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View From Sidley: ‘Ordinary Principles of Contract Law’—Handicapping the Tackett Case on Remand



By ERIC MATTSON

When the U.S. Supreme Court issues an opinion, it can raise as many questions as it answers. Foremost among them: How will the lower courts apply it? We may soon start learning the answer to that question with respect to *M&G Polymers USA, LLC v. Tackett*, in which the Supreme Court directed the Court of Appeals to apply “ordinary principles of contract law”—not a presumption in favor of plaintiffs—when deciding whether a contract promised lifetime medical benefits to retirees (17 PBD, 1/27/15).

The case has now been remanded to the Sixth Circuit, re-briefed, and re-argued. The court’s forthcoming opinion will likely shed light on how “ordinary principles of contract law” apply to welfare benefits in the collective bargaining context and, potentially, other ERISA contexts.

This article traces the history of the *M&G* case, describes the parties’ arguments on remand, and, based on the briefs and the oral argument, offers a prediction on what will happen next.

Eric Mattson (emattson@sidley.com) is a partner in the Chicago office of Sidley Austin LLP. He is a class action defense lawyer and co-leader of the Consumer Class Actions practice area team. Eric’s practice includes the defense of ERISA class actions.

The Dispute Over Lifetime Health Care Benefits

The plaintiffs in *M&G Polymers* sued their former employer under ERISA, claiming they had been promised lifetime health care benefits. Both the district court and the Sixth Circuit ultimately ruled in their favor, relying largely on the so-called *Yard-Man* presumption, which created a presumption that retirees’ welfare benefits were vested—guaranteed for life—as long as they were provided for in some way in a collective bargaining agreement.¹

After growing and morphing for more than three decades, the *Yard-Man* presumption met its demise in 2015 at the hands of a unanimous Supreme Court. The Court began by noting a key difference between ERISA-governed pension plans (like 401(k) plans) and ERISA-governed welfare benefit plans (like health care plans): The former come with “elaborate minimum funding and vesting standards,” while the latter can be modified or terminated “for any reason.”

The extent of flexibility employers enjoy with respect to welfare benefit plans can be cabined by contract, but the Supreme Court held that the *Yard-Man* presumption—itsself purportedly based on “traditional rules for contractual interpretation”—“violates ordinary contract principles by placing a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements.”

After dismantling the *Yard-Man* presumption and the “shaky factual foundation” on which it stood, the Court sent the case back to the Sixth Circuit “to apply ordinary principles of contract law in the first instance.” Among the principles the Supreme Court mentioned as being potentially relevant:

■ “Although a court may look to known customs or usages in a particular industry to determine the mean-

¹ The presumption draws its name from a Sixth Circuit opinion from 1983, *International Union, United Auto, Aerospace, and Agricultural Implement Workers v. Yard-Man, Inc.*, 716 F.2d 1476, 4 EBC 2108 (6th Cir. 1983).

ing of a contract, the parties must prove those customs or usages using affirmative evidentiary support.”

- “The written agreement is presumed to encompass the whole agreement of the parties.”

- “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.”

- The “illusory promises doctrine” requires courts to avoid construing contracts in a way that makes promises illusory, but the fact that a collectively-bargained promise provides benefits to some retirees but not others does not make it “illusory.”

- “Courts should not construe ambiguous writings to create lifetime promises.”

- “Contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.”

The Debate Upon Remand

Not surprisingly, on remand the defendants and supporting amici relied heavily on the Supreme Court’s stinging repudiation of *Yard-Man* and the Court’s description of the “ordinary contract principles” that, in the main, weigh heavily in favor of defendants. *Yard-Man*, the defendants observed, had been removed “root and branch,” and the “ordinary principles of contract interpretation” described in the Supreme Court’s opinion showed that “the agreements at issue do not clearly manifest an intent to provide retirees unalterable, contribution-free health-care benefits.”

The defendants relied particularly heavily on the “general durational clauses” in the relevant agreements. But they also noted that, as the district court had found in an early round of the lawsuit, the key language in the contract itself—that retirees would receive a “full Company contribution towards the cost of the [health care] benefits”—“said nothing about the duration of those benefits.” And as the Supreme Court had stated, “[W]hen 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.”

The plaintiffs admitted that the contracts at issue did not clearly and expressly vest any health care benefits for retirees. But they did not agree that the contracts were “silent” on that point, and they disputed that the absence of clear, express vesting language meant the case was over. On the latter point, plaintiffs argued that “had the Supreme Court adopted a ‘clear and express language’ requirement, the Court would have directed entry of judgment for M&G,” rather than remanding the case for further consideration.

Plaintiffs also perceived signs of vesting in the language of the agreements that described who would receive retiree health benefits, namely people “who are eligible for and receiving a monthly pension.” In plaintiffs’ view, because pension benefits generally are both vested and last for a lifetime, and because the parties chose to use the word “receiving,” which in plaintiffs’ view is “the verb form that describes a process that continues over time,” the parties must have intended that health care benefits would last for life as well.

Venturing outside the contract itself, plaintiffs pointed to extrinsic evidence that they say confirms

their interpretation. Most notably, they pointed to evidence that when the factory at issue was sold to its current owner, the buyer was given credit for the actuarially calculated cost of lifetime health care benefits for retirees and their spouses, without any assumption that the retirees would contribute to the cost of those benefits. They also pointed out that the company had paid for retiree health benefits even after the relevant contract had expired.

The Sixth Circuit Oral Argument

The Sixth Circuit held oral argument on October 6, 2015. The bench was not exactly “hot” but was fairly warm, with Judge Merritt—the only member of the panel who did not serve on the panel that issued the opinion that the Supreme Court vacated—being particularly active. The questioning focused not on legal principles, but rather on the state of the record: Was it complete and reliable enough to answer the key issue in the case, or was a remand necessary?

That question is complicated by the procedural history of the case. The district court initially dismissed the case under Rule 12; the Sixth Circuit then reversed; the district court then held a trial and ruled for plaintiffs; the Sixth Circuit then affirmed; and the Supreme Court vacated and remanded to the Sixth Circuit “for that court to apply ordinary principles of contract law in the first instance.”

It would be simple enough for the Sixth Circuit to apply “ordinary principles of contract law” to the agreement itself, which means it could find that the agreement unambiguously favors one side’s interpretation or the other’s. Based on the tenor of the oral argument, however, that outcome seems unlikely. Plaintiffs’ counsel conceded that the contract was ambiguous, and no judge asked questions suggesting that he thought the defendant could win the case based on the unambiguous language of the contract.

That then leads to extrinsic evidence, a classic method of interpreting an ambiguous contract. Because the district court held a trial, the record includes extrinsic evidence, and plaintiffs’ counsel contended that this evidence—most particularly the evidence about the seller giving a credit for the cost of lifetime benefits when the factory was sold, as well as the evidence that the company continued paying retiree health care benefits after one of the pertinent contracts expired—meant the plaintiffs should win outright, without any need for a remand.

The Most Likely Outcome: A New Trial

Lawyers are no better at seeing the future than anyone else, but based on the briefs and the oral argument, your author will hazard a guess as to the most likely outcome of the proceedings before the Sixth Circuit: the case will be remanded for another trial. M&G has a strong argument that the contract itself, viewed in light of the “ordinary principles of contract law” described in the Supreme Court’s opinion, unambiguously provides for retiree health benefits only for the duration of the contract—not vested benefits for life. But none of the judges on the panel seemed receptive to that argument.

On the flip side, it is hard to see the Sixth Circuit entering judgment for plaintiffs based on the limited record before it. The record as it stands includes some rel-

evant extrinsic evidence, but the fact remains that the trial that yielded that evidence was not meant to resolve the question of vesting. The trial court thought the Sixth Circuit had already resolved that question in the first appeal.

In addition, as M&G pointed out in its brief and at oral argument, all of the prior proceedings took place “in the shadow of *Yard-Man*.” In theory, this might not have affected the district court’s fact-finding; facts are facts, no matter what the law is. Still, judicial fact-finding does not take place in a vacuum. The facts a judge focuses on and chooses to memorialize are shaped and sharpened by the rules that apply to those facts. And again, the trial itself presupposed that the retiree health benefits had vested, which meant some of M&G’s best evidence, such as the parties’ understand-

ing of the general durational clauses in the contract, was not presented.

In a way, moreover, the Sixth Circuit has already telegraphed that the record now before it is not sufficient to resolve the vesting question. In the opinion it issued after the trial, the Sixth Circuit clarified that it had not meant to decide the vesting question in its earlier opinion. “Although we applied general principles of contract interpretation in *Tackett I*,” it observed, “we did not apply them to a complete factual record as would have been necessary for a conclusive determination of the vesting issue.”

The court went on to find that retiree health benefits had vested, but did so by relying heavily on the now-defunct principles of *Yard-Man*. A new trial governed by different principles—“ordinary principles of contract law”—may be in the offing.