UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re CITY OF DETROIT, MICHIGAN, Debtor.	Chapter 9 Case No. 13-53846 Hon. Steven W. Rhodes
THE OFFICIAL COMMITTEE OF RETIREES OF THE CITY OF DETROIT, MICHIGAN, et al., Plaintiffs, v. THE CITY OF DETROIT, MICHIGAN, et al., Defendants.	Chapter 9 Adv. Pro. No. 14-04015 Hon. Steven W. Rhodes

RESPONSE OF RDPFFA ON BEHALF OF *WEILER* CLASS TO DEFENDANTS' MOTION TO DISMISS

Plaintiff, Retired Detroit Police and Firefighters Association (the "RDPFFA"), specifically on behalf of their members who are *Weiler*-class members, submit this response to Defendants' Motion to Dismiss Complaint [Dkt No. 7].

The Retiree Committee has submitted a comprehensive response to the Defendants' motion. The RDPFFA incorporates that response by reference and will address in this response issues which are unique to the retired police and firefighters, their dependents and survivors, who are within the class of retirees covered by the consent judgment issued by the Wayne County Circuit Court and consented to by the City in the *Weiler* litigation.

THE *WEILER* JUDGMENT SHOULD BE GIVEN GREATER CONSIDERATION THAN AN ORDINARY CONTRACT

The City of Detroit has long been bound by written collective bargaining agreements to provide healthcare benefits to its public safety employees and retirees, and often their spouses and dependents. The public safety employees agreed to a compensation package which included retirement health care coverage, and, as it pertains to the *Weiler*-class members, settled a class-action lawsuit which resulted in the entry of a consent judgment (the "*Weiler* judgment") by the Wayne County Circuit Court. The *Weiler* judgment guarantees a specified level of healthcare benefits for retirees, their spouses, and their covered dependents.

The Weiler judgment pertains to benefits which were earned pursuant to a collective bargaining agreement. Courts have held that collective bargaining agreements should be afforded greater status in bankruptcy than are ordinary contracts:

> My conclusion that Congress intended that a debtor in possession adhere to the terms of a collective-bargaining agreement in the post-petition period, when he is free to disregard all other contracts, is supported by our consistent recognition that collective-bargaining agreements are not like other agreements. What Justice Douglas wrote in 1960 remains true today:
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> "The collective bargaining agreement ... is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate…. A collective bargaining agreement is an effort to erect a system of industrial self-government. When most parties enter into contractual relationship, they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability preexists the negotiations. Rather, it is between having the relationship governed by an agreed-upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces." *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 578-580, 80 S.Ct. 1347, 1350-1351, 4 L.Ed.2d 1409 (1960) (citations and footnotes omitted). See also *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 550, 84 S.Ct. 909, 914, 11 L.Ed.2d 898 (1963).

NLRB v. Bildisco and Bildisco, 465 U.S. 513 (1984) (dissenting opinion)[1].

Courts should give "special heed… to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve". *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 567 (1960). *See also, Emery Air Freight Corporation v Int'l Brotherhood of Teamsters, Local*

[1] Following this decision, Congress enacted sections 1113 and 1114 of the Bankruptcy Code, in effect superseding the majority opinion.

295, 23 F.Supp.2d 313 (E.D.N.Y. 1998); *Bowen v USPS*, 459 U.S. 212; 103 S. Ct. 588; 74 L.Ed.3d 401 (1983)[2]. "A collective bargaining agreement governs an entire, evolving labor-management relationship. It is negotiated in a highly regulated environment that determines the certification and decertification of unions and establishes bargaining obligations of unions and employers." *United Steelworkers of Am. v. Warrior & Gulf Nav. Co*. at 582. "Plaintiffs correctly contend that the principles that govern ordinary commercial contracts do not necessarily apply to collective bargaining agreements". *Burmeister v. Pension Benefit Guaranty Corp*., 943 F.Supp.2d 83 (D.C. 2013), *citing John Wiley & Sons v Livingston*, 376 U.S. 543, 550, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964).[3]

In addition to the greater protections afforded to collectively-bargained-for benefits, *Weiler* class members must be afforded additional protections under the *Weiler* judgment, which was entered in 2007 by the Wayne County, Michigan Circuit Court. In Michigan, generally, a consent judgment is considered the equivalent of a settlement since the matter is resolved through agreement of the parties and none of the issues involved in the case are actually litigated. *See, e.g., Am. Mutual Liab. Ins. Co. v. Mich. Liab. Co*., 64 Mich. App. 315, 327, 235 N.W.2d 769, 776 (1975). However, the sole recognized exception to this general rule is that a consent judgment will give rise to collateral estoppel when such

[2] While the *Steelworkers* trilogy pertains specifically to the arbitration clauses found in the collective bargaining agreements, the cases do illustrate the heightened status over ordinary contracts.
[3] The Retiree Association Parties also assert the strength of protection for collectively bargained for benefits on behalf of all retirees whose benefits are born from collective bargaining agreements.

judgment explicitly reflects the parties' intent to be bound on a particular issue of fact. *See Am. Mutual Liab.*, 64 Mich. App. at 327 n.13, 235 N.W.2d at 776 n.13 In the *Weiler* settlement, it is clear that the intent of the parties was to guarantee that the City of Detroit would make ***no change*** to the benefits in effect at the time the judgment was entered.

Had this case been under chapter 11, the City would not be entitled to unilaterally alter the benefits to which the Retirees in general or the *Weiler* class in particular are entitled. The procedures mandated by 11 U.S.C. § 1114, and the protections to retiree rights afforded by that provision, would govern the City's actions. No alteration of retiree benefits would be implemented without a finding that the parties "are treated fairly and equitably" and the terms are "clearly favored by the balance of the equities." 11 U.S.C. § 1114(g)(3).

In such a situation, the fact that the City and the *Weiler* class entered into a settlement would merit consideration. The consent judgment represents a compromise of issues raised and negotiated in 2009. In balancing the equities, the Court would have to consider that recent resolution, the City's representations and promises evidenced thereby, and the compromise made by the *Weiler* class.

The City points out that § 1114 does not apply in chapter 9, but the principles for which § 1114 stands should and do apply. Public retirees are entitled to equal protection of the law, so if federal law, out of deference to the state, denies them the protections of § 1114, the retirees must be entitled to the protections

afforded by state law. Conversely, if § 1114 does not apply due to deference to the political powers reserved to the states, then deference to the political power of the state must be given. That political power was expressed in the *Weiler* judgment. The *Weiler* judgment should therefore be given effect by this Court, or the Retirees should be permitted to seek its enforcement elsewhere.

The City argues that retiree benefits, under Michigan law, are simply contractual obligations. The Pension Clause of the Michigan Constitution of 1963, it has been observed, refers to pension obligations as contractual, and was adopted, at least in part, in reaction to *Brown v. City of Highland Park*, 320 Mich. 108 (1948) in which the Michigan Supreme Court held a public pension to be an "expectancy" rather than a contractual obligation. *Id*. at 114. Notably, the Michigan Supreme Court, even when considering a pension obligation to be less than a contract, ruled that a retiree-beneficiary of such an obligation was entitled to require the municipality to "[act] within reasonable limits." *Id*. Thus, under Michigan law, the Plaintiffs are entitled to judicial oversight.

The *Weiler* judgment benefits not only the retirees, but their spouses. Section II of the Settlement Agreement (attached to the *Weiler* judgment) provides, in pertinent part, that the class members consist of "retired City police officers and their spouses, and [retired] City firefighters… and their spouses". However, the City, in its proposal to make payments of the reduced benefits, has ignored its obligation to the spouses. The City is proposing to pay each retiree only

$125/month, regardless of whether that retiree is married. This is arbitrary and capricious.

RELIEF FROM THE AUTOMATIC STAY

Plaintiffs also seek in their motion relief from the stay. An additional basis for relief from the stay exists with respect to the *Weiler*-class retirees because of an insurance policy provided for by the *Weiler* judgment. This basis was not yet the subject of a motion by Plaintiffs, but because the City has filed a motion to dismiss the adversary proceeding, the issues of additional discovery required and additional relief to be afforded must be considered.

The *Weiler* judgment provides for the City to obtain a "stop-loss" insurance policy. The City agreed, and was ordered in the judgment to "maintain **'stop loss' insurance coverage** for all of the current self-funded coverages Group Nos 81100-700, 701 (Ex. 9), 04436-700 (Ex. 8) and 54731-701 (Ex. 8) in an amount to maintain the lifetime maximum benefit limits contained in those coverages". The City has, by presenting unilateral changes to the coverage and benefits protected by the *Weiler* judgment, potentially triggered a "loss" which the "stop loss" insurance coverage may insure against.

Plaintiffs have been provided with only limited information by the City as to the existence and terms of this policy. The policy may afford the *Weiler*-class retirees with a remedy in the event that the City is permitted to repudiate the *Weiler* judgment. Discovery on the issue of the availability of such a remedy is necessary.

Assuming that such a policy may afford a remedy to the *Weiler* class, the RDPFFA should be granted relief from the automatic stay to enable it to pursue a claim against the policy.

The "stop loss" insurance coverage would, upon information and belief, benefit only the Plaintiffs or the *Weiler* class as a subset of the Retirees, and proceeds of the policy would not be an asset of the bankruptcy estate. To the best of Plaintiffs' knowledge and belief, the City does not have a direct interest in the proceeds of the insurance. The City does not have equity in the "stop loss" insurance, nor is the "stop loss" insurance necessary to an effective reorganization. Relieving the Plaintiffs from the automatic stay will not cause hardship to the bankruptcy estate; conversely, the hardship to the Plaintiffs absent relief outweighs any claimed hardship to the City.

Section 362(d) of Title 11 reads, in pertinent part:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--
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> ***(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;***
> ***(2) with respect to a stay of an act against property under subsection (a) of this section, if--***
> ***(A) the debtor does not have an equity in such property; and***
> ***(B) such property is not necessary to an effective reorganization;***

11 U.S.C. §362(d)(emphasis added).

In re Zenith Laboratories, 104 B.R. 659, 665 (Bankr. D.N.J. 1989) held that "an insurance policy purchased by the debtor is only an asset to the extent that it increases the debtor's worth or diminishes its liabilities." The court reasoned that if the asset could not meet either criterion, then it could not be considered an asset of the estate and therefore relief from the stay should be granted to enable claims to be made against the issuer of the policy by intended beneficiaries of the policy. Bankruptcy courts have also determined that when no great prejudice to either the bankruptcy estate or the debtor results in a continuance of an outside civil action, and the hardship caused to the plaintiff caused by the continuance of the stay outweighs the hardship caused to the debtor, a modification of the stay should be granted. *In re McGraw*, 18 B.R. 140, 141 (Bankr. W.D. Wis. 1982)(Martin, J.). The court in *In Re McGraw* also opined that where the claim is one covered by insurance or indemnity, continuation of a civil action "should be permitted since hardship to the debtor is likely to be outweighed by hardship to the plaintiff. *Id* at 142.

Courts have decided on a case-by-case basis whether a policy is property of the estate. *In re Arter & Hadden, L.L.P.*, 335 B.R. 666, 671 (Bankr. N.D. Ohio 2005)(Baxter, J.). The language and scope of the policy is more important and "if a debtor does not have a direct interest in the proceeds of the insurance policy, the insurance proceeds are no longer property of the debtor's estate." *Id*. However,

the bankruptcy court maintains authority and discretion to fashion relief according to the particular needs in a bankruptcy proceeding. *Id* at 674.

For these reasons, relief from the automatic stay should be considered for the benefit of the *Weiler*-class Plaintiffs, to the extent of the insurance, after affording Plaintiffs the opportunity for discovery.

WHEREFORE, Plaintiffs request this Court to issue the requested Preliminary Injunction, strike Defendants' Motion to Dismiss, or, alternatively, grant relief from the automatic stay.

Respectfully submitted,

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