



Chapter 8

Retiree Health Benefits in the Coal Industry: A Final Solution to the High Cost of Easy Promises?

John R. Woodrum

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
Washington, D. C.

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§ 8.01. Introduction.

Sixty years ago, in the 1946 National Bituminous Coal Wage Agreement (NBCWA), the coal industry and the United Mine Workers of America (UMWA or Union) pioneered the concept of using a multiemployer plan to provide pension and health benefits to union members and their families. Nearly three decades later, the 1974 NBCWA transformed what had been the policy of the plan's trustees to provide health care benefits to retired UMWA miners on a pay-as-you-go basis into a contractual promise to provide benefits to retirees for life.¹

By the early 1990s, it was apparent that the declining number of companies contributing to the UMWA retiree plans could no longer shoulder the cost of the expansive collectively bargained health benefit program the Union had secured over the years for its retired members. The UMWA multiemployer plans' mushrooming deficits meant that the 120,000 UMWA retirees and dependents enrolled in those plans might lose their health benefits when the 1988 NBCWA expired on February 1, 1993. This led the Secretary of Labor to appoint an Advisory Commission in 1990 "to focus on health care issues arising from the 1950 and 1974 UMWA Benefit Plans and the effects of resolving these issues in the coal industry as a whole."² The impending crisis ultimately resulted in enactment of the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act),³ the first and (to date) only time Congress has intervened to elevate a private-party contractual promise to provide retiree health benefits into a statutory obligation.

¹ As one commentator noted, "[r]etiree health benefits were a bargaining prize that apparently could be won or granted with no present sacrifice in wages or profits. Now the long-run consequences are becoming apparent." See Alain C. Enthoven, "Retiree Health Benefits as a Public Policy Issue," in *Retiree Health Benefits: What Is the Promise?* 3, 12-13 (1989).

² See Sec'y of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits, *Coal Commission Report: A Report to the Secretary of Labor and the American People* [hereinafter cited as *Coal Comm. Rept.*] reprinted as pages 142-277 in *Coal Commission Report on Health Benefits of Retired Coal Miners: Hearing Before the Subcomm. on Medicare and Long-Term Care of the Senate Comm. on Finance*, 102 Cong., at 143 (1991) [hereinafter cited as *Senate Hearing*].

³ 26 U.S.C. § 9701-9722.

This chapter will examine how a commitment to provide lifetime health benefits evolved in the coal industry, and the complicated patchwork of single and multiemployer plans the parties and Congress have created to keep the promise alive. It will also review why the sweeping and highly controversial 1992 Coal Act did not provide a permanent solution to the UMWA retiree health care problem, and why in 2006 Congress intervened yet again to preserve benefits.⁴ Finally, it will examine whether the changes embodied in the 2006 Amendments, in conjunction with other recent developments, have put the question of funding UMWA retiree health benefits to rest, and what lessons the coal industry experience may offer to employers in other industries concerning how to avoid the high cost of easy promises.⁵

§ 8.02. Anatomy of a Promise to Provide Lifetime Health Benefits.⁶

[1] — The 1946 Krug-Lewis Agreement and the UMWA 1950 Welfare Fund.

In 1946 the UMWA called a nationwide strike in support of its collective bargaining demands for a change in the way health care was provided to coal miners. In response, President Truman issued an Executive Order authorizing Julius Krug, Secretary of the Interior, to seize the mines and negotiate a contract with UMWA President John L. Lewis. The historic Krug-Lewis agreement established the very first multiemployer welfare plans to be

⁴ Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, 120 Stat. 2922 (2006).

⁵ In the 1991 Senate Hearing, Senator Dave Durenberger described the crisis in funding UMWA retiree benefits as involving “a whole bunch of promises made to a whole lot of people back in the 1940s and 1950s when the cost consequences of those problems were totally unknown. Now that we see them they are so much bigger than we think they ought to be.” Senate Hearing at 16.

⁶ The story of how the promise of lifetime health care for UMWA retirees came about has been related in numerous articles and court decisions. A comprehensive review is contained in the Coal Comm. Rept., reprinted in 1991 Senate Hearing, at 167-181. *See also* Eastern Enterprises v. Apfel, 524 U.S. 498, 504-511 (1998); John R. Woodrum and Larry P. Rothman, “Proposals for Funding United Mine Workers of America Retiree Health Benefits: The Constitutional Dimensions,” 93 *W. Va. L. Rev.* 633, 638-45 (1991).

funded by producer royalties and employee payroll deductions.⁷ It was not until the 1950 National Bituminous Coal Wage Agreement (1950 NBCWA), however, that the UMWA and the Bituminous Coal Operators' Association (BCOA) established a functioning multiemployer plan—the United Mine Workers of America Welfare and Retirement Fund of 1950 (1950 Fund)—to provide pension and welfare benefits. No benefits were guaranteed by the 1950 NBCWA or by the 1950 Fund during the term of the agreement, or thereafter. Rather, the 1950 Fund operated on a pay-as-you-go basis. Fund trustees were charged with fashioning the rules governing the provision of health, pension and death benefits to UMWA members, to the extent the contractual contributions made by operators permitted.⁸ This system of delivering benefits to UMWA members remained largely unchanged for the next 24 years.

[2] — The 1974 NBCWA and the Promise of a Health Card for Life.

The 1974 NBCWA was a landmark labor contract in the coal industry for many reasons. Among other things, in response to the requirements of the Employee Retirement Income Security Act of 1974 (ERISA), the 1974 NBCWA split the original 1950 Fund into four separate pension and benefit plans. Specifically, it created the UMWA 1950 Benefit Plan to provide health benefits to miners who retired prior to 1976, and the UMWA 1974 Benefit Plan (the UMWA Plans) to provide health benefits to working miners and to miners who retired after 1975.⁹ The 1974 NBCWA also broadened the eligibility rules governing coverage for dependents and non-working miners, and provided for increased health benefits, thereby greatly increasing the cost of the UMWA health care program. It was also the first labor contract to specifically mention retiree benefits. Significantly, the 1974 NBCWA included language providing that a retired miner would retain a Health Card

⁷ Coal Comm. Rept., reprinted in 1991 Senate Hearing at 170-171.

⁸ *Eastern Enterprises*, 524 U.S. at 506-507.

⁹ *Id.* at 509.

until his death, and his widow would retain a Health Card until her death or remarriage.”¹⁰

Notwithstanding the promise of a Health Card for life, the 1974 NBCWA also specified that a signatory operator’s only obligation was to contribute to the UMWA Benefit Plans the amounts set forth in the contract during the term of the Agreement.¹¹ Thus, the promise that retirees would have a Health Card for life did not include a commitment to a particular level of benefits, and was not a promise by the individual signatory employers that they would provide the benefits directly. Rather, the promise was that lifetime benefits would be provided by the UMWA 1950 or 1974 Benefit Plans, and the actual availability of future benefits would necessarily be contingent on the Union’s ability to negotiate sufficient contribution levels in future NBCWAs to cover the cost. This contractual promise of a Health Card for life, coupled with a contractual requirement that employers would make payments to the UMWA Plans only during the term of the agreement, resulted in a disconnect that laid the groundwork for a financial meltdown 20 years later.¹²

[3] — The 1978 NBCWA and a Limited Benefit Guarantee.

The 1978 NBCWA reconfigured the multiemployer system for delivering health benefits to working miners and retirees. It provided that employers would, for the first time, assume direct responsibility for providing health benefits for their active employees and for their former employees who retired in and after 1976.¹³ The 1978 NBCWA also included a guarantee clause that

¹⁰ *Id.* at 509-510.

¹¹ *Id.* at 509.

¹² The statement in the 1974 NBCWA that retirees would have a Health Card for life probably seemed inconsequential to a company that signed the Agreement, because the employer did not agree that it would provide health benefits to anyone. However, a quarter of a century later the Supreme Court would conclude in *Eastern Enterprises* that this promise of a Health Card for life provided a constitutionally sufficient factual connection to the 1992 funding crisis that enabled Congress to impose on a signatory to the 1974 Agreement a statutory obligation to provide health benefits to a former employee who may have worked for the company for as little as one day forty-five years prior to enactment.

¹³ *Eastern Enterprises*, 524 U.S. at 510. All UMWA miners who retired prior to 1976 continued to receive their health care benefits from the UMWA 1950 Benefit Plan.

required signatory operators to guarantee benefits for all retirees at existing levels during the term of the Agreement.¹⁴ To ensure that all UMWA retirees would have the same benefits, this Agreement introduced a dispute resolution process that circumscribed the ability of employers to interpret or modify their individual health benefit plans.¹⁵

As with prior contracts, the 1978 NBCWA did not require an employer to provide health care to its retirees beyond the term of the agreement. (The UMWA 1974 Benefit Plan assumed this responsibility if an employer went out of business during the term of the agreement or did not sign another NBCWA).¹⁶ To provide an incentive for viable companies to stay in the multiemployer system, the negotiators included in the applicable trust documents a “continuing contributions” or “evergreen” clause which required companies that did not sign a successor NBCWA to nevertheless continue to contribute to the UMWA Plans at the rates specified in future NBCWAs.¹⁷ The structure set out in the 1978 NBCWA for providing health

¹⁴ *Id.* at 510.

¹⁵ Article XX of the 1978 NBCWA specified that the trustees of the UMWA Health and Retirement Funds would resolve disputes between the Union and an employer concerning benefits provided by each employer under its own benefit plan. *See* 1978 NBCWA, Art. XX Health and Retirement Benefits at 126. This delegation of authority to the trustees has been carried forward in Article XX(e) of every subsequent NBCWA, including the 2007 NBCWA. The effect of this provision is that a court will review the trustees’ resolution of dispute (referred to as a “ROD”) under the same standard of review applied to an arbitrator’s decision, and will affirm the ROD so long as it draws its essence from the terms of the agreement and plan documents. This greatly restricts an employer’s ability to implement programs to control healthcare costs. *See e.g.* Peabody Coal Company v. District 12, UMWA, C.A. 4:03-CV-74-M, slip op. (W.D. Ky. May 17, 2004) (affirming ROD invalidating a mail order drug program that required the beneficiary to be responsible for additional cost where a drug purchased at a retail pharmacy could have been obtained for less from the mail order pharmacy, in view of Trustees’ conclusion that language in the benefit plan prohibited employer from reducing benefits or adding costs for services covered under the plan).

¹⁶ *See* District 29, UMWA v. Royal Coal Co., 768 F.2d 588 (4th Cir. 1985); District 29, UMWA v. 1974 Benefit Plan and Trust, 826 F.2d 280 (4th Cir. 1987), *cert denied*, 485 U.S. 935 (1988).

¹⁷ *Eastern Enterprises*, 524 U.S. at 510; *see* UMWA 1974 Pension v. Pittston Co., 984 F.2d 469 (D.C. Cir.), *cert denied sub nom.*; *Rawl Sales & Processing Co. v. UMWA 1974 Pension Trust*, 509 U.S. 924 (1993).

care benefits for all UMWA retirees remained essentially unchanged for the next decade.¹⁸

As this history reflects, from 1950 until the early 1990s the collectively bargained system that enabled all UMWA retirees to receive comprehensive health benefits funded by companies signatory to a labor contract worked reasonably well. The hundreds of thousands of miners who left the industry prior to 1974 could not point to any contractual provision in effect at the time they retired that promised they would receive health benefits for life. However, the UMWA's dominant position in the coal industry throughout this period, and its ability to negotiate sufficient contribution rates for the UMWA Plans, no doubt provided a basis for them to assume that benefits would always be available. The specific statement in the 1974 NBCWA that all UMWA retirees would have a Health Card for life reinforced this expectation, even though that commitment did not promise that benefits would never be reduced. The 1978 and subsequent NBCWAs further contributed to an expectation that benefit levels would be maintained, because these contracts guaranteed no reduction during the term of the agreement. Nevertheless, as a matter of contract law, retirees could point to no language guaranteeing that their benefits would not be reduced during their lifetime.

[4] — The End of an Era.

During the term of the 1988 NBCWA it became clear that health care benefits for all UMWA retirees were in serious jeopardy. Benefit increases and liberalized eligibility rules under prior NBCWAs, rapid escalation in medical costs, the dramatic decline in the number of companies operating

¹⁸ In an effort to address the UMWA Plans declining funding base, the 1988 NBCWA added provisions that authorized the Plans to assess withdrawal liability against a signatory that went out of business or otherwise ceased to have an obligation to contribute to the Plans. 1988 NBCWA, Art. XX, Health and Retirement Benefits, at 142-145. Contractual benefit plan withdrawal liability in the 1988 NBCWA was modeled after pension plan withdrawal liability imposed by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 4201-4225. *See* *Barrick Gold Exploration, Inc. v. Hudson*, 823 F. Supp. 1395 (S.D. Ohio 1993), *aff'd*, 47 F.3d 832 (6th Cir. 1995), for a discussion of the background and assessment of benefit plan withdrawal liability under this contractual provision.

under a UMWA contract, and the resulting flood of new retirees into the UMWA Plans meant that fewer and fewer companies were left to absorb the ever-increasing cost of funding the Plans.¹⁹ During the early 1990s, even though signatory operators' contributions to the UMWA Plans increased to \$3.96 for each hour worked by an active miner, the Plans filed suit under the guarantee clause to compel further increases.²⁰ Operator contributions to the multiemployer plans were, of course, in addition to the cost signatory employers were incurring to provide health benefits to their own retirees.

The steep rise in contribution rates meant that by the end of the 1988 NBCWA operators were paying \$4,628 to the UMWA Plans for every working UMWA miner. Even so, this was not enough. By July 31, 1990 the Plans had accrued a deficit of \$114 million, and the shortfall was projected to reach \$300 million by the time the 1988 NBCWA expired in early 1993.²¹ Under these circumstances, it seemed implausible that the dwindling number of UMWA signatory companies would agree to continue funding the UMWA Plans after the 1988 NBCWA expired.²² Given the UMWA's adamant commitment to preserving health benefits for its retired members, full scale labor warfare seemed imminent. It was not clear that the unionized sector of the coal industry would survive.

§ 8.03. The Coal Industry Retiree Health Benefit Act of 1992.

In 1992 Congress intervened to prevent the wholesale loss of health benefits for the 120,000 UMWA retirees and dependents covered by the UMWA Plans, as well as the tens of thousands of retirees who were receiving benefits directly from their former employer.²³ The Coal Industry Retiree

¹⁹ *Eastern Enterprises*, 524 U.S. at 510-511.

²⁰ Coal Comm. Rept., reprinted in Senate Hearing at 247.

²¹ Coal Comm. Rept., reprinted in Senate Hearing at 155, 194-196.

²² *Sigmon v. Barnhart*, 534 U.S. 438, 445 (2002).

²³ It is misleading, of course, to imply that all retirees would have lost all of their health benefits. The benefits provided by the UMWA Plans were supplemental to Medicare, so eligible beneficiaries would have continued to receive Medicare benefits.

Health Benefit Act of 1992 (Coal Act)²⁴ was far reaching and controversial.²⁵ In effect, the Coal Act superceded the open-ended, unfunded and vague promise in the NBCWAs that UMWA retirees would have a Health Card for life. It did so by creating a specific scheme for allocating each UMWA retiree to a particular former employer who would pay an annual premium for each assigned retiree and his dependents.

[1] — The UMWA Combined Benefit Fund.

The Coal Act merged the 1950 and 1974 UMWA Benefit Plans into a new statutory multiemployer health plan called the UMWA Combined Benefit Fund (Combined Fund).²⁶ Congress directed the Commissioner of Social Security (SSA) to review the wage record of every retiree receiving benefits from the UMWA Plans, and assign to a particular former employer the responsibility to pay an annual premium to the Combined Fund with respect to each assigned retiree and his dependents.

Assignments were made pursuant to a three-tiered hierarchy described in section 9706 of the Act. Under the assignment criteria any company that had employed miners under any UMWA coal wage agreement since 1946 was subject to receiving assignments, and payment of premiums. Thus, in some cases the agency reached back to assign liability to companies that had not been involved in the coal business since the 1950s.²⁷ If the responsible employer was defunct, premium responsibility was allocated to any entity that was a “related person” to the employer on July 20, 1992 (or on the date the signatory employer went out of business).²⁸

These expansive assignment rules greatly expanded the universe of companies that could be required to fund benefits. Tens of thousands of

²⁴ 26 U.S.C. §§ 9701-9722.

²⁵ See *Sigmon*, 534 U.S. at 445-46 (“The Coal Act was passed amidst a maelstrom of contract negotiations, litigation, strike threats, a Presidential veto of the first version of the bill and threats of a second veto, and high pressure lobbying, not to mention wide disagreements among members of Congress.”)

²⁶ 26 U.S.C. § 9702(a).

²⁷ 26 U.S.C. § 9706.

²⁸ 26 U.S.C. §§ 9701(C)(2)(A), 9704(a), 9706(a).

UMWA retirees and their dependents were allocated to companies that were no longer contributing to the UMWA Plans, and that no longer had a bargaining relationship with the UMWA. Indeed, many companies that received assignments based on their status as a related person to a defunct coal company had never been in the coal business. The Act provided that assigned operators would also be assessed an “unassigned beneficiaries premium” to cover the health care costs of beneficiaries for whom no employer or related person still in business could be identified, and authorized the transfer of interest earned on the Abandoned Mine Land Reclamation Fund (AML Fund)²⁹ to the Combined Fund each year to help offset the financial impact of the unassigned beneficiaries premium.

[2] — Individual Employer Plans.

In section 9711, Congress mandated that those operators who were providing benefits directly to their retirees through an individual employer plan pursuant to the 1988 NBCWA must continue to do so, whether or not they signed a successor labor agreement. Thus, section 9711 superseded the contractual right of these employers to terminate retiree benefits when the 1988 NBCWA expired. It also extinguished their right to bargain with the UMWA for changes in retiree benefits or to introduce cost sharing arrangements or cost containment programs in future agreements.

[3] — The UMWA 1992 Benefit Plan.

Congress recognized that there might be some retirees eligible to receive benefits from the UMWA Plans who, for various reasons, were not actually receiving benefits from those Plans as of the July 20, 1992 bright-line date for enrollment in the Combined Fund,³⁰ and that beneficiaries covered under an individual employer benefit plan maintained pursuant to Section 9711 could nevertheless lose benefits if their employer went out of business. To provide a comprehensive, self-contained statutory solution to finance all

²⁹ 26 U.S.C. §§ 9704(a)(3), (d), 9407, 9705; 30 U.S.C. § 1232(h).

³⁰ See 26 U.S.C. § 9703(e); *Fawn Mining Corp. v. Hudson*, 80 F.3d 519 (D.C. Cir. 1996).

UMWA retiree health benefits, the Act provided for the creation of a separate multiemployer plan to cover such exigencies.

Section 9712³¹ directed the UMWA and the BCOA to establish the UMWA 1992 Benefit Plan (1992 Plan) as a safety net to provide coverage to eligible UMWA retirees and dependents who would otherwise fail to receive benefits under these circumstances. Significantly, the Act allocated the cost of providing benefits to “orphans” in the 1992 Plan solely to signatories to the 1988 NBCWA. These signatories were required to pay an annual “pre-funding premium” calculated by the trustees of the 1992 Plan for this purpose, whether or not they signed successor labor agreements.³²

§ 8.04. An Imperfect Solution.

It appeared in 1992 that the controversial, comprehensive, and highly reticulated Coal Act would put an end to the chronic problem of funding health care benefits for UMWA retirees. It did not. Within a decade, issues in funding benefits for Combined Fund beneficiaries and for UMWA miners who retired after the effective date of the Coal Act once again became a flashpoint for the Union and for employers.

[1] — Combined Fund Shortfalls.

The Coal Act directed the Commissioner of Social Security to calculate an annual premium assigned operators would be required to pay for each assigned beneficiary. The statutory premium was pegged to the aggregate amount that signatories had paid to the UMWA Plans during a base year (July 1991 – June 1992), and it was thereafter to be adjusted annually by the medical component of the CPI.³³ The Act therefore assured the Combined Fund a predictable revenue stream, but it did not guarantee that Combined Fund beneficiaries would receive a particular level of benefits. Rather, the Act directed the trustees to enroll beneficiaries in a health care services

³¹ 26 U.S.C. § 9712.

³² 26 U.S.C. § 9712(d)(1).

³³ *See* 26 U.S.C. § 9704(b)(2).

plan which undertakes to provide benefits on a prepaid risk basis,³⁴ and to negotiate payment rates with those plans each year which did not exceed aggregate premiums paid by assigned operators, subject to certain other revenue adjustments.³⁵ The apparent intent of this provision was to put the Combined Fund in a position analogous to the predecessor UMWA Plans, in that the trustees would provide benefits commensurate with premium income (plus AML transfers), but with the important assurance that annual beneficiary-based premium revenue would be both predictable and guaranteed, and not subject to the vagaries of total hours worked by employees at signatory companies.

This is not the course of action the trustees followed, however. First, they continued to directly administer the provision of benefits to all plan participants, presumably because of practical difficulties in identifying health service plans willing to enter into agreements to provide benefits on a managed care or prepaid risk basis. Second, because the amount needed to maintain existing benefit levels eventually began to outstrip premium revenue, the trustees were confronted with the prospect of imposing co-pays and other cost-sharing requirements on the beneficiaries. To avoid this outcome, the trustees instead elected to operate the Combined Fund at a deficit rather than bring expenditures into line with revenues.³⁶ The Combined Fund had a deficit of approximately \$52 million at the end of plan year 2005, and this shortfall was projected to grow to nearly \$400 million by plan year 2013.³⁷ Moreover, by 2006, a separate financial crisis was brewing with a

³⁴ 26 U.S.C. § 9703(b)(1).

³⁵ 26 U.S.C. § 9703(b)(2).

³⁶ The trustees apparently reasoned that they would not violate the statutory mandate to match expenditures with income so long as they preserved the option of imposing draconian benefit reductions late in the year, so premium income for the remainder of the year could be applied against the accrued deficit. This brinksmanship approach worked, because the specter of large benefit reductions resulted in Congress authorizing supplemental AML transfers to the Combined Fund on several occasions. *See* Dep't of the Interior and Related Appropriations Act, 2001, Pub. L. No. 106-291, § 701, 114 Stat. 922 (2000); District of Columbia Appropriations Act, 2000 Pub. L. No. 106-113, § 501, 113 Stat. 1501 (1999).

³⁷ June 2004 King Assocs. Actuarial Projections for the UMWA Combined Benefit Fund.

different group of UMWA retirees who were receiving health benefits from a contractual multiemployer plan the UMWA and the BCOA established after enactment of the Coal Act.

[2] — The UMWA 1993 Benefit Plan.

The Coal Act only secured benefits for UMWA miners who retired prior to October 1, 1994.³⁸ Section 9711(e) provided that the question of whether miners who retired after September 30, 1994 would receive employer-provided health care, and the level of any such benefits, would be determined in collective bargaining.³⁹

In the 1993 NBCWA the Union obtained a commitment from signatory operators that they would provide lifetime health benefits to their employees who retired during the term of the Agreement, and that benefits for these contract retirees could not be changed after the contract expired without the Union's consent.⁴⁰ This was the first NBCWA to actually provide that signatory employers would be responsible for providing benefits to their own retirees for life, without regard to whether they signed a successor agreement.

The 1993 NBCWA also provided for the establishment of a new multiemployer plan—the UMWA 1993 Benefit Plan (1993 Plan)—to provide health benefits to these post-Coal Act retirees in the event their employer became financially unable to provide benefits during the term of the Agreement. The 1993 NBCWA set the contribution rate to the 1993 Plan at 10 cents per hour worked for the term of the Agreement.⁴¹ Following the turmoil that resulted in the 1992 Coal Act, signatories to the 1993 NBCWA insisted on contract language that made clear that benefits provided by

³⁸ 26 U.S.C. § 9711(b)(1). For purposes of vesting in a right to receive retiree health benefits, a miner is deemed to have retired on his last date of credited service towards his UMWA Pension. *See* UMWA Int'l Union v. BethEnergy Mines, No. 2:99-cv-00738, 2001 WL 737558 (S.D. W. Va. March 19, 2001).

³⁹ 26 U.S.C. § 9711(e).

⁴⁰ *See* 1993 NBCWA, Art. XX, Health and Retirement Benefits at 463. This language has been carried forward in every successor NBCWA.

⁴¹ *Id.* at 147-48, 150.

the 1993 Plan were not for life, that the Plan could be terminated after the Agreement expired, and that benefit levels were not guaranteed during the term of the Agreement.⁴² The 1993 Plan was carried forward in the 1998 and 2002 NBCWAs, along with the provisions that made clear the Plan was established only for the term of the contract and no benefits were guaranteed.

The number of individuals eligible to receive benefits from the 1993 Plan grew significantly over time, as did the amount of the contractually required contributions. The 2002 NBCWA set the contribution obligation to the 1993 Plan at 50 cents per hour worked. However, since even this rate did not generate enough revenue to maintain benefits for the expanding beneficiary population, the Agreement also provided that the UMWA 1974 Pension Plan would pay to each pensioner or retired spouse eligible to receive benefits from the 1993 Plan an annual supplemental \$2,250 pension benefit. The Agreement provided that the recipient must in turn pay \$2,000 of this amount to the 1993 Plan in order to receive benefits from the Plan.⁴³ With fewer than 10,000 working UMWA miners,⁴⁴ it became clear that the cost of continuing the 1993 Plan would present a difficult, if not intractable, issue in bargaining a new agreement when the 2002 NBCWA expired at the end of 2006.⁴⁵

⁴² *See id.* at 163 (“Benefits under the 1993 Benefit Trust shall only be those that can be provided from the assets of the Trust

... [U]nder no circumstances will an Employer be responsible to provide benefits or to contribute toward the provision of benefits, through the 1993 Benefit Trust or any other plan, trust or mechanism, to former employees and retirees (or their spouses, surviving spouses or dependents) of any other Employer beyond the term of this Agreement.”

⁴³ *See* 2002 NBCWA, Art. XX, Health and Retirement Benefits, at 165-66.

⁴⁴ This estimate is derived by dividing the aggregate number of hours worked that signatory operators reported to the UMWA Funds in 2006 by 2000 hours.

⁴⁵ The trustees reported 10,000 beneficiaries were enrolled in the 1993 Plan at December 31, 2006, when the 2002 NBCWA expired. They have also calculated that the actual cost of funding benefits for these 10,000 retirees and dependents in 2007 is \$2.00 per hour worked by each working UMWA miner. *See* January 10, 2007 Memorandum from Lorraine Lewis, Executive Director, UMWA Health and Retirement Funds to Employers with Contribution

Less than 15 years after the Coal Act, the prospect of benefit reductions for Combined Fund beneficiaries, and the likelihood that signatory companies could not afford to maintain the 1993 Plan under the next labor contract, created a situation where the parties once again needed to look to Congress for a solution. *Deja vu* all over again.

§ 8.05. A Final Solution to the High Cost of Easy Promises.

It seems likely that 2006 will be remembered as the year in which a number of events combined to finally resolve the chronic problem of preserving and funding health care benefits for generations of retired coal miners and their families. Of course, as one might expect with an issue that has occupied center stage in the coal industry for so long, we should not discount the possibility that there could be one more crisis in the future.

[1] — The Tax Relief and Retiree Health Care Act of 2006.

On December 20, 2006, President George W. Bush signed the Tax Relief and Health Care Act of 2006,⁴⁶ which, among other things, amended the Coal Act and section 402(h) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA).⁴⁷ The 2006 Amendments were crafted to provide a permanent solution to the UMWA retiree health care funding issues that have bedeviled the coal industry's labor relations for nearly two decades. The Amendments provide a two-fold solution: (i) benefit levels are now guaranteed for retirees in both the Combined Fund and the 1993 Plan, and (ii) the cost of providing health benefits to all "orphan" UMWA retirees in the Combined Fund, the 1992 Plan and the 1993 Plan will be assumed by the federal government. Among other things, the 2006 Amendments provide that:

Obligations to the UMWA Health and Retirement Funds Regarding Contribution Obligations to the UMWA Health & Retirement Funds.

⁴⁶ Public Law No. 109-432, 120 Stat. 2922 (2006).

⁴⁷ 30 U.S.C. § 1232(h).

Beneficiary assignments to companies that did not sign the 1988 NBCWA will be withdrawn effective October 1, 2007. Although, these “reachback” companies will continue to pay a reduced premium for their withdrawn beneficiaries for the next three years (55 percent, 40 percent and then 15 percent, respectively, of the amount they otherwise would have paid), they will have no further obligation to the Combined Fund effective October 1, 2010.⁴⁸

Beginning October 1, 2007, a transfer will be made to the Combined Fund each year from the AML Fund (and, to the extent necessary, from the General Treasury) to cover the shortfall the trustees estimate the Combined Fund will incur to provide benefits for all participants at the levels in effect on the date of enactment.⁴⁹ This transfer will cover the cost of providing benefits to all unassigned beneficiaries, as well as any shortfall between the amount of the statutory per-beneficiary premium paid by assigned operators and the cost the Combined Fund actually incurs to provide benefits to assigned retirees at the levels in effect under the 1988 NBCWA.

Beginning June 1, 2008, federal funds will be transferred to the 1992 Plan to cover the cost of providing benefits to all orphan beneficiaries in that Plan at the levels in effect under the 1988 NBCWA. These transfers will be phased in over a three year period (25 percent, 50 percent, and 75 percent, respectively). Effective 2011, the 1988

⁴⁸ 26 U.S.C. § 9706(h), as amended. Pre-1988 signatory companies, commonly referred to as “reachback operators,” had vehemently opposed the original 1992 Coal Act, and were not likely to support any legislative changes that did not address their demand to be relieved of the retiree health care obligations imposed on them. Thus, to gain widespread political support for a solution to the larger UMWA retiree funding issues, the 2006 Amendments included financial relief for the reachback companies. This relief was phased in over a three-year period to address concerns that the amendments would otherwise be so costly they would exceed budget scoring limitations.

⁴⁹ See 30 U.S.C. § 1232(h)(1)(A), (h)(2)(A), (h)(4)(A)(i), (h)(4)(B); § 1232(i)(1).

signatory companies will no longer be required to pay any prefunding premium to the 1992 Plan for this purpose.⁵⁰

The 2006 Amendments require signatories to the 2002 NBCWA to finance benefits for every retiree and dependent enrolled in the 1993 Plan on December 31, 2006, at the levels in effect on the date of enactment. This statutory obligation covers the four year period 2007 – 2010. However, federal funds will be transferred to the 1993 Plan to subsidize this statutory obligation beginning in 2008 (25 percent), 2009 (50 percent), and 2010 (75 percent).⁵¹ Beginning in 2011 federal transfers should cover the full cost of these beneficiaries' health care.

No federal funds can be used to provide benefits for any person who is enrolled in the 1993 Plan on or after January 1, 2007.⁵² Thus, as with the original 1992 Act, the 2006 Amendments do not purport to address or resolve the question of post-employment health benefits for UMWA miners who retire in the future.

[2] — The National Bituminous Coal Wage Agreement of 2007.

The 2006 Amendments did not require UMWA employers to agree to provide lifetime health benefits for miners who retire after December 31, 2006, and did not require that the 1993 Plan remain open for new entrants.⁵³ However, the 2007 NBCWA, which became effective January 1,

⁵⁰ See 30 U.S.C. § 1232(h)(1)(B), (h)(2)(B), (h)(4)(A)(ii), (h)(4)(B); § 1232(i)(1)(B); 26 U.S.C. § 9712(d)(1).

⁵¹ See 30 U.S.C. § 1232(h)(1)(B), (h)(2)(C), (h)(4)(A)(ii), (h)(4)(B).

⁵² See 30 U.S.C. § 1232(h)(5)(B); § 1232(i)(1)(B).

⁵³ Although the 2006 Amendments do not impose an affirmative obligation on the UMWA and employers to maintain the 1993 Plan for the purpose of providing benefits to future retirees, 30 U.S.C. § 1232(h)(5)(B) states that no federal transfers will be made to the 1993 Plan if the UMWA enters into a future labor contract with a company that establishes a contribution less than the 50 cents per hour rate that was required under the 2002 NBCWA. This provides a strong statutory incentive for the UMWA to insist in future bargaining that the Plan remain open to new enrollees, and that the employer contributions be at least 50 cents per hour.

2007, provides that the 1993 Benefit Plan will be continued for the purpose of enrolling UMWA retirees who would otherwise lose their health care during the term of the Agreement because their last employer fails to provide coverage. The 2007 NBCWA provides that during the term of the Agreement signatory employers will pay 50 cents per hour worked to the Plan for this purpose.⁵⁴

Significantly, however, the 2007 NBCWA marks the beginning of the end of the era of employer-provided health benefits for UMWA retirees. The 2007 NBCWA provides that a new employee who did not have a State Miner's Certification prior to January 1, 2007 "shall not be entitled to health care following his retirement date" unless he qualifies for a disability pension. In return for giving up the historical right to receive this cherished benefit, the UMWA secured a promise that these new miners "shall receive monthly Enhanced Premium Contributions (\$1.00 per hour worked) from the Employer to the UMWA Cash Deferred Savings Plan of 1988." All other working miners also have a unilateral right to make an irrevocable election to give up any claim to receive retiree health benefits on the basis of years of service with the Employer in return for the same \$1.00 per hour worked contribution.⁵⁵ Thus, all new hires (and current employees who elect the option) will accrue funds in their account which can be used to purchase post-employment health benefits, or for any other purpose.⁵⁶ This new arrangement means that no new UMWA-represented miners will be eligible for employer-provided retiree health care, and it signals the beginning of the end of an issue that has confounded the unionized sector of the industry for decades.

⁵⁴ See 2007 NBCWA, Art. XX Health and Retirement Benefits at 145-47, 149-40.

⁵⁵ See *id.* at 193.

⁵⁶ Under prior NBCWAs, a new employee generally needed to work 20 years to vest in a right to receive retiree health benefits from his last employer. Thus, in most cases employers will not realize a financial benefit from contributing to a 401(k) plan for 20 (or more) years in lieu of providing retiree health care benefits when the employee retires. This is because current employment trends suggest that most new miners entering the workforce today will not in fact work under a UMWA contract for 20 years.

[3] — *A.T. Massey Coal Company v. Barnhart.*

The requirement in the original 1992 Coal Act that assigned operators must pay a specified, inflation-adjusted, per-beneficiary premium to the Combined Fund each year was intended to provide the trustees with a predictable annual revenue stream. This predictability did not work out as Congress envisioned, however, because the formula in section 9704(b) of the Coal Act for calculating the amount of the base premium was embroiled in litigation in three different federal circuits from 1993 until 2006. In *National Coal Association v. Chater*,⁵⁷ the Eleventh Circuit concluded that Social Security Administration ignored the plain meaning of “reimbursement” in section 9704 of the Coal Act, which resulted in the Commissioner erroneously setting the base premium at a rate 10 percent greater than permitted. In response to this decision, in 1995 the Commissioner recalculated the base premium for all assigned operators.⁵⁸ In *Holland v. National Mining Association*,⁵⁹ the Combined Fund challenged the premium that the Commissioner recalculated pursuant to the *NCA* decision. The D.C. Circuit disagreed with the Eleventh Circuit’s analysis, and concluded the term “reimbursement” was ambiguous. However, in order to determine whether the Commissioner’s recalculation of the base year premium in response to *NCA* was entitled to deference, the court remanded the matter to SSA for further consideration. The agency responded to the remand by abandoning

⁵⁷ Nat’l Coal Ass’n v. Chater, 81 F.3d 1077 (11th Cir. 1996).

⁵⁸ During the statutory base year (July 1991-June 1992) Medicare paid the UMWA Plans \$182.3 million as reimbursement for the Plans’ agreement to assume responsibility for paying providers for Medicare-covered services rendered on behalf of Plan beneficiaries. This amount was determined pursuant to a contractual arrangement which specified that the Plans would be reimbursed on a “capitated” basis, not on a cost basis. However, when the Secretary of Health and Human Services computed the base year premium, she concluded that the reimbursement number should be \$156.3 million, which is the amount the Plans paid providers for Medicare services. The differential between the two amounts had a 10 percent impact on the base year premium. The cumulative effect amounted to hundreds of millions of dollars over the projected life of the Combined Fund, and therefore resulted in substantial uncertainty concerning the amount of revenue that was actually available to the Fund to spend on benefits.

⁵⁹ *Holland v. Nat’l Mining Ass’n*, 309 F.3d 808 (D.C. Cir. 2002).

the interpretation it implemented in 1995 in response to the *NCA* decision, and, on June 10, 2003, announced that it intended to reinstate the methodology used to calculate the original base year premium in 1993.

Shortly after the Commissioner announced her June 2003 decision, more than 100 assigned operators filed suit to overturn the premium increase. In *A.T. Massey Coal Co. v. Barnhart*,⁶⁰ the Fourth Circuit agreed with the Eleventh Circuit that the statutory language was clear, and voided SSAs 2003 decision re-imposing the higher premium. In early 2007, SSA and the Combined Fund agreed to accept the Fourth Circuit's interpretation, and the Combined Fund agreed to return the operators' overpayments with interest. This brought to conclusion all significant litigation contesting the Coal Act's liability assignment rules and funding provisions.

[4] — Are We There Yet?

These developments in 2006 presage an end to the contentious retiree health care disputes that have roiled the unionized sector of the industry for nearly two decades. Under the 2006 Amendments, benefits for every UMWA miner who retired before 2007 are now guaranteed and fully funded, and the federal government will assume responsibility for the full cost of providing health benefits for all "orphan" UMWA retirees by 2011. This means that in the future current and former UMWA signatories will be obligated to provide retiree benefits only for their own retirees.

The lingering question is whether a new crisis could erupt in the next decade or two with respect to the provision of benefits to miners who are vested in a contractual right to lifetime health benefits, but have not yet retired. Since the 2007 NBCWA provides that new miners entering the industry no longer qualify for employer-provided benefits, the number of miners who could potentially fall into this category is capped.

It is not possible to provide an accurate picture of the number of people in this group. It potentially includes all UMWA miners who actually worked under the 1993, 1998 and 2002 NBCWAs who were not receiving retiree

⁶⁰ *A.T. Massey Coal Co. v. Barnhart*, 472 F.3d 148 (4th Cir. 2006).

benefits as of December 31, 2006. We know that approximately 10,000 miners were actively employed on December 31, 2006, when the 2002 NBCWA expired, and it is likely most of them are vested in a contractual right to receive health benefits from their employer after they retire. Additionally, there are probably tens of thousands of individuals who retired after 1993 who currently receive benefits from their last employer's health plan. (Although their last employer is required to provide their benefits, there is no guarantee that their employer will remain in business for the retiree's lifetime.) There are, no doubt, many other miners who ceased working during this 13-year period, but who, for various reasons, are not receiving a UMWA pension (or retiree health benefits) at this time.

This suggests that tens of thousands of UMWA miners are vested in lifetime benefits, but are not protected under the Coal Act or the 2006 Amendments. If we assume that the major signatory companies will fulfill their promise to provide lifetime benefits to their own retirees, the only future retirees at risk are those who eventually end up in the 1993 Plan because their responsible employer is defunct. Although benefits for retirees who enroll in the 1993 Plan after 2006 are not guaranteed by federal law, they should be secure until 2012 because that Plan will receive sufficient employer contributions to provide their benefits until December 31, 2011 when the 2007 NBCWA expires.

If the number of post-2006 retirees who are enrolled in the 1993 Plan during the term of the 2007 NBCWA is not excessive, and does not outstrip the revenue generated by the required 50 cents per hour-worked contribution, signatory companies probably will accede to Union demands that the 1993 Plan be continued under the next agreement. The industry's willingness to keep the 1993 Plan open for new enrollees after 2011 will, of course, depend on the number of miners working under a UMWA contract at that time, and the number of post-2006 retirees who are receiving benefits from the Plan at that time.⁶¹

⁶¹ If signatory companies continue to employ 10,000 UMWA miners in and after 2012, a contribution of 50 cents per hour worked should generate approximately \$10 million dollars per year. Even assuming an annual health care expenditure of \$10,000 per retiree, this

Under these assumptions the UMWA retiree health care issue should be quiescent for at least another decade. However, unless the UMWA is able to reverse or stabilize its declining membership, the underlying problem will again surface in the future. It seems inevitable that the time will come when the number of miners working under a UMWA contract is simply insufficient to support the number of post-2006 retirees who have no last employer financially able to provide their health benefits. Given the lessons of the past, it may therefore be premature to declare that this issue has truly been “retired.”

§ 8.06. Conclusion.

Drawing on the coal industry’s long and tumultuous experience with the provision of retiree health benefits, certain observations now seem self-evident.

Employers should never make vague or open-ended promises with respect to providing post-employment benefits of any type. Any generalized statement that suggests an intention to provide post-employment benefits (*e.g.*, you will have a Health Card for life) will, at a minimum, invite litigation as to its meaning and effect, and could lock an employer into providing a lifetime benefit that cannot be changed no matter the cost.

Always include in any promise or offer of post-employment benefits language that clearly reserves to the employer the absolute right to change or terminate benefits in the future, at the employer’s sole discretion. Most courts will give effect to an employer’s right to terminate a benefit program, even where it uses a phrase such as “for life”, provided the grant of the benefit is expressly coupled with language stating that the benefit may be changed or terminated in the future.⁶²

level of contributions would enable the 1993 Plan to provide benefits to approximately one thousand post-2006 “orphan” retirees.

⁶² The case of *United Mine Workers of America v. Brushy Creek Coal Co.*, No. 04-CV-4249-JPG slip op. (S.D. Ill. Jan. 18, 2006), appeal docketed, No. 06-2324 (7th Cir. filed

Do not grant or assign a third party the right to interpret your benefit plan or the meaning or intent of your promise.

A promise to provide benefits in the future may look like a cheap solution to a current problem, but the coal, steel and automotive industries are proof that there is no free lunch.

No person (or employer) is safe while Congress is in session.⁶³

May 8, 2006), demonstrates the critical nature of the language used. Brushy Creek signed a 1998 Memorandum of Understanding (MOU) that adopted the 1998 NBCWA, with various amendments. Significantly, the 1998 MOU provided that Brushy Creek would have a separate health care plan, not the standard NBCWA plan. The Brushy Creek plan stated that “[t]he Plan Administrator may terminate, suspend, withdraw, amend or modify the Plan in whole or in part, with respect to any class or classes of employees at any time, subject to the Collective Bargaining Agreement, with proper notification and subject to the terms of the Plan and any applicable laws.” *Id.* at 3, n.2. (This language does not appear in the standard NBCWA benefit plan.) In 2004, Brushy Creek informed the Union it intended to make changes to the Plan. The Union claimed that explicit language in the collective bargaining agreement vested retirees in their benefits, and any change required the Union’s consent. *Id.* at 4. Relying on the reservation of rights language in the Plan, however, the district court concluded that it was clear that the MOU did not provide vested benefits for retirees. *Id.* at 21.

⁶³ Signatories to the 2002 NBCWA can vouch for this. Notwithstanding explicit language in the 1993 and subsequent NBCWAs stating that retirees enrolled in the 1993 Plan are not entitled to any specific level of benefits, and that no benefits are promised beyond the term of the Agreement, the 2006 Amendments nevertheless compel signatories to the 2002 NBCWA to fund benefits for the next four years for every participant at the levels in effect when the 2002 Agreement expired.

