Corporate Articles

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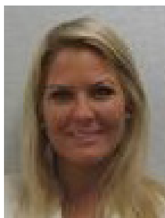
An Interview With Angela Anderson, Tax Counsel, Marathon Oil

by Rachel V. Rose, JD, MBA



RR: Please share a bit about your background and your career progression to your current position.

AA: I have worked at Marathon Oil (Marathon) at its corporate headquarters in Houston, TX for almost five years practicing tax law. Marathon Oil was an integrated oil company until it spun-off its downstream operations on July 1, 2011. Now it is an exploration and production (E&P) company with current operations in North Dakota, Oklahoma, Texas, Wyoming, Canada, Equatorial Guinea, Ethiopia, Gabon, Kenya, and the United Kingdom. Marathon Oil had net income of $1.75 billion and approximately 3,359 employees, including 5 tax lawyers and 30 lawyers in the Legal organization.

At Marathon Oil, I have practiced in tax legal, tax compliance, and tax audit functions. I serve on the Marathon Oil Pro Bono Committee, the Houston Pro Bono Joint Initiative Committee, and volunteer with Houston Junior League.

Prior to joining Marathon Oil, I graduated from the University of Oklahoma with a Bachelors of Business Administration in Finance, from the University of Tulsa College of Law with a law degree (J.D.) and a certificate in international and comparative law, and from the University of Washington School of Law with a masters in tax law (LL.M.). After internships with the U.S. Securities & Exchange Commission Enforcement Division, U.K. Financial Services Authority General Counsel, and Washington Department of Revenue Appeals Division, I joined Deloitte's Tax Controversy practice then made my transition to industry at Cheniere Energy and Marathon Oil.

RR: What are some of the major changes you have seen over the past year in terms of tax law and the impact on Marathon Oil?

AA: Some of the major changes in tax law that affect Marathon Oil are the ever evolving transfer pricing (base erosion and profiting shifting), tangible property repair, and FATCA laws and regulations.

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Message from the Chair

by Rachel V. Rose, JD, MBA

With Spring just around the corner, the Corporate and Association Counsel Division is delighted to provide some amazing articles for our readers, as well as highlight a couple of upcoming programs. In this issue, and just in time for tax season, we interviewed Angela Anderson, Tax Counsel at Marathon Oil (Houston, TX), who discusses various aspects of tax law, with a particular emphasis on Master Limited Partnerships and their tax implications. Also, Hayes Bryant, a private equity investor with First Avenue Partners (Nashville, Texas) contributed a "must read" piece on cybersecurity and credit card processing equipment. Angelo Scozia, Vice-President at Willis discusses long-term benefit plans and Ryan Temme, Vice-chair of Membership, authored an article on the Supreme Court's recent decision in M&G Polymers v. Tackett - concluding that courts should interpret the retiree health care provisions of collective bargaining agreements according to traditional principles of contract law.

Look for emails related to upcoming programs, as we had to reschedule the program with Robert Wittman, founder of the FBI's Art Crime Division. Robert Kohn, Chair of the Litigation Section, has partnered with our Division to conduct a CLE on corporate internal investigations and responding to whistleblower reports and lawsuits. If you have any suggestions or would like more information, please contact Lauren Lucht, Vice-chair of Programs.

In our next issue, we will highlight one of the CACD's members. If you have any suggestions for topics that you are interested in, please let us know. As always, thank you for being part of the Federal Bar Association's Corporate and Association Counsel Division. ■

RR: Do you deal with Master Limited Partnerships (MLPs) and what impact do they have on Marathon Oil's SEC filings?

AA: Marathon Oil does not have a MLP. The company it spun off, Marathon Petroleum, created a MLP. MLPs have stable cash flows and provide lower capital costs. No MLP is alike, thus, the impact to SEC filings vary. Considerable effort is spent on tax planning to ensure qualifying income, *etc*., financial reporting, tax compliance, and general administration.

RR: North Dakota is now one of the hottest places in the country for oil and gas. Are there any environmental factors/regulations that Marathon Oil has been able to capitalize on from a tax standpoint?

AA: From a federal tax standpoint, oil companies spend a considerable amount of capital on Intangible Drilling Costs (IDC). E&P companies can deduct 100 percent of their IDC in the current year. Integrated companies can only deduct 70 percent of their IDC. This reduces taxable income and increases the amount of capital available for exploration and production.

From a North Dakota standpoint, state tax expenses for income, sales & use, severance, *etc*. are significant for oil companies. North Dakota's income tax is based on world-wide income with property, payroll, and sales as factors. North Dakota has various income tax credits, including ones for research and experimental expenditures, internship employment, and workforce recruitment that oil companies can utilize. Of the North Dakota taxes, severance tax is one of the largest. North Dakota's severance tax includes an oil gross production tax (5 percent), gas gross production tax (annually adjusted for gas fuels flat rate per mcf of non-exempt gas), and an oil extraction tax (6.5 percent). One of the largest taxes is extraction tax. Under North Dakota law, if the average monthly price of benchmark West Texas Intermediate ("WTI") crude oil at Cushing, Oklahoma falls below a certain threshold for 5 consecutive months, then North Dakota will reduce or waive its 6.5 percent oil extraction tax. For 2015, the "trigger price" is $52.59 per barrel. The average price of a barrel of crude oil has not been lower than the trigger price for a consecutive five month period so this reduction or waiver has not come into play yet, but oil companies of course would benefit from this from a tax standpoint.

RR: What impact, if any did these factors have on earnings?

AA: From a federal tax standpoint, the ability to deduct 100 percent of IDC in the current year reduces taxable income and, thus, reduces tax liability in that year. The ability to save on cash tax is important for all companies. Tax is obviously a large expense on a company's income statement, so any reduction to tax expense favorably impacts earnings. From a North Dakota standpoint, reducing extraction taxes would favorably impact earnings.

RR: From your perspective, what is the most prudent way for in-house counsel to stay in compliance with the multitude of tax laws, both here and abroad, given the range of company sizes?

AA: In industry, lawyers quickly step away from theory and learn to balance compliance with risks. It's great for career development because you are exposed to many different areas of the law, lawyers, companies, government agencies, *etc*., but sometimes it can be overwhelming. To stay in compliance with the multitude of tax laws, it's crucial to spot the big issues, utilize experienced counsel within your company and at other companies, and always seek outside counsel when necessary. Business needs require lawyers to act quickly and there is no way that in-house counsel can know or research everything.

RR: What accomplishment are you most proud of?

AA: I am most proud of my first pro bono Special Immigrant Juvenile Status ("SIJS") immigration case with Catholic Charities in Houston. It was beyond rewarding to help a deserving young person be awarded his permanent resident status in the United States and was challenging to learn a new area of the law by appearing in federal immigration court and state family law court. These cases take a lot of time and legal paperwork, but they are inspiring and worthwhile. Marathon Oil's lawyers are passionate about immigration cases and devote impressive amounts of time and energy to these efforts. ■

Wake That Sleeping Dog: Long-Term Disability Considerations

by Angelo Scozia

When surveyed, employees rank health benefits (medical, prescription drug, dental and vision) as their most valued benefit. Obviously, employees value coverage and protection. However, research shows that only a small subset of employees actually will file claims in any specific year that exceed the paid premium amount. Historical medical claims data demonstrates that, generally, less than 15 percent of plan participants incur expenses that exceed the premium payment for a group health plan (including both employer and employee contributions). That is, healthcare expenses for certain episodic and major diseases certainly trigger significant costs for those affected, but, for most individuals, medical expenses incurred in most years are relatively small.

By comparison, an even smaller percentage of individuals make qualified long-term disability claims. According to the Council of Disability Awareness, only about 2 percent of the covered population received benefits (653,000 out of 32.1 million with coverage).[1] And, not too surprisingly, the low probability of making such a claim has a significant impact on employees' appreciation for the coverage—it is anything but a priority among employees. In fact, aggregate participation data shows more employers offer, and more employees are covered for, life insurance than for long-term disability claims. Notwithstanding, the risk of becoming disabled for 90 days or longer is greater than the risk of premature death.[2] According to the Social Security Administration, 1 in 4 of today's 20-year old individuals will incur a disability prior to age 67.[3]

The consequences of becoming disabled are devastating for most employees. Because long-term disability often results in an inability to earn significant income, household financial stability can be

greatly impacted by disability claims. For example, an overwhelming majority of workers surveyed for a 2010 study rank the ability to earn an income as valuable in achieving financial security; this outranked medical insurance and even retirement savings.[4] Moreover, even where workers are receiving disability benefits, such claims can have a significant, adverse impact on households. A Milliman study cited by the Department of Labor's *ERISA Council Advisory Report* indicates that a lengthy disability, even where 60 percent of monthly earnings are covered, is "severe."[5] Simply stated, maintaining your standard of living in disability is difficult even with long-term disability coverage; without such coverage, it is an improbable task for most Americans. The *ERISA Council Advisory Report* states, "[a]ccording to testimony, 65 percent of individuals living in poverty for at least three years had a disability."[6]

Interestingly, financially savvy and knowledgeable workers often rank long-term disability as a top priority. Unfortunately, too frequently, the need for long-term disability is learned only when a spouse or family member suffers a debilitating loss.

External Considerations

To date, the mass media has not focused on the long-term disability issues. They have, however, now become aware of the significant increase in disability claims experienced by the Social Security Disability Income program.

Social Security Disability Insurance (SSDI) covers more than 150 million workers, with over 9 million of them collecting disability benefits.[7] These benefits, however, apply only to persons whose disabilities make them unable to engage in "any substantial gainful activity," a standard that is strictly interpreted and applied by the Social Security Administration. That standard is significantly different than the definition of disability included in most group disability benefit plans. Social Security Disability benefits are based on the past earnings of the disabled worker with an average disability benefit of approximately $1,110 per month, or $13,320 per year.[8] Many group insurance policies offset disability benefits with Social Security Disability benefits, making this a potential cost issue for group long-term disability plans in the future.

In part due to the "Great Recession" and in part due to a broadening interpretation of disability qualification, the SSDI beneficiaries have increased by almost 75 percent in this Century.[9] The *Washington Post* reports that the growth in the number of beneficiaries is so significant that, at the level of program contributions combined with benefit payouts occurring right now, the Social Security Disability Income trust fund reserves will be exhausted by 2016.[10]

Internal Considerations

If there is a cut in Social Security benefit payments, it will have a sizeable impact on group policy pricing for private plans that have a benefit formula providing a percentage of pre-disability income replacement. The Social Security offset to the policy benefits (a critical component in the funding of benefits under many group disability contracts) would be noticeably less with such a cut. As a result, the privately-insured benefit likely would have to increase to make up the difference, thereby necessitating higher premiums for the employee for the same disability benefit payment. If such a cut occurs, it would be prudent to review the projected consequences and impact to the group policy.

Given the importance of disability benefits to workforces and to society, employers sponsor long-term disability plans. These plans, which largely are documented by long-term disability insurance carrier contracts and certificate booklets, must be accessed and reviewed regularly. Often, the long shelf-life of these programs allows them to bypass scrutiny; but the sleeping dog must be woken for several critical reasons.

First, ensuring accurate and intended eligibility is a concern. Similar to other group benefits contracts, the long-term disability contract has an eligibility provision specifying who gets particular levels of benefits, on what terms and to what maximum amount. If the employer has undergone workforce changes, it is essential to ensure that all classes of employees that the employer intends to insure are covered by the contract. Furthermore, the eligibility waiting period for benefits should match the employers overall strategy: this might take into account historical turnover, company philosophy, other benefits and workforce planning.

In addition to the eligibility waiting period, almost all long-term disability plans/policies include a *benefit* waiting period, sometimes called an "elimination period." A benefit waiting period is the time that lapses after the date of disability and prior to the date benefits commence. Too frequently, employers and participants will confuse the eligibility waiting period and the benefit waiting period. The "elimination period" ensures that only long-term disability claims trigger benefits, consistent with the communications, disclosures, and importantly, premium rates/pricing.

Furthermore, it is significant to note that pre-existing condition limitations exist in most long-term disability contracts. This contrasts with the *removal* of the pre-existing condition exclusion under the Affordable Care Act (ACA), and, more relevant prior to 2015, creditable coverage notices under HIPAA that could bypass pre-existing condition exclusions when moving from one medical plan to another. Pre-existing condition clauses may preclude coverage for conditions incurred prior to moving to an employer's long-term disability plan, which would result in disability exclusions for the same conditions during periods specified in the employer's long-term disability policy/contract. Do these pre-existing condition limitations or exclusions align with the employer's communication efforts and strategy? This question is an important one, because it affects long-term disability benefit coverage by the employer's plan.

Second, a long-term disability policy may not always receive equivalent annual scrutiny when compared to the medical contract/policy. For instance, some contend that where a group long-term disability policy is employee-pay-all, that it is not subject to ERISA. However, the existence of a group policy where the employer selects the benefits and occupies the position as the contract holder all but assures ERISA status (for employers where ERISA applies). And, where ERISA status applies, fiduciary duties also apply. To fulfill fiduciary duties, no less than an annual review of the experience, rates, administration, and other features of the benefit plan are required. Moreover, where ERISA applies, formal requirements such as a written plan document, appointment of a plan administrator, and issuance of a Summary Plan Description, all apply. And, where material changes are made to the plan, the plan administrator is charged with the responsibility to issue a Summary of Material Modifications to employees.

Alternatively, where employees are subject to a collective bargaining agreement, long-term disability benefits would be a term and condition of employment and subject to bargaining. Long-term disability plan provisions should reflect agreed upon requirements incorporated into the collective bargaining agreement. Such a

consideration may integrate with the eligibility structure review practice mentioned previously.

Concluding Remarks

Despite the described trend in increased claims of Social Security Disability benefits, fewer American workers were covered by group long-term disability plans in 2013 than in each of the four (4) preceding calendar years.[11] Rather than discounting the importance of this coverage because of its (to date) omission from the national conversation, now is the time for employers who do not offer long-term disability benefits to consider either a group plan or a voluntary benefit structure. And, for those employers who do offer coverage, it would be timely to conduct a comprehensive review of the benefits to be provided, the premium rates, the allocation of contributions between the employees and the employer, as well as a review of the contract's provisions – specifically focused on Social Security offsets. Analyzing the alignment of plan provisions to workforce changes, current employee groups, and organizational goals will at a minimum generate conversation about revisions. These revisions, if undertaken carefully and collaboratively (in conjunction with financial considerations), should benefit employees *and* employers more than they may know. In the end, the importance of group disability coverage cannot be overstated. ■

Angelo Scozia is a strategic account and business development executive and broker with the Chicago Human Capital Practice of Willis Group Holdings, a global insurance consulting intermediary and professional services firm. His role constitutes partnering with mid-market and large company plan sponsors to achieve specific, measurable financial and strategic goals along with employee productivity, recruitment, retention, satisfaction and engagement. He helps employers achieve objectives through benefits plan design and brokerage, and total rewards program analysis, development, outsourcing, deployment, and evaluation. He adds value through strategic consulting in the areas of reporting analytics, human resources, compliance, communications and health outcomes. He has been an instructor for the International Foundation of Employee Benefit Plans' Retirement Plans Associate (RPA) designation since January 2012. Prior to joining Willis in 2007, Scozia was a group insurance underwriter for a major insurer, and, prior to that, an analyst at a global consultancy. Scozia has earned the Certified Employee Benefit Specialist (CEBS), Compensation Management Specialist, Group Benefits Associate, and Retirement Plans Associate designations from the International Foundation of Employee Benefit Plans and the Wharton School at the University of Pennsylvania. He has been a CERTIFIED FINANCIAL PLANNER™ since May, 2014. He attained a Master of Public Policy from Vanderbilt University's Peabody College as well as undergraduate degrees from Vanderbilt's Economics and Political Science departments.

Endnotes

[1] www.disabilitycanhappen.org/research/CDA_LTD_Claims_Survey_2014.asp

[2] America's Health Insurance Plans and the Society of Actuaries Disability Chart Book Task Force. *Disability Insurance: A Missing Piece in the Financial Security Puzzle*. 2004. p. 4.

[3] www.dol.gov/ebsa/publications/2012ACreport2.html

[4] www.disabilitycanhappen.org/chances_disability/disability_stats.asp

[5] www.dol.gov/ebsa/publications/2012ACreport2.html

[6] Ibid.

[7] Social Security Administration. Annual Statistical Report on the Social Security Disability Insurance Program. 2013.

[8] Ibid.

[9] www.ssa.gov/OACT/STATS/dibStat.html

[10] www.washingtonpost.com/politics/social-security-disability-trust-fund-projected-to-run-out-of-cash-by-2016/2012/05/30/gJQA3AfH1U_story.html

[11] www.disabilitycanhappen.org/research/CDA_LTD_Claims_Survey_2014.asp

Federal Bar Association

SECOND ANNUAL WOMEN IN THE LAW CONFERENCE

SAVE THE DATE!

One out of every three lawyers in the United States is a woman; however, a recent study shows that 11 percent of the country's largest law firms have no women on their governing committees. Building on last year's overwhelming success, the FBA's Women in the Law Conference will again provide a forum to discuss the advancement of women as legal practitioners and an empowering environment to explore current issues from a number of perspectives.

Why You Shouldn't Wait to Upgrade Your Credit Card Processing Equipment and Software

by Hayes Bryant

Minneapolis-based Target Corporation fell out of a top ten list this December, but no one at the big-box retailer was upset. Target is now out of the top ten largest payment information data breaches in the last 12 months. The new "who's who" of this list includes Home Depot, Neiman Marcus, Michaels, Staples, and P.F. Changs, among others, but data breaches are not limited to large merchants, or to retailers and restaurants. Merchants and corporations of every type should be aware of the liabilities and reputational risk they face for data breaches and fraudulent charges.

When the card payment industry was born in the 1950s and 1960s, security was nearly the same as what was used for cash: locking registers, vaults, bank deposits, settling transactions, and receiving deposits. With the introduction of electronic terminals, the chain of custody for cardholder data was opened to anyone with the proper surveillance equipment. In 2007, TJ Maxx was the first major credit card data breach to make headlines. It was a large breach, but it wasn't the first breach of card account information. Egghead Software was driven to bankruptcy in mid-2001 after a breach of 3.7 million card account numbers in December 2000.

By late 2001, Visa and MasterCard had their own versions of security compliance programs, and in December 2004 they aligned their strategies and released PCI version 1.0. The only G-rated shorthand for this set of rules is simply "PCI." The industry is now on version 3.0, released in November 2013. According to Jeff White, Vice President of Sales at i3 Verticals and 25-year veteran of the merchant services industry, "Payment Card Industry Data Security Standard (PCI DSS) is a misunderstood standard to many merchants, but its impact on card-related fraud has been a success for the industry."

The cost of fraud is borne by everyone, and likewise, reducing it benefits everyone. According to White, "the US industry's next step in that direction is neither another mandate nor a compliance program, but rather, it is a shift of card fraud liability to merchants who have not upgraded to accept EMV chip cards." EMV is short for Europay, MasterCard, and Visa, and it describes a set of chip specifications first published in 1996 and updated many times since then. It is a standard for authenticating credit and debit card transactions that is used throughout the world, except in the US. If you look in your wallet, you have 3 or 4 cards like the average American, according to government statistics. All of them have a magnetic strip on the back, and maybe one of them has a little gold-colored rectangular chip on the left hand side of the card. That is an EMV chip, and it contains the same information as your magnetic strip, plus more information. The EMV chip is more difficult for fraudsters to hack today than the magnetic strip, and transactions processed via chip authentication are less susceptible to fraud and are less valuable if stolen in a data breach.

On Oct. 1, 2015, merchants who have not upgraded to EMV compliant technology will bear the cost for card fraud that could have been prevented by EMV authentication. For merchants with older equipment or software, and even some of those with technology less than a year old, there may be no defense to chargebacks for alleged fraudulent card activity. Even though the deadline is several months away, there are several reasons to invest in the new technology today.

First, upgrading to EMV compliant technology may allow your company to "future proof" its customer experience with the addition of contactless payments such as Apple Pay and Google Wallet. One of the more popular upgrades offered by terminal manufacturer Verifone includes both the EMV chip technology and near field communications (NFC) capabilities to support mobile wallets from Apple, Google, and others. Upgrading now will allow your company to enjoy the benefits of the newer customer experience before competitors, perhaps increasing revenues and market share.

Second, the EMV technology may be viewed as more secure in the eyes of customers and business insurance carriers. Millions of Americans have been the victims of card payment fraud in the last year, and many of those same people went through the hassle of a canceled and reissued card. Consumers are more educated today about the benefits of a secure transaction environment. The Federal Reserve Board reported in March 2014 that consumers expressed less confidence in the security of mobile banking and mobile payments than they did in 2011 or 2012. Can you imagine what the surveyors might hear after 2014's headlines?

Offering a more secure payment environment to customers may have other tangible benefits in a company's cyber liability policy and PCI compliance costs. Many merchants carry cyber liability insurance policies to protect them in the event of a breach. According to Tyler O'Connor with CRC Insurance Services, underwriters are not viewing EMV technology as a reason to lower premiums today. One reason given for keeping premiums the same is that most cards in the U.S. market do not utilize EMV chips. However, O'Connor points out that certain terms and conditions of coverage may be adjusted to reflect the liability shift to merchants. He says, "Revised contract language related to EMV isn't widespread or standard in the industry today. Investigations may still be covered under a standard forensic investigation, which is part of most policy's Definition of Loss in the first party sections. Any fines or penalties for EMV violations coverage could fall under a grant in the policy, under the Regulatory Defense sub-limit in most policies, or under a contract exclusion, depending on how carriers interpret the liability shift." For a typical general counsel, this is a key risk management item, and waiting until after October 2015 may put your coverage at risk.

In addition, Phillip Miller, Global Head of the Acquiring Knowledge Center for MasterCard Advisors, says that "PCI audit relief is applicable if 75 percent or more of the merchant transactions are captured at hybrid EMV terminals, effective October 2012. Even if the majority of transactions are from magnetic stripe-only cards, if they are performed at hybrid

EMV terminals the relief is applicable. Beginning in October 2015, MasterCard Account Data Compromise relief is available to merchants where 95 percent of transactions go through EMV hybrid terminals."

Finally, as the deadline approaches and point-of-sale (POS) providers rollout EMV compliant offerings, the industry may reach capacity in its ability to reach all of its merchants. There are an estimated 8 to 12 million point-of-sale systems in the U.S. By October 2015, the Smart Card Alliance forecasts that half of all U.S. POS terminals will be EMV compliant, but Javelin Strategy and Research estimates that today only 20 percent of small merchant terminals have been upgraded to EMV technology. In the next 9 months, as many as 5 million new POS terminals would need to be rolled out. Some merchants may not be able to complete upgrades due to manufacturing shortfalls or service provider shortages. In particular, integrated POS providers may experience a shortage of qualified technicians or certification staff to certify their products.

In closing, inside counsel at firms that accept credit and debit card payments should be part of the discussion around roll-out of new EMV compliant POS terminals. The return on the investment in new terminals may not be easily determined, but there are several contingent liabilities a merchant may accept if it does not upgrade before the liability shift this October. ■

Hayes Bryant is a Nashville-based private equity investor with First Avenue Partners. First Avenue Partners invests in growth businesses in healthcare, business, consumer, and financial services, including card payment related companies. Bryant holds an MBA from Vanderbilt University and has earned the Chartered Financial Analyst designation from the CFA Institute. He can be reached at hbryant@1stpartners.com.

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Supreme Court Rejects "Yard-Man Inference" that Retiree Welfare Benefits Extend Beyond the Term of Collective Bargaining Agreements

by Ryan Temme

On Jan. 26, 2015, the Supreme Court handed down its decision in *M&G Polymers v. Tackett*, No. 13-1010, concluding that courts should interpret the retiree health care provisions of collective bargaining agreements ("CBAs") according to traditional principles of contract law. The Court explicitly struck down the Sixth Circuit's so-called "*Yard-man* inference," which courts in and out of the Sixth Circuit have relied upon in holding that retiree welfare benefits extend beyond the term of the CBA, often for the life of the retiree.

Genesis and Prior Application of *Yard-Man*

While ERISA prescribes detailed vesting requirements for pension benefits, it does not provide such a comprehensive regime for welfare plans. Generally, employers are given broad discretion to modify or terminate welfare plans (including retiree welfare benefit plans). Unlike pension plans, there are no vesting requirements for welfare benefit plans under ERISA (i.e. there is no automatic vesting). However, because retiree benefits necessarily extend beyond the term of active employment, the duration of such benefits (and attempts to modify or terminate the plan documents that provide for them) is frequently the subject of litigation. Such litigation generally seeks to determine whether the employer intended to bind itself, through some contractual agreement, to provide the benefits for the life of the retirees, i.e., whether the benefits are "vested." Employers can bind themselves contractually in a number of ways, but the disputes frequently revolve around the meaning of language in ERISA plan documents and in CBAs with unions. United States Courts of Appeals have adopted a variety of standards used to interpret such language in an effort to determine the parties' intent with regard to the vesting of retiree health benefits. For example, the Seventh Circuit presumes that "an employee's entitlement to such benefits expires with the agreement" absent some ambiguity more than silence. *See Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 543 (7th Cir. 2000). Taking a different approach, the Second Circuit permits the question of vesting to go to a trier of fact if the documents contain language "capable of reasonably being interpreted as creating a promise" to lifetime benefits. *Am. Fed'n of Grain Millers, AFL-CIO v. Int'l Multifoods Corp.*, 116 F.3d 976, 980 (2d Cir. 1997). The Sixth Circuit's approach favors the vesting of retiree welfare benefits more than any other circuit. In *International Union, United Auto, Aerospace, & Agricultural Implement Workers of Am. v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), the Sixth Circuit held that a lack of explicit termination language in the retiree health benefit provision(s) of the CBA, the nature of collective bargaining, and the possibility for an "illusory promise" required the court to infer vesting if language in CBAs regarding the duration of retiree health benefits is determined to be ambiguous.

The *Yard-Man* court claimed to have relied on ordinary principles of contract law when reaching its decision that vesting should be inferred when possible because changes to retiree benefits were unlikely to be taken up in further contract negotiations. While the *Yard-Man* inference has been applied numerous times to varying degrees in the three decades since it was announced, the Supreme Court had not opined on whether this inference was an appropriate tool for contractual interpretation.

Supreme Court's Decision

The facts in *M&G Polymers* align closely with those in *Yard-Man*. The employer, M&G Polymers, had contracted with the union to provide retiree health benefits at no cost to the retiree. After the expiration of the CBA in which the employer agreed to pay for retiree health benefits, the employer sought to reduce its benefit liabilities by increasing the contributions it required of retirees. The retirees challenged these changes as a breach of contract under the Labor-Management Relations Act as a failure to provide benefits under ERISA, and as a breach of fiduciary duty under ERISA. The district court dismissed the complaint for failure to state a claim, but the Sixth Circuit reversed based on *Yard-Man*, and the district court ruled in favor of the retirees on those same grounds. The Sixth Circuit affirmed the district court's ruling. Writing for a unanimous court, Justice Thomas held that the interpretive tools used by the Sixth Circuit in deciding *Yard-Man* and its progeny were inconsistent with ordinary principles of contract law. *M&G Polymers*, 13-1010, slip op. at 1. As a result, the *Yard-Man* inferences are not permissible guide posts for courts to use in interpreting provisions of collective bargaining agreements dealing with welfare benefits because they "distort the attempt to ascertain the intention of the parties." *Id.* at 10 (quotations and citations omitted). The Supreme Court's analysis rest on two premises: (1) that courts should attempt to implement contract provisions as written when dealing with ERISA welfare plans; and (2) that courts should rely on ordinary principles of contract law when interpreting CBAs, unless federal labor policy dictates otherwise. *Id.* at 6-7. As a result, the plain meaning of unambiguous terms in a CBA that deal with welfare benefit plans should be given effect without reference to external evidence. *Id.*

The Supreme Court took issue with three of the principles used by the Sixth Circuit in developing the *Yard-Man* inference: that generally applicable durational terms do not apply to retiree welfare benefits, that vesting is necessary to avoid contractual problems under the theory of an "illusory promise," and that the nature of collective bargaining necessarily means that the parties did not intend to negotiate retiree welfare benefits in future negotiations.

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please send an email to cellis@scheerlaw.com and rvrose@rvrose.com.

Justice Thomas' opinion makes clear that any inferences of the type adopted by the Sixth Circuit must be based on facts found in the record, not on a court's "suppositions about the intentions of employees, unions, and employers negotiating retiree benefits." *Id.* at 10 (quotations and citation omitted). Importantly, the analytic framework adopted by the Supreme Court requires that future courts confronting vesting questions conduct a traditional analysis of the contractual language, only relying on extrinsic evidence if a material term is ambiguous.

Implications of M&G Polymers

The Supreme Court's ruling in *M&G Polymers* puts an end to the line of cases that places a thumb on the scale in support of vesting of retiree welfare benefits. Employers whose retiree welfare benefits are the subject of union contracts will continue to face lawsuits over any changes that they might make to benefits that retirees believe to be vested. However, without the specter of *Yard-Man*, employers can more easily rely on the contractual language contained in their CBAs and ERISA plan documents in arguing that they retain the authority to amend, modify, or terminate those plans.

In overturning *Yard-Man*, the Supreme Court also provided employers with some additional tools to argue that retiree welfare benefits are not vested. First, the opinion makes clear that silence in an agreement cannot serve as the basis for a promise of lifetime benefits. Second, the Court implied that the Sixth Circuit should have considered two traditional principles of contract interpretation that clearly favor employers. The Supreme Court admonished the Sixth Circuit for failing to consider both the traditional principle that courts should not construe ambiguous writings to create lifetime promises, and the traditional principle that contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement. While this language likely is in dicta, it will provide counsel for plan sponsors with additional support for arguing that, absent a clear statement to the contrary, retiree welfare benefits do not vest for the lifetime of the retirees. Finally, the Supreme Court specified that retiree welfare benefits are not, as the *Yard-Man* court determined, a form of deferred compensation, as defined in ERISA. *Id.* at 11.

While *M&G Polymers* will most clearly be felt in the Sixth Circuit, the detail with which the Supreme Court analyzed the *Yard-Man* inference and the statements it made regarding what types of contract principles should apply to a vesting analysis will have broader repercussions. Employers and plan sponsors should be careful to draft ERISA plan documents and CBA provisions that ensure that the parties are explicit about the duration of retiree welfare benefits. ■

Ryan Temme, JD, is an associate at the Groom Law Group, located in Washington, D.C., where he has worked extensively on implementation of the Affordable Care Act and the Mental Health Parity and Addiction Equity Act, as well as retiree health litigation. Temme holds a law degree from the University of Virginia. Prior to law school, Temme served two members of congress as a legislative staffer. Temme is licensed in Virginia and the District of Columbia. Currently, he is the vice-chair for membership for the Federal Bar Association's Corporate and Association Counsel Division.

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( )

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Application continued on the back

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