No. 07-5068

IN THE UNITED STATES COURT OF APPEAL
FOR THE SIXTH CIRCUIT

JULIUS NOE et al,

Plaintiffs-Appellants-Respondents,

v.

POLYONE CORPORATION,

Defendant-Appellee-Petitioner.

Appeal From The United States District Court
For the Western District of Kentucky
Case No. 3:06-CV-001700-JIG
The Honorable John G. Heyburn II,
Chief District Judge

BRIEF OF THE AMERICAN BENEFITS COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF POLYONE CORPORATION'S PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

The American Benefits Council is a non-stock, non-profit trade association. It has no corporate affiliation or financial interests subject to disclosure under Fed. R. App. P. 26.1 or 6th Cir. R. 26.1. The Council is not aware of any publicly owned corporation not a party to the appeal that has a financial interest in the outcome of the litigation.

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INTEREST OF *AMICUS CURIAE*

The interest of the American Benefits Council (the Council) in filing *amicus* briefs on behalf of member companies that sponsor and administer plans covering more than 100 million plan participants and beneficiaries is addressed in the accompanying motion.

STATEMENT OF THE CASE

The Council incorporates PolyOne's "Statement of the Case" in its petition for rehearing *en banc*.

SUMMARY OF ARGUMENT

This Court should grant e*n banc* consideration of the Panel Decision to insure uniformity of court decisions, so critical under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* (ERISA), and to resolve questions of significant importance decided here in conflict with the decisions of this and other federal appellate courts. F.R.A.P. 35(B).

No other circuit has presumed, as does the Panel Decision, that an employee benefit plan *eligibility* provision "tying eligibility for retiree health care benefits to eligibility for a pension, *which in and of itself suggests an intent to vest*," slip. op. p. 9 (italics added), should be construed as a *vesting* provision. No other circuit, and no other decision of this Court, has determined that such "tying" vests retiree health care benefits for life unless the benefit plan or labor agreement specifically states that *retiree* benefits do not vest for life or terminate at a specific date.

The Council urges this Court to grant PolyOne's motion for rehearing *en banc* for three reasons. First, by elevating the so-called "*Yard-Man* inference" to a presumption of vesting absent a specific statement about *retiree* benefits otherwise, the Panel Decision subverts Congress' intent that employee welfare benefits not presumptively vest.[1] Second, the Panel Decision impedes the national uniform administration of employee benefits plans by exacerbating a split among the Circuits, in which this Circuit stands alone in construing employee benefit plan eligibility provisions as vesting provisions. Third, the Panel Decision creates a disincentive for employers to provide employee welfare benefits voluntarily, including retiree benefits, contrary to congressional intent in ERISA.

[1] For purposes of this petition for rehearing *en banc*, the Council contends that, even if this Court adheres to the *Yard-Man* inference first articulated in *Int'l Union, UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), for cases involving existing retirees' claims of alleged lifetime retiree health care benefits, this Court should vacate the Panel Decision's unwarranted transformation of that inference into a presumption of vesting based upon eligibility language unless, and only if, an employer can negotiate a clear anti-vesting statement with an express reference to retiree benefits. However, the Council continues to maintain that this Court should abandon the *Yard-Man* inference as inconsistent with federal labor and employee benefit law and policy for the reasons stated in their brief in support of El Paso Tennessee Pipeline Company's petition for certiorari in *El Paso Tennessee Pipeline Co. v. Yolton*, Supreme Court No. 06-201, and elsewhere.

ARGUMENT

I. A VESTING PRESUMPTION ABSENT A SPECIFIC STATEMENT OTHERWISE FRUSTRATES FEDERAL BENEFIT POLICY.

Congress expressly exempted employee welfare benefits from ERISA's stringent vesting requirements. 29 U.S.C. § 1053. As a result of this congressional judgment, ERISA provides that employee welfare benefits do not automatically vest. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) (noting that ERISA does not mandate minimum vesting requirements for welfare benefit plans, and citing with approval *Adams v. Avondale Industries, Inc.*, 905 F.2d 943, 947(6th Cir. 1990)).

Congress did not impose such mandatory vesting "for fear that placing such a burden on employers would inhibit the establishment of such plans" and because it sought "to keep costs within reasonable limits" by permitting benefit amendment in a widely fluctuating market of health care and health insurance costs. *Adams,* 905 F.2d at 947:

> Automatic vesting was rejected because the costs of such plans are subject to fluctuating and unpredictable variables. Actuarial decisions concerning fixed annuities are based on fairly stable data, and vesting is appropriate. In contrast, medical insurance must take account of inflation, changes in medical practice and technology, and increases in the cost of treatment independent of inflation. These unstable variables prevent accurate prediction of future needs and costs.

Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 492 (2d Cir. 1988).[2]

This Court has held *en banc* that, because Congress did not mandate vesting of welfare benefits in ERISA, "an employer's commitment to vest such benefits is not to be inferred lightly; the intent to vest 'must be found in the plan documents and must be stated in clear and express language.'" *Sprague v. General Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998) (*en banc), cert. denied*, 524 U.S. 923 (1998). This Court has also cautioned that "[courts] must avoid any rule that would have the effect of undermining Congress' considered decision that welfare plans not be subject to a vesting requirement." A*dams*, 905 F.2d at 947.

Turning those cautions on their heads, the Panel Decision transforms a inference into a presumption. Although the majority recognizes that "pension plans are subject to mandatory vesting, [but] welfare plans are not," slip op. p. 2, the Panel Decision in essence creates an automatic presumption of vesting that only the most refined duration clause may rebut. After the Panel's Decision, only clear and express language specifically mentioning "retiree" benefits (and not just

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[2] In fact, other Circuits critical of the *Yard-Man* inference and status-vesting theory find the theory inconsistent with federal employee benefit policy. For example, in *Int'l Union, UAW v. Skinner Engine Co.*, 188 F.3d 130 (3d Cir. 1999), a unanimous decision in then Judge Alito, participated, the Third Circuit rejects the "*Yard-Man* inference" of vesting ERISA-governed retiree insurance benefits, quoting the Eighth Circuit's reasoning with approval: "Congress explicitly exempted welfare benefits from ERISA's vesting requirements. It, therefore, seems illogical to infer an intent to vest welfare benefits in every situation where an employee is eligible to receive them on the day he retires." *Skinner,* 188 F.3d at 140-141.

"benefits") will rebut the presumption of vested lifetime retiree benefits whose eligibility is tied to pension eligibility.

While the Panel Decision protests that it does not *presume* the vesting of retiree benefits, the Dissent correctly notes that, in this Circuit, "[w]hat started out as a potential inference became an omnipresent presumption and now appears to have become a clear-statement rule." Slip. op., p. 16. The Dissent parts with the majority precisely because it declines to presume the vesting of lifetime retiree benefits absent a clear statement otherwise: "Unless a company can point to explicit language in the relevant agreement stating that 'retiree benefits' terminate at a particular date or do not vest, the benefits seem to vest as a matter of law. What we continually disclaim presuming we continually seem to presume." *Id.*

Moreover, the Panel Decision insists that no less than a specific reference to the non-vesting of *retiree* benefits or to the termination of *retiree* benefits alone suffices to rebut the presumption of vesting. The Decision rejects a durational provision that clearly states that all benefits (including retiree benefits) may be renegotiated and extend no further than 90 days after labor contract expiration because it "refers to *all* benefits; it does not specifically limit the duration of retiree health benefits as required by *Yolton* [*v. El Paso Tenn. Pipeline Co.,* 435 F.3d 571 (6th Cir. 2006)] and its progeny." Slip op. p. 7. The Dissent thus correctly recognizes that the Panel Decision has gone so far that, in its wake, companies must now attempt, probably unsuccessfully, to secure agreement through

negotiations to include the word "retiree" in durational provisions that once seemed to authorize the possibility of negotiated change for *all* benefits.

The "clear statement otherwise" rule adopted by the Panel Decision frustrates the federal employee benefit policy embodied in ERISA, *i.e.*, that employee welfare benefits do not automatically vest by operation of law. The Decision's new clear statement rule sharply diminishes the flexibility that Congress intended to accord employers, including the Council's members, in designing and maintaining employee welfare benefit plans. This Circuit should vacate the Panel Decision and grant rehearing *en banc*, in order to clarify a presumption against vesting by operation of law, one that does not contravene federal employee benefit policy.

II. THE PANEL DECISION IMPEDES NATIONAL UNIFORM ADMINISTRATION OF EMPLOYEE BENEFIT PLANS.

Over PolyOne's objection, the Panel Decision determined that the collectively bargained memoranda of agreement at issue incorporated health benefits provisions from employee benefits agreements (EBAs). The Panel Decision then concluded that EBA provisions conditioning retiree benefit eligibility upon pension eligibility *in and of themselves* "suggested an intent to vest." Slip op. p. 9. The Panel Decision exacerbates a circuit split that frustrates Congress' goal of uniform nationwide treatment of benefits. *See Lockheed Corp.*

v. Spink, 517 U.S. 882, 890-91 (1996); *Gen. Motors Corp. v. Buha*, 623 F.2d 455, 459 (6th Cir. 1980).

No other federal circuit has denominated employee benefit plan eligibility provisions as vesting provisions. In fact, four circuits reject the Sixth Circuit's insistence that language of description regarding pension eligibility in effect operates as language of prescription of vested lifetime benefits.[3]

The Panel Decision chastises the district court for "disregard[ing] the significance of this tying language because it 'focuses upon an employee's eligibility for benefits rather than upon the duration of those benefits,'" slip. op. p. 9. Yet the district court simply recognized an important distinction between an eligibility provision and a vesting provision for life, a critical distinction recognized in other circuits.

In fact, the Third Circuit has criticized this Circuit's *Yard-Man* inference, its methodology, and its illogical leap from language of pension eligibility to an intention to vest retiree welfare benefits for life. In *Skinner,* 188 F.3d at 141-42, the Third Circuit declined to infer that retiree health benefits vest for life simply because they are tied to pension eligibility, and because pensions last for life. The

[3] The Panel Decision cites two earlier Sixth Circuit opinions tying the duration of retiree health care benefits to pension eligibility, but on review of grants of preliminary injunctions for abuse of discretion. See slip op., p. 8, citing *McCoy v. Meridian Auto. Sys., Inc.*, 390 F.3d 417, 422 (6th Cir. 2004), and *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 656 (6th Cir. 1996).

Second, Seventh and Ninth Circuits have also declined to elevate mere language of description (a supposed "tie-in" with pension eligibility) to a vesting provision with an implied lifetime durational term for retiree benefits. See *Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130, 135 (2d Cir. 1999); *Cherry v. Auburn Gear, Inc.*, 441 F.3d 476, 484 (7th Cir. 2006) ("Words that signify a lifetime commitment in a pension plan may not have the same effect in the context of health benefits."); *Puzis v. Masters Mates and Pilots Plans*, 1989 WL 57657 at *2 (9th Cir. May 22, 1989) (see attached).

In contrast, the Dissent points to an actual vesting provision within the pension benefits section of the EBA. That section provided that pensions accrued to the date of partial or full termination of the employee benefit plan "to the extent then funded, shall be nonforfeitable." The Dissent contends that the Panel Decision should not have ignored the conspicuous absence of such actual vesting language (as opposed to mere eligibility language) from the welfare benefit plan. Slip op. p. 5.

Because it creates vesting out of eligibility language, and because it compounds the error by requiring employers to make a clear anti-vesting statement that specifically references retiree benefits, the Panel Decision should be vacated in favor of *en banc* consideration.

III. THE PANEL DECISION THREATENS RETIREE HEALTH CARE BENEFITS.

The Panel Decision also contravenes one of the purposes of ERISA, *i.e.,* to encourage employers to provide employee welfare benefits, including health care benefits, voluntarily to the nation's workers. Because the Decision adopts a new "clear statement" rule that retiree benefits are presumed to vest for life absent a specific statement otherwise expressly referencing *retiree* benefits, it creates a disincentive for Council companies to provide retiree health care benefits.

Many Council members provide health care benefits to employees and retired employees and arrange for the provision of health care services through employee welfare benefit plans, consistent with ERISA. Consistent with federal labor policy under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"), and the Labor-Management Relations Act, 29 U.S.C. § 185a (LMRA), many Council members have collectively bargained agreements relating to health care benefits for retired employees and their dependents.

Consistent with federal employee benefit policy, Council members have typically elected not to vest such retiree benefits, given the unpredictability of the costs and pricing factors to which such benefits are subject. If the Panel Decision remains undisturbed, employers will likely remain unsuccessful in negotiating the specific "clear statement" language that the Panel Decision mandates in order to avoid the vesting of retiree benefits by operation of law where retiree benefit

eligibility is conditioned upon pension eligibility. As a result, the Panel Decision will burden employers with substantial unforeseen liabilities. Employers will face major uncertainty about the scope of their commitments to fund health care benefits for their retirees. The risk of incurring such unforeseen open-ended liabilities will leave employers little choice but to cease offering retiree benefits to future retirees and to reduce benefits or eliminate them altogether for existing retirees.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* the American Benefits Council respectfully requests that this Court grant PolyOne Corporation's petition for rehearing *en banc*.

Respectfully submitted,

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Dated: May 2, 2008

CERTIFICATE OF SERVICE

I hereby certify that, on the 2nd day of May 2008, I caused two true and correct copies of the foregoing Brief of The American Benefits Council as *Amicus Curiae* in Support of PolyOne Corporation's Petition for Rehearing En Banc to be served on the following parties by U.S. mail, postage prepaid, to the following addresses:

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