

No. 13-1010

IN THE
Supreme Court of the United States

M&G POLYMERS USA, LLC, et al.,

Petitioners,

v.

HOBERT FREEL TACKETT et al.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

**BRIEF OF GOLDSTEIN & RUSSELL, P.C.,
AS *AMICUS CURIAE* IN SUPPORT OF
NEITHER PARTY**

Thomas C. Goldstein
Counsel of Record
Tejinder Singh
GOLDSTEIN &
RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tg@goldsteinrussell.com

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INTEREST OF THE *AMICUS*¹

This is the rare true “*amicus*” brief. It is respectfully submitted as a friend of the Court, with no agenda or desire to direct the outcome of the case. The only purpose of the brief is to provide the Court with factual information that may be useful in guiding its decision.

Amicus is a law firm that practices before the Court. The firm has no interest in the outcome of the case. Nor is it aware that any of its clients has an interest in the outcome of the case.

The genesis of the brief is a desire for members of the bar to provide the Court with assistance in deciding cases correctly. In particular, while many cases before the Court on the merits involve broad and general questions of law, or generate large numbers of thorough *amicus* submissions, others do not. A material number of cases instead involve important questions that arise in technical fields, yet generate few *amicus* briefs that elaborate on the legal issue and the factual context in which that issue regularly arises. In those cases, the bar has the ability to use its resources to provide the Court with that information.

This appears to be such a case. The Question Presented asks the Court to determine when retiree health benefits vest under collective bargaining

¹ Pursuant to Rule 37.6, *amicus* certifies that no party’s counsel authored this brief in whole or in part and that no person or entity other than *amicus* or its counsel has made a monetary contribution to the preparation or submission of this brief. Both parties have filed blanket letters of consent with the Court.

agreements (CBAs). The certiorari papers make clear that the issue arises regularly, as well as that CBAs contain diverse language implicating that question. But in their merits briefing both parties are understandably likely to focus on the particular agreement in this case. As a result, there is a realistic prospect that the Court could be left to decide the case without a thorough understanding of how the legal rule it adopts will affect the interpretation of other CBAs.

Amicus therefore undertook a simple study. It drew a sample of CBAs that contain language relating to retiree health-care benefits. It then identified what proportion of the agreements contains the various provisions to which the courts of appeals have looked in determining whether those benefits vest. Because the lower courts also frequently look to the text of the CBAs' summary plan descriptions (SPDs), *amicus* also undertook the same study of a sample of SPDs that discuss the duration of retiree health-care benefits.

Our hope is that the Court will find the information useful in developing a legal rule and understanding the implications of its decision.

SUMMARY OF ARGUMENT

Amicus reviewed a sample of 100 CBAs for language relating to the vesting of retiree health benefits. That review revealed the following:

60% of the sampled CBAs (70% private; 50% public) include at least one clause that is generally recognized to preclude vesting; some contain more than one. A small number—5% of the sample,

comprising 6% of the private agreements and 4% of the public ones—state outright that benefits do not “vest.” A similar number—7% (10% private; 4% public)—give employers a unilateral right to amend eligibility standards. A greater number—23% (34% private; 12% public)—provide that benefits are guaranteed only “during the term of” the bargaining agreement. The most common language—present in 35% of all sampled CBAs (32% private; 38% public)—ties retirees’ eligibility to their age or Medicare status, curtailing benefits after a period of time.

By contrast, 26% of the sampled CBAs (30% private; 22% public) contain at least one clause suggesting that benefits do vest. One public-sector CBA specifically describes retiree health benefits as “vesting.” A small number of the sampled CBAs—6% (8% private; 4% public)—describe retiree health benefits as “lifetime” or “for life.” Another 22% (26% private; 18% public) tie a retiree’s eligibility for health-care benefits to his eligibility for pension benefits.

14% of the sampled CBAs (6% private; 22% public) include the ambiguous phrase that benefits “will continue,” but do not specify a period of duration or conditions associated with that continuance.

Finally, 16% of the sampled CBAs (14% private; 18% public) were completely silent on the question of vesting.

Amicus also reviewed a smaller sample (39) of Summary Plan Descriptions (SPDs), which courts sometimes consult to determine whether benefits have vested. That analysis reveals that when SPDs speak to the question, they often prohibit vesting. However,

many SPDs are silent on the issue. Moreover, because the SPD sample was relatively small, inferences from that sample should be made lightly.

The data, and a summary of it, are available in Microsoft Excel format on *amicus's* website at <http://goo.gl/l7MhsG>.

ARGUMENT

The Question Presented by this case calls on the Court to decide when collective bargaining agreements (CBAs) provide for retiree health-care benefits that are “vested”—*i.e.*, benefits that “continue so long as the beneficiary remains a retiree.” *Linville v. Teamsters Misc. & Indus. Workers Union, Local 284*, 206 F.3d 648, 651 (6th Cir. 2000). Recognizing that the specific CBA at issue in this case may be a poor proxy for all such agreements, this brief reviews a larger sample of agreements from both the public and private sectors.

Courts interpreting a CBA often compare the language of different provisions in the agreement, and in the case of ambiguity consider extrinsic evidence as well. This study is more limited. *Amicus* reviewed the language of CBAs provisions that has given rise to recurring issues in the lower courts. The goal is to assist the Court in understanding how the legal rule it adopts will affect later cases.

I. Methodology

The Office of Labor-Management Standards (OLMS) of the United States Department of Labor maintains an online database of CBAs. The agreements are sorted into private-sector and public-sector agreements. Each has a unique file number.

See Collective Bargaining Agreements File: Online Listings of Private and public Sector Agreements, U.S. Dep't of Labor, <http://www.dol.gov/olms/regs/compliance/cba/index.htm> (last modified Sept. 21, 2010). This brief cites CBAs using the following format: (*Employer Name and Union Name*, Expiration Date, OLMS File Number, URL).

Amicus studied a sample of 50 relevant CBAs from the private sector and 50 from the public sector. Moving alphabetically through the OLMS listings, *amicus* identified the first 50 agreements from each category that expressly provide retiree health-care benefits. Agreements that merely recognize employers' obligations under the Consolidated Omnibus Budget Reconciliation Act were excluded. Agreements that offer coverage to "qualified beneficiaries" but do not define the members of that class were also excluded. Only one agreement per employer was included in the sample, to ensure that the study was not biased by multiple products of a single series of negotiations.

Utilizing these criteria, *amicus* located 50 agreements in each category after reviewing 286 private-sector CBAs and 137 public-sector CBAs. According to data maintained by OLMS, the 100 sampled agreements govern the employment of more than 375,000 employees in more than 25 states—including a wide variety of professions ranging from carpentry to health care in the private sector and from transportation to university education in the public sector.

II. The Provisions

Amicus reviewed the sampled agreements for language that speaks expressly or implicitly to whether retiree health benefits vest, and recorded instances of potentially relevant language. This brief identifies how frequently particular language appeared in the sampled CBAs.

A. Express Statements of Intent

Very rarely, CBAs expressly state that retiree health-care benefits are vested. *Amicus* found only one such agreement: a public-sector agreement between containing a section entitled “Health Benefits Vesting.” (*State of California and California Correctional Peace Officers Association*, 7/2/06, 800368, <http://goo.gl/J3uQ1M>). The sample did not include any private-sector agreements with such an explicit provision.

A small number of CBAs expressly state the opposite: that health care benefits do not “vest.” 5% of all agreements (6% private; 4% public) contain such clauses. An example of such a provision is:

It is specifically recognized that post-retirement health care benefits as well as other post-retirement benefits, excluding pension, provided hereunder are not vested and may be amended or terminated by the Company at any time (*First Energy Corp. and Utility Workers Union of America*, 6/30/11, 6007, <http://goo.gl/n68rqx>).

B. Language Suggesting Vesting

1. *Lifetime Benefits*: 6% of the sampled agreements (8% private; 4% public) include language stating that retirees will receive health benefits “for life.”

The following clause from an agreement between Anchor Glass Container Company and the American Flint Glass Workers Union is representative:

The present health care program for those who either became or become (and remain) eligible retirees and their eligible spouses on and after April 1, 1983, and through August 31, 2002, will be continued for their respective lives, subject to its term and conditions (8/31/05, 8756, <http://goo.gl/a8lXYY>).

The Third and Sixth Circuits have held that such language demonstrates a clear intent to vest. *Noe v. PolyOne Corp.*, 520 F.3d 548, 560 (6th Cir. 2008); *UAW v. Skinner Engine Co.*, 188 F.3d 130, 141 (3d Cir. 1999); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 614 (6th Cir. 1985). The Seventh Circuit has held that such language is not conclusive, but does overcome a presumption against vesting. *Bland v. Fiatallis N. Am., Inc.*, 401 F.3d 779, 784-85 (7th Cir. 2005).

2. *Pension-tying*: 22% of the sampled agreements (26% private; 18% public) tie retirees’ eligibility for health benefits to their pension status—*i.e.*, they provide health-care benefits only to pension beneficiaries.

A common phrasing of this clause is as follows: “[the] City will pay this premium for regular retirees and the spouses for only as long as they receive a

pension from the City” (*City of Detroit and AFSCME*, 6/30/01, 810132, <http://goo.gl/p6bAOQ>).

The Sixth Circuit treats pension-tying provisions as evidence of intent to vest, if retirees receive pension benefits for life. *Tackett v. M & G Polymers USA, LLC*, 733 F.3d 589, 600 (6th Cir. 2013); *McCoy v. Meridian Automotive Sys., Inc.*, 390 F.3d 417, 422 (6th Cir. 2004); *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 656 (6th Cir. 1996). The Second Circuit disagrees, however. *Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130, 134 (2d Cir. 1999).

C. Language Precluding Vesting

1. *Right to Amend*: 7% of the sampled CBAs (10% private; 4% public) provide that a party—either the company or an appointed Board of Trustees—has a full or significant ability to amend, alter, or terminate retiree health-care benefits.

The phrasing of these clauses varies, but two examples are representative:

The Company expects to continue the Sprint Retiree Medical Plan indefinitely. However, the Company reserves the right to amend or terminate any one of the various components of the Sprint Retiree Medical Plan at any time including changing the level of Company contributions, deductibles, out of pocket maximums, and requiring retiree contributions, so long as the changes are uniformly applied to all eligible retirees (*Carolina Telephone and Telegraph Co. and*

Communications Workers of America, 11/15/08, 5801, <http://goo.gl/XbF19B>).

And:

The Board of Trustees of the Joint Benefit Trust shall have full authority and discretion to modify the benefits provided under options d. (3) and (4) and the premium paid by the retired employee to participate in either of those options and to eliminate either one, but not both, of those options if in their judgment it is no longer in the best interests of the Trust to continue such option (*California Processors, Inc. and Teamsters California State Council*, 6/30/12, 253, <http://goo.gl/ROnF6p>).²

Every circuit to consider the question has held that such a provision demonstrates intent to preclude vesting. *UAW v. Rockford Powertrain, Inc.* 350 F.3d 698, 704 (7th Cir. 2003); *Spacek v. Maritime Ass'n*, 134 F.3d 283, 293 (5th Cir. 1998), *abrogated on other grounds Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004); *Chiles v. Ceridian Corp.* 95 F.3d 1505, 1514 (10th Cir. 1996), *abrogated on other grounds*

² We do not include agreements that significantly limit the reservation of rights. For example, an agreement between the Hartford, Conn., Board of Education and the American Federation of Teachers states, “[the] Board reserves the right to change health insurance provided . . . [the] plan suggested as an alternative [contains] substantially equal coverage, benefits, portability and administration as the present plan(s) at no additional cost to the employee” (6/30/05, 830762, <http://goo.gl/dTZmmm>).

CIGNA Corp. v. Amara, 131 S. Ct. 1866 (2011); *In re Unisys Corp. Retiree Med. Benefit “ERISA” Litig.*, 58 F.3d 896, 904 (3d Cir. 1995).

2. *Term Limits*: 23% of the sampled CBAs (34% private; 12% public) state that benefits are guaranteed only during the term of the bargaining agreement.

The following language from an agreement between Aerospace Corporation and the Aerospace Professional Staff Association is representative:

The monetary benefits specified within Article VIII, including specific referenced plans with regard to Group Insurance, Retirement and Voluntary Annuity, shall be continued during the term of this Agreement for bargaining unit employees (8/1/08, 4193, <http://goo.gl/lmn1ok>).

The courts of appeals that have considered the question agree that such a provision precludes vesting. *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560, 566 (7th Cir. 1995); *Senn v. United Dominion Indus., Inc.*, 951 F.2d 806, 815 (7th Cir. 1992); *Turner v. Local Union No. 302, Int’l Bhd. of Teamsters*, 604 F.2d 1219, 1225 (9th Cir. 1979).

3. *Termination upon Medicare Eligibility (Or Some Other Period)*: 35% of the sampled CBAs (32% private; 38% public) provide for health-care benefits until a retiree is eligible for Medicare; some of these provisions are explicit, while others limit benefits to the age at which an individual becomes Medicare eligible—*i.e.*, age 65.

Some examples of this type of clause are the following:

Employees who retire from Mercy Hospital of Buffalo will be eligible to participate in the group health plan, at their own expense, until they are eligible for medical coverage under Medicare (*Mercy Hospital of Buffalo and Communications Workers of America*, 6/3/08, 8050, <http://goo.gl/TBVPcz>).

And:

The District shall pay the dollar amount required to provide the equivalent coverage given to active members for health insurance (medical and prescriptions) for employees who retire between the ages of fifty-five (55) and sixty-five (65) years. . . . The District's obligation for payment of such coverage shall cease upon the last day of the month preceding the month in which the retiree reaches age sixty-five (65) (*Bakersfield City School District and Bakersfield Elementary Teachers Association*, 6/30/06, 830629, <http://goo.gl/i0E4EH>).

The Sixth Circuit, which is the court of appeals that is most likely to deem benefits to be vested, has concluded that such a provision precludes vesting. *Linville*, 206 F.3d at 651.³

³ *Amicus* also identified one public sector agreement that promised to "reimburse the retiree the cost of [the] individual TRS health insurance plan . . . for three (3) years after the effective date of the teacher's retirement" (*Board of Education, Schaumburg Community Consolidated School District 54 and*

D. Ambiguous Language: Statements of Continuity

14% of the sampled CBAs (6% private; 22% public) provide that benefits “will continue,” but do not specify for how long or until when.

Here are two examples:

The Authority will continue to provide for retirees of the New York State and Local Employees' Retirement System who have been employees of the Authority and who retired from the Authority (Retirees), the health and prescription drug insurance plans and options available to the Authority for Retirees through the New York State Health Insurance Program of the Civil Service Department (*Dormitory Authority of New York and UAW*, 3/31/11, 9190, <http://goo.gl/VmHGw3>).

And:

Upon retirement, employees may remain in the same County group medical plan if immediately before their retirement they are either active subscribers to one of the County Health Plans (*Contra Costa County and*

Schaumburg Education Association, 6/30/12, 840049, <http://goo.gl/3cJ2Zw>). For the purposes of this study, *amicus* has grouped this provision with the age and Medicare-tying clauses. Both guarantee retiree health-care benefits for a specified amount of time, but do not vest them.

AFSCME, 9/30/05, 820527,
<http://goo.gl/VmHGw3>).

The circuits disagree over how to interpret this language. The Sixth and Eighth Circuits deem it to create an ambiguity that should be resolved by reference to other contract provisions or extrinsic evidence. *Smith v. ABS Indus., Inc.*, 890 F.2d 841, 846 (6th Cir. 1989); *Anderson v. Alpha Portland Indus., Inc.* 836 F.2d 1512, 1519 n.4 (8th Cir. 1988). The Third and Seventh Circuits disagree. *Skinner Engine Co.*, 188 F.3d at 141; *Senn*, 951 F.2d at 816.

E. Silence

16% of the sampled CBAs (14% private; 18% public) do not include *any* of the above clauses that courts have construed as evidence whether benefits vest or are precluded from vesting.

Illustrative provisions are:

Benefit coverage shall also be provided by the C&CWDC Welfare Fund and the C&CWDC Pension Fund to eligible retirees (*Independent Employer and Cement and Concrete Workers*, 6/3/05, 8705, <http://goo.gl/D0Oz5S>).

And:

The Company will make available to retiring employees age 65 or older who retire after May 6, 2002, a Medicare Supplement, which will be completely employee paid (*Army Fleet Support and AFL-CIO*, 4/27/14, 3320, <http://goo.gl/oJqcnv>).

And:

The District will, through HPN, assure that retirees who were enrolled in the Trust on July 31, 2001, and employees who retire thereafter shall have the opportunity to enroll in either the HPN HMO Plan or the HPN Senior Dimensions Medicare Risk Plan (for Medicare eligible) formerly offered to ESEA bargaining unit members (*Clark County School District and Education Support Employees Association*, 6/30/07, 820816, <http://goo.gl/jYK77V>).

III. Summary Plan Descriptions

The 100 CBAs reviewed and analyzed above relate most immediately to the Question Presented. But courts have also looked beyond the express terms of CBAs and (particularly in cases of ambiguity) “generally accord significant weight to representations made in” summary plan descriptions (SPDs). *See, e.g., Golden*, 73 F.3d at 656. *Amicus* therefore analyzed the text of SPDs as well.

A. Methodology

As discussed in Part I, *supra*, *amicus* reviewed a total of 286 private-sector CBAs. For each, *amicus* sought to locate the corresponding SPD.⁴ The vast majority of SPDs were not readily available. From the ones that were, *amicus* excluded SPDs that merely

⁴ The search for SPDs was limited to private-sector plans due to time constraints, and because this case involves such a plan.

state employers' obligations under COBRA or that discuss coverage for "qualified beneficiaries" without elaboration. Occasionally, multiple bargaining agreements would refer to the same health-care plan, and therefore to the same SPD—*e.g.*, the employees of both CBI Services and Tencon Inc. are party to the Boilermakers National Health and Welfare Fund. In these cases, *amicus* only recorded the SPD once.

This search revealed 39 SPDs that expressly discuss retiree health care. These 39 SPDs are logically divided into two categories: those that elaborate on express provisions in the CBA; and those that define benefits where the CBA is largely silent.

Only 5 SPDs fell in the first category, and relate to one of the fifty private CBAs that expressly provide for retiree health care. We call these "Elaborating" SPDs.

The other 34 SPDs relate to CBAs that provide health insurance, but the CBAs themselves do not discuss retiree eligibility. These CBAs refer to health-care plans or trust funds, but offer few details about the extent or quality of their coverage. We call these "Defining" SPDs. Representative examples of the health care provisions of the CBAs corresponding to Defining SPDs are:

Employees will continue to be covered by University group insurance plans for the Supporting Staff employees, as modified below, provided that such coverage is contingent upon compliance with all existing requirements and conditions, including but not limited to, those which apply to employee eligibility and

contributions (*Trustees of Columbia University and UAW/AFL-CIO*, 1/31/12, 9189, <http://goo.gl/HEAoiR>).

And:

The Employer agrees to contribute five cents (\$.05) per hour for up to forty (40) hours per week per employee . . . to the Retiree Health Plan to provide Retiree Health Benefits as may be determined by the Trustees of the Fund (*Great Atlantic and Pacific Tea Company and United Food and Commercial Workers*, 6/1/07, 6822, <http://goo.gl/VKrM16>).

And:

All Employers referred to in paragraph (43) of this Article . . . accept and agree to be bound by the Agreement and Declaration of Trust, as hereinbefore and/or hereafter amended, establishing the: (a) Ohio Carpenters Health and Welfare Fund (*Associated General Contractors of Northwest Ohio and Ohio & Vicinity Regional Council of Carpenters*, 6/30/07, 8623, <http://goo.gl/SLNWAL>).

B. Provisions

Courts generally interpret language in SPDs in the same way as similar language in CBAs. This section will discuss the distribution of that language across both Elaborating and Defining SPDs. Note at the outset that although the language of the SPDs generally stated or strongly suggested that retiree health benefits do not vest, that does not necessarily suggest that it is generally accepted that such benefits

do not vest. That is because this language appears only in the subset of SPDs that expressly discuss the duration of those benefits; many other SPDs are silent on the issue. Moreover, because the sample of SPDs is substantially smaller than the sample of CBAs, inferences drawn from the sample may be less reliable.

1. *Express Statements of Intent:* Many SPDs explicitly state that retiree health benefits are not vested. 80% of the sampled Elaborating SPDs (4 out of 5) and 53% of Defining SPDs contain such unambiguous language. *Amicus* did not find any SPDs that describe retiree healthcare as “vested.”

2. *Language Suggesting Vesting:* *Amicus* did not find any SPDs that provide for “lifetime” benefits. However, 100% of Elaborating descriptions and 79% of Defining descriptions tie retiree’s eligibility for healthcare benefits to their pension status.

3. *Language Precluding Vesting:* 100% of both Elaborating and Defining SPDs contained a reservation of rights clause, granting either a company or an appointed Board of Trustees a full or significant ability to amend, alter, or terminate retiree health care benefits. Additionally, 20% of Elaborating SPDs and 26% of Defining SPDs provide benefits only until a retiree is eligible for Medicare.

Amicus did not find any SPDs that guarantee benefits only during the term of the bargaining agreement.

4. *Ambiguous Language or Silence:* *Amicus* did not find any SPDs that state benefits “will continue,” but do not specify for how long or until when. Similarly,

none of the SPDs were silent on the duration of benefits.

5. *Miscellaneous*: *Amicus* identified one provision that is common in SPDs but absent from the above CBAs: the SPD provides that retiree health benefits will end if the base healthcare plan is terminated

A representative example of this clause is as follows:

Coverage for a retired Employee and his or her dependents will terminate upon the occurrence of the first of the following events . . . on the date of discontinuance of the Senior Program or the Plan (*United Food and Commercial Workers Local 400 Health and Welfare Plan SPD*, <http://goo.gl/txftEO>).

50% of Defining SPDs include this language, which was absent from the Elaborating SPDs.

Amicus was unable to find any circuit precedent regarding this language.

FURTHER INFORMATION

Four data tables, formatted as worksheets in a Microsoft Excel workbook, accompany this brief. The first displays the explicit provisions contained in each private-sector collective bargaining agreement. The second displays the same with regards to public-sector agreements. The third outlines the provisions each of the 39 SPDs that discuss retiree healthcare benefits and also separates the plan descriptions into Elaborating and Defining SPDs. The fourth summarizes the results of the project, showing the distribution of provisions across document types. It

also highlights the key contrasts between private- and public-sector bargaining agreements.

These tables, which also include URLs for every CBA and SPD discussed in this brief, are available at *amicus's* website: <http://goo.gl/l7MhsG>.

CONCLUSION

Amicus hopes that the information in this brief will be helpful to the Court.

Respectfully submitted,

Thomas C. Goldstein
Counsel of Record

Tejinder Singh

GOLDSTEIN &

RUSSELL, P.C.

7475 Wisconsin Ave.

Suite 850

Bethesda, MD 20814

(202) 362-0636

tg@goldsteinrussell.com

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