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Retiree Benefits

Parties Hammer Ordinary Contract Principles In High Court Arguments on Retiree Benefits

By Jacklyn Wille

Nov. 10 — When the U.S. Supreme Court heard oral arguments over the duration of retiree health benefits promised under collective bargaining agreements, everyone appeared to agree that ordinary principles of contract interpretation should govern (*M&G Polymers USA, LLC v. Tackett,* U.S., No. 13-1010, *argued* 11/10/14).

What was less clear was which principles—such as reliance on related contract terms or consideration of extrinsic evidence—would apply and how those principles would shake out in a given case.

Although the case asks the justices to weigh in on the controversial "*Yard-Man* inference"—a judicial inference that the U.S. Court of Appeals for the Sixth Circuit uses to find that union retiree health benefits are vested for life in the absence of specific language to the contrary—the inference itself received little support from either party, with counsel for both sides encouraging the justices to remand the case for reconsideration under ordinary principles of contract interpretation.

Multiple attorneys who followed the arguments agreed that the court appeared likely to reject the inference.

With both parties singing the praises of ordinary contract interpretation principles and appearing to disclaim the *Yard-Man* inference, it became difficult at times to pinpoint their specific areas of disagreement.

Julia P. Clark, counsel for the retirees involved in the instant dispute and a member of Bredhoff & Kaiser PLLC in Washington, spoke favorably of the approach used by the U.S. Courts of Appeals for the Second and Seventh Circuits, which have required at least some language reasonably supporting the vesting of retiree health benefits in order to find such benefits vested.

Allyson N. Ho, co-chair of Morgan Lewis's appellate practice in Dallas and counsel for the employer, M&G Polymers LLC, warned the justices away from such an approach, saying that it wasn't in line with traditional principles of contract interpretation.

BNA Snapshot

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

Key Development: U.S. Supreme Court hears oral arguments in case asking whether unclear contract language should cause courts to presume that retiree health benefits are intended to be vested for life.

Key Takeaway: Both parties in dispute over vested retiree health-care benefits ask high court to remand case for reconsideration under traditional principles of contract interpretation.

Attorneys: End of *Yard-Man*?

Steven W. Suflas, the managing partner with Ballard Spahr LLP's Cherry Hill, N.J., office, said it didn't seem likely that the *Yard-Man* inference would survive the court's ruling in this case.

"It certainly appears that the *Yard-Man* presumption will die," Suflas told Bloomberg BNA Nov. 10, adding that counsel for the retirees "appeared to concede that point right from the start."

Moreover, Suflas said that all the justices appeared to be "somewhat troubled by the idea that the Sixth Circuit applied a special presumption for retiree benefits that's a bit at odds with traditional principles of contract interpretation."

Suflas said he thought the court—or at least some of the justices—might be inclined to adopt a more "middle ground" approach to retiree vesting, such as the approaches used by the Second and Seventh Circuits.

Finally, Suflas said it would be interesting to see the "scope of the remand" if the court indeed decides to remand the case. Suflas pointed out that this case involved a trial on the merits, with the district court judge declining to take into consideration certain side letter agreements that Suflas said would've been "powerful evidence of the intent of the parties."

Suflas wasn't involved in the litigation.

According to Gregory C. Braden, a partner in Morgan Lewis's Washington office, the *Yard-Man* inference lacked a defender during the court's oral arguments.

"The retirees seem to have abandoned any hope of defending the *Yard-Man* vesting presumption," Braden told Bloomberg BNA in a Nov. 10 e-mail. "Their strategy seemed defensive, trying to argue that the Court should not adopt an opposite presumption. At one point retirees' counsel appeared to concede that retirees would gladly take the Seventh Circuit rule, presuming that all obligations expire with the collective bargaining agreement unless there is language suggesting vesting."

"None of the Justices appeared to support the *Yard-Man* presumption," he added.

Moreover, Braden said that the retirees also tried to argue that striking down *Yard-Man* "would not require reversal of the judgment in favor of the retirees, but this appeared to get little support from the justices."

"The District Court originally found that the contract unambigously rejected vesting, applying the same contract construction rules that everybody agreed should apply," Braden said.

Braden's firm represented M&G Polymers.

Attorney: Wrong Presumption

Brian E. Hayes, a shareholder with Ogletree, Deakins, Nash, Smoak & Stewart PC in Washington, said he thought the justices might not have fully appreciated the specific ways in which collective bargaining agreements differ from ordinary commercial contracts.

Specifically, Hayes pointed out that CBA terms are presumed to expire when the agreement itself expires. Moreover, he said that the Employee Retirement Income Security Act treats health-care benefits differently from pension benefits, which the statute requires be vested.

These two factors taken together should create "an inference against vesting that should only be overcome by clear language," Hayes said.

However, Hayes said that some of the justices appeared "hostile" toward that position, adding that, although there seemed to be a consensus that a presumption of vesting wasn't appropriate, there was no clear support for the proposition that the contract language must clearly support an intention that benefits would continue after the contract expired.

Hayes wasn't involved in the litigation.

Attorney: No Party Lines

Nancy G. Ross, a partner with Mayer Brown in Chicago, said she was struck by how the justices' questions indicated that they weren't adhering to strict party lines in their consideration of the case.

Ross also said that the parties appeared in agreement over the "surface issue" of whether traditional contract interpretation principles applied, but "you don't have to go very far below the surface to see what that means to each side."

"This is a situation where both people are using the same term, but that term doesn't have the same meaning to both people," Ross told Bloomberg BNA Nov. 10.

According to Ross, the "really interesting question" is how the justices will resolve this difference and what they will choose to address in their opinion.

"What I think is difficult to predict is what kind of a ruling the court could hand down that is really going to address the issue," Ross said. "If they say these cases should be addressed under traditional contract

interpretation principles, I don't think that moves the ball very far."

Ross wasn't involved in the litigation.

Plaintiff-Side Attorneys Weigh In

Three attorneys with Feinstein Doyle Payne & Kravec LLC in Pittsburgh who typically represent retirees and plan participants weighed in on the arguments in a joint e-mail to Bloomberg BNA.

"The parties were in agreement that basic contract principles should control in retiree health cases, differing on how they should apply," William T. Payne, Pamina Ewing and Joel R. Hurt said Nov. 10.

"The Court seemed unreceptive to M&G's argument that the lower court should have ruled against retirees before trial based on the alleged absence of clear and express vesting language. Justice Kagan pointed out that far from imposing any such requirement, ERISA leaves it to the parties to negotiate the terms of their agreement," they said.

Denise M. Clark, an employee benefits attorney and founder of Washington-based Clark Law Group PLLC, told Bloomberg BNA Nov. 10 that she saw a possibility for the justices to decide the instant dispute on its facts without even reaching the *Yard-Man* inference.

She added that she was "surprised and grateful" by how little *Yard-Man* came up in the arguments, as it indicated that the court may be inclined to decide this case on its facts and "leave *Yard-Man* alone."

"If *Yard-Man* had been squarely challenged here, it would really upset the apple cart for a lot of retirees that have had the benefit of the *Yard-Man* inference for a number of years, and those who are about to go into retirement status right now," she said.

Neither Denise Clark nor the Feinstein Doyle attorneys were involved in the instant litigation.

What's at Stake

The case asks the justices to weigh in on how courts should interpret plans and collective bargaining agreements that award retirees health benefits without specifically indicating whether those benefits are vested for life. A ruling in favor of the employer could affect union retirees across the country who are currently receiving employer-provided, health-care benefits by implicitly granting the employer permission to terminate those benefits.

The retiree-friendly Sixth Circuit has responded to the challenge posed by unclear contract language by promulgating the controversial "*Yard-Man* inference," which places a thumb on the scale in favor of vested retiree health benefits when the contract (*United Auto Workers v. Yard-Man Inc.*, 716 F.2d 1476, 4 EBC 2108, 6th Cir., 1983).

Other circuits—including the Second and Seventh—have required stronger language in order to infer vesting, with the Third Circuit applying nearly the opposite presumption to require a clear statement of vesting in order to find retiree benefits vested for life.

Death of *Yard-Man*?

One surprising aspect of the arguments was the fact that neither party seemed very interested in defending the *Yard-Man* inference, which was the issue the justices agreed to address when they granted review in the case.

Not surprisingly, Ho argued most fervently against *Yard-Man*, saying that it was contrary to normal principles of contract interpretation to put a "thumb on the scale" in favor of either party.

Clark also appeared to disclaim *Yard-Man*, saying that the case should be decided "like every other dispute under a collective bargaining agreement" and "without applying any presumptions."

Even Justice Stephen G. Breyer appeared to foreshadow the death of *Yard-Man*, saying that he hadn't heard anything to change his mind from his original conclusion, which was that courts should "decide these things without any presumption, period. Ordinary contract. Go read the contract."

However, Justice Antonin Scalia appeared to offer a few words in support of *Yard-Man* at one point, saying he thought the Sixth Circuit would find that *Yard-Man* is in line with ordinary rules of contract interpretation.

Silence or Ambiguity?

One argument consistently advanced by M&G Polymers was that courts shouldn't infer from a bargaining agreement's "silence" that the employer assumed the responsibility to provide a significant and unalterable benefit like lifetime retiree health benefits. According to Ho, an employer wouldn't agree to provide such a benefit without memorializing that agreement in clear language.

Justices Ruth Bader Ginsburg and Elena Kagan challenged the company's characterization of the agreement as "silent," saying that both parties had pointed to potentially conflicting contract provisions in support of their positions.

Justice Sonia Sotomayor jumped in on this topic as well, reminding counsel that contract provisions describing retirement benefits and benefits for surviving spouses could be reasonably interpreted as providing for the vesting of retiree health benefits, as well.

Arguing on behalf of the retirees, Julia Clark raised the point that interpreting alleged silence in a contract as relieving one party of an obligation could be tantamount to a court determining which party "had a bigger stake" in the case and then punishing them "if their language is ambiguous."

Contract Principles

In urging the court to apply traditional contract principles, Ho pointed to two "background rules" that she said should've guided the lower courts in this case.

First, she said that contract principles counsel against reading a contract's "silence" as imposing obligations on a contracting party.

Second, she argued that the obligation to provide lifetime retiree health benefits was "extra-statutory," because ERISA exempts welfare benefits from the requirement that other benefits—such as pensions—be vested for life.

This argument struck out with at least one justice, with Kagan jumping in to say that ERISA provides no rules for the vesting of welfare benefits; rather, it leaves that issue up to the contracting parties.

Kagan also voiced her disapproval of Ho's argument that an obligation to provide lifetime health benefits would've been clearly stated in the agreement, saying that this argument "cuts both ways" and could be used by the retirees to argue that they wouldn't have given up such a benefit without clear language.

"Congress has said we don't care," Kagan said of vested retiree health benefits. "Congress has said we leave it to them."

Justice Samuel Alito appeared more receptive to the idea that contractual silence could imply the absence of any obligation to provide lifetime benefits.

"This is an important benefit and an expensive one," Alito said. "Why is it that in this collective bargaining agreement and apparently many others—I don't know whether the figure is 40 percent or whatever it is—there isn't anything explicit one way or the other?"

Arguing on behalf of the retirees, Julia Clark also spoke favorably of traditional principles of contract interpretation. In particular, she encouraged courts to avoid reading discrete contract provisions out of context with the agreement as a whole.

Ho appeared to agree with this argument, telling the justices that the retiree health benefit provisions at issue should be read in concert with other contract provisions establishing durational limits for the agreement.

Extrinsic Evidence

At one point, Scalia caught Ho in what he considered to be a misstep regarding the ability of courts to use extrinsic evidence to interpret ambiguous contracts.

Interrupting Ho's argument in favor of traditional principles of contract interpretation, Justice Kagan asked whether extrinsic evidence—including, presumably, evidence of an employer's past practice of providing lifetime retiree health benefits—could be considered under traditional contract principles.

When Ho began to reply in the affirmative, Scalia jumped in.

"You acknowledge that?" he asked. "See, I wouldn't acknowledge that if I were you."

Parties 'Deserve to Lose.'

In a remark that appeared intended more for the other justices than the litigants, Scalia voiced his opinion that "Whoever loses deserves to lose" in this case.

"I mean, this thing is obviously an important feature. Both sides knew it was left unaddressed, so, you know, whoever loses deserves to lose for casting this upon us when it could have been said very clearly in the contract."

He added, "I hope we'll get it right, but, you know, I can't feel bad about it."

Justice Breyer took the bait, responding that retirees who had received uninterrupted health benefits for years might "feel a little bad about it" if their benefits were suddenly terminated following an adverse Supreme Court decision.

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.

The Supreme Court granted review of the case in May (87 PBD, 5/6/14).

The court limited its review to the first question presented by M&G Polymers, which asks whether courts construing collective bargaining agreements in Labor Management Relations Act cases should presume that silence concerning the duration of retiree health benefits means that the parties intended for those benefits to vest or life.

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