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Judge OKs $35 Million Settlement in WARN Act Case

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A Delaware Bankruptcy Court judge has agreed to approve a $35.3 million settlement between two North American affiliates of a European technology firm and their former employees, who alleged that they were laid off without notice in violation of the Worker Adjustment and Retraining Notification Act, also known as the WARN Act.

Qimonda North America and Qimonda Richmond are both wholly owned subsidiaries of Qimonda AG, a manufacturer of electronic memory products. In late 2008 and early 2009, the two North American affiliates, which are based in Cary, N.C., and Sandston, Va., shut down and laid off nearly 2,200 employees. The employees filed multiple suits, which were later consolidated into one class action claim, alleging that they were not given proper notice of the layoffs, violating the WARN Act, a federal statute passed in 1988.

The WARN Act requires companies with at least 100 or more employees laying off more than 50 employees at once to give anyone who is laid off at least 60 days' notice. The suit was initially filed against the company two years ago in federal court in Virginia. However, after the suit was filed the Qimonda affiliates entered into bankruptcy and the claims were shifted to bankruptcy court in Delaware, where the entities are incorporated.

Klehr Harrison Harvey Branzburg, of Philadelphia, and Outten & Golden, a New York firm, served as co-counsel for the laid off employees.

The defendants included both North American affiliates as well as their European parent company and Infineon, a German semiconductor manufacturer, which spun off its memory products division to create Qimonda. All the defendants were represented by Simpson & Thacher & Bartlett, Jones Day, Wilmer Hale, Morrison & Foerster, Richards Layton & Finger, Ashby & Geddes and Cole Schotz Meisel Forman & Leonard. Attempts to contact some of Qimonda's defense attorneys were unsuccessful.

Qimonda defended itself by asserting the two affirmative defenses allowed under WARN. First Qimonda argued that it was a faltering company and second, that the layoffs were the result of "unforeseen business circumstances," according to court documents.

The affiliates argued that under these affirmative defenses, they were entitled to a reduction of damages.

In addition, Qimonda argued that because it was in bankruptcy, the company was exempt from making severance payments to employees. Under the act, severance pay can be used in lieu of the 60-day notice requirement. If there is already a severance package in place before the business climate goes bad, however, that might not count as a credit toward the WARN requirements.

However, the plaintiff's attorneys successfully argued that neither affirmative defense applied. In order for Qimonda to use the "faltering company defense," it had to be actively seeking financing to keep its offices operational at the time of the layoffs. In addition, the "unforeseen business circumstances" defense is only applicable if a company suddenly losses a large client or a natural disaster occurs. The plaintiff's attorneys also alleged that both affiliates' impending shutdowns were obvious at least 60 days before the layoffs were issued.

In August, both parties entered into a settlement agreement. Under the settlement's terms, the affiliates are fully released from all claims related to the WARN Act, lost severance pay or benefits arising from the layoffs. In exchange for the claims release, Qimonda will create a common fund composed of an $8.3 million priority claim and general unsecured claims of $17 million and $10 million against the affiliates' bankruptcy estates, which will be distributed at a later date.

"[Qimonda's affiliates] clearly didn't give notice, but they believed they had affirmative defenses," Charles A. Ercole, a

partner with Klehr Harrison, told Delaware Law Weekly. "We were able to demonstrate some potential weaknesses in their case. There was a sufficient amount of money in the bankruptcy that it was to the advantage of the creditors to get this case resolved."

Bankruptcy Judge Mary Walrath is expected to enter the final order in October and the plaintiffs could start seeing checks by mid-November, according Ercole.

"This is a very good result for one of these cases, because bankruptcy rarely produces a fair amount of revenue," said Ercole. "In this case there were lot of assets, receivables and other sources of income, which you don't always have in industrial shutdowns. The employees will get real checks."

Ercole said that the number of WARN cases has actually decreased in the past few years. Since the Qimonda suit was filed in 2009, his firm has only filed about two or three more cases.

"Companies are complying with the WARN Act," he said. "Companies are seeing cases like this one along with an increase in the number of overall cases filed in the last five years and are starting to give notices."

Ercole estimates that Klehr Harrison and its co-counsel, Outten & Golden, have filed over 30 WARN Act claims in the past five years. A majority of those cases have been settled.

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