

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMP INCORPORATED	:	CIVIL ACTION
	:	
v.	:	
	:	
ALLIED SIGNAL INC., et al.	:	NO. 98-4405

ALLIED SIGNAL INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
AMP INCORPORATED	:	NO. 98-4058

IN RE: AMP SHAREHOLDER LITIGATION	:	CIVIL ACTION
	:	
	:	NO. 98-4109

MEMORANDUM

GILES, J.

NOVEMBER 18, 1998

A. Introduction

1. AMP Incorporated (“AMP”) is a Pennsylvania corporation with its principal place of business in Harrisburg, Pennsylvania, and a registered corporation within the meaning of Section 2502 of the Pennsylvania Business Corporation Law (“PBCL”), 15 Pa. Cons. Stat. Ann. §2501, et seq. AMP designs, manufactures and markets worldwide electronic, electrical and electro-optic connection devices, interconnection systems and connector assemblies.

2. Allied Signal, Inc. is a Delaware corporation with its principal place of business in Morristown, New Jersey. Allied Signal is an advanced technology and manufacturing company with worldwide operations in the aerospace, automotive and engineered materials businesses.

3. This court has jurisdiction over these actions pursuant to 28 U.S.C. §§ 1331, 1332 and 1367. The amount in controversy is in excess of \$75,000, exclusive of interest and cost. Venue is proper under 28 U.S.C. § 1391(b) and (c). The court is empowered to grant declaratory relief under 28 U.S.C. § 2201 because there is a case of actual controversy among the parties.

4. This past August, Allied Signal commenced a tender offer for all outstanding AMP shares, but chose not to purchase shares tendered at that time. However, as a result of a subsequent, more limited tender offer initiated on September 21, 1998, Allied Signal now owns approximately 9.1% of AMP shares.

5. Allied Signal has announced its intention to acquire the remaining shares of AMP through a tender offer or other transaction.

B. Relief Sought by Parties

6. AMP moves for partial summary judgment on Count Four of its Amended Complaint against Allied Signal Inc. and PMA Acquisition Corporation (together “Allied Signal.”) AMP requests that this court (1) issue a declaratory judgment

establishing that Allied Signal has acquired control shares as defined by Subchapter G of Chapter 25 of the PBCL, 15 Pa. Cons. Stat. §§ 2561-68; and (2) enjoin Allied Signal from voting any AMP shares it owns unless and until its voting rights are restored under Section 2564 of the Subchapter.

7. Allied Signal has filed a cross-motion for partial summary judgment against AMP, seeking dismissal of Count Four of AMP's Amended Complaint. Allied Signal argues that its acquisition of less than twenty percent (20%) of AMP shares pursuant to a tender offer does not convert its shares into control shares and that Section 2564 of the PBCL, which states that control shares cannot be voted without specific approval of the other shareholders, is not applicable.

C. Relevant Pennsylvania Statutes

8. Section 2561(a) of Subchapter G of Chapter 25 provides that “[e]xcept as otherwise provided in this section, this subchapter shall apply to every registered corporation.” Section 2561(b) provides numerous exceptions to the application of Subchapter G, none of which have been argued or found to be applicable to AMP.

9. Allied Signal’s purchase of AMP shares, with the stated intention of making a control-share acquisition, triggered Subchapter G.

10. Section 2564(a) provides that:

[c]ontrol shares shall not have any voting rights unless a resolution approved by a vote of shareholders of the registered corporation at an

annual or special meeting of the shareholders . . . restores to the control shares the same voting rights as other shares of the same class or series with respect to elections of directors and other matters coming before the shareholders . . .

Thus, this section provides that an owner of control shares loses the right to vote such shares unless and until disinterested shareholders approve voting rights for those shares at a shareholder meeting.

11. “Control shares,” as defined in Section 2562, are

[t]hose voting shares of a corporation that, upon acquisition of voting power over such shares by an acquiring person, would result in a control-share acquisition. Voting shares beneficially owned by an acquiring person shall also be deemed to be control shares where such beneficial ownership was acquired by the acquiring person: (1) within 180 days of the day the person makes a control-share acquisition, or (2) with the intention of making a control-share acquisition.

(emphasis added).

12. An “acquiring person” is defined in Section 2562 as “[a] person who makes or proposes to make a control share acquisition.”

13. “Control-share acquisition” is defined in that section as:

“[a]n acquisition . . . by any person of voting power over voting shares of a corporation that . . . would, when added to all voting power of that person over other voting shares . . . entitle the person to cast . . . such a percentage of the votes for the first time with respect to any of the following ranges that all shareholders would be entitled to cast in an election of directors of the corporation: (1) at least 20%”

15 Pa. Cons. Stat. Ann. § 2562 (emphasis added).

D. Contentions of the Parties

14. AMP has argued that Allied Signal's presently acquired shares fall within the second sentence of the definition of "control shares." This is incorrect. That sentence refers to control shares beneficially owned by an acquiring person. "Beneficial owner," as defined in Section 2552, is one who does not own the shares outright but who has the right to vote or control the shares. It excludes shares tendered pursuant to a tender or exchange offer until the tendered shares are accepted for purchase or exchange. Further, a person shall not be deemed the beneficial owner of shares if the agreement, arrangement or understanding to vote shares arises solely from a revocable proxy or consent given in response to a proxy or consent solicitation.

15. Allied Signal agrees that it meets the definition of an "acquiring person." It also agrees that if it were to purchase another 10.9% of AMP's outstanding shares and reach the 20% threshold of a control-share acquisition, it would not be able to vote any of its shares, including the 9.1% it already owns, without AMP disinterested shareholder approval. However, Allied Signal takes the position that because its acquired share percentage does not currently constitute the minimum percentage required for a control-share acquisition, it has not triggered a loss of voting rights pursuant to Section 2564. It intends to vote its AMP shares unless and until it acquires at least another 10.9% of AMP shares or surpasses the 20% threshold for a control-share acquisition.

E. Analysis

16. On its face, the “control share” definition encompasses the 9.1% of AMP shares presently owned by Allied Signal. When an acquiring person has proposed a control-share acquisition, the totality of shares over which the person has, and proposes to have, voting control in order to accomplish a control-share acquisition are deemed control shares. The definition is written in present and future tenses. It embraces voting shares that a person has acquired (“[t]hose voting shares”) plus the voting power that the person proposes to acquire (“upon acquisition of voting power”) which would result in a control-share acquisition.

17. Therefore, the shares that the acquiring person has already acquired, whenever acquired, are deemed control shares because they result in the control-share acquisition that is made or that is proposed to be made.

18. The second sentence of the control shares definition is instructive. Parsed, it provides that “voting shares beneficially owned by an acquiring person shall also be deemed to be control shares” if that ownership was acquired “with the intention of making a control-share acquisition.”

19. First, the use of the phrase “shall also be deemed to be control shares” necessarily implies that phrase into the first sentence. Therefore, the first sentence must be understood to read that voting shares owned by an acquiring person are deemed to be control shares.

20. The use of the phrase “by an acquiring person” in the first sentence incorporates the concept that there has been a proposal to make a control-share acquisition. So, when a person deems itself an acquiring person its shares also become converted into, or deemed, control shares.

21. Second, the second sentence of the control shares definition is of further aid in understanding when the voting shares of an acquiring person are deemed control shares. Beneficially owned shares, whenever acquired, carry a rebuttable presumption that they are control shares. That is, the acquiring person is given the opportunity to try to prove that the acquisition of beneficially owned shares was not obtained with the intention of making a control-share acquisition or that the acquisition did not occur within 180 days of the control-share acquisition event. There is no such rebuttable presumption in the first sentence covering the voting shares actually owned by an acquiring person.

22. Therefore, it follows conclusively that an acquiring person’s shares owned outright are deemed control shares, whenever acquired.

23. Third, it is noted that, in the second sentence, beneficially owned shares are not deemed to be control shares if their acquisition is shown to have been made more than 180 days prior to the day that the beneficial owner makes the control-share acquisition, that is achieves at least 20% of the company’s total share ownership. However, it is conclusive that beneficially owned shares acquired within 180 days of a

control-share acquisition are control shares. This statutory conclusion is not subject to rebuttal. Moreover, even if the acquisition of such beneficially owned shares occurred more than 180 days prior to the control-share acquisition, but was done with the intention of making such a control-share acquisition in the future, they are deemed to be control shares when acquired.

24. If beneficially owned shares, are deemed to be control shares if acquired with the requisite intent, then it follows that shares, purchased by an acquiring person in its own name with the intention of making a control-share acquisition, are control shares.

25. It is undisputed that Allied Signal purchased all but 100 shares of its 9.1 % share percentage with the intent of making a control-share acquisition. It may also be true that the 100 shares were purchased with that intent. Nevertheless, it is undisputed that Allied Signal's presently owned shares, when added to what Allied Signal proposes to purchase, would result in a control-share acquisition. This meets the definition of control shares precisely

26. Therefore, all of Allied Signal's shares are control shares, either because they were purchased with the intent of making a control-share acquisition or because, when added to the acquiring person's existing share ownership, the shares proposed to be acquired would result in a control-share acquisition.

28. The draftsmen's comments to Section 2562, are entirely consistent.

They make clear that voting shares, such as those in the present case, are control shares if they are acquired by an acquiring person with the intention of making a control-share acquisition. According to the draftsmen's comments, the term "acquiring person" includes

not only those who make a control-share acquisition but also those who "propose" to make a control-share acquisition. Consequently, a person who publicly discloses its proposal to seek to acquire voting power over voting shares at the levels described in the definition of 'control-share acquisition' would be an 'acquiring person' (absent an exemption) even if the person had not then taken further steps to effect the acquisition. Consequently, if a person announces a proxy contest to replace the directors of a corporation and such person has announced its intention, for example, to make a future tender offer for all the corporation's shares in the event the directors are replaced, then that person will be deemed an acquiring person (and any voting shares owned by the person will be control shares if, for example, they were acquired with the intention of making a control-share acquisition) even though the tender offer has not been commenced and the proxy contest has not yet occurred.

(emphasis added).

29. Accordingly, AMP's motion for partial summary judgment on Count Four of its Amended Complaint against Allied Signal is granted. It is declared that Allied Signal has acquired control shares as defined by Subchapter G of Chapter 25 of the PBCL. Allied Signal is enjoined from voting any AMP shares it owns unless and until its voting rights are restored under Section 2564 of the Subchapter.

30. For the aforementioned reasons, Allied Signal's cross-motion for partial summary judgment is denied.

An appropriate order follows.

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ORDER

AND now, this 18th day of November, upon consideration of AMP Incorporated's ("AMP") motion for partial summary judgment on Count Four of its Amended Complaint and for declaratory judgment and injunctive relief and any responses thereto, and Allied Signal, Inc and PMA Acquisition Corporation's (together "Allied Signal") cross-motion for partial summary judgment dismissing Count Four of AMP's Amended Complaint and any responses thereto, it is hereby ORDERED that:

1. AMP's motion is GRANTED. With regard to Count Four of AMP's Amended Complaint, partial summary judgment is entered in favor of AMP and against Allied Signal. It is declared that Allied Signal has acquired control shares as defined by Subchapter G of Chapter 25 of Pennsylvania's Business Corporation Law. Allied Signal is enjoined from voting any AMP shares it owns unless and until its voting rights are restored under Section 2564 of the Subchapter.

2. Allied Signal's cross-motion for partial summary judgment is DENIED.

BY THE COURT:

JAMES T. GILES, J.