

June 2, 2006

NO FIRST CIRCUIT PRESUMPTION IN FAVOR OF VESTING FOR RETIREE WELFARE BENEFITS

In a case of first impression released Wednesday, the First Circuit disavowed any presumption of vesting for collectively bargained retiree welfare benefits and announced rules of federal labor contract construction applicable to retiree benefit disputes brought under Section 301 of the Labor-Management Relations Act (LMRA). *Senior et al v. NStar Electric and Gas Co. et al*, No. 05-2015 (1st Cir. May 31, 2006). In *Senior's* companion case involving non-union retirees, brought under the Employee Retirement Income Security Act (ERISA), the First Circuit recognized that retiree welfare benefits do not vest under ERISA unless an employer affirmatively cedes its right to amend or terminate the benefits, either in a collectively bargained agreement or in an ERISA plan document. *Balestracci et al. v. NStar Electric and Gas Co.*, No. 05-1894 (1st Cir. May 31, 2006).

Factual Content

The *Senior* case arose in the context of early retirement programs (ERPs) offered by COM/Energy in a reduction-in-force after the merger of Commonwealth Gas and Commonwealth Electric in 1997. The *Balestracci* case arose in the context of voluntary separation programs offered by NStar in an attempt to standardize its retiree benefit programs following its merger with Commonwealth Gas. In both cases, the company announced that it would terminate retiree dental benefits once the retiree reached age 65 unless the retiree had reached that age by April 1, 2003.

Plaintiffs in both cases claimed that they had received documents promising that their dental benefits would last "for life." In *Senior*, plaintiffs also relied on oral statements about "lifetime benefits" made by Human Relations personnel during the early retirement window. In both cases, the plan documents contained an express reservation of the employer's right to terminate, amend, modify or cancel the existing retiree welfare benefits. In *Balestracci*, plaintiffs claimed that company representatives had failed to inform them of that reservation of rights.

Union Forum Shopping Strategy

The United Steelworkers International Union (USW) undoubtedly backed its local union, one of the named plaintiffs in *Senior*. The USW has actively and aggressively shopped for any forum other than the Third Circuit, in which it is based, in order to avoid that Circuit's opinion in *UAW v. Skinner Engine Co.*, 188 F.3d 130 (3rd Cir. 1999), which rejected a presumption in favor of vesting for retiree welfare benefits.

In particular, the USW has recently brought several retiree benefits lawsuits within the Sixth Circuit, which clings to its opinion in *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983). In *Yard-Man*, the Sixth Circuit described an inference (the so-called "Yard-Man" presumption) that collectively bargained retiree benefits vest throughout retirement if labor contracts do not contain benefit-specific durational clauses and contain terms deemed ambiguous by a court.

No Vesting Under ERISA

In the case involving non-union retirees, the First Circuit first held that the retiree dental benefits in issue were ERISA benefits, although they were contained in a multi-faceted early retirement program which provided for severance payments that the Court had previously found were not governed by ERISA because of their "limited non-discretionary nature." *O'Connor v. Commonwealth Gas Co.*, 251 F.3d 262 (1st Cir. 2001).

The First Circuit then announced two federal substantive rules of interpretation of ERISA welfare benefit plans: (1) that ERISA does not create any entitlement to welfare benefits other than by an employer's agreement to have such benefits vest; and 2) that unambiguous language in a plan is enforced according to its terms. *Balestracci*, slip op. 12.

However, the Court observed that, where ambiguity exists in an ERISA plan term, the issue of what the parties intended by the plan language typically reaches the fact-finder. Nonetheless, the First Circuit expressly cautioned that such an ambiguity does not foreclose summary judgment, where the evidence presented about the parties' intended meaning proves "so one-sided that no reasonable person could decide the contrary." *Balestracci*, slip. op. 12, quoting *Allen v. Adage, Inc.*, 967 F.2d 695, 698 (1st Cir. 1992). Whether a purported ambiguity exists in an ERISA plan term generally remains a question of law for the judge. To demonstrate the parties' intent regarding an ambiguous ERISA plan term, the parties can offer other parts of the plan, conduct of the parties, and other extrinsic evidence.

The plaintiffs argued that the ERP plan documents were "stand alone" documents in order to avoid the company's express reservation of the right to amend the plan contained in the dental plan document. The First Circuit rejected that argument. The Court also rejected the company's argument that there is a presumption against the vesting of ERISA welfare benefits. In addition, the Court rejected the lower court's conclusion that ERISA welfare benefits cannot vest absent "clear and express" statements of vesting.

Following without mentioning the Sixth Circuit's opinion in *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998), the First Circuit gave effect to both the "benefits for life" language in the personalized documents provided to plaintiffs and the reservation of rights language in the plan documents, concluding that "[t]he only reasonable reading of the ERPs is that the company would provide lifetime benefits to its retirees subject to its reservation of the right to modify, alter, or terminate dental plan coverage should future circumstances require such changes." *Balestracci*, slip. op. 17.

Also of significance, the First Circuit enforced the express rule of construction in the dental plan document stating that the plan document would control and govern in the event of any inconsistencies or omissions in the summary plan descriptions or other documents. The Court also rejected the alleged oral statements made by company representatives as "similarly insufficient to overcome the unambiguous reservation of rights in the plan documents." *Id.* at 18.

No Vesting Under Section 301

In *Senior*, the case involving USW retirees, the summary plan descriptions of the dental plan, which plaintiffs admitted receiving, again contained an express reservation of the employer's right to change or terminate the plan. Individualized benefit summaries stated that dental coverage "would be for life."

Although the First Circuit confined *Senior* to its facts as

a case that did not involve whether retiree benefits survive labor contract expiration, slip. op. at 23, n. 15, the principles of federal labor law contract interpretation which it articulated may foreshadow future decisions. The First Circuit first noted that retirees bear the burden of proving that their welfare benefits have vested and cannot be changed by unilateral company action. *Senior*, slip. op. at 23. Recognizing that ERISA welfare benefits generally do not vest, the Court observed that even the Sixth Circuit had recently moved away from a vesting presumption in favor of ordinary principles of contract interpretation in *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571 (6th Cir. 2006).

After surveying the unresolved split in the federal circuits concerning whether a presumption arises in favor of the vesting of retiree welfare benefits, the First Circuit struck a middle course: that federal labor law did not create any presumption for or against retiree welfare benefit vesting. Reasoning that the Supreme Court had only created one presumption under federal labor law, i.e., the presumption in favor of arbitration, the First Circuit expressly approved interpreting collectively bargained benefits provisions under the "traditional rules of interpretation of labor agreements." Slip op. at 28.

The labor contracts in question did not expressly incorporate provisions relating to retiree benefits from the ERISA-governed retiree benefit plans. Nevertheless, the First Circuit adopted a rule of implied incorporation of plan provisions within labor contracts where the labor contracts refer to existing plans. The Court also looked outside the four corners of the labor contract to the "industrial common law" defined in the "Steelworkers Trilogy," noting that the "source of law is not confined to the express provisions of the contract, as the industrial common law - the practices of the industry and the shop - is equally a part of the collective bargaining agreement although not expressed in it." *Id.* at 32 (citing *USW v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960)).

Ultimately, the First Circuit articulated a "facts and circumstances" test under which courts may determine whether related documents are to be construed together, including a review of the bargaining history, the practices in the company, and the custom and usage regarding retiree benefits. In *Senior* itself, the Court declined to credit "negative inferences drawn from a series of omissions by the company to repeat at every instance that the company continued to reserve its right to change dental benefits." *Id.* at 38. In short, silence at the bargaining table about the company's right to terminate or change the benefits and the occasional omission of a reservation of rights from summary plan descriptions could not give rise to the negative inference that the benefits were unalterable for life. *Id.* at 38-40.

Practical Considerations

Employers who wish to retain the right to modify retiree benefits unilaterally should ascertain whether plan documents and collective bargaining documents contain express reservations of rights to amend or terminate such benefits. Employers should also make every effort to retain any documentation of bargaining history (including highlights memos, union and company proposals, bargaining minutes, settlement agreements, ratification documents, 60-day notices of intent to terminate the contract, etc.) and any documents describing the conduct of the company and the union relating to retiree benefits during labor contract terms, after contract expiration, and during strikes (if any).

In the First Circuit, as in others, all such materials become grist for the “facts and circumstances test” to determine whether the employer agreed to give up its right to amend or terminate unvested retiree welfare benefits.

For more information on these decisions and their impact on retiree benefits litigation and litigation avoidance, please contact your Seyfarth Shaw attorney or the following Seyfarth Shaw attorneys resident in the Boston office:

Diane M. Soubly: (617) 946-4899 or dsoubly@seyfarth.com

Andrew Eisenberg: (617) 946-4909 or aeyisenberg@seyfarth.com

ATLANTA

One Peachtree Pointe
1545 Peachtree Street, N.E., Suite 700
Atlanta, Georgia 30309-2401
404-885-1500
404-892-7056 fax

BOSTON

Two Seaport Lane, Suite 300
Boston, Massachusetts 02210-2028
617-946-4800
617-946-4801 fax

CHICAGO

55 East Monroe Street, Suite 4200
Chicago, Illinois 60603-5803
312-346-8000
312-269-8869 fax

HOUSTON

700 Louisiana Street, Suite 3700
Houston, Texas 77002-2797
713-225-2300
713-225-2340 fax

LOS ANGELES

One Century Plaza
2029 Century Park East, Suite 3300
Los Angeles, California 90067-3063
310-277-7200
310-201-5219 fax

NEW YORK

1270 Avenue of the Americas, Suite 2500
New York, New York 10020-1801
212-218-5500
212-218-5526 fax

SACRAMENTO

400 Capitol Mall, Suite 2350
Sacramento, California 95814-4428
916-448-0159
916-558-4839 fax

SAN FRANCISCO

560 Mission Street, Suite 3100
San Francisco, California 94105-2930
415-397-2823
415-397-8549 fax

WASHINGTON, D.C.

815 Connecticut Avenue, N.W., Suite 500
Washington, D.C. 20006-4004
202-463-2400
202-828-5393 fax

BRUSSELS

Boulevard du Souverain 280
1160 Brussels, Belgium
(32)(2)647.60.25
(32)(2)640.70.71 fax

This newsletter is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have.