premiums consistent with the APA, but did not amend the plan document or otherwise formally document the arrangement. Several years later, the buyer filed for bankruptcy and sought to reject certain contracts, including the APA. However, the buyer did not seek to modify or terminate any of its benefit plans, and the buyer directly communicated to participants, including the acquired employees, that there would be no changes to any of its benefit programs as a result of the bankruptcy.

The buyer emerged from bankruptcy having rejected the APA, but the health plan remained under the same terms as existed prior to the bankruptcy petition. Over the next several years, the buyer raised the premiums paid by the acquired employees without the seller's consent, and the acquired employees ultimately sued the buyer for improperly raising their premiums. The Fifth Circuit ruled that the provision in the APA regarding benefit and premium levels constituted an amendment to the retiree health care plan, and therefore the APA's provision survived the bankruptcy. As a result, the

court determined it was improper for the buyer to raise premiums or reduce benefits without the seller's consent. The court held that if an agreement (1) is in writing, (2) contains a provision directed to an ERISA plan and (3) the plan amendment formalities are satisfied, then the agreement will constitute a valid plan amendment regardless of whether the parties expressly intended to amend the plan through the agreement. Because the APA satisfied each of these factors, the court determined it constituted a valid plan amendment.

While the court noted an agreement did not have to expressly state an intent to amend in order to qualify as a plan amendment, the court declined to evaluate whether a statement that an agreement *was not* intended to be a plan amendment would impact the determination of whether an agreement was a plan amendment. Therefore, the court left open the possibility that contracting parties could prevent an agreement from being construed as a plan amendment by adding a statement that a plan amendment was not intended.

## Prior First and Sixth Circuit Decisions

Contrary to the Fifth Circuit's *Sterling* decision, the First and Sixth Circuits have ruled that corporate agreements cannot amend benefit plans unless there is a direct intent to do so in the agreement. In ***Sprague v. General Motors*****,** retirees claimed the early retirement agreements they executed with the company formally amended the employer's health plan. The agreements stated the retirees would receive certain health benefits indefinitely. The retirees argued these statements amended the health plan to provide full vesting in the health benefits provided, meaning the employer could not subsequently reduce or eliminate their retiree health care benefits. The Sixth Circuit disagreed with the employees, finding their argument for a plan amendment unpersuasive. The court ruled that while the agreements satisfied the required formalities regarding amendment form, an agreement could not constitute a plan amendment without a clear indication that it was intended to amend the benefit plan. Because the agreements in question did not state they were intended to amend the health plan, the court determined that they did not constitute plan amendments.

Likewise, in *Coffin v. Bowater Inc.*, the First Circuit was presented with a claim that a provision in a stock purchase agreement met the formal amendment requirements and thus constituted a plan amendment. The stock purchase agreement in *Coffin*, which was in writing and executed by an individual with authority to amend the health plan, transferred responsibility for all disclosed liabilities, including the health plan, from the seller to the buyer. The seller argued the purchase agreement constituted an amendment terminating the plan. The First Circuit disagreed, holding that although the stock purchase agreement satisfied the technical amendment requirements, it failed to constitute an amendment because it did not clearly state the plan was being amended. The First Circuit noted that the seller could have amended or terminated its plan in the stock purchase agreement had the seller taken the additional step of clearly conveying its intent to do so in the language of the agreement.

## Impact on Employers

In light of the current conflict between the Circuit Courts that have considered whether an employee benefit plan may be amended by a corporate agreement, employers should carefully review the language in any corporate agreement that impacts an employee benefit plan to evaluate whether the agreement could inadvertently amend an employee benefit plan. Although it was not discussed in the cases described above, some corporate agreements contain standard language preventing third-party beneficiaries from benefiting under the agreement, which could provide some protection against those agreements being construed as plan amendments. However, employers should also consider

adding language to any corporate agreement relating to its employee benefit plans, that is not intended to amend those plans, stating the agreement is not intended to be a plan amendment. While this language would not guarantee that a provision would not be construed as an amendment by a court, it would provide stronger support for an employer's position should it be challenged in the future. In any event, employers should pay close attention to the employee benefits provisions in purchase agreements to ensure the agreements are not unintentionally amending the benefits plans and changing the amount of liabilities that may be transferred through the transaction.



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