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One Minute Memo®

Supreme Court Wades Into The Fray As To Public Sector Unions' Use Of Non-Member Fees For Ideological Purposes

On June 21, 2012, in *Knox et al. v. Service Employees International Union, Local 1000*, the Supreme Court issued a landmark, 5-2-2 decision which held that a union that imposes a special fee or other dues increase mid-year to meet expenses that were not earlier disclosed when the regular dues rates were set must provide a fresh "*Hudson* notice" and cannot exact any funds from non-members without their affirmative, opt-in consent. Critically, this decision calls into serious question the constitutionality of the current practice wherein public employees who are in bargaining units but are not union members must affirmatively opt-out of that portion of union dues that are devoted to "non-chargeable" political and ideological expenses. The *Knox* decision and rationale seem to suggest that a majority of the Court will find in a future case that all non-member public employees who are in a bargaining unit be required to opt-in to payment of any dues or assessments that are to be used for political or ideological purposes.

The Decision

California public employees (and those of other similarly situated states) who are part of a bargaining unit, but who are not union members, can nonetheless be required to pay an annual fee, commonly called a "fair share" or "agency" fee, to cover the cost of union services related to collective bargaining. Such annual fees have been held constitutional provided the unions meet certain procedural requirements set forth in *Teachers v Hudson*, 475 U.S. 292 (1986). These requirements include providing notice to bargaining unit employees on an annual basis of the percentage of dues to be used for non-chargeable political or ideological expenses, and allowing employees an opportunity to opt out of those contributions.

In the instant case, in June 2005 SEIU Local 1000 (the "Union") notified members what its dues structure was for the coming 12 months, and what percentage of its expenditures would be chargeable to collective bargaining activities. The Union estimated 56.35% of total expenditures would be chargeable, and also advised employees that the agency fee was subject to increase at any time without further notice. Non-members were provided the opportunity to opt-out of paying non-chargeable expenses for the coming year.

Late in 2005, in response to statewide ballot initiatives, the Union instituted a temporary 25% increase in fees to build a "Political Fight-Back Fund." The Union explained that the Fund would be used for a variety of political expenses but would not be used to pay for the Union's regular operating costs. Non-members who had not previously opted out in June of that year (to paying dues related to non-chargeable expenses) were not permitted to object to the increase; those who had objected in June were required to pay 56.35% of the increase.

A class of all non-members sued, and a California district court found that the Union violated the non-members' First Amendment free speech rights. The Ninth Circuit, in a 2-1 decision, reversed, finding under a balancing test it read into *Hudson*, the Union reasonably accommodated the competing interests of the interested parties.

The Supreme Court's majority found that the Union had indeed violated non-members First Amendment rights. The Court rejected the Ninth Circuit's claim that *Hudson* mandated balancing the "right" of the union to collect an agency fee against the First Amendment rights of non-members. The Court noted that unions have no constitutional entitlement to the fees of non-members, and that instead of a balancing test any procedure for exacting fees from unwilling contributors must be carefully tailored to minimize the infringement of free speech rights.

With that in mind, the Court majority found to be indefensible: i) the Union's refusal to allow non-members a fresh opportunity to opt out of the new "special assessment"; ii) the Union's automatic application to the special assessment of the 56.35% allocation that had been applied to the annual allocation the prior June. The Court decried the lack of a fresh *Hudson* notice because non-members could not have had a fair opportunity to decide whether to object to the increase during the annual objection period when, at the time, they did not know about the increase or its purpose.

With regard to those non-members who had opted out, the Court found that there was no reason to suppose that 56.35 percent of the new assessment was going to be used for chargeable expenses, particularly when the Union announced the opposite. The Court distinguished *Hudson* on the grounds the Court had accepted the use of the prior year's actual percentage breakdown (as to chargeable and non-chargeable expenses) for setting the subsequent year percentages only for annual notices, and that was predicated on the assumption that the Union's allocation of funds for chargeable and non-chargeable expenses was not likely to vary greatly from year-to-year. That assumption fails when there is a special levy based on unforeseen events; particularly where the Union has stated, in fact, that the special assessment is entirely for non-chargeable political expenses.

The Court also rejected the idea of permitting the Union to perform a new breakdown analysis because of the Court's concerns about the accuracy of such a calculation and the burden a non-member would have in challenging it. Given that allowing opt-out for annual dues already substantially impinges on the First Amendment rights of non-members, the Court saw no justification for any further impingement.

The Court spent considerable time analyzing whether non-member employees can be required to "opt-out" of contribution amounts to be used for political purposes, or must be required to "opt-in" to such amounts. While the Court was focused primarily on special contribution elections, it did discuss more broadly the issue of the Union's annual contribution election. It concluded that for purposes of a special assessment or dues collection, the Union must provide a fresh *Hudson* notice and may not exact any funds from non-members without their affirmative consent (*i.e.*, the employee must elect to "opt-in").

Justices Sotomayor and Ginsburg concurred with the majority that the First Amendment requires non-members be given an opportunity to opt-out of an increase, but objected to the majority taking on issues not part of the appeal, such as whether non-members should have to opt-in. They also objected to the majority casting aspersions on prior precedent that permits opt-out provisions for annual dues, and noted the majority left open many questions as to how the decision is to be applied.

Justices Breyer and Kagan dissented because they considered the Union's actions to be consistent with *Hudson* and prior precedent. The use of the annual percentage breakdown from the prior year followed *Hudson*, and holding non-members to an annual objection was a reasonable approach. Moreover, prohibiting a union from charging any portion of a mid-year increase to non-members and the requirement of affirmative consent were inconsistent with prior precedent.

The dissent also asserted that the opt-in issue had not been raised by either party to the litigation. The dissent acknowledged the majority's rationale would apply to annual objections as well, and stated that the decision "will play a role in an ongoing, intense political debate."

Impact of Knox

While mid-year union assessment and dues increases are relatively rare (so the case has limited direct application), the *Knox* majority appears primed to prohibit unions from using the opt-out approach on any annual agency fees. The Court noted that compulsory union fees in the public sector constitute a form of compelled speech and association that significantly impacts First Amendment rights. The Court acknowledged that prior cases had tolerated this to solve the free rider problem, an exception it considered to be an "anomaly" and "a remarkable boon for unions." The majority further stated that

judicial acceptance of the opt-out approach instead of an opt-in approach "appears to have come about more as a historical accident than through the careful application of First Amendment principals." No doubt further litigation challenging op-out procedures for annual fees will follow.

It is also worth noting that the majority, *in dicta*, strongly suggested that the SEIU improperly had categorized certain clearly political expenses, namely lobbying the electorate and the Union's fight to defeat a proposition it claimed impacted bargaining, as chargeable. This part of the decision will provide additional support for non-member challenges as to how public-sector unions break down chargeable and non-chargeable expenses.

As the dissent predicted, this decision will become part of the current political debate. *Knox* throws another log on the debate over the power, role and scope of public sector unions.

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