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End Run

Companies Sue Union Retirees To Cut Promised Health Benefits

**Firms Claim Right to Change
Coverage, Attempt to Pick
Sympathetic Jurisdictions**

The Process Server Pays a Call

By **ELLEN E. SCHULTZ**
 Staff Reporter of THE WALL STREET JOURNAL
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When a deputy sheriff came to his door with a court summons, George Kneifel, a retiree in Union Mills, Ind., was mystified. His former employer was suing him.

The employer, beverage-can maker Rexam Inc., had agreed in labor contracts to provide retirees with health-care coverage. But now the company was asking a federal judge to rule that it could reduce or eliminate the benefit.

Many companies have already cut back company-paid health-care coverage for retirees from their salaried staffs. But until recently, employers generally were barred from touching unionized retirees' benefits because they are spelled out in labor contracts. Now, some are taking aggressive steps to pare those benefits as well, including going to court.

In the past two years, employers have sued union retirees across the country. In the suits, they ask judges to rule that no matter what labor contracts say, they have a right to change the benefits. Some companies also argue that contract references to "lifetime" coverage don't mean the lifetime of the retirees, but the life of the labor contract. Since the contracts expired many years ago, the promises, they say, have expired too.

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George Kneifel
George Kneifel

The companies taking such steps remain a minority. Most big employers continue to provide the retiree health coverage spelled out in labor contracts. But the number of employers using the courts to attempt to reduce benefits for union retirees is rising, and some have been successful. "There's absolutely no doubt that there's been an increasing number of cases over the past three years," says Richard Brean, associate general counsel of the United Steelworkers of America.

They have little to lose by trying. Typically, as such legal cases drag on, the employers save money as some of the retirees, who have to pay growing portions of their health-care costs, forgo costly care, drop out of the plans or die. If companies lose in court, the worst that happens is they have to resume paying benefits. They don't face punitive damages or penalties. And they may not have to resume benefits for those retirees who dropped out of the health plans.

What's more, their earnings get a pop. That's because at the same time as they sue, employers typically announce reductions in the retirees' benefits. Doing so entitles them to lessen the liabilities carried on their books. Lower liabilities translate to higher earnings.

The retirees, by contrast, often find themselves in a bind -- unsure of their recourse and facing, as they age, the court system's typical long waits for legal resolution. The U.S. Labor Department is of little help. Retired workers "aren't our constituents anymore," says a spokeswoman for the department.

Unions often do go to bat for retirees. The United Auto Workers and the Steelworkers have been the most active in filing suits to protect retirees whose benefits a company has unilaterally changed. But unions aren't allowed to strike or file unfair-labor-practice complaints on behalf of retirees.

Employers that want to cut union retirees' health coverage or make retirees pay a larger portion could just impose changes and wait to be sued. But by suing first, they stand a chance of choosing the jurisdiction. This is important, because federal circuits' appellate courts tend to take differing positions in these disputes. Indeed, the unsettled nature of the law on these issues -- with employers' arguments sometimes succeeding and sometimes not -- may be a factor prompting some companies to have a go at gaining the legal right to change benefits.

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One afternoon last December, Basil Chapman was sitting on his porch in Barboursville, W. Va., with his dog, Bo, when a union representative phoned the retiree to say an executive of his former employer wanted to speak to him. Mr. Chapman called the executive, at ACF Industries Inc., a railroad-car

maker where Mr. Chapman worked for 38 years. He was told ACF was going to change health coverage, making retirees pay for a portion that previously was free.

"We have a contract. You can't do that," Mr. Chapman said, according to court papers later filed by ACF. "We will file in federal court against you b-----ds." Asked about this, Mr. Chapman, who is 60, says he didn't swear on the phone.

The next Monday, ACF, which financier Carl Icahn controls through an investment vehicle, sued Mr.

Chapman in federal district court in St. Louis. The company asked the court to rule that it had the right to change or terminate health coverage for 678 retirees and their dependents. ACF said it was suing to protect itself, noting that "defendant Chapman has already informed ACF that he plans to file a lawsuit concerning the amendments of the plan."

"I can't understand why they're picking on me," Mr. Chapman says. "I'm just a retired guy who was sitting on my porch."

CO-PAY BLUES

This week, the Online Journal looks at the financial burdens facing health-care consumers who have insurance and offers advice on handling medical expenses.



Do you have questions or ideas about selecting health-care coverage and managing your family's costs? We invite you to [participate in a discussion](#)² with health-insurance and benefits experts.

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Employers that sue retirees name one person or a handful. They may choose people at random, retirees who have complained, or people who were active in the union that negotiated the contract at issue. Mr. Chapman, who repaired equipment and stenciled names on railroad cars at ACF, also headed a Steelworkers bargaining committee. The named defendants represent the "class" of retirees.

Key Contract Element

Mr. Chapman says health coverage for retirees was a key element of labor contracts he helped negotiate in 1995. Up to then, although the company paid 100% of hospitalization and surgical coverage, retirees paid for major medical. But their premiums for that coverage had risen so high that many had dropped it.

To make health coverage affordable for future retirees, the union accepted lower starting pay for new workers in exchange for lower-cost major medical coverage for retirees. According to the contract, any employee retiring during the term of the agreement "will contribute a flat \$100 per month for life towards the cost of such coverage. The Company will pay any additional required costs."

The company doesn't dispute that the contract says that, but it says that "\$100 per month for life" referred only to the major medical coverage, not explicitly to the hospital/surgical portion.

In addition, it believes the agreements to provide health coverage to retirees expired with the contracts, said Marc Weitzen, general counsel for ACF at Icahn & Co. in New York, in an interview.

The retirees, represented by the union, countersued to dismiss the complaint. They contended ACF had gone through "the charade of telephoning retiree Mr. Chapman about the cuts, just so it could provoke a predictable negative reaction and then use the reaction to immediately sue."

The retirees said ACF had sued in St. Louis, which is part of the 8th federal circuit, because it "apparently believes that the 8th Circuit is more favorable to employers in retiree medical benefits cases, and apparently feels that its chances are improved if it makes the retirees litigate hundreds of miles from their homes."

Most of ACF's retirees live in West Virginia, in the 4th Circuit, where a court favored union retirees in an earlier decision. The retirees asked the judge to dismiss the case or transfer it to the southern district of West Virginia.

Mr. Weitzen at Icahn & Co. said ACF sued in Missouri because it administers the benefits plans from there. He added, "As with many other U.S. businesses, ACF believes it has the right to pass along certain of its health-insurance costs to retirees."

It is legal and common for litigants to try to pick a favorable jurisdiction. If two parties sue each other, the courts generally hear the case that's filed first. But a court can dismiss or transfer a case if it believes a company is "forum shopping" or suing retirees as a pre-emptive strike to deprive them of their rights, as "natural plaintiffs," to sue in the court they would choose.

That happened in this case. In August, the court in St. Louis -- saying it appeared ACF's move "resulted in a proverbial race to the courthouse in order to deprive defendants of their choice of forum" -- moved the suit to federal court in Huntington, W.Va. The case is ongoing.

But a different court came to the opposite conclusion regarding Rexam, illustrating why employers make these legal thrusts at retirees.

In early 2002, Rexam raised retirees' share of the cost of prescription drugs. "For people getting a pension of \$300 to \$400 a month, it ate their whole pension," says Mr. Kneifel, the retiree in Union Mills, Ind., who is 65.

For more than a year, retirees complained to the company that it had no right to change negotiated agreements, which stated that "Company-paid major medical coverage will be provided for all retirees," and specified what the retirees' costs would be.

'Reserves the Right'

Rexam responded that a booklet describing the coverage contained a clause that said the company "reserves the right to amend, modify or discontinue the plan in the future in conformity with applicable legislation."

The retirees said the clause meant that if government legislation or regulations changed, then the plan might have to be modified accordingly. It didn't give the company a right to unilaterally change the agreement, retirees said, pointing to another clause specifically stating that the right to modify the benefits "was subject to any applicable collective bargaining agreement."

In May 2003, Rexam sued the retirees, asking a federal court to declare that it had the right to change their benefits.

CREATIVE STRATEGIES

Companies that cut retiree health benefits promised in writing may use one or more arguments or tactics:

- **Escape Clause:** Insert sentence in benefit plan saying company "reserves the right" to change benefits.
- **'Life' Line:** Argue that "lifetime coverage" refers to life of the contract, not lives of retirees.
- **Fine Print:** Say that retirees signing health-plan enrollment forms waived prior agreements.
- **Trip to Court:** Sue retirees, ask court to declare company has right to cut benefits.

Source: WSJ research

It filed in Minneapolis. The appearance of a deputy sheriff bearing a summons to court 475 miles away was a shock to Mr. Kneifel. "I'm glad I was home when they came, because my wife had a stroke about six years ago," he says. "Suing retirees is a cowardly way to go about the whole thing."

The retirees, represented by the Steelworkers, countersued in Toledo, Ohio, asking that the case be dismissed or transferred there. They said Minnesota was home to only 100 of the 3,600 retirees and that Rexam had made a pre-emptive legal strike to choose the jurisdiction. The business, which was called American National Can Co. before its 2000 purchase by Rexam Inc., is based in Chicago and has offices in Charlotte, N.C. It is a subsidiary of Britain's **Rexam PLC**.

The judge in Minneapolis rejected the retirees' arguments. Because they had not been planning to sue Rexam, they couldn't claim Rexam was suing in a pre-emptive strike, said Judge Ann Montgomery. She let the case stay in Minneapolis because Rexam employs 115 people in St. Paul and has retirees in Minnesota.

Judge Montgomery also said she was allowing the suit to move forward "in the interests of justice." She cited a liability for the benefits on Rexam's balance sheet and said the company was harmed "because it cannot lower the liability unless it reduces the retirees' benefits." The case is pending.

A Rexam spokesman said with health-care costs rising, the company "must do what we can to address these costs" to remain competitive, but will continue to provide retirees with fair coverage.

Gradual Erosion

The erosion of legal protection for retiree health benefits has been gradual. When medical costs began to rise steeply in the 1980s, employers first started to cut benefits for salaried retirees. If sued, employers pointed to clauses they had added to the health plans' technical documents. The clauses said the employer reserved the right to change the benefits.

Retirees complained that the clauses were buried in long technical documents they often didn't know existed. (Companies must provide employees a summary of these documents when they first become health-plan participants; the summaries may or may not include the clauses at issue.) The retirees also pointed to employer literature referring to lifetime coverage. Nonetheless, courts began accepting company arguments.

A key case involved cuts by **General Motors Corp.** in coverage it had offered to 50,000 salaried employees over the years to induce them to retire early. A 6th Circuit appellate court ruled in 1998 that what mattered weren't brochures that advised prospective retirees that health coverage would be provided "at GM's expense for your lifetime," but a clause in which GM reserved the right to alter benefits. Although dissenting judges assailed this reasoning, and the federal circuits remain divided about it, salaried retirees have steadily lost in benefits cases ever since.

Union retirees were more secure because their benefits were part of negotiated contracts. But after the GM ruling, more employers began to argue that that decision's logic applied to union retirees, as well, and some courts agreed.

Meanwhile, over the years some employers also have argued that promises of lifetime coverage expired

when the contracts expired, or were canceled out by clauses noting how long the contracts would run. Initially, courts rejected those arguments, saying general "duration clauses" in contracts refer simply to the period of the contract, and pertain to salary and benefits for active employees, not to benefits for retirees.

But some courts in the past decade have accepted these employer arguments. The federal circuits are split.

Retirees who go to court on their own to contest cuts in their benefits face a hard road.

Employers generally use a combination of arguments when they unilaterally change union retirees' health coverage and file suit against the retirees.

Serving Papers

Asarco Inc. told retirees in mid-2003 that it was raising their health-care premiums. As it did so, the copper company sent summonses to some retirees in Arizona, where many live, telling them they were defendants in a suit it was filing in Phoenix.

The suit pointed to a clause in health-plan documents saying, "The Company reserves the right to amend or terminate the Plans at any time for any reason....even after you retire."

In addition, Asarco pointed to general "duration clauses" in the contracts, which said the agreements expired when the labor contracts did. The agreements that expired, the company said, included the one to provide retirees with health coverage until they qualify for Medicare.



Chuck Yarter

Retired Asarco miner Chuck Yarter learned he was being sued when he got a call from a process server trying to find his remote home in the Sonora Desert near Marana, Ariz. Mr. Yarter, 61, says he told the man how to find his modest 625-square-foot house, which sits at the end of a dirt road, with a distant view of the open-pit Silver Bell copper mine where Mr. Yarter was a mechanic on heavy equipment.

He smiles recalling the visit: His black dog, Lady, wouldn't let the visitor out of his car. The process server handed the papers through the car window before trundling away through the saguaro and mesquite. "I've never been served papers in my life," Mr. Yarter says.

In its July 8, 2003, letter to him and other retirees, Asarco, a unit of Grupo Mexico SA, said: "As you know, the past several years have been very difficult for the copper industry. The continuing low copper prices and escalating medical costs force us to make these changes."

Mr. Yarter, who monitors copper prices on the Internet, says Asarco is just making excuses. Copper prices have nearly doubled since the July 2003 letter, to about \$1.36 a pound from 76 cents.

Asarco, in a statement, said it acted in response to "the constantly escalating" cost of providing medical and drug coverage, saying it must control costs because it can't control what it gets for its copper. It said it

continues to make coverage available "at a reasonable cost," declining further comment because the case is in litigation.

Three unions filed a counterclaim on retirees' behalf against Asarco: the Steelworkers, the International Brotherhood of Electrical Workers and the International Chemical Workers. The retirees' suit says that the duration clauses weren't meant to limit the retirement benefits of people who had already retired, "as such retirement benefits were meant to last during retirement independent of the expiration of agreements applicable to active employees."

It added that the "alleged 'severe financial distress' has not prevented the Company from paying its top management quite handsomely." And it said that " 'unforeseen circumstances' do not justify a breach of contractual obligations ... to persons living on fixed income who can ill-afford to pay the costs the company has shifted upon them."

Since Asarco imposed the changes, Mr. Yarter's share of premiums, deductibles and co-payments has grown to consume half of his \$1,005 monthly pension. He says he is staying in the plan anyway, because his wife, Frances, has diabetes.

But Larry Bracamonte, 64, with a pension of \$448 a month, is among Asarco retirees who have dropped the plan as a result of the increase. He works at a furniture store, and twice a month, he drives a van full of Arizona retirees five hours to Algodones, Mexico, to buy prescription drugs more cheaply than in the U.S. He says a neighbor can't afford even the lower-cost Mexican drugs on her Asarco widow's pension of \$54 a month, so she gets drugs from a state program for low-income people.

Mr. Yarter says he's in better shape than many Asarco retirees. "I did all the retirement planning you're supposed to do," he says. "I decided I could afford to retire." After retiring, he studied computer programming and obtained an associate's degree in systems administration.

Now he's looking for work, so far without success. "If the company kept its promise, I'd be all right," he says. "Nobody ever thought the company would try to renege on a contract like that."

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