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Plaintiff Cry: When Retirees Sue an Ex-Employer

By ELLEN E. SCHULTZ
 Staff Reporter of THE WALL STREET JOURNAL
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When retirees of GenCorp Inc. were told the company was going to start charging them for health insurance, despite a labor contract they say promises coverage for life, John Van Dyke thought fighting back in court was the answer. "I was sure that once the judge saw the contract, it would be over," the 76-year-old says. "How long could it take?"



John Van Dyke

So far, almost five years. What happened to the retirees shows the daunting challenges faced by the oldest Americans, union and salaried, if they go to court on their own to recover health benefits.

In January 2000, the former General Tire & Rubber began charging 2,063 hourly retirees health-care premiums. Mr. Van Dyke, a former millwright who once was active in the Rubber Workers union, quickly learned that it couldn't help. In negotiating a contract in 1994, the union had agreed not to represent retirees in any future lawsuit.


On their own, the retirees faced their first challenge: finding a lawyer. Few lawyers take cases involving health benefits, because under the Employee Retirement Income Security Act, or Erisa, there are no punitive damages that contingency-fee attorneys can use to finance cases. All a plaintiff can win is restoration of the disputed benefit, and the judge may or may not let the plaintiff's lawyer be reimbursed from that for the cost of preparing the case, thanks to a quirk in Erisa.

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So Mr. Van Dyke passed the hat. He collected \$12,000 from fellow retirees of a GenCorp plant in Jeanette, Pa. They chipped in \$100 per couple, widows \$50. While this would cover only a fraction of the cost of mounting a suit, he found lawyers who were willing to take the case. In August 2000, he met them at a diner in Pittsburgh, taking along a cardboard box full of union literature going back decades.

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Told the suit needed named plaintiffs, he volunteered, along with fellow retirees Stanley Wotus and Ed Peksa. All three are World War II veterans who served in either Iwo Jima or Okinawa. (Veterans may qualify for some health care from Veteran's hospitals, but there can be long waits for care and their spouses don't qualify.)

In October 2000, they sued GenCorp in federal court in Akron, Ohio. The suit cited labor contracts promising lifetime coverage. But GenCorp, in court documents, responded that lifetime didn't mean "at no cost."

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GenCorp also pointed to enrollment cards retirees filled out a decade ago. The cards asked the retirees either to pick a plan that had high deductibles and co-payments or continue in one that had no cost. They chose the no-cost option. But at the bottom of the form was fine print saying the signer acknowledged that "I am choosing the benefits selected on this form to replace any medical benefits available under any prior GenCorp retiree medical plan." By signing the forms, GenCorp now argued, the retirees had released it from its obligation under the union contract.

In April 2001 came the first meeting with a judge. The retirees left early in the morning, first heading to a rendezvous with their lead lawyer. At the wheel was Mr. Van Dyke, who had the best eyesight. Still, at 5 a.m. in the dark on the Pennsylvania turnpike, he missed his turn, he recalls.

The retirees linked up with the lawyer, William Payne of Pittsburgh, who drove them the last 180 miles in his minivan, usually used to take his sons to hockey practice. Because of their various infirmities, they had to pull over several times. Mr. Van Dyke had part of his stomach removed following a bout of cancer in the 1990s. Mr. Wotus was taking several medications for blood pressure and heart problems. In the back seat, Mr. Van Dyke recalls, the diabetic Mr. Peksa had taken

one insulin shot too many and was passing out. "I was worried about Ed. He's got the sugar real bad," Mr. Van Dyke says. They pulled over and gave Mr. Peksa some juice.

They finally made it to Akron in time for the 9 a.m. court session. There, the judge pressed the two parties to settle their differences. With nothing resolved, the retirees headed home.

GenCorp then said the plaintiffs should include retirees from other plant locations besides Jeanette, Pa. The judge agreed. So the retirees recruited more volunteers to serve as plaintiffs.

A year later, a larger group headed out, this time to a mediation meeting in Cleveland. Several retirees traveled from Kentucky and Ohio, booking senior-discount rooms at the Holiday Inn. Coming farthest was Kenneth Bottolfs, now 83. He made the three-flight trip from Waco, Texas, in eight hours.

Mr. Bottolfs says the health-care premium for him and his wife is now \$685 a month, more than erasing his GenCorp pension of \$460. "A lot have dropped out because of the inability to pay" for the health coverage, he says. "My wife says they're waiting for everyone to die."

The Cleveland meeting was to see whether the retirees and the company could resolve their dispute. It failed. The retirees began their long trips home.

Eight months later, the retirees went to another mediation meeting, minus Mr. Wotus, who'd had a stroke. It failed too. The judge said the case should move to trial.

The retirees traveled to Cleveland on May 14, 2003, for depositions by GenCorp. The sessions took several hours each. The retirees whiled away their waits playing cards and trading war stories, says Mr. Van Dyke.

The following August, their lawyers filed to have the suit certified as a class action. Without this, even if the named plaintiffs won, no others would get their benefits restored.

Although GenCorp had insisted the plaintiff group be expanded to include people from around the country, and this was done, GenCorp opposed its certification as a class. It said the men didn't qualify as representatives of the whole group of retirees. The reasons: Depositions showed some had forgotten what they were thinking when they signed enrollment forms. One didn't remember what was in GenCorp's slide presentation explaining the benefit options eight years earlier.

What's more, the retirees had mixed their paper work when they pooled their brochures in a cardboard box while searching for a lawyer. That constituted "spoliation," or destroying evidence, GenCorp said, adding it would "seek appropriate remedies at a later date." Remedies in these situations can include charging retirees for a company's legal fees.

Finally, GenCorp said the retirees should be denied class status because they were too dispersed, and because the named plaintiffs were too sick to adequately represent everybody.

Indeed, after GenCorp filed its brief, one plaintiff, Robert Berger, 69, died in October 2003. Plaintiff Frank Polumbo, who joined the company at 16, and as a youth took part in a 1934 strike that gave birth to the Rubber Workers union, died in November. He was 89. "He was a fighter, says his widow, Mary Elizabeth, 88, who volunteered to take his place.

In December 2003, Judge Dan Polster agreed with GenCorp and denied retirees' request to be certified as a class. "I just couldn't believe it," Mr. Van Dyke says.

FINE PRINT

GenCorp argues it can change union retirees' health benefits because of a line in enrollment forms they signed nearly a decade ago:

I have read the brochure which explains my retiree medical benefit options under the GenCorp plan, and I am electing to enroll in the coverages stated on this form.

I agree to pay any contributions, deductibles, and copayments required under the plan, and I authorize release of information on all claims submitted for payment.

I understand that I may change coverages only under limited circumstances. I acknowledge that I have choices available, and that I am choosing the benefits selected on this form to replace any medical benefits available under any prior GenCorp retiree medical plans.

The retirees, fearing they'd all be dead by the time the case was resolved, and worried about a statute of limitations that the company said was running out, signed up an additional 294 plaintiffs and filed another suit in July 2004. In August, the judge dismissed that case. Now the 294 retirees, most in their 80s, must file individual suits by the end of January 2005, and each pay a \$150 filing fee.

The original suit continues. In its latest quarterly filing, GenCorp said it didn't expect a trial until after next summer.

Its filings also show that over five years, GenCorp's liabilities for retiree health care have declined 16%. The company declined to comment, citing ongoing litigation.

Mr. Van Dyke got out of the hospital last February after treatment for colon cancer. He had been caring for his wife of 58 years, June, who earlier this year had a stroke and a heart attack, but in September she died.

"A lot of people want to drop out" of the suits to restore company-paid health care, he says, "but I keep telling them to hang on."

Write to Ellen E. Schultz at ellen.schultz@wsj.com⁵

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