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ERIC FOCUS ON CALL: STRATEGIC DECISION-MAKING FOR RETIREE HEALTH BENEFITS IN THE POST-*TACKETT* ERA: WHAT SHOULD EMPLOYERS BE DOING NOW TO ASSESS THEIR LIABILITY?

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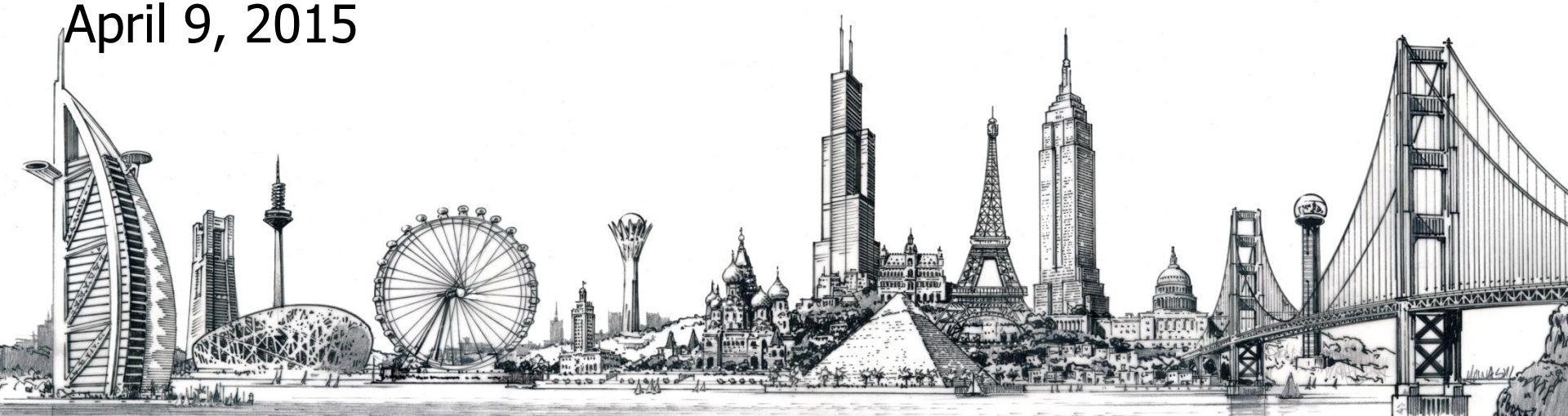

Background/History of Retiree Insurance Litigation

- Pre-ERISA Concept of "Contractual Vesting" – Unilateral contract for non-union retirees; bilateral collective bargaining (or ancillary) agreement for union retirees.
- *Allied Chemical & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971): Retiree benefits are not a mandatory subject of bargaining, but parties to a CBA can permissively agree on "vested" obligations for retirees that will survive the termination of the CBA.
- ERISA enacted in 1974 – vesting/accrual/anti-cutback provisions for pensions; no similar provisions for welfare benefits (like health insurance) included in the statute.
- Early-mid 1980's – downturns in Rust Belt industries (steel, auto, rubber/glass) lead to plant closings and strikes. Along with that, employers began trying to limit/eliminate retiree medical benefits, and litigation ensued.

Background/History of Retiree Insurance Litigation (Cont.)

- Process accelerated in the 1990's as the result of FAS 106 (requirement to book the accrued future OPEB liabilities)
- Litigation involving non-union retirees typically turned on:
  - Whether SPDs/other descriptions included a "lifetime" promise that could be accepted by working to retirement and whether they included reservation of rights language; or
  - Claims of fiduciary misrepresentation/estoppel (*Unisys*)
- Case law involving non-union retirees eventually became fairly universal – "Reservation of Rights" provisions trumped lifetime benefits

The Circuit Split Over Retiree Health Care "Vesting" in CBA Context

- Before *Tackett*, Judge Posner observed that the circuits were "all over the lot" in applying different legal rules to determine when retiree health-care benefits in a CBA vested and thus could not be altered by the employer even after the agreement terminates. *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 543 (7th Cir. 2000).

The Circuit Split Over Retiree Health Care "Vesting" in CBA Context (cont'd)

- The Sixth Circuit presumption favored retirees:
  - Silence or ambiguity in a CBA creates an "inference" or "presumption" that the agreement vests a right to lifetime, contribution-free benefits unless there is extrinsic evidence to the contrary. *UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1482 (6th Cir. 1983).
- The Third Circuit required much more:
  - Agreement to vest lifetime, contribution-free benefits requires a clear statement in the CBA that the parties intend the benefits to continue indefinitely. *Int'l. Union, UAW v. Skinner Engine Co.*, 188 F.3d 130 (3d Cir. 1999) (joined by then-Judge Alito).

The Circuit Split Over Retiree Health Care "Vesting" in CBA Context (cont'd)

- The Second & Seventh Circuits found a middle ground:
  - Retirees must be able to "identif[y] specific written language that is reasonably susceptible to interpretation as a promise… to vest the retirees' health benefit[.]" *Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130, 134 (2d Cir. 1999) (authored by then-Judge Sotomayor).
  - Entitlement to benefits expires with the CBA that creates the entitlement unless there is a genuine ambiguity -- something beyond silence. *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993) (*en banc*).

The Effect of the Circuit Split on Employers

- Split created dilemma for employers, particularly those with operations in or around the Sixth Circuit; plaintiffs' class-action counsel and unions routinely sued in the Sixth Circuit if possible.
- Some employers resorted to preemptive declaratory judgment actions in friendlier circuits – race to the courthouse.

M&G Polymers v. Tackett
Background

- In 2000, M&G Polymers purchased a plant in Apple Grove, West Virginia.
- M&G assumed liabilities related to collectively bargained agreements providing healthcare benefits to retirees.
- Along with the agreements were side letters that limited the employer's liability for retiree healthcare costs.

M&G Polymers v. Tackett
Background (cont'd)

- In 2006, M&G informed retirees that they would be required to contribute to their "above cap" healthcare costs.
- Retirees and their former union sued M&G in Ohio, claiming the caps did not apply and the benefits were vested and unchangeable.
- The district court initially dismissed the suit given the absence of vesting language, and confirmed by the cap agreements.

M&G Polymers v. Tackett Background (cont'd)

- The Sixth Circuit reversed, applying its longstanding "*Yard-Man* doctrine" that presumed retirement benefits obtained through a collective bargaining agreement are vested.
- On remand, the district court—constrained by the Sixth Circuit's previous decision—found the benefits vested.
- The Sixth Circuit affirmed and M&G sought *certiorari*.

M&G Polymers v. Tackett
Supreme Court Opinion, 135 S. Ct. 926 (2015)

- The Supreme Court unanimously rejected the *Yard-Man* doctrine in favor of traditional contract interpretation. The Court specifically repudiated:
  - the notion that collective bargaining agreements should be construed with any "thumb on the scales" toward vesting;
  - the assumption that parties would not leave the benefits subject to future negotiations; and
  - the idea that "tying" eligibility for healthcare benefits to receipt of a pension says anything about the duration of the benefits.

M&G Polymers v. Tackett Supreme Court Opinion (cont'd)

- The Court specifically rejected a series of principles used by the Sixth Circuit to justify *Yard-Man*, holding instead that:
  - the fact that retiree health benefits are not a subject of mandatory bargaining has no affect on interpreting the contract;
  - healthcare and other welfare benefits, unlike pension benefits, are not deferred compensation;
  - general duration clauses are sufficient to terminate benefits—specific clauses limiting the duration of health care benefits are not required; and
  - a contractual promise that benefits some members of a group is, by definition, **not** an illusory promise.

M&G Polymers v. Tackett Supreme Court Opinion (cont'd)

- The Court also highlighted principles the Sixth Circuit overlooked in applying *Yard-Man*:
  - Courts should not construe ambiguous writings to create lifetime promises—a principle recognized by the Sixth Circuit outside the collective bargaining context, where the court of appeals holds that an "employer's commitment to vest [health-care] benefits is not to be inferred lightly" and "the intent to vest must be found in the plan documents and must be stated in clear and express language." (*Sprague*)
  - "Contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement," as the Supreme Court previously held in *Litton Financial Printing v. NLRB*, and as a result, while "explicit terms" in a contract can override that default position, the general rule is that obligations cease when the contract ends.

M&G Polymers v. Tackett
Concurring Opinion

- Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, concurred, but wrote separately to:
  - highlight her willingness for courts to look at extrinsic evidence;
  - note the significance of a survivor benefits clause that says a surviving spouse would "continue to receive [healthcare] benefits . . . until death or remarriage";
  - reject the argument that ordinary contract interpretation **requires** a clear and express statement of intent to vest retiree benefits; and
  - agree that no thumb should be placed on the scales in favor of vesting, but insist that contractual language be considered in light of industry practices and extrinsic evidence, including bargaining history.

M&G Polymers v. Tackett
Key Takeaways

- The Supreme Court pulled out *Yard-Man* root and branch, taking pains to lay out for the Sixth Circuit what "ordinary principles of contract interpretation" really are.
- The Supreme Court's unanimous opinion, at the very least, levels the playing field of employee healthcare benefits litigation and no longer subjects employers to having to prove a negative—that they did not intend vesting.
- Multiple cases are now pending in the Sixth Circuit, including *Tackett* on remand, that require the Sixth Circuit to apply the principles set out by the Supreme Court.

Post-Tackett Developments

- *UAW v. Kelsey-Hayes,* 13-1717 (6th Cir.):
  - After the Sixth Circuit affirmed a ruling in favor of the retirees, Kelsey-Hayes and TRW petitioned for rehearing, and the Sixth Circuit requested additional briefing on the effect of *Tackett.*
  - Relying on *Tackett*, Kelsey-Hayes argued that there was no language that explicitly excluded retiree health care benefits from the scope of several durational provisions in the applicable CBAs, which expired in 2006.
  - The retirees argued that the language of the CBAs, combined with certain admissions such as Kelsey-Hayes' continuing provision of benefits after the final CBA had expired, showed that the parties intended retiree benefits to vest for life. Therefore, according to the plaintiffs, the Court could have held in their favor even without *Yard-Man*.

Post-*Tackett* Developments (cont'd)

- *Gallo et al. v. Moen Inc.*, 14-3633, 14-3918 (6th Cir.):
  - The N.D. of Ohio ruled that the CBAs at issue unambiguously guaranteed lifetime vested benefits based in part on language that each CBA "continued" the benefits for individuals who had retired under prior CBAs.
  - Based on *Tackett*, Moen argues that this language did not show an intent to vest benefits. Rather, the "continued" language was necessary for the benefits of existing retirees to continue into the next CBA. And so, if later CBAs had not continued the benefits, the benefits would have expired. Once the 2005 CBA expired and was not replaced, Moen could terminate those benefits.

Post-*Tackett* Developments (cont'd)

- *Zanghi v. FreightCar Am., Inc.*, (W.D. Pa. 13-CIV-00146):
  - Court denied cross-motions for summary judgment, finding ambiguities in the bargaining agreements on the question of whether FreightCar remained bound to provide medical benefits to certain retirees. *See* Dkt. No. 161.
  - Based on those ambiguities, the Court found that it was allowed (based on *Tackett's* concurrence) to look to extrinsic evidence to determine the parties' intent re: whether certain mirroring obligations of a side letter were meant to continue past the expiration of the applicable CBAs. *See* Dkt. No. 161, p. 46.

Post-*Tackett* Developments (cont'd)

- *Zino v. Whirlpool Corp.*, 11-CIV-1676 (N.D. Ohio)
  - Court concluded after a bench trial that the retirees were promised lifetime vested benefits based on *Yard-Man*.
  - Whirlpool is seeking reconsideration in light of *Tackett.*
- *Dewhurst v. Century Aluminum Co.*, 09-CIV-01546 (S.D. W. Va.)
  - Court recently allowed the parties to brief the effect of *Tackett* on their pending summary judgment motions.
  - *See also Barton v. Constellium*, 13-CIV-03127 (S.D. W. Va.) (also recognizing *Tackett's* relevance to this retiree benefits case, and staying disposition of the pending summary judgment motions in deference to Judge Copenhaver's decision in *Dewhurst*, the first-filed case).

Post-*Tackett* Considerations for Employers

- Creates a fresh opportunity for employers in and around the Sixth Circuit to consider their options with respect to union retiree medical benefits.
- Need to consider all historical agreements, plan documents and other relevant documents, *e.g.*:
  - CBAs and other formal plan documents
  - side letter agreements ("published" and "unpublished")
  - SPDs (related issue – were relevant provisions of SPDs negotiated with union?)
  - bargaining notes, proposals and memos
  - communications to and from union
  - communications to active employees
  - communications to retirees
  - union ratification materials
  - historical accounting/actuarial information and projections
  - Transaction/deal documents for any acquired businesses/units

Post-*Tackett* Considerations for Employers (cont'd)

- Need to consider whether current CBA requires continued retiree coverage for the term of the agreement for some or all of the prior retirees.
  - If so, may not be able to change coverage for those retirees until the agreement expires and a new agreement is bargained (or, if the union won't agree, the company bargains to impasse and then implements the changes).
- Need to evaluate whether there are any potential *Unisys/Amara* claims, even if CBA might permit termination
  - Recurring litigation scenarios over the years have involved early retirement or severance programs that allegedly created a new set of vested rights, even if no right to vested benefits under the governing CBAs/plan documents themselves.

Post-*Tackett* Considerations for Employers (cont'd)

- Even if agreements still create some risk for the company, *Tackett* may have increased the risk to the retirees sufficiently that the company may be able to settle a class-action suit in a way that achieves favorable terms (caps, agreed cost-sharing, use of a private exchange, potential transition of liabilities to a VEBA, etc.).
- No company wants to get sued, but…getting a binding agreement with all the retirees outside a class-action suit may be very difficult. Will we see an uptick in declaratory actions/defensive class actions?

Biography

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John G. Ferreira represents clients in equity and executive compensation and every facet of employee benefits. He advises global public companies, private equity firms, large financial institutions, nonprofit organizations, middle-market companies, individual executives, and emerging information technology and life sciences companies. John counsels these clients on compliance with ERISA, tax, securities, and labor laws. He also advises vendors to employee benefits plans on compliance with the reporting, fiduciary responsibility, and prohibited transaction requirements of Title I of ERISA.

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Deborah S. Davidson represents plan sponsors, trustees, fiduciaries, service providers, and other clients facing a range of employee benefits litigation around the United States. She has a particular focus on class and multiparty actions arising under the Employee Retirement Income Security Act (ERISA). She counsels clients facing litigation through trial, as well as with appellate matters. Deborah serves as national management co-chair of the employee benefits committee of the American Bar Association's labor and employment law section.

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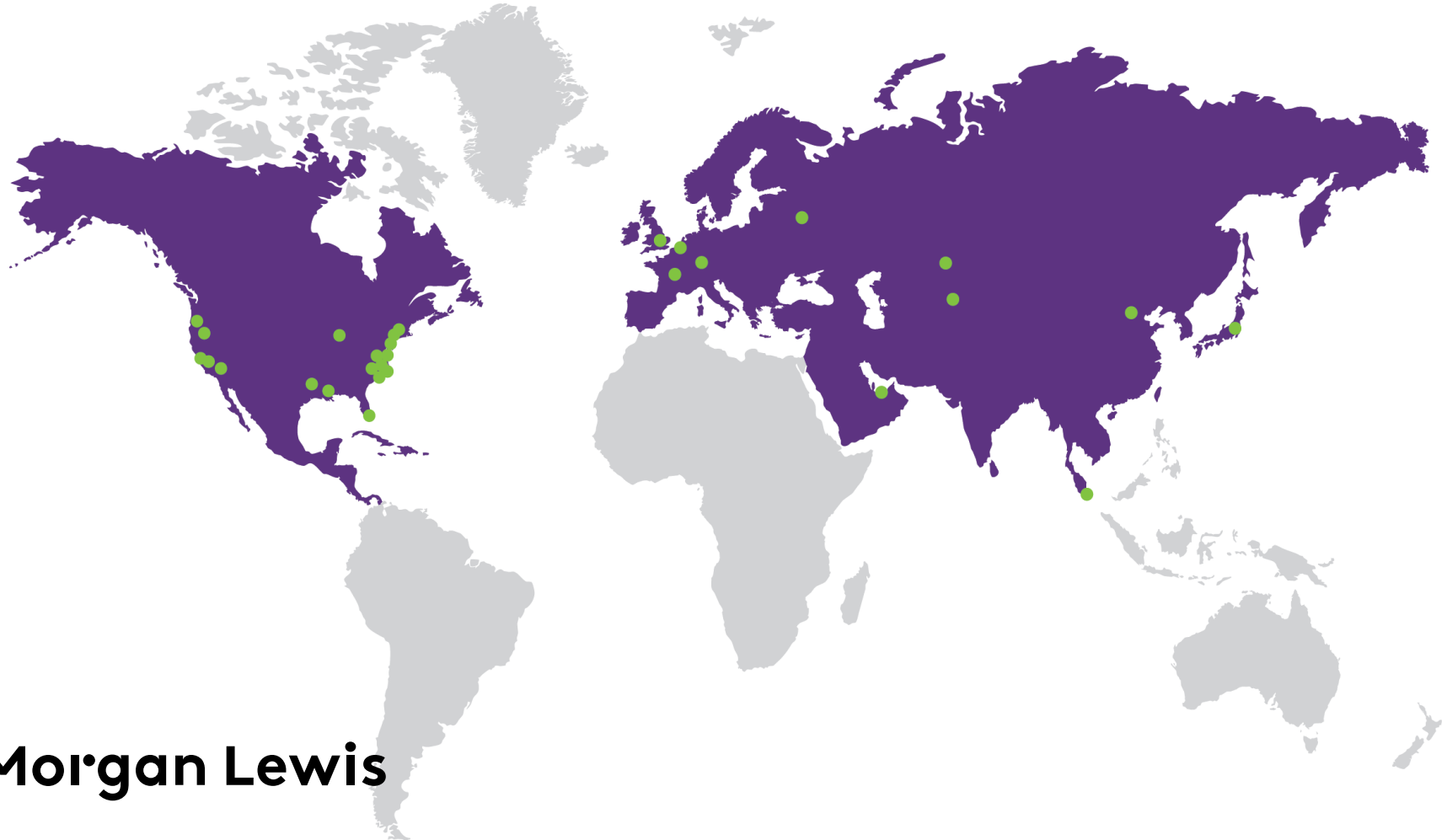

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