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Pension Benefits as an Evidentiary Collateral Source*

Our analysis in this note is based on the recent decision of the Maryland Court of Appeals in *Norfolk Southern Railway Corp. v. Tiller* (2008), and two legal decisions cited therein. These decisions indicate a unique application of the collateral source rule. Typically, the collateral source rule functions to prevent a defendant from claiming an offset for damages in a personal injury or wrongful death action if the offset was provided by a source unrelated to the defendant. For example, in most states and under most circumstances, life insurance paid for by a decedent cannot be introduced as an offset against lost financial support a decedent would have provided. In *Tiller*, however, the defendant did not attempt to claim an offset for any collateral source, but wanted to introduce evidence about the existence of pension benefits that an injured railroad worker would have had he not been injured. The Court in *Tiller* held that defendants could not introduce evidence about future pension benefits of a railroad worker to support a claim by the defendant that the plaintiff railroad worker in an FELA (Federal Employer's Liability Act) action would have been likely to retire at age 60, not at age 65 as projected by the plaintiff economic expert. Thus, the common interpretation of the collateral source rule as prohibiting offsets for benefits a worker had from another source was not involved. In this case, the collateral source rule was invoked to preclude evidence of what might have happened had the plaintiff not been injured. That is why the title of this note refers to an "evidentiary collateral source."

Tiller had been injured and allegedly could no longer work for the railroad. Under existing provisions of the Railroad Retirement Act, if Tiller had not been injured he could have retired at age 60 with a "full" Tier I/Tier II railroad pension. Unless a railroad worker is earning a high income it is often the case that the financial benefit from continuing to work relative to retiring on railroad pension benefits is relatively small if the worker is a "30/60" worker. Under the rules of the Railroad Retirement Board (henceforth RRB), a worker with 360 months of "credits" (months in which some amount of Tier I and Tier II taxes were paid) can retire at age 60 or thereafter "as if" the worker was at his Social Security retirement age with "full" (not actuarially reduced) pension benefits. Thus, a railroad worker who had 30 years of experience working for railroads, was 60 years of age, and had been earning in the range of $50,000 per year at the time he reached age 60 could receive a retirement benefit that was, after all tax consequences were considered, almost as much as the worker was earning by working full time for the railroad.[1] In *Tiller*, the plaintiff economic expert had projected lost earnings to age 65. The Norfolk Southern wanted to limit lost earnings calculations to age 60 and to demonstrate that Tiller would have had significant incentives to retire at that age because of RRB pension provisions. The Maryland Court of Appeals held that because retirement benefits are a collateral source, the existence of such pension benefits could not be introduced as evidence to show Tiller's future incentive to retire.

Underlying Facts about RRB Pensions

The underlying facts were and are that a large majority of railroad workers with "30/60" eligibility retire within one year and that an overwhelming majority do so within three years. The Railroad Retirement Board, in its *Twenty-Third Actuarial Valuation of the Assets and Liabilities Under the Railroad Retirement Acts as of December 31, 2004 with Technical Supplement* (2006), estimated that 64% of "30/60" eligible railroad workers retire within one year of reaching age 60.[2] Another 50% of those eligible at age 61 retire at that age. Another 45% retire at age 62 and another 41% at age 63. Since some number of railroad workers reach eligibility at ages 61, 62 and 63, these percentages are not based on strictly comparable eligibility pools, but these percentages demonstrate that the vast majority of railroad workers with "30/60" eligibility retire at age 60 or soon thereafter.

It should also be noted that these facts do not take income levels of workers into account. For reasons discussed in footnote 1, incentives of workers to retire are different for workers earning $100,000 per year than for workers earning $50,000 per year. The percentage of income replaced by pension benefits is much smaller for $100,000 per year workers than for $50,000 per year workers. Thus, one would expect that the percentage of $50,000 per year workers who retired at age 60, 61, 62, and 63 would be

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[1] Tier II of the Railroad Retirement System is based on a maximum income of up to about $55,000 per year. If a railroad worker earns substantially more than that amount, his Tier II pension benefit will not be large enough to offset his lost earnings upon retirement. For a railroad worker earning $50,000 per year, which is under the maximum income (for both Tier II taxes and benefits), the net financial benefit from continuing to work will be small.

[2] Based on Table S-10, page 52 of the *Twenty-Third Actuarial Valuation* (2006).

higher than the percentage of $100,000 per year workers. To the best of our knowledge, data is insufficient to show the anticipated differences, but we still expect that any reported percentages would understate the percentages of those workers earning up to $55,000 per year who take retirement at age 60.

On the other hand, a significant minority of railroad workers continue working at those ages. The minority gets smaller and smaller in each year, but there may be reasons why even a worker earning approximately $50,000 per year may want to continue working. He may enjoy his job. His wife may have recently died and his job may be important to him for social reasons. He may be of an age such that continuing to work would maintain medical insurance, and so forth. If the railroad is liable for the worker's injury, the injury has taken away the choice with respect to retirement the worker had before his or her injury. Each worker represents a unique circumstance such that allowing evidence of a pension benefit that a worker would not have chosen to use may unfairly limit the recovery of that worker. The defendant railroad is not precluded from inquiring about the worker's intended age of retirement. It is only precluded from introducing evidence about pension benefits for which the worker would have been eligible at age 60 in an effort to make the jury think the worker would have retired at age 60. That is, however, using the word "only" in a casual way. Since workers have a strong financial incentive to claim that they would have worked to age 65, defendant railroads have been denied a powerful tool to cause a jury to question such claims, which plaintiff economic experts often use in their calculations of earnings loss damages to the detriment of railroads.

Are Defendants Left Without Recourse?

In the Appendix to this note, we provide descriptions of three legal decisions that have reached the conclusion that pension benefits are an evidentiary collateral source in the sense that we have been describing. The last of the decisions listed is the decision in *Tiller*. The other two decisions were cited in the *Tiller* decision. The decision in *Brumley v. Federal Barge Lines* (1979) indicates that it is not only the railroad industry but also the barge industry that considers pension benefits to be an evidentiary collateral source and that the conclusions reached in the *Tiller* decision had been reached in other courts at least as early as 1979. The decision of the Pennsylvania Superior Court in *Griesser v. National Railroad Passenger Corporation* (2000) was in the railroad industry and is more recent than the *Brumley* decision. The *Griesser* decision, however, implicitly points to a

recourse left to defendants. While pension benefits themselves cannot be introduced to demonstrate the unlikelihood of a railroad worker working to age 65, the retirement percentages of railroad workers with 30 years of railroad experience that were discussed above do not require specific mention of pension benefits. The *Greisser* Court pointedly indicated that the defendant railroad could have explored the lack of the plaintiff's economic expert's lack of knowledge about the patterns of retirement among railroad workers. Presumably that also means that the railroad could have presented its own expert to talk about retirement patterns of railroad workers. The expert could not offer an explanation for those retirement patterns, but the defense economic expert could presumably testify about the percentages of railroad workers with 30 years of railroad experience who retire at ages 60, 61, 62, and 63. Doing so would appear to have largely the same impact as providing an explanation based on pension benefits—unless the specific intent of the testimony was to bring pension benefits to the attention of the jury. Such an intention, of course, would violate the intent of the collateral source rule as it applies to offsets and not just as an evidentiary rule.[3]

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[3]To be clear, we do not reject the argument that if a railroad contributes toward a pension it may have some rights to an offset. We are simply indicating that several courts have ruled that evidence of future pension benefits cannot be introduced to show when a worker would be likely to retire.

References

U.S. Railroad Retirement Board. 2006. *Twenty-Third Actuarial Valuation of the Assets and Liabilities Under the Railroad Retirement Acts as of December 31, 2004 with Technical Supplement.*

Appendix: Legal Decisions Regarding Pensions as an Evidentiary Collateral Source

Brumley v. Federal Barge Lines, 78 Ill. App. 3d 799; 396 N.E.2d 1333 (Ill. App. 1979). In this Jones Act case, Brumley was a river barge pilot who testified that he intended to work beyond his 65th birthday and presented another river pilot aged 72 to testify that this was possible. The defendant attempted to present evidence based on Social Security and retirement benefits to show that Brumley was unlikely to work beyond the age of 65. The court held that the collateral source rule prohibited introduction of retirement benefits, citing *Eichel v. New York Central R. R. Co.*, 375 U.S. 34 (1963) as reflecting "a strong policy against the admissibility of this kind of collateral source evidence in FELA and Jones Act cases."

Griesser v. National Railroad Passenger Corporation, 2000 PA Super 313; 761 A.2d 606 (Pa. Super 2000). The Pennsylvania Superior Court reversed the trial court decision based on the trial court's admission of evidence about plaintiff's retirement benefits in a way that violated the collateral source rule. The plaintiff was 45 at the time of trial. His economic expert projected damages for lost earning capacity to ages of 65 or 70. Plaintiff's expert was asked on cross examination if he was aware of retirement benefits available to railroad workers with 30 years of experience at age 60. Amtrak presented its own forensic economic expert who testified, over objection, based on assumptions that plaintiff would have retired at 60, 62 or 66. Plaintiff's expert also testified that with retirement at age 62 plaintiff would be receiving basically as much from pension benefits as he would be earning if he continued to work. The Court cited *Eichel v. New York Central R. R. Co.*, 375 U.S. 34 (1963) in holding that evidence of retirement benefits should not have been admitted. The Court said:

> We understand that future retirement benefits are not triggered by the injury; rather, they would have been awarded even if Appellant had not been injured. Moreover, future retirement benefits do not improperly suggest that the plaintiff is currently being compensated for his injury from another source. In these respects, the evidence at issue is not "classic" collateral source evidence. On the other hand, there remains a significant danger that a jury will misuse and misinterpret evidence of early retirement benefits. For example, a jury could conclude that Amtrak was liable for lost wages to age

> 65 or 70, but then decline to award such damages because of the fortuitous existence of equivalent retirement benefits. Or, the jury could conclude that Appellant was entitled to benefits only to age 60 and was attempting to seek a double recovery of benefits after age 60.

Amtrak raised the alternative argument that the purpose of this questioning about retirement benefits was to impeach the credibility of the plaintiff's lost wages expert based on his lack of knowledge about retirement patterns of railroad workers. The Court pointed out that "Amtrak could have pursued this line of cross examination without alluding to the fact of early retirement benefits."

Norfolk Southern Railway Corp. v. Tiller, 944 A.2d 1272 (Md. App. 2008). The court said:

> We hold (and this is not dicta) that evidence of future retirement or pension benefits is not admissible on the issue of when an employee, but for the accident, would have been expected to stop working. The probative value is too attenuated to offset the potential misuse that the jury could make of the evidence. Evidence bearing on the expected work-life of the employee is not a cognizable exception to the collateral source rule.

The plaintiff was just under 52 years of age at the time of his injury and had been working for the Norfolk Southern for 29 years and 5 months. He therefore would have been eligible for "30/60" retirement, a fact that the defendant railroad tried to introduce through its expert witness Thomas Walsh. Plaintiff filed a motion in limine to preclude evidence of retirement benefits from being introduced to explain why the plaintiff would have been likely to retire at age 60 in eight years and a few months. The trial court granted the motion in limine. Plaintiff testified that he had intended to work to age 65 and the jury awarded damages on that basis. The decision noted that Walsh had based his own calculations on an expected work-life of 10.5 years, but does not explain how Walsh arrived at that figure. The decision also cites earlier decisions reaching the same conclusion. Damages reported in the decision indicate that there was no award for lost future retirement benefits and apparently also not for loss of medical/dental/vision insurance.