ALSTON&BIRD

WWW.ALSTON.COM

Employee Benefits & Executive Compensation ADVISORY ■

FEBRUARY 3, 2015

M&G Polymers v. Tackett: New Standards for Vesting of Retiree Medical Benefits in Collective Bargaining Agreements

On January 26, 2015, the U.S. Supreme Court changed the landscape for vesting of collectively bargained retiree medical benefits with its 9-0 decision in *M&G Polymers v. Tackett*.[1] Overturning the Sixth Circuit's *Yard-Man* presumption, that such benefits should vest for life, the Court held that collective bargaining agreements (CBAs) should be interpreted using "ordinary contract principles" without putting a "thumb on the scale" in favor of retiree vesting. However, the instructions that "courts should not construe ambiguous writings to create lifetime promises," and "an employer's commitment to vest such benefits is not to be inferred lightly," may tilt the scale in the other direction.

Background

The Employee Retirement Income Security Act (ERISA) provides vesting requirements for pension benefits, but not for health and welfare (H&W) benefits. ERISA leaves any H&W vesting to the discretion of employers. Where benefits are collectively bargained, the vesting of H&W benefits is determined by the collective bargaining process. Retiree medical benefits, an interesting hybrid of retirement and H&W, have generated tremendous controversy and litigation.

Most CBAs expire at a certain date and the benefits thereof likewise expire. For pension benefits, which are required to be vested, retirees will continue to collect the benefits they have earned for life, even after the expiration of the CBA.

A CBA can specify that retiree medical benefits "vest" (that is, last for life) or that they do not vest, and may expire or be curtailed when the CBA expires, or sooner. However, most CBAs have no specific language as to whether retiree medical benefits vest. Perhaps this is because the employers and unions believed the standard durational language, that any portion of the agreement may be modified by the parties after the expiration date, controlled retiree medical benefits as well as all other benefits.

Typically, such modification would be the result of collective bargaining. So, when retirees claim their benefits are "vested," they not only challenge the employer's right to curtail the benefits, but also the union's right to bargain for wages, job security or other benefits in exchange for modifications to the retiree medical benefits. Under federal law, however, unions generally do not have a legal obligation to represent the retirees, and some courts have been skeptical of subsequent agreements that curtail retiree benefits.

---

[1] 2015 WL 303218 (U.S. 2015).

This issue has only become more important over time; with skyrocketing medical costs resulting in liabilities that may far exceed what employers and unions had planned, often the parties are contracting to decrease or terminate retiree medical benefits entirely.

Prior to *M&G Polymers*, there was a federal circuit split over how to interpret collective bargaining agreements to determine whether retiree medical benefits are vested after the expiration of the CBA. *International Union, United Auto, Aerospace, & Agricultural Implement Workers of Am. v. Yard-Man, Inc.*[2] *(Yard-Man)* controlled in the Sixth Circuit. *Yard-Man* and its progeny created a presumption in favor of vesting retiree medical benefits. The Sixth Circuit reasoned that such benefits would be partly illusory if they could be taken away and inferred that parties to the agreement would want the benefits to be vested.

Yard-Man was the most pro-vesting standard imposed in any of the federal circuits. For instance, the Third Circuit generally requires a clear statement that health care benefits are intended to survive the termination of the CBA in order to find that such benefits are vested. The Second and Seventh Circuits require at least some language in the CBA that can reasonably support an interpretation that health care benefits should continue indefinitely.

M&G Polymers v. Tackett

M&G Polymers entered into a CBA and Pension, Insurance, and Service Award Agreement with the union,[3] which provided for retiree medical coverage with a full employer contribution to be provided "for the duration" of the agreement (with future renegotiations). After these agreements expired, M&G decided to require retirees to contribute to the cost of their health coverage. Several retirees sued, arguing that they had a vested right to retiree medical benefits with no contribution requirement. The district court initially dismissed the case, but the Sixth Circuit, on appeal, applied *Yard-Man* and reversed. On remand, both the district court and the Sixth Circuit ruled in favor of the retirees. In *M&G Polymers*, the Court disagreed, holding the Sixth Circuit's use of *Yard-Man* was "incompatible with ordinary principles of contract law."

Critique of *Yard-Man*

The main focus of the Court's opinion was its critique of the *Yard-Man* inferences, which favor vesting. The Court began by noting that collective bargaining agreements must be interpreted according to ordinary principles of contract law, when not inconsistent with federal labor policy. The Sixth Circuit analysis distorts the attempt to ascertain the intention of the parties by placing a thumb on the scale in favor of vesting. The Sixth Circuit's "assessment of likely behavior in collective bargaining is too speculative and too far removed from the context of any particular contract to be useful in discerning the parties' intention." The Sixth Circuit relied on its own suppositions about the intentions of the parties and improperly applied those theories indiscriminately.

The Supreme Court found fault with the Sixth Circuit's refusal to apply general durational clauses to retiree benefits (on the theory that various inferences outweigh routine duration clauses); the Court found that this distorted the text and conflicted with the principle that a written contract is presumed to encompass the parties' entire agreement.

Traditional Contract Principles

The Supreme Court disagreed with the Sixth Circuit's analysis that unvested benefits create a partially illusory promise because they benefit some, but not all, retirees. Illusory promises have no substance and therefore cannot provide

---

2 716 F.2d 1476 (6th Cir. 1983).

3 United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC.

consideration for a contract. However, under the Supreme Court's guidance, a *partly* illusory promise is not illusory at all. If it is only *partly* illusory, then it has *some* substance. If a promise benefits some retirees, then it is sufficient to provide consideration. This is particularly common in the CBA context, where agreements are negotiated on behalf of broad categories of individuals and may not benefit every member.

The Court laid out a number of principles of contract construction applicable to the vesting analysis. For example, courts should not construe ambiguous writings to create lifetime promises. Also, contracts that are silent on duration will not ordinarily be treated as "operative in perpetuity" but rather as "operative for a reasonable period of time." The Court also instructed that contractual obligations will generally cease upon the termination of the bargaining agreement. Such agreements may provide for lifetime benefits, in specific terms, but courts cannot infer this when a contract is silent. And, "when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life."

Taken together, these principles of construction provide a framework under which the typical CBA will not result in vesting. The vast majority of CBAs contain general limits on duration, but very few directly address vesting of retiree medical benefits.[4] If vesting is not to be inferred lightly, and if ambiguous writings should not create lifetime promises, then it would seem that most CBAs should not result in vesting.

The Supreme Court vacated the lower court decision and remanded the case for the Sixth Circuit to review under "ordinary principles of contract law."

Concurrence

The concurring opinion of Justice Ginsburg (joined by Justices Breyer, Sotomayor and Kagan) encouraged the lower courts to look at the entire agreement to discern the intent of the parties. Justice Ginsburg stated that when a contract is ambiguous, a court may consider extrinsic evidence to determine the intent of the parties. According to Justice Ginsburg, a determination of vesting can be made from a CBA's explicit *and* implied terms. However, Justice Ginsburg agreed that the analysis must be done "without *Yard-Man's* 'thumb on the scale in favor of vested retiree benefits.'"

What Does *M&G Polymers* Mean?

The *Yard-Man* standard is dead. However, the Court did not reach a conclusion as to whether the benefits in this case were vested. The many various ways that durational limits are expressed in CBAs, and the many various statements suggestive of vesting in such CBAs, ensures that courts will be fleshing out the implications of *M&G Polymers* for years to come.

Potential Implications for Employers

For employers and unions currently negotiating CBAs, the clear message is to be explicit about whether they intend to assume liability for unalterable lifetime retiree medical benefits. For existing CBAs, *M&G Polymers* will likely generate much litigation as to the application of "ordinary contract principles" to the many variations of specific contractual language.

---

[4] An interesting amicus brief filed by Goldstein & Russell, P.C. "in support of neither party" provided statistics on clauses in a nonscientific sample of CBAs. According to the amicus, only 6% of private sector CBAs state outright that retiree medical benefits vest. In contrast, 14% were completely silent on the question of vesting, while 70% contain one or more statements that may be recognized to preclude vesting and 30% contain statements suggesting that benefits do vest. These percentages add to more than 100% because many CBAs have statements suggestive of both positions—vesting and not vesting.

If you would like to receive future *Employee Benefits & Executive Compensation Advisories* electronically, please forward your contact information to **employeebenefits.advisory@alston.com**. Be sure to put "**subscribe**" in the subject line.

If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

Members of Alston & Bird's Employee Benefits & Executive Compensation Group

Robert A. Bauman
202.239.3366
bob.bauman@alston.com

Saul Ben-Meyer
212.210.9545
saul.ben-meyer@alston.com

Stacy C. Clark
404.881.7897
stacy.clark@alston.com

Emily Seymour Costin
202.239.3695
emily.costin@alston.com

Patrick C. DiCarlo
404.881.4512
pat.dicarlo@alston.com

Meredith Gage
404.881.7953
meredith.gage@alston.com

Ashley Gillihan
404.881.7390
ashley.gillihan@alston.com

David R. Godofsky
202.239.3392
david.godofsky@alston.com

John R. Hickman
404.881.7885
john.hickman@alston.com

H. Douglas Hinson
404.881.7590
doug.hinson@alston.com

Emily C. Hootkins
404.881.4601
emily.hootkins@alston.com

James S. Hutchinson
212.210.9552
jamie.hutchinson@alston.com

Johann Lee
202.239.3574
johann.lee@alston.com

Blake Calvin MacKay
404.881.4982
blake.mackay@alston.com

Emily W. Mao
202.239.3374
emily.mao@alston.com

Steven Mindy
202.239.3816
steven.mindy@alston.com

Craig R. Pett
404.881.7469
craig.pett@alston.com

Earl Pomeroy
202.239.3835
earl.pomeroy@alston.com

Jonathan G. Rose
202.239.3693
jonathan.rose@alston.com

Syed Fahad Saghir
202.239.3220
fahad.saghir@alston.com

Thomas G. Schendt
202.239.3330
thomas.schendt@alston.com

John B. Shannon
404.881.7466
john.shannon@alston.com

Richard S. Siegel
202.239.3696
richard.siegel@alston.com

Carolyn E. Smith
202.239.3566
carolyn.smith@alston.com

Michael L. Stevens
404.881.7970
mike.stevens@alston.com

Jahnisa P. Tate
202.239.3670
jahnisa.tate@alston.com

Daniel G. Taylor
404.881.7567
dan.taylor@alston.com

Elizabeth Vaughan
404.881.4965
beth.vaughan@alston.com

Kerry T. Wenzel
404.881.4983
kerry.wenzel@alston.com

Kyle R. Woods
404.881.7525
kyle.woods@alston.com

ALSTON&BIRD

WWW.ALSTON.COM

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719
CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100
NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
RESEARCH TRIANGLE: 4721 Emperor Blvd. ■ Suite 400 ■ Durham, North Carolina, USA, 27703-85802 ■ 919.862.2200 ■ Fax: 919.862.2260
SILICON VALLEY: 1950 University Avenue ■ 5th Floor ■ East Palo Alto, California, USA, 94303-2282 ■ 650.838.2000 ■ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.756.3300 ■ Fax: 202.756.3333