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Retiree Benefits

Retiree Health Benefit Dispute Draws Multiple Briefs, Including 'True' Amicus Brief

By Jacklyn Wille

Oct. 22 — In a surprising move, Bethesda, Md.-based law firm Goldstein & Russell PC has filed an amicus brief with the U.S. Supreme Court in an upcoming retiree benefit case that purports to be solely informational and in support of neither party (*M&G Polymers USA, LLC v. Tackett,* U.S., No. 13-1010, *arguments scheduled* 11/10/14).

In the brief, Goldstein—which is the law firm of Thomas C. Goldstein, co-founder of Supreme Court tracking website SCOTUSblog—said it had "no agenda or desire to direct the outcome of the case." Rather, the brief provided data on the terms of collective bargaining agreements across the country, so that the court could have a "thorough understanding of how the legal rule it adopts will affect the interpretation of other CBAs."

Although it remains to be seen what the justices will make of this new kind of brief, the brief itself could prove useful to practitioners in the world of retiree health benefits, as it provided aggregated data about the terms of CBAs with 100 different public and private employers, including Boeing Co., Campbell Soup Co., Continental Airlines Inc. and Harvard University.

However, William T. Payne, a partner with Feinstein Doyle Payne & Kravec LLC in Pittsburgh, told Bloomberg BNA Oct. 23 that the brief may be of limited benefit to the court, because it didn't reflect a scientific sampling and didn't focus on the type of unions and settings where disputes over retiree health benefits typically arise.

BNA Snapshot

M&G Polymers USA, LLC v. Tackett, U.S., No. 13-1010, *arguments scheduled* 11/10/14

Key Development: Amicus briefs in retiree benefit vesting case ask court to reject judicial inference in favor of clear language standard or traditional principles of contract interpretation.

Key Takeaway: In addition to partisan amicus briefs submitted in retiree benefit case, Supreme Court receives unusual brief purporting to be purely informative and in support of neither party.

In addition to Goldstein's brief, the case garnered eight other amicus briefs on behalf of various industry groups, labor organizations and employers, with the majority of the briefs encouraging the court to reject the so-called *Yard-Man* inference in favor of vested retiree benefits.

The case comes to the Supreme Court by way of a decision of the U.S. Court of Appeals for the Sixth Circuit ordering retirees of M&G Polymers USA LLC reinstated in the company's health plan. Applying the retiree-friendly *Yard-Man* inference—a judicial inference in favor of vesting that has been rejected by other circuits—the Sixth Circuit agreed with a federal district court that the retirees' benefits had vested under the language of the plan.

'True' Amicus Brief

The Goldstein brief described itself as "the rare true '*amicus*' brief," because its only purpose was "to provide the Court with factual information that may be useful in guiding its decision."

According to the brief, it's very rare for CBAs to include clear, express language on the issue of vested retiree health benefits. However, the brief said that 6 percent of CBAs provide that retirees will receive health benefits "for life," while 22 percent link retirees' eligibility for health benefits to their pension status.

Another 7 percent of CBAs include language reserving the right to amend or alter retiree health benefits, the brief said, while 23 percent of the CBAs provided that benefits would be guaranteed only throughout the life of the bargaining agreement. Thirty-five percent of the CBAs said that health benefits would end when a retiree

became eligible for Medicare, typically at age 65, the brief said.

Further, the brief said that 14 percent of CBAs said that benefits "will continue" without specifying for how long, while 16 percent were "silent" on the issue.

Retirees Criticize Goldstein Brief

In their response brief , the M&G Polymers retirees cautioned the court against relying too heavily on the Goldstein brief.

In particular, the retirees said that, "Contrary to the assumptions reflected in the *amicus* brief of Goldstein & Russell, P.C., the intent of parties to a CBA regarding the duration of retiree medical benefits often is not expressed in a single phrase of an agreement."

They also took the brief to task for its "arbitrary" taxonomy, "limited" sample size and the fact that it focused on public sector CBAs.

According to the retirees, "the statements in the Goldstein brief regarding the relative frequency of various kinds of provisions are unreliable, not only because of the arbitrary nature of the taxonomy employed, but because half of the agreements in the very limited sample are from the public sector, where CBAs are negotiated under varying state and local laws and constitutions, such that the terms thus negotiated may not fairly be compared to private-sector agreements that are negotiated under the National Labor Relations Act and enforced through the LMRA."

M&G Polymers didn't discuss the Goldstein brief in the reply brief it filed Oct. 15.

Briefs Challenging Inference

In addition to Goldstein's "true" amicus brief, five amicus briefs were filed in support of M&G Polymers and arguing against the continued viability of the *Yard-Man* inference.

The Council on Labor Law Equality and the Society for Human Resource Management argued that Congress created a "purposeful and intentional" distinction between pension benefits—which must be vested—and welfare benefits, which need not. The Sixth Circuit's *Yard-Man* inference "effectively stands ERISA's anti-vesting presumption on its head in the instance of collectively bargained plans," the groups argued. They also referenced the Supreme Court's most recent ERISA ruling in *Fifth Third Bancorp v. Dudenhoeffer* as establishing that any ERISA-based presumption must be rooted in the statutory text, rather than crafted by judges.

In their joint brief, the ERISA Industry Committee and the American Benefits Council emphasized the changes in health care that have taken place since the Sixth Circuit promulgated the *Yard-Man* inference in 1983. The "constantly changing" world of health care—including new treatments, technologies and drugs—means that employers will have more trouble anticipating future retiree health costs than they will have estimating pension costs, the groups argued. Further, the groups said that legislative changes such as Medicare expansions and the Affordable Care Act have "created healthcare options that did not exist in 1983," and these changes ensure that retirees "have access to affordable, comprehensive healthcare coverage even in the absence of the Sixth Circuit's artificial rule that unilaterally imposes lifetime healthcare obligations on employers."

According to the joint brief filed by the U.S. Chamber of Commerce and the Business Roundtable, the *Yard-Man* inference works to impose "unpredictable and substantial labor costs on American companies," which weakens their "international competitiveness" and harms their employees, retirees and customers. The groups also criticized the Sixth Circuit for interpreting silence in a CBA to mean that benefits were vested, saying that "Silence is not how sophisticated parties memorialize an agreement to provide costly, immutable healthcare benefits."

The brief filed by the National Association of Manufacturers argued that *Yard-Man* allows retirees to "undermine any collectively-bargained limitations" on health benefits, thereby removing an issue of "increasing importance" from the bargaining table. In the association's view, retiree health benefits shouldn't vest absent "clear and express language" in favor of vesting, a rule the association said would serve Congressional intent and "promote greater certainty" for all parties involved in the bargaining process. The

association's brief also echoed arguments raised by others about the unpredictable costs of retiree health benefits as compared to pension benefits.

Finally, Whirlpool Corp. argued in its brief that the Supreme Court should reject the Sixth Circuit's *Yard-Man* inference in favor of the Third Circuit's approach, which requires "clear and express" language providing for vesting. Whirlpool also encouraged the court to reject the standards of the Second and Seventh circuits, which infer vesting when CBA language is reasonably susceptible to the conclusion that retiree health benefits were intended to vest.

Briefs Supporting Retirees

The high court also received three amicus briefs arguing in support of the retirees and, to varying degrees, in favor of the *Yard-Man* inference.

The Labor and Benefits Law Professors offered a "historical account" in its brief, arguing that employers in the 1960s and 1970s regarded vested retiree health benefits as "an inexpensive benefit, a useful bargaining chip, and a convenient tool to accomplish other management goals such as voluntary workforce reduction." According to the brief, in the context in which many CBAs were negotiated, "it would have been eminently reasonable for employers to agree to vest retiree health benefits in order to manage their workforces and to reach agreement with unions at relatively little cost."

Another amicus brief in support of the retirees—but not necessarily in support of the *Yard-Man* inference itself—was filed by three retiree committees formed as a result of class action settlements in lawsuits over lifetime retiree health benefits. The committees argued that a "clear statement" rule like the one proposed by M&G Polymers could disadvantage retirees by barring them from producing evidence of their employers' "actual intent" with respect to vesting of health benefits. They encouraged the court to uphold "traditional rules of contract interpretation," which they said would allow the introduction of evidence showing the intentions of the contracting employer.

The AFL-CIO also filed a brief arguing in favor of traditional contract law principles. Similar to the retiree committees, the AFL-CIO argued that the parties to a CBA will "frequently have the occasion to make statements and engage in actions that tend to demonstrate their mutual understanding of the terms of their agreement." Evidence of these statements and actions is "highly relevant" to the proper interpretation of a CBA and should be considered by courts determining whether particular retiree health benefits were intended to vest, the AFL-CIO argued.

Litigation History

The dispute at the center of these briefs stemmed from M&G's 2006 announcement that it would begin requiring retirees to contribute to the cost of their health benefits. The retirees filed a lawsuit alleging that M&G's CBAs with the United Steelworkers granted them free, lifetime health benefits.

The U.S. District Court for the Southern District of Ohio dismissed the case in November 2007 (228 PBD, 11/29/07; 42 EBC 2984), but the Sixth Circuit revived it in April 2009 by ruling that the retirees might have vested benefits in light of CBA language stating that they would receive "full company contributions" toward their health benefits (63 PBD, 4/6/09; 46 EBC 1901).

On remand, M&G pointed to an "unbroken chain" of side agreements providing that M&G retained the ability to impose caps on its contributions toward retiree health benefits.

Following a bench trial (60 PBD, 3/29/11; 51 EBC 1080), the district court found that certain M&G retirees had a vested right to contribution-free lifetime health benefits, while other retirees had a right to capped lifetime benefits, contingent upon their paying above-cap premiums (153 PBD, 8/9/11; 51 EBC 2454).

In February 2012, the district court awarded a group of retirees a permanent injunction reinstating them in the existing version of M&G's health plan (35 PBD, 2/23/12; 52 EBC 1935).

M&G appealed, and the Sixth Circuit affirmed the district court's decision to treat the cap letters as inapplicable, along with its ruling that the retirees had a vested right to lifetime health benefits. The Sixth Circuit found that the relevant CBA language "specifically promised a 'full Company contribution' toward health care benefits," making it reasonable for the district court to find that benefits vested.

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For More Information

Text of the brief filed by Goldstein & Russell is at http://op.bna.com/pen.nsf/r?Open=jwie-9q5jns.

Text of the brief filed by the Council on Labor Law Equality and the Society for Human Resources Management is at http://op.bna.com/pen.nsf/r?Open=jwie-9q5jg8.

Text of the brief filed by the ERISA Industry Committee and the American Benfits Council is at http://op.bna.com/pen.nsf/r?Open=jwie-9q5jq4.

Text of the brief filed by the U.S. Chamber of Commerce and the Business Roundtable is at http://op.bna.com/pen.nsf/r?Open=jwie-9q5jqx.

Text of the brief filed by the National Association of Manufacturers is at http://op.bna.com/pen.nsf/r?Open=jwie-9q5jrs.

Text of the brief filed by Whirlpool Corp. is at http://op.bna.com/pen.nsf/r?Open=jwie-9q5jsn.

Text of the brief filed by Labor & Benefits Law Professors is at http://op.bna.com/pen.nsf/r?Open=jwie-9q5kdl.

Text of the brief filed by the retirement committees is at http://op.bna.com/pen.nsf/r?Open=jwie-9q5kep.

Text of the brief filed by the AFL-CIO is at http://op.bna.com/pen.nsf/r?Open=jwie-9q5kfp.

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