

Retired Employees

By James L. Griffith, Jr.

M&G Polymers is a big stakes case, and will likely impact retiree benefits on a national scale.

Can an Employer's Silence in an ERISA Plan Vest Welfare Benefits?

In its next term, the Supreme Court will decide *M&G Polymers v. Tackett*, a case that will likely have a profound impact on how the country's employers, plan administrators, and insurers approach—and litigate

disputes over—retiree welfare benefits. At issue, ultimately, is how courts should interpret plan documents that include an employer's promise to pay for retiree benefits but are silent on the vesting and duration of those benefits.

Although the Supreme Court has addressed some of the ERISA principles that are at the core of the parties' dispute, it has never before decided what retirees must prove by words, silence or combination thereof in order to demonstrate that their employer intended to provide them with lifetime benefits. That issue is squarely teed up for the Court. Relatedly, the Court will likely have to decide whether retiree benefits—and, in particular, retiree healthcare benefits—should be afforded some special status that favors vesting.

However the nation's highest court decides these issues, the stakes are high for a number of reasons. First, although *M&G Polymers* arises under the Labor Management Relations Act (LMRA), the arguments are based in substantial part on

ERISA principles concerning welfare benefits. And as explained further below, both the LMRA and ERISA cases apply similar (if not identical) principles to determine whether retiree benefits are vested. If the Supreme Court says certain words or silence have special meanings when it comes to vesting retiree benefits, it may be hard to confine *M&G Polymers* to the LMRA-collective bargaining arena.

That potentially means that the decision will impact all of the country's employee benefit plans that include retirement benefits. And, because insurance companies and plan administrators help prepare plan summaries and otherwise communicate with ERISA plan beneficiaries, their interests are potentially at stake as well. *See Haviland v. Metro. Life Ins. Co.*, 730 F.3d 563 (Cir. 2012) (addressing claims that group life insurer made enforceable promise of lifetime benefits in the course of administering the employer's group life insurance benefit).

Second, the nation is currently facing growing healthcare costs, and neither employers nor retirees (nor taxpayers) are eager to pick up the tab. According to the Social Security Administration (SSA), there are 46.6 million retirees today, a number that will grow to 77 million by



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2033. See SSA Fact Sheet, available at <http://www.ssa.gov/>. This retirement-age population can be expected to live longer than their parents. At the same time, this age group generally uses more health care services, the costs of which (1) have been accelerating over the last few decades and are predicted to continue doing so (see CMS National Health Expenditures Projections 2012–2022, available at <http://www.cms.gov/>); and (2) can be far less predictable than pension costs. See, e.g., *Moore v. Metro. Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988). The combination of these factors makes the prospect of picking up the tab—particularly if it is unexpected or retroactively imposed—daunting.

But for whom is it more daunting, retirees or their former employers? Both can make a pretty good argument for avoiding cost-shifting. The retirees have emotional appeal and a rising tide of financial pressures. Regarding the latter, the country has been bombarded with messages from the federal government and others telling us that there is a retirement income crisis because retirees just haven't saved enough and because the government hasn't been managing the social security fund very well. The bottom line is that retirees are on fixed incomes that may be getting squeezed, and those fixed incomes may amount to far less if they must pay to maintain or replace healthcare or other welfare benefits.

But what about employers' financial pressures? The same federal government that laments the lack of retiree savings has conceded that rising healthcare costs may well destabilize or bankrupt U.S. companies. See U.S. Soc. Sec. Admin., Soc. Sec. Adv. Bd., *The Unsustainable Cost of Healthcare* (Sept. 2009), available at <http://www.ssab.gov/>. Indeed, in 2009, the Treasury Department (which purportedly knows something about finances) told its debtor-in-crisis General Motors Corp. (which just so happens to be the nation's largest automaker) that it needed to *cut retiree welfare benefits* in order to establish a path to "fiscal viability." U.S. Government Accountability Office, Report to Congressional Committees, "Summary of Government Efforts and Automakers' Restructuring to Date" (April 2009) at 4. GM did so—in bankruptcy.

The Supreme Court justices—if not expressly in their opinions, then in deliberations—will have to wrestle with these high-stakes, societal issues. Whichever way the Court comes out on *M&G Polymers*, one group is going to gain an important advantage, and the other is going to wish they had it. It's safe to predict that the decision will likely impact the country for a long time.

With the stakes in mind, we can turn back to the specific issues in *M&G Polymers*. After providing some background, this article examines where *M&G Polymers* will likely impact retiree benefit litigation under ERISA—and where it likely won't.

The Story Behind *M&G Polymers*

The *M&G Polymers* class action comes to us courtesy of the union workers in a factory in the quaint-sounding town of Apple Grove, West Virginia. Goodyear owned the factory first; then Shell; and then M&G Polymers. But no matter which company owned the factory, a national union would negotiate with the employer a "master" collective bargaining agreement (CBA) and a "Pension and Insurance Agreement" (P&I Agreement), which was incorporated into the master CBA. The local unions at the plant level would adopt the nationally-negotiated CBA and P&I Agreement, or adopt them with modifications.

The 1994, 1997, and 2000 P&I Agreements (which were also distributed in booklet form to the employees) each promised retirees that they would receive "a full Company contribution towards the cost of healthcare benefits" if they met eligibility requirements based on their respective ages and years of service, and a diminished contribution to the extent they fell below those age and service requirements. The P&I Agreements did not use words like "vested," "irrevocable," "non-forfeitable," "permanent," or any phrase with the words "life" or "lifetime" to describe retiree benefits.

In 2006, M&G Polymers informed all retirees (including those receiving a "full contribution") that they would need to contribute to the cost of their health care to maintain it. Some retirees made the contributions under protest; some did not and were dropped from coverage.

The ensuing class action lawsuit alleged that the employer's promises of a "full contribution" vested in the retirees a right to receive healthcare benefits at no cost to them. At trial, the defendant made two principal arguments. First, it argued that written "side agreements" with the local union capped the dollar amounts of its required contribution and thus entitled it

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to shift costs to the retirees. The trial court found those side agreements were never part of the CBA, and the Sixth Circuit declined to disturb that finding.

Second, M&G Polymers argued that its purported failure to include a clause that specifically limited the duration of the benefits could not be construed as intent to vest those benefits because the CBA contained a clause generally limiting the duration of the terms of the entire CBA to just a few years. In support of its argument, M&G Polymers cited the Supreme Court's opinion in *Litton Financial Printing Division v. NLRB*, 501 U.S. 190 (1991), which held that benefits in a CBA last only as long as the term of the agreement itself. Thus, argued M&G Polymers, the general durational clause meant that there was no need to specifically state that the retiree benefits would not continue beyond the term of the CBA.

An argument backed by Supreme Court precedent must have seemed like a winner to M&G Polymers, but it lost in the trial court and it lost in the Sixth Circuit. *Tackett v. M&G Polymers*, 733 F.3d 589 (6th Cir. 2013), cert. grtd., 134 S.Ct. 2136 (2014).



M&G Polymers claims it lost because of *UAW v. Yard-Man Inc.*, 716 F.2d 1476 (6th Cir. 1983), cert. den., 465 U.S. 1007 (1983).

In *Yard-Man*, the Sixth Circuit was asked to decide whether a CBA that stated that the employer “will provide” health-care benefits to retirees aged 65 on the “same terms as” active employees created a vested right in those benefits. Similar to the

an inference that they continue so long as the prerequisite status is maintained. *Yard-Man Inc.*, 716 F.2d at 1482. From these premises, the Sixth Circuit concluded that “when the parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree.” *Id.*

Fast forward 31 years later. According to M&G Polymers, the *Yard-Man* presumption (or inference), *i.e.*, that the parties “likely intended [retiree] benefits to continue as long as the beneficiary remains a retiree,” put an unjustifiable “thumb on the scales” in favor of the retirees. The presumption, M&G argued, turned a bland statement about the *amount* of a contribution toward retiree healthcare benefits into an irrevocable, “lifetime” promise based solely on plaintiffs’ status as retirees. It petitioned the Supreme Court to hear the case.

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M&G Polymers P&I Agreement, the *Yard-Man* CBA did not use words like “vested,” “irrevocable,” “non-forfeitable,” “permanent,” or any phrase with the words “life” or “lifetime” to describe the employer’s obligations. When the *Yard-Man* employer properly terminated the *active* employees’ benefits pursuant to the CBA, it also terminated the retirees’ benefits (which were supposed to be the same as the active employees). The *Yard-Man* retirees claimed that the employer could not do so because the benefits were vested. It based its argument on the mere fact that the CBA said the employer “will provide” retirement benefits and the absence of a durational clause that specifically applied to retiree benefits.

The *Yard-Man* court agreed with the retirees. It based its decision in part on its views that (1) retiree benefits are typically understood as a form of delayed compensation or reward for past services; (2) unions owe no obligation to bargain for continued benefits for retirees; (3) if retirees forego wages now in expectation of retiree benefits, they would want assurance that once they retire they will continue to receive such benefits regardless of the bargain reached in subsequent agreements; and (4) retiree benefits are in a sense “status” benefits which, as such, carry with them

The Outcome in *M&G Polymers* Will Likely Affect Claims for Lifetime Benefits Brought under ERISA §502(A)(1)(B) The Court’s Decision in *M&G Polymers* Will Be Guided—if Not Governed—by ERISA, Notwithstanding that It Arises under the LMRA and a Collective Bargaining Agreement

The parties in *M&G Polymers* have not ignored ERISA in their Supreme Court briefs—and for good reason. Welfare benefits—regardless of whether they appear in a CBA or in an “ERISA plan” (as used in this article, a benefit plan that is not the product of collective bargaining)—are governed by ERISA. *See, e.g., Am. Fed’n of Grain Millers, AFL-CIO v. Int’l Multifoods Corp.*, 116 F.3d 976, 979–80 (2d Cir. 1997); *Bidlack Wheelabrator Corp.*, 993 F.2d 603, 604 (7th Cir. 1993). In fact, when union retirees sue for lifetime welfare benefits, they often bring claims under the LMRA and ERISA. *See, e.g., Int’l Union, UAW v. Skinner Engine Co.*, 188 F.3d 130, 136–37 (3d Cir. 1999); *Multifoods*, 116 F.3d at 978. Of course, the critical issue here is whether welfare benefits are vested, and ERISA has a lot to say about that.

ERISA has always treated welfare benefits differently from pension benefits. This

disparate treatment was “not an accident.” *Inter-Modal Rail Employees Assoc. v. Atchison, Topeka and Santa Fe Ry. Co.*, 520 U.S. 510, 515 (1997). Congress knew that there are qualitative differences between pension and welfare benefits, particularly with respect to the volatility and predictability of the costs that go into paying for those benefits. *Wise v. El Paso Nat. Gas Co.*, 986 F.2d 929, 935 (5th Cir. 1993); *Moore*, 856 F.2d 492. Pension costs are considered relatively stable and predictable; welfare benefits—especially healthcare benefits—are not. *See id.* And, as courts have long recognized, Congress did not want to tie employers’ hands so tightly on welfare benefits that they refused to provide any welfare benefits at all. *See Inter-Modal Rail Employees Assoc.*, 520 U.S. at 515.

For these and similar reasons, Congress decided that welfare benefits—unlike pension benefits—do not automatically vest. *See* 29 U.S.C. §§1051–1061, *esp.* §1051. Employers are generally free to terminate or amend welfare benefits at any time without triggering ERISA fiduciary responsibilities. *Curtiss-Wright Corp. v. Schoonenjongen*, 514 U.S. 73, 78 (1993). However, as the parties in *M&G Polymers* recognize, employers—whether in a CBA or in an ERISA plan—may relinquish their right to unilaterally terminate or amend benefits and provide for lifetime vesting. *See Skinner*, 188 F.3d at 140 (recognizing employers can relinquish rights in a CBA); *Sprague v. General Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998) (recognizing employers can relinquish rights in an ERISA plan). And, to gauge whether employers have so relinquished their right, federal courts apply contract principles (consistent with the principles reflected in the LMRA and/or ERISA) to determine whether benefits are vested. *See, e.g., Balestracci v. NSTAR Elec. & Gas Corp.*, 449 F.3d 224, 230 (1st Cir. 2006); *Alday v. Raytheon Co.*, 693 F.3d 772, 782 (9th Cir. 2012).

So, the issue becomes which ERISA or contract principles should be applied to determine whether an ERISA plan or a CBA creates vested benefits. More on that precise issue is in subsection (B). It’s not too hard to see that if the Supreme Court says certain words or silence have special meanings when it comes to vesting retiree benefits in the LMRA/CBA context, there is a

chance that those same words or silence are going to have a similar meaning when it comes to vesting retiree benefits in the ERISA/ERISA plan context.

But perfect overlap between LMRA/CBA retiree benefit cases and ERISA/ERISA plan retiree benefit cases does not necessarily exist. Practitioners need to think carefully about how to draw parallels between the two. Union benefits are the product of bilateral negotiations that are reflected in the terms of a collective bargaining agreement. Conversely, non-union benefits reflect the unilateral discretion of the plan sponsor. The different approaches to benefit creation of necessity require different strategies to address the scope of the employers' commitment to provide benefits.

The employer providing benefits to *non-union* employees typically uses a reservation of rights clause to control the scope of the obligation. In its simplest form, the clause tells employees that the employer reserves the right to terminate or amend the benefits for any time or any reason. An unambiguous reservation of rights clause in the plan will almost always defeat a claim to vested benefits. See *Vallone v. CNA Fin. Corp.*, 375 F.3d 623, 633-35 (7th Cir. 2004).

The employer providing benefits to union employees usually has no "reservation of rights" option. It is highly unlikely that union negotiators would agree to include such a clause in a CBA (or why bother to negotiate a contract at all?). Thus, the employer generally has to rely on the durational clause of the CBA, which is usually limited to just a few years, in order to cap exposure. Of course, if Mr. Tackett wins and M&G Polymers loses, silence plus the durational clause will not cut it for union employers and their administrators. They'll have to say *something*.

And so it may be, too, for ERISA plan sponsors and administrators, who sometimes face "silence" issues in the retiree benefit context. For example, non-union employers and their plan administrators do not always include a reservation of rights clause in every document that describes benefits. *Devlin v. Empire Blue Cross and Blue Shield*, 274 F.3d 76, 83 (2d Cir. 2001) (employer conceding its pre-1987 SPDs did not include a reservation of rights). Still, too, employers or plan administrators have

been known to make well-intentioned but undisciplined uses of reservation of rights clauses that can create issues as to the clause's intended application. See *Abbruscata v. Empire Blue Cross Blue Shield*, 274 F.3d 90, 94, 95 (2d Cir. 2001) (employer included clause with healthcare benefits but not with life insurance benefits); *Haviland*, 730 F.3d at 578-79 (according to the dissent, the employer's plans included a reservation of rights clause only with the life insurance benefit description, then inexplicably dropped it in later years).

And still yet, the employer or plan administrator may not include a reservation of rights clause in an early retirement program because it believes the program will be governed by the existing ERISA plan (where there typically is such a clause). See *Vallone*, 375 F.3d at 635-36. *M&G Polymers* may affect what silence means in these circumstances.

The Court Has Golden Opportunities to Require Concrete Proof of an Intent to Vest and to Eliminate Vesting Based Solely on Retiree Status

In LMRA and ERISA cases, the plaintiff always has the burden of proving that the welfare benefits are vested. *In re Unisys Corp. Retiree Medical Benefit ERISA Litig.*, 58 F.3d 896, 902 (3d Cir. 1995); *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1517 (8th Cir. 1988). *M&G Polymers* is likely to impact that burden in two principal ways.

First, the Court is likely to decide whether vesting requires a "clear" or "express" statement indicating that the benefits irrevocably continue for the retirees' lifetime, or proof under some other standard. See *M&G Polymers* Brief, 2014 U.S. S.Ct. Briefs LEXIS 2591, at *1 (stating the issue is "[w]hether... courts... should require a clear statement that benefits are intended to survive the termination of the collective bargaining agreement... or should require at least some language in the agreement that can reasonably support an interpretation that benefits should continue indefinitely....").

Many of the circuit courts of appeals have adopted the "clear and express" language requirement. *Skinner*, 188 F.3d at 139; *Sprague*, 133 F.3d at 400; *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1515 (10th

Cir. 1996); *Gable v. Sweetheart Cup Co., Inc.*, 35 F.3d 851, 855-56 (4th Cir. 1994); *Wise*, 986 F.2d at 937-38. Still others suggest plan ambiguity is sufficient to avoid summary judgment. *Jones v. Am. Gen. Life and Acc. Ins. Co.*, 370 F.3d 1065, 1070 (11th Cir. 2004) (plaintiff must show plan is at least ambiguous as to vesting); *Devlin*, 274 F.3d at 83 (ambiguity is enough; retiree

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need only identify written language capable of reasonably being interpreted as creating a promise on the part of the employer to vest benefits).

To the extent that the justices pick a standard—and the need for clarity and uniformity in LMRA and ERISA practice suggests that they should—their choice will affect the degree of proof needed to prove contractual vesting. But any standard that allows for vesting based on ambiguity is likely to provide no standard at all. The Court should not squander this opportunity to provide certainty by picking a wishy-washy standard.

Second, the Supreme Court is likely to decide whether retiree benefits are status benefits that are ordinarily expected to continue, as suggested by *Yard-Man*. In other words, should retirees be entitled to make a lesser showing simply by virtue of the fact that they are retirees? ERISA itself certainly does not require different vesting standards for welfare benefits based on the status of the recipients. In addition, retirement should be considered insignificant from a vesting standpoint:

As [our precedent] make[s] clear, the mere fact that employee welfare benefits continue in retirement does not indicate that the benefits become vested for life



at the moment of retirement. No inference of an intent to vest can be presumed from the fact the benefits are retirement benefits. Indeed, the benefits at issue here are “retirement benefits” only in a technical sense only. Unlike pension benefits, coverage under the welfare benefit plan does not begin at an employee’s retirement. Rather, as plain-

fare benefits when it comes to vesting. At least one *amicus* brief suggests that federal legislation passed in the last 20 years has increased the availability, funding and affordability of healthcare coverage for retirees, including but not limited to Medicare expansion and the Affordable Care Act. From this premise it argues that a *Yard-Man*-like presumption is no longer necessary to protect retirees.

The argument likely has modest persuasive value with respect to eliminating the *Yard-Man* presumption. As an initial matter, the Sixth Circuit did not cite the absence of available healthcare coverage as a basis for creating the presumption in the first place. In addition, it’s unlikely the Supreme Court will want to excuse a contractual commitment on the ground that the retirees can just go elsewhere to secure benefits. And, one might just as readily point out that no new legislation mandates that employers provide healthcare benefits to retired employees (the ACA’s play or pay obligation for large employers is limited to active employees). That said, the argument is not irrelevant. Its value likely will lie in easing any strain on the heartstrings that the Justices may experience if they conclude that the retirees lose.

What Might We Expect in Light of Precedent and the November 10, 2014, Oral Argument?

The Supreme Court’s recent opinions that address silence in contracts and the Justices’ questions at the November 10, 2014 oral argument provide a glimpse as to how the Court might decide the case. As a general matter, the transcript of oral argument (available on the Supreme Court’s website, and cited herein as “Tr.”) strongly suggests the Court will apply ordinary contract principles, a point on which the parties agree. Tr. at 4, 23. But the Court has applied a number of principles to interpret contractual silence. For example, the Court generally presumes that contracting parties were aware of established law or precedent; thus, absent express contract language to the contrary, it interprets silence to mean the parties desired to apply the established law. See, e.g., *U.S. Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, 1548 (2013) (plan sponsor should have “draft[ed] its contract [— an ERISA plan—] to say” that it did not

wish to apply “the well-established common-fund rule”); *Tarrant Regional Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2132-33 (2013) (court expects a “clear indication” that states intended to surrender historical sovereign powers); *State of New Jersey v. State of N.Y.*, 523 U.S. 767, 809 (1998) (court assumes parties “would have explicitly provided for” deviation from precedent holding that the “low water mark” establishes a boundary); see also *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 684, 685 (2010) (where contracting parties each conceded there was no agreement to arbitrate on a class-wide basis, *i.e.* there was silence, the party opposing class arbitration did not need to demonstrate its intent to preclude class arbitration where, among other things, “there is no tradition of class arbitration”). Such opinions support an argument that the onus was on the union to demand more particularity in the contract, given that ERISA does not provide for automatic vesting of welfare benefits. See Tr. at 28 (Chief Justice suggesting health benefits for life are a “big deal” and thus should have been addressed more specifically).

But the Justices were not exclusively looking for legal precedent from which express deviation might be required. They also asked the parties to comment on whether, in general, collective bargaining agreements expressly exclude lifetime benefits (as one *amicus* submission posited); and whether the rubber industry in which M&G operates has any practices favoring lifetime benefits. If the Court determines that such practices exist, then it might hold the employer had the duty to expressly disavow the established practices. See *Tarrant Regional Water Dist.*, 133 S. Ct. at 2133-34 (examining “customary practices employed” in similar contracts); *id.* at 2135 (noting course of performance demonstrates intent, and party acted inconsistently with its own interpretation).

Both parties’ silence on the duration of the benefits seemed to frustrate the Justices: This certainly can’t be something that didn’t occur to the employer or to the union. Why did they choose to leave it silent?

Tr. at 18 (Justice Alito).

I mean, this thing [the duration of the benefits] is obviously an important feature. Both sides knew it was left unad-

Welfare benefits—

regardless of whether they appear in a CBA or in an “ERISA plan” (as used in this article, a benefit plan that is not the product of collective bargaining)—are governed by ERISA.

tiffs themselves strenuously argue, the welfare benefits simply continue when an employee retires. Nothing in the documents establishes retirement as a vesting point.

Howe v. Varsity Corp., 896 F.2d 1107, 1110 (8th Cir. 1990) (citations omitted), *aff’d*, 516 U.S. 489 (1996); see also *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 377 (5th Cir. 2008); *Jones*, 370 F.3d at 1070; *Gable*, 35 F.3d at 855 (all quoting or citing *Howe* for same proposition). The Supreme Court’s definitive elimination of a special status for retiree benefits would likely go a long way in eliminating vesting claims based on nothing more than statements that benefits “will continue” or will be somehow funded by the employer in the employee’s retirement. It would force plaintiff-retirees to find more a concrete peg on which to hang a vesting hat.

But what about the fact that the welfare benefits at issue are healthcare benefits? Should there be a special status for vesting (or taking away) healthcare benefits? Again, ERISA makes no distinction between healthcare, life, or disability wel-

dressed, so, you know, whoever loses deserves to lose for casting this upon us when it could have been said very clearly in the contract.

Id. at 21-22 (Justice Scalia). Note, however, that some Justices dispute the assertion that the contract is silent on duration. *Id.* at 3, 7. Their view is that the contract speaks to duration (if not expressly, then ambiguously) by virtue of the promise to provide a full contribution, along with other terms. *Id.* at 3, 7-8, 16-17, 18. The case may then be decided on extrinsic evidence, depending on whose views command a majority.

From the defense perspective, the employer's colloquy with Justice Sotomayor with respect to the degree of clarity required to establish vesting (*i.e.*, should the vesting language be "clear and express," or merely "reasonably susceptible" to an interpretation of vesting) was potentially concerning. Initially, the employer urged the Court to apply ERISA's default rule (no vesting), Tr. 15-16, and insisted that the Court require clear language reflecting an intended deviation from that rule before it could find vesting. *Id.* at 16 (intent to vest must be "clear on the face of the contract"), 42 (advocating "clarity"). But later, the employer "absolutely agree[d]" that "[t]he language of vesting has to be reasonably susceptible from something in the contract," *id.* at 42, a statement arguably at odds with the "clear and express" standard for which the employer had already advocated, and more in line with the Second Circuit's less vigorous approach. See *Devlin*, 274 F.3d at 83. Whether that discussion has a bearing on the contract standards the Court applies in this case or in future cases remains to be seen.

M&G Polymers Is Less Likely to Have an Impact on Certain ERISA §502(a)(1)(B) Theories and Claims Under ERISA §502(a)(3)

There are three liability theories in the ERISA retiree benefit cases that are likely to see less impact from the *M&G Polymers* decision, simply because they are not specifically at issue in the case. These include (1) the unilateral contract theory (a twist on the ERISA §502(a)(1)(B) claim), (2) an ERISA §502(a)(3) promissory estoppel theory, and (3) an ERISA §502(a)(3) breach of fiduciary duty theory. I briefly cover

them below, if only to provide a more complete perspective on the potential impact of *M&G Polymers*.

The Unilateral Contract Theory. Retiree plaintiffs like the unilateral contract theory. See *Hooven v. Exxon Mobil Corp.*, 465 F.2d 566, 574 (3d Cir. 2006) (citing cases from the Second, Fourth, Sixth, and Eleventh Circuits that addressed unilateral contract theories in retiree benefit cases). The Second Circuit explained the theory as follows:

This provision [in the SPD that provides retiree benefits] can be construed as an offer that specifies performance as the means of acceptance—sometimes referred to as an offer for a unilateral contract—and promises lifetime life insurance benefits upon performance. Therefore, by "performing" (that is, working for at least twenty years until attaining the age of 55), the plaintiffs accepted this offer. *Restatement (Second) of Contracts §45(1)* (1981). Where the offeror did not explicitly reserve the power to revoke, such an offer cannot be revoked once the offeree has begun to perform. See *id.* §45 & cmt. d ("The beginning of performance... completes the manifestation of mutual assent and furnishes consideration."). Therefore, Empire's reliance on its 1987 SPD, "Your Handbook," for its reservation of the right to modify the life insurance benefits is unavailing. We reject Empire's argument because after the plaintiffs began performance, pursuant to the pre-1987 SPDs, Empire was not free to revoke.

Devlin, 274 F.3d at 84.

As the Second Circuit's opinion suggests, the unilateral contract theory can be defeated so long as the employer includes the reservation of rights clause along with the alleged promise of retirement benefits. See *id.*; see also *Hooven*, *supra* (noting most courts ignore the unilateral/bilateral distinction and focus on whether the plan has language creating irrevocable benefits). Plaintiffs nonetheless like the theory because, from their point of view, all they need is one plan document that omits a reservation of rights clause. Then, they claim that they only need to prove they went to work to be entitled to irrevocable benefits.

The Promissory Estoppel Theory. The promissory estoppel theory has been a part of retiree benefit litigation for a long time, and, thanks to *Cigna Corp. v. Amara's dicta* concerning ERISA §502(a)(3) remedies, will continue to be. However, in light of ERISA's core principle that benefits must be based on written plans, courts typically require proof of "extraordinary circum-

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stances" justifying the application of equity to overcome plan terms.

The Breach of Fiduciary Duty Theory. Retiree plaintiffs also like fiduciary misrepresentation and non-disclosure claims. These claims typically suggest that the employer or administrator significantly downplayed or failed to mention the application of the reservation of rights clause when they discussed the lifetime nature of the benefits. See, e.g., *In re Unisys Corp. Retiree Medical Benefit ERISA Litig.*, 242 F.3d 497 (3d Cir. 2001) (upholding trial verdict for plaintiffs).

Any potential impact on these theories must await the decision.

Conclusion

M&G Polymers is a big stakes case, and will likely impact retiree benefits on a national scale. It is going to impact retiree welfare benefit litigation and has significant potential to shape how employers, insurers and administrators communicate with their employees about retirement benefits. 