A Timely Analysis of Legal Developments

ASAP®

June 26, 2012

Opting Out: Supreme Court Holds Public Sector Unions Cannot Force Non-Members to Pay Agency Fees Subsidizing Political Speech

By Jacqueline Phipps Polito and Gregory Brown

On June 20, 2012, the U.S. Supreme Court issued its anticipated opinion in *Knox v. Service Employees International Union, Local 1000*, No. 10-1121. Building on precedent establishing that public sector union fees levied on non-members represent an "impingement" on non-members' First Amendment rights, a 5-4 majority held that unions must provide non-members with the opportunity to opt out of certain special assessments and unexpected fee increases. Moreover, the majority sent strong signals that the Court could go even further and find those opt-out procedures for non-members paying union fees unconstitutional if the question comes before it.

The Court's decision in *Knox* grows out of its 1986 opinion in *Teachers v. Hudson*, 475 U.S. 292 (1986). There, the Court held that the First Amendment to the U.S. Constitution's guarantee that an individual could not be compelled to fund private speech with which he or she disagreed precluded a public sector union from requiring objecting non-members to fund a union's political and social agendas. Following *Hudson*, unions are required to provide non-members with annual notice of the union's agency fees via a "*Hudson* notice," which identifies the percentage of those fees that are attributable to "non-chargeable" expenses designed to further the union's political and social goals. Once a non-member employee receives the *Hudson* notice, he or she has 30 days to opt out of the full agency fee. The objecting non-member pays only the percentage of fees attributable to "chargeable" expenses related to the union's collective bargaining obligations.

In June 2005, Service Employees International Union, Local 1000 (SEIU), sent out its annual *Hudson* notice. SEIU calculated objecting non-members' fees at 56.35% of the full agency fees. Just after the window for objecting to the full fee closed, the union implemented a temporary 25% increase in employee fees expressly designed to further the union's political objectives in the November 2005 and November 2006 elections. On August 31, 2005, SEIU sent a letter to employees notifying them that it was implementing the special assessment, but the letter failed to provide non-members an opportunity to opt out. After non-members complained about the inability to opt out of the special assessment, the union permitted non-members who timely opted out in response to the June 2005 *Hudson* notice to pay the limited 56.35% of the special assessment. Employees who did not previously opt out were required to pay the full fee.

After the Supreme Court accepted the case for review, the union offered all class members a full refund of the increased fees and claimed the case was moot. The majority rejected the mootness argument out of hand, explaining that dismissal on mootness grounds would enable SEIU to repeat

the challenged conduct as soon as the Court dismissed the case. Although the Court could no longer grant the class members prospective relief, the majority reasoned that it could still preclude the union from continuing to engage in the challenged conduct. That is exactly what it did.

The majority held that the union's failure to provide non-members the opportunity to opt out of the special assessment impermissibly infringed upon non-members' First Amendment rights. According to the majority, *Hudson*'s opt-out procedure approached the threshold of impermissible infringement on First Amendment rights, and SEIU's decision to levy a special assessment for the explicit purpose of furthering its political agenda, without providing a timely opportunity to opt out, clearly crossed that threshold. Filtered through the prism of *Hudson*, the majority explained that any requirement that non-members pay agency fees be "'carefully tailored to minimize the infringement' of free speech rights." In other words, such a requirement must serve a compelling interest and must not be significantly broader than necessary. Because it would have been "relatively simple" for the union to provide an opt-out opportunity with the notice of the special assessment, the union did not carefully tailor its procedures for collecting the special assessment.

The majority further held that the union's requirement that non-members who opted out pursuant to the June 2005 *Hudson* notice pay a percentage of the special assessment violated those non-members' First Amendment rights. Those non-members already had objected to the funding of the union's political and social agendas. Consequently, the union's levying even a percentage of a special assessment earmarked exclusively for that purpose violated their First Amendment rights. Moreover, although the union calculated that objecting non-members owed 56.35% of the annual agency fee, the union provided no basis for charging them the same percentage of the special assessment.

The majority concluded its opinion by explaining that, while public sector unions have a First Amendment right to express their views on political and social issues, individuals' First Amendment rights to not be compelled to subsidize a union's speech is paramount. Consequently, the Court held that a union must provide a new *Hudson* notice whenever it imposes a special assessment or dues increase and could not charge non-members any fees without their "affirmative consent."

It is unclear from the majority's opinion exactly what "affirmative consent" means. Despite an analysis that was highly critical of the *Hudson* opt-out paradigm, the majority stopped short of replacing that paradigm with opt-in procedures for non-members who did not object to funding a union's political and social endeavors. Nevertheless, the majority clearly signaled that it favors a procedure requiring employees who want to fund a union's political or social agenda to opt in to contributing those funds, rather than requiring objecting non-members to opt out. Had the issue been before the Court, the majority might have struck down *Hudson*'s opt-out procedures in favor of an opt-in requirement. As Justice Breyer's dissent, with which Justice Kagan joined, lamented, the majority's holding is likely just the first salvo in "an ongoing, intense political debate."

Jacqueline Phipps Polito is Of Counsel in Littler Mendelson's Rochester office, and Gregory Brown is an Associate in the Boston office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Ms. Phipps Polito at jpolito@littler.com, or Mr. Brown at gbrown@littler.com.