

MUSMECI V. SCHWEGMANN GIANT SUPERMARKETS, OR HOW TO MAKE A PENSION PLAN OUT OF MAKIN' GROCERIES

By Edward F. Martin

A. What is a "Pension Plan" under ERISA?

1. Section 3(2) of the Employee Retirement Security Act of 1974 (ERISA) defines the term "pension plan" as follows:

(A) Except as provided in subparagraph (B), the term... 'pension plan' mean[s] any plan, fund or program . . . maintained by an employer . . . , to the extent that by its express terms or as a result of surrounding circumstances such plan, fund or program –

- i. Provides retirement income to employees, or
- ii. Results in a deferral of income by employees for periods extending to the termination of covered employment or beyond. . . .

(B) The Secretary may by regulation prescribe rules. . . under which severance pay arrangements, . . . shall . . . be treated as welfare plans rather than pension plans."

2. Although most pension plans are "qualified plans" under Section 401(a) of the Internal Revenue Code (IRC), ERISA's scope reaches beyond qualified plans. Even the humblest of arrangements may be considered an ERISA pension plan. Suppose an employer discovers that a couple of loyal low-level employees are retiring without adequate savings for their retirements, and decides to pay each of them, out of the company's general assets, a pension of \$500 per month for life. It's a pension plan!

3. Can an arrangement be a "pension plan" if the benefit is provided for just one person? Yes, if (a) it provides a pension-type benefit, and (b) the arrangement involves "an ongoing administrative scheme and reasonably ascertainable terms". *Cvelbar v. DBI Illinois*, (106 F. 3d 1368, at 1376 (7th Cir. 1997)). See, generally, McNeil, *Nonqualified Deferred Compensation Plans* (West 2003 edition) at §1.2.

B. ERISA Requirements for Pension Plans:

1. *Requirements.* Among the requirements that the sponsor or administrator of any "pension plan" must meet, even if the plan is not designed to qualify under IRC §401(a), are the following:

- a. Execute a written plan document. ERISA §402.
- b. Fund benefits through a trust or insurance policy. ERISA §403.

- §302.
- c. If a defined-benefit plan, meet minimum funding requirements. ERISA
 - d. Supply a Summary Plan Description. ERISA §102.
 - e. File annual reports. ERISA §103. Failure to file is subject to substantial penalties under ERISA §502(c)(2).
 - f. Comply with the Retirement Equity Act of 1984, including the provisions regarding qualified joint and survivor annuities and qualified pre-retirement survivor annuities. ERISA §205.
 - g. Vest accrued benefits after 5 years of service. ERISA §203(a)(2).

2. *Exemptions.* Pension plans exempt from ERISA's requirements:

- a. Governmental Plans. ERISA §4(b)(1).
- b. Most church plans. ERISA §4(b)(2).
- c. Excess benefit plans (i.e., plans providing benefits that exceed the limits under Section 415). ERISA §4(b)(5).
- d. Top-Hat Plans. These plans, for "a select group of management or highly-compensated employees", are exempted from Parts 2, 3 and 4 of Title I of ERISA. ERISA §201(2), §301(a)(3), and §401(a)(1). And the plans are exempt from the regular reporting and disclosure requirements of Part 1 of Title I if the top-hat notice described at DOL Reg. §2520.104-23 is filed with the DOL no later than 120 days "after the plan becomes subject to Part 1". Top-hat plans are subject only to the enforcement provisions, Part 5 of Title I, including the requirement of a claims procedure, under §503.

Query: Why should our national policy be to allow non-qualified plans only for the highest-paid employees?

3. *No PBGC Coverage.* The good news is that a non-qualified defined-benefit pension plan (that is, a plan not intended to be qualified under IRC §401) is not covered by Title IV of ERISA and therefore no PBGC premiums have to be paid by the employer. ERISA §4021(a). Of course, any defined-contribution plan is also excluded.

4. *Welfare Plans Distinguished.*

a. Welfare plans are governed by many fewer requirements than pension plans. Most importantly, there is no funding requirement for welfare plans, and the plans can be terminated at any time.

b. What distinguishes a pension plan from a severance plan? Under DOL Reg. §2510.3-2(b) a program paying benefits upon termination of employment will be deemed a severance benefit (and therefore a welfare plan rather than a pension plan) only if -

- i. the payments are not contingent upon the employee's retiring,
- ii. the total amount of the payments do not exceed twice the employee's annual compensation, and
- iii. the payments are completed within 24 months of termination of employment.

C. The Schwegmann Voucher Program

1. In 1985, John Schwegmann, the majority stockholder and chief executive officer of Schwegmann Giant Supermarkets, decided to institute a voucher program for the benefit of certain retired personnel. Mr. Schwegmann was motivated by the "desire to help ensure that certain long-term and loyal employees would always 'have food on their tables' ". Musmeci v. Schwegmann Giant Supermarkets, 26 EBC 2148 at 2151 (D.C.E.D. La. 2001).

2. A retirement policy was written up to provide for the benefit for employees who had completed 20 years of service, achieved the age of 60 and been employed in a position of supervisor for at least one year at the time of retirement. Other than this one policy statement, the plan was never put in writing and no explanation of the plan was ever communicated in writing to the employees.

3. Starting in 1985, retired employees who met the requirements of the policy statement began receiving monthly food vouchers. "Each grocery voucher had a face value of \$54 and qualified retirees received a total of \$216 worth of vouchers each month." Id. At 2151. A notation was printed on each voucher indicating that it was valid for a period of 30 days. The company's controller kept a list of all retirees receiving vouchers and the personnel office would notify him when someone was to be added or deleted. The company each year issued a 1099-R to the voucher recipients reporting the value of the vouchers as taxable pension and retirement benefits. And the value of the vouchers was deducted on the company's tax returns under the category "retirement plans, etc."

4. In the mid-1990s Schwegmann's began to have financial problems and the business was sold on February 14, 1997. Mr. Schwegmann signed a letter dated February 7, 1997, informing the voucher recipients that they would no longer receive vouchers, due to the sale of the business. At that time about 40 former Schwegmann employees were receiving grocery vouchers. Another 19 met all the requirements but had not yet retired. Another 73 met all of the requirements except they were under age 60 and had not retired.

5. The plaintiffs filed suit for resumption of the grocery vouchers or the monetary equivalent for life.

D. The Court's Findings on the Several Issues.

1. Is the Voucher Program a Welfare Plan Rather than a Pension Plan?

Besides noting that the voucher program flunked at least two prongs of the test for a "severance plan" under DOL Reg. §2510.3-2(b), discussed above, the Court said, "benefits triggered by attainment of a specified age, conditioned upon length of service, and paid until death, are hallmarks of a pension benefit plan, not a welfare benefit plan." *Id.* At 2155.

2. Is the Voucher Program a "Pension Plan" as defined by ERISA?

a. Are the vouchers "retirement income"? The court concluded that the word "income" should be interpreted consistently with the Internal Revenue Code and, therefore, would include non-cash payments.

The court noted that if Schwegmann had simply made food available at a discount price to employees or former employees, such a benefit might not be considered an ERISA pension plan in view of Reg. §2510.3-1(e). *Id.* At 2157.

b. Is there a plan when there is no formal writing, notice to employees, or funding? None of these omissions prevent the program from being considered an ERISA pension plan. An employer cannot avoid ERISA obligations by failing to comply with ERISA's requirements.

A plan exists when "from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits". *Donovan v. Dillingham*, 688 F.2d 1367, 3 EBC 1122 (11th Cir. 1982). A case from the 5th Circuit is *Hansen v. Continental Ins. Co.*, 940 F.2d 971 (14 EBC 1909) 5th Cir. 1991. At trial it was brought out that everyone who met the requirements set forth in the statement of policy did in fact receive the standard benefit.

c. Is there a plan when the employer intends a gratuitous benefit? The fact that Mr. Schwegmann thought that what he was doing was a gratuity does not change the nature of the plan. The court noted DOL Reg. §2510.3-2(e), which stated:

voluntary, gratuitous payments by an employer to former employees [are exempt from ERISA if the] former employees separated from the service of the employer prior to September 2, 1974, payments made to such employees commenced prior to September 2, 1974, and former employees receiving such payments are notified annually that the payments are gratuitous and do not constitute a pension plan.

By implication, any gratuitous pension benefit that begins after September 2, 1974 would not be exempt from ERISA.

d. Thus, the Court concluded that the voucher program was an ERISA Pension Plan and that the individuals who met the eligibility requirements were entitled to continued benefits for life.

3. *Who is Eligible for a Benefit?* In a supplemental opinion, the court awarded benefits to former employees even though they (a) left before retirement, or (b) worked as non-supervisors after working as supervisors, or (c) were discharged for cause. Everyone with 20 years of total service and one year of service as a supervisor was vested. Musmeci v. Schwegmann Giant Supermarkets, 27 E.B.C. 289, at 1291 (USDC ED La. 2001).

4. *Top-Hat Plan?* Apparently no effort was made to argue that the Voucher Program was a top-hat plan.

E. The Plaintiffs' Remedy

1. The court recognized that while ERISA provides for claims for benefits to be made against the plan and not the employer, when the plan is an unfunded plan self-administered by the employer "the plan is merely a nominal defendant with a true party in interest being the employer." Id at 2164.

2. The liable parties are the partnership that owned Schwegmann Giant Supermarkets, and its partners. The new owner of the grocery stores is not liable evidently because it did not assume Schwegmann's liabilities when it purchased Schwegmann's stores.

3. Schwegmann, as plan administrator, breached numerous fiduciary duties including the duty to fund the benefits.

4. However, the plaintiffs' claim is treated as a claim for benefits. The parties apparently stipulated that the judgment would provide a lump-sum payment to each participant equal to the present value of his lifetime benefit. The total value of the awarded benefits was more than \$4,000,000.

5. In addition, the court awarded interest at the rate of 9.25% per annum *and* awarded attorney's fees to the plaintiffs.

6. Fortunately for Schwegmann, the Court also found that Schwegmann's liability insurance covered this claim, subject only to one \$250,000 self-insured retention amount, so the party most at interest in this case was its insurer, United States Fidelity & Guaranty Company.

7. There was no discussion of Schwegmann's violation of its reporting obligations, and other violations of ERISA.

THE MORAL OF THE CASE: Don't feel sorry for your retirees, for no good deed goes unpunished.

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