AUGUST 2009

RETIREE MEDICAL LITIGATION'S DIRTY LITTLE SECRET: "LOCATION, LOCATION, LOCATION!"

Over the past 30 years, a tsunami of retiree medical litigation has crashed over the dockets of our nation's federal courts. The hundreds upon hundreds of published retiree medical cases arising under the Labor Management Relations Act ("LMRA") and under the Employee Retirement Income Security Act ("ERISA") did not occur by accident.

Everyone knows that providing retiree medical benefits during the "shipwreck of old age" is an expensive proposition. In recent years, the costs of providing employees with medical benefits has grown geometrically, while retiree medical costs have risen even faster. When many employers first offered retiree medical coverage in the 1960s, it didn't cost much (nor did houses, food, or gasoline). It has become a much more expensive world. Compounding the problem is the fact there are now many more retirees and fewer active workers. As we learned from the looming Social Security crisis, fewer active employees are at work to generate employee benefit contributions to supply benefits to an ever-increasing number of retirees. The ratio between active employees to retirees has declined from 16-to-1 in 1970, to 4-to-1 in 1991, and is projected to be 2- to-1 within the next 20 years.

Further exacerbating these serious economic problems was the 1992 introduction of an accounting rule – Standard 106 issued by the Financial Standards Accounting Board. This rule requires employers to accrue an expense against current income for the expected future cost of retiree medical benefits and to recognize on their financial statements a liability representing the full expected cost for providing such benefits. The increase in retiree medical liabilities has been staggering. For example, GM's $23 billion in unfunded retiree medical benefits during 1992 grew to over $64 billion by 2007.

Employers have aggressively pursued ways to contain retiree medical costs. According to the federal government's Agency for Healthcare Research and Quality, just 13 percent of private sector employers offered health benefits to early retirees or

Medicare-eligible retirees in 2005, down from as much as 21.6 percent for pre-65 retirees and 19.5 percent for post-65 retirees before 2000. The most common method to reduce retiree medical costs is cost sharing.

Benefit reductions are, of course, universally resisted by retirees. While employers have been generally successful in sharing costs with salaried retirees under ERISA plans (*see, e.g., Sprague v. General Motors*, 133 F.3d 388, 400 (6th Cir. 1998) (*en banc*)), the same cannot be said about retiree medical benefits covered under a union contract. *UAW v. Yard-Man*, 716 F.2d 1476, 1479-80 (6th Cir. 1983). The Circuit Courts of Appeals are openly divided as to what circumstances permit collectively bargained retiree medical plans to be changed.

As we will show below, the outcome of a retiree medical lawsuit depends on the approach the court takes. The favorite venue for retired union members is the Sixth Circuit, where they are batting 1,000 in retiree medical disputes. Of the twelve published retiree medical cases arising under the Labor Management Relations Act in the Sixth Circuit, all twelve resulted in a finding that retiree medical benefits were vested. *Noe v. Polyone Corp*., 520 F.3d 548 (6th Cir. 2008); *Yolton v. El Paso Tenn. Pipeline Co*., 435 F.3d 571 (6th Cir. 2006); *McCoy v. Meridian Auto. Sys., Inc*., 390 F.3d 417 (6th Cir. 2004); *Maurer v. Joy Techs., Inc*., 212 F.3d 907 (6th Cir. 2000); *UAW v. BVR Liquidating*, 190 F.3d 768 (6th Cir. 1999); *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648 (6th Cir. 1996); *Armistead v. Vernitron Corp*., 944 F.2d 1287 (6th Cir. 1991); *Smith v. ABS Indus., Inc*., 890 F.2d 841 (6th Cir. 1989); *Weimer v. Kurz-Kasch, Inc*., 773 F.2d 669 (6th Cir. 1985); *Policy v. Powell Pressed Steel Inc*., 770 F.2d 609 (6th Cir. 1985); *UAW Cadillac v. Malleable Iron Co.*, 728 F.2d 807 (6th Cir. 1984); *UAW v. Yard-Man*, 716 F.2d 1476 (6th Cir. 1983).

Next door, employers crowd the docket because the Seventh Circuit has ruled retiree medical benefits are not vested in eight out of ten published LMRA cases. *See Barnett v. Ameren Corp*., 436 F.3d 830 (7th Cir. 2006); *Cherry v. Auburn Gear, Inc*., 441 F.3d 476 (7th Cir. 2006); *Int'l Union, UAW of Am. v. Rockford Powertrain, Inc*., 350 F.3d 698 (7th Cir. 2003); *Rossetto v. Pabst Brewing Co.,* 217 F.3d 539 (7th Cir. 2000); *Pabst Brewing Co. v. Corrao*, 161 F.3d 434 (7th Cir. 1998); *Dieht v. Twin Disc., Inc*., 102 F.3d 301 (7th Cir. 1996) (vested); *Murphy v. Keystone Steel & Wire Co*., 61 F.3d 560 (7th Cir. 1995); *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993) (potentially vested); *Senn v. United Dominion Indus*., 951 F.2d 806 (7th Cir. 1992); *Ryan v. Chromalloy Am. Corp*., 877 F.2d 598 (7th Cir. 1989).

THE PECULIAR NATURE OF RETIREE MEDICAL BENEFITS

We learned in ERISA 101 that there are two types of employee benefit plans: pension plans and welfare benefit plans. *See* 29 U.S.C. § 1002(1) and § 1002(2). While pension plans are subject to mandatory vesting rules (*see* 29 U.S.C. § 1053), welfare plans are not (*see* 29 U.S.C. § 1051). An employee's right to ERISA-regulated welfare benefits do not vest unless and until the employer says they do. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). Thus, whether an employer has the right to change medical benefits for retired employees turns on what that employer has promised them.

Retiree medical-benefit disputes are complicated because an employer's agreement to provide medical benefits is regulated by ERISA and (in the case of collectively bargained for retiree medical arrangements) by the LMRA, Section 301. All courts agree that under either ERISA or the LMRA, where an employer expressly reserves the right to change or terminate a retiree medical plan, that right will be enforced.

Ambiguity about the nature of the retiree medical promise or silence about its duration plays a leading role in generating the conflicts among the circuits. For example, in the Seventh Circuit, "the presumption that health care benefits do not exceed the life of an agreement imposes a high burden of proof upon the retirees." *Cherry v. Auburn Gear, Inc*., 441 F.3d 476, 481 (7th Cir. 2006). As Judge Posner explained in another case:

> If a collective bargaining agreement is completely silent on the duration of health benefits, the entitlement to them expires with the agreement, as a matter of law (that is, without going beyond the pleadings), unless the plaintiff can show by objective evidence that the agreement is latently ambiguous, that is, that anyone with knowledge about the real-world context of the agreement would realize that it might not mean what it says.

Rossetto, 217 F.3d at 547.

The rule in the Second Circuit is similar to the Seventh Circuit's as the "court will not infer a binding obligation to vest benefits absent some language that itself reasonably supports that interpretation." *Joyce v. Curtiss Wright Corp*., 171 F.3d 130, 134 (2d Cir. 1999). The Third Circuit, for its part, presumes retiree medical benefits do not vest unless the "employer's commitment to vest such benefits … [is] stated in clear and express language. *UAW v. Skinner Engine Co*., 188 F.3d 130, 139 (3rd Cir. 1999).

At the other end of the spectrum lies the Sixth Circuit's view that ambiguity in a retiree medical promise is endemic and generally permits plaintiffs to introduce extrinsic evidence. *UAW v. Yardman*, 716 F.3d at 1479 ("The intended meaning of even the most explicit language can, of course, only be understood in light of the context which gave rise to its inclusion."). Thus, even when the collective bargaining agreement contains no language suggesting retiree medical benefits are vested and is, therefore, silent, plaintiffs are allowed to introduce extrinsic evidence to show retiree medical benefits are vested and unchangeable.

The conflicting rules adopted by the circuit courts about these basic questions leads to completely different results in similar cases depending solely on where suit was filed. The rules governing collectively bargained retiree medical disputes are simple. We have been taught that when a collective bargaining agreement expires, the employer is ordinarily free to modify or terminate any retiree medical benefits provided under that collective bargaining agreement. For example, in *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190 (1991) the Supreme Court explained that the layoff of 10 factory workers after the expiration of a collective bargaining agreement was not subject to the expired contract's grievance and arbitration procedure: As with the obligation to make pension contributions in *Advance Lightweight Concrete Co.*, other contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement. *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co*., 404 U.S. 157 (1971). Contractual obligations can survive the contract's termination "if a collective bargaining agreement provides in explicit terms that certain benefits continue after the agreement's expiration."

ERISA retiree medical cases have uniformly applied the *Litton* court's "clear statement" rule to determine if retiree medical benefits are vested. *See, e.g., Sprague v. Gen. Motors Corp*., 133 F.3d 388, 400 (6th Cir. 1998) (*en banc*); *In re Unisys Corp. Retiree Medical Benefit ERISA Litig*., 58 F.3d 896, 902 (3rd Cir. 1995); *Gable v. Sweetheart Cup Co*., 35 F.3d 851, 855 (4th Cir. 1994).

The different approaches to the same questions used by the circuits is probably best exemplified by their conflicting positions about whether the same standards govern retiree medical benefits arising from collective bargaining agreements and arising under ERISA. The Third and Seventh Circuits have expressly refused to draw any distinction between ERISA and collectively bargained cases. *See Skinner Engine*, 188 F.3d at 139 (stating that the same principles apply "without regard to whether the employee welfare benefits are provided under a collective bargaining agreement, summary plan description, or other plan document"; *Rossetto*, 217 F.3d at 544 ("The distinction between collective bargaining agreements and ERISA plans is not recognized in our cases, and we are not minded to embrace it now and make the law even more complicated than it is.") The Second Circuit has one standard for both collectively bargained and ERISA cases. *See Joyce*, 171 F.3d at 134 (collectively bargained retiree medical case); *Abbruscato v. Empire Blue Cross & Blue Shield*, 274 F.3d 90, 97 (2d Cir. 2001) (ERISA case). Judge Posner suggests the Sixth Circuit's application of the "inference of vesting" to collectively bargained cases is mistaken:

> It can be argued that a reversal of these presumptions would make better sense – that if the union negotiated for such rights, they would surely appear in the collective bargaining agreement, whereas an employee ought to get the benefit of vague language in his ERISA plan. The distinction between collective bargaining agreements and ERISA plans is not recognized in our cases, and we are not minded to embrace it now and make the law even more complicated than it is.

Rossetto, 217 F.3d at 543-44.

ERISA cases are treated differently than collectively bargained retiree medical cases in the Fourth and Sixth Circuits. *UAW v. BVR Liquidating, Inc*., 190 F.3d 768, 772-73 (6th Cir. 1999). For example, in *BVR Liquidating*, the Sixth Circuit refused to apply the ERISA clear statement rule because "the *Yard-Man* presumption was specifically intended to apply in the context of

a collective bargaining agreement." The Sixth Circuit ruled in *Yard-Man* that there is an "inference" that collectively bargained retiree medical benefits vest, because: "It is unlikely that such benefits, which are typically understood as a form of delayed compensation or reward for past services, would be left to the contingencies of future negotiations … retiree benefits are in a sense 'status' benefits which, as such, carry with them an inference that they continue so long as the prerequisite status is maintained." 716 F.2d at 1482.

Further complicating this area is the fact that bargaining for retired employees is a permissive, rather than a mandatory, subject of collective bargaining (because retired employees are no longer members of the bargaining unit). *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co*., 404 U.S. 157 (1970). Unionized retirees are in a kind of labor law limbo – they are not employees, but their benefits are governed by a law, the Labor Management Relations Act, that protects the benefits of active workers. Supreme Court precedent on collectively bargained for retiree medical benefits is sparse. We know that there is no federal labor policy that favors the creation of nonforfeitable rights to any term subject to collective bargaining. *See United Mine Workers v. Robinson*, 455 U.S. 562, 575, 102 S. Ct. 1226, 71 L. Ed. 2d 419 ("when neither the collective bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of the collective bargaining contract"). Any argument that the retirees' benefits are vested and, hence, survive beyond the term of the labor agreement must find its genesis in the labor contract itself. *See John Wiley & Sons v. Livingston*, 376 U.S. 543, 555, 84 S. Ct. 909, 11 L. Ed. 2d 898 (1964).

Given this sparse Supreme Court guidance, the cases in the Circuit Courts of Appeal are "all over the lot" about how to deal with retiree medical-benefit disputes. *Rossetto*, 217 F.3d at 543. For example, the Seventh Circuit's decision in *Rossetto* established that: "If a collective bargaining agreement is completely silent on the duration of health benefits, the entitlement to them expires with the agreement, as a matter of law … unless the plaintiff can show by objective evidence that the agreement is latently ambiguous." *Rossetto*, 217 F.3d at 547. The Sixth Circuit assumes, on the other hand, that, absent explicit contract language to the contrary, it should infer retiree medical benefits are status benefits that continue after the expiration of the contract. *Noe v. Polyone Corp*., 520 F.3d 548, 552 (6th Cir. 2008). The Third Circuit insists that collectively bargained retiree medical benefits are not vested unless the "employer's commitment to vest such benefits … is stated in clear and express language." *Int'l Union, UAW v. Skinner Engine Co*., 188 F.3d 130, 139 (3d Cir. 1999). The Sixth Circuit rejected the "clear statement" rule in *Golden v. Kelsey-Hayes Co*., 73 F.3d 648, 655 (6th Cir. 1996). Five Circuit Courts make no presumptions. *Deboard v. Sunshine Mining & Refining Co*., 208 F.3d 1228, 1240-41 (10th Cir. 2000); *Joyce v. Curtiss-Wright Corp*., 171 F.3d 130, 134-35 (10th Cir. 1999); *Barker v. Ceridian Corp*., 122 F.3d 628, 634-38 (8th Cir. 1997); and *Int'l Ass'n of Machinists and Aerospace Workers, Woodworkers Div. v. Masonite Corp*., 122 F.3d 228, 231-32 (5th Cir. 1977). *Bower v. Bunker Hill Co*., 725 F.2d 1221, 1223-25 (9th Cir. 1984); and *Stewart v. KHD Deutz of America Corp*., 980 F.2d 698, 702-04 (11th Cir. 1993). These courts permit plaintiffs to introduce extrinsic evidence even when the collective bargaining agreement contains no language regarding vesting. Simply put, whether collectively bargained for retiree medical benefits vest will be determined as a matter of federal common law, as interpreted by the federal circuit where the case is litigated.

WHAT HAPPENED IN *YARD-MAN*?

One of the earliest Circuit Court of Appeals decisions to consider collectively bargained for retiree medical benefits is the Sixth Circuit's decision in *Yard-Man*. It was perceived as announcing the following rule:

> Retiree benefits are in a sense "status" benefits which, as such, carry with them an inference that they continue so long as the prerequisite status is maintained. Thus, when the parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely inferred those benefits to continue as long as the beneficiary remains a retiree.

UAW v. Yard-Man, Inc., 716 F.2d 1476, 1482 (6th Cir. 1983).

The facts in *Yard-Man* are familiar: The company tells the union it is shutting down a factory and will end the payment of retiree medical benefits on the last day of the collective bargaining agreement. The union sues, claiming the retiree medical benefits were "lifetime" benefits that cannot

be terminated. *Id*. at 1478. The company responds that the contract is clear—no retiree benefits outlive the termination of the union contract. In *Yard-Man*, the key provision of the contract in dispute stated: "[w]hen the former employee has attained the age of 65 years then . . . [t]he [c]ompany will provide insurance benefits equal to the active group benefits . . . for the former employee and his spouse." *Id*. at 1480.

The Sixth Circuit found this language to be ambiguous: "The language 'will provide insurance benefits equal to the active group' could reasonably be construed, if read in isolation, as either solely a reference to the nature of retiree benefits or as an incorporation of some durational limitation as well." *Id*. Due to this ambiguity, the Sixth Circuit said that to determine "whether retiree insurance benefits continue beyond the expiration of the collective bargaining agreement depends upon the intent of the parties." *Id*. at 1479. It then detailed seven rules courts should use to examine extrinsic evidence to divine the parties' intent:

1. Traditional rules for interpreting contracts should be applied in a manner consistent with federal labor policies;
2. The court should first look to the explicit language of the contract for clear manifestations of intent;
3. Explicit language should be viewed in light of the context that gives rise to its inclusion and each contract provision should be interpreted as part of an integrated whole;
4. The contract's terms should be construed so as to render none nugatory and avoid illusory promises;
5. Where ambiguities exist, the court may look to other words and phrases in the contract for guidance;
6. The court should review the interpretation ultimately derived from its examination of the language, context, and other indicia of intent for consistency with federal labor policy. *Id*. at 1479-80.

The mischief in *Yard-Man*'s reasoning is the way in which it resorts to the use of extrinsic evidence in the face of silence about the duration of retiree medical benefits or ambiguity as to whether the benefits are vested. By inferring an "intent to vest" retiree medical benefits, *Yard-Man* made the words of almost every contract susceptible to multiple interpretations. An "inference of vesting" necessarily tilted the playing field and in the face of silence or ambiguity, an employer defending itself in the Sixth Circuit must disprove it vested retiree medical benefits.

All of the circuits employ approaches similar to the *Yard-Man* rules described above when examining the relevant contractual provisions. Whether a collective bargaining agreement vests medical benefits is, of course, a question of contract interpretation. *Anderson v. Alpha Portland Indus., Inc*., 836 F.2d 1512, 1516 (8th Cir. 1988). The language of the parties' agreements is examined in detail to determine whether the intent to provide unchangeable retiree medical benefits has been unambiguously expressed. In making this determination, the core issue is whether the parties intended to vest retiree medical benefits or whether they intended to tie those benefits to the duration of the collective bargaining agreement. *District 29, UMW v. Royal Coal*, 768 F.2d 588, 590 (4th Cir. 1985). The contractual provisions that receive the most attention typically include clauses that define eligibility for retiree medical benefits, the termination of coverage, the reservation of the right to amend or terminate the plan, and durational provisions. The court often finds the agreement between the parties to be comprised of a series of documents, including the collective bargaining agreements, summary plan descriptions, and enrollment forms used by the parties over the course of many years. *Keffer v. H.K. Porter Co*., 872 F.2d 60, 63 (4th Cir. 1989). The conduct of the company's representatives may also show an intent to vest retiree medical benefits. *Id*. at 64.

After considering the evidence, the *Yard-Man* court ruled that retiree medical benefits were intended to outlive the collective bargaining agreement. *Id*. at 1482-83. After the Sixth Circuit indicated that it favored the vesting of retiree medical benefits, a plague of plaintiffs' cases descended upon the federal district courts within the Circuit. Within a short time, some Sixth Circuit cases began to expand this "rule": This court has recognized that normally retiree benefits are vested." *Policy v. Powell Pressed Steel Co*., 770 F.2d 609, 613 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017 (1966). Other Sixth Circuit decisions were more circumspect about the alleged "*Yard-Man*" inference. *UAW v. Cadillac Malleable Iron Co*., 728 F.2d 807, 808 (6th Cir. 1984) ("There is no legal presumption based on the status of retired employees.") While the vitality of the *Yard-Man* inference has waxed and waned within the Sixth Circuit over the past 20 years, in its most recent decision, *Yolton v. El Paso Tenn. Pipeline Co*., 435 F.3d 571 (6th Cir. 2006), *reh'g and reh'g en banc denied* (May 9, 2006); *petition for cert. filed*, 75 U.S.L.W. 3065 (Aug. 3, 2006)

(No. 06-176), the Sixth Circuit appears to have backed away from the *Yard-Man* inference:

> This [c]ourt has never inferred an intent to vest benefits in the absence of either explicit contractual language or extrinsic evidence indicating such an intent. Rather, the inference functions more to provide a contextual understanding about the nature of labor-management negotiations over retirement benefits. That is, because retirement health care benefits are not mandatory or required to be included in an agreement, and because they are "typically understood as a form of delayed compensation or reward for past services" it is unlikely that they would be "left to the contingencies of future negotiations." Yard-Man, 716 F.2d at 1481–82 (citations omitted). If other contextual factors so indicate, Yard-Man simply provides another inference of intent. All that Yard-Man and subsequent cases instruct is that the Court should apply ordinary principles of contract interpretation.

Id. at 580 (emphasis added).

One of the key defenses raised in *Yolton* was defendant's assertion that the collective bargaining agreement's group insurance clause limited the company's liability for benefits to the term of the collective bargaining agreement. This clause stated: "Except for pension improvements, all wage schedules, pension benefit and insurance levels would remain in effect at the current schedule rates or levels for the term of the Extension Agreement." 318 F. Supp. 2d 455, 461-62 (E.D. Mich. 2003). The Sixth Circuit, however, rejected defendant's argument explaining: "Absent specific durational language referring to retiree benefits themselves, courts have held that the general durational language says nothing about those retiree benefits." *Yolton*, 435 F.3d at 581.

The recent *Yolton* court decision, on the other hand, did deny an injunction to those retirees who retired after October 3, 1993 due to a disputed FAS-106 "cost sharing agreement" between the parties. 435 F.3d at 577. The disputed "FAS-106 letter" agreement set average per capita annual costs to the company of providing retiree medical benefits. *Id*. at 575. The *Yolton* court did, however, grant an injunction to El Paso employees who retired before October 3, 1993 based on a *Yard-Man* analysis. These six pre-1993 *Yolton* retirees argued that language in the Group Insurance Plan that tied medical benefits to pension eligibility made it reasonable to infer that retiree medical benefits were lifetime benefits. "Because the pension plan is a lifetime plan and the health insurance benefits are tied to the pension plan, the district court found that the health insurance benefits were vested and intended to be lifetime benefits." 435 F.3d at 580.

THE SEVENTH CIRCUIT'S DIFFERENT TAKE ON THE SAME QUESTION

Reviewing almost identical durational language to that in *Yolton*, the Seventh Circuit reached the opposite result in *Pabst Brewing Co., Inc. v. Corrao*, 161 F.3d 434 (7th Cir. 1998). The disputed language appeared in the parties' 1984 collective bargaining agreement, which stated: "For the term of this Agreement, the Employer, at its sole cost and expense, shall provide major medical, health, dental, sickness and accident, and life insurance benefits in accordance with and as summarized in Appendix A attached …" 161 F.3d at 435-36. The Seventh Circuit concluded that the phrase "for the term of this Agreement" established that Pabst did not intend to vest the retiree medical benefits. *Id*. at 441-42. Other courts have reached the same conclusion when confronted with similar language in other union contracts. For example, language tying retiree medical to pension eligibility has been found to be an insufficient indication of an unambiguous intent to vest welfare benefits. *See, e.g., Joyce v. Curtiss-Wright Corp*., 171 F.3d 130, 134 (2d Cir. 1999) (finding the phrase "insurance benefits will be provided for employees … [who become] entitled to receive pension benefits" did not evince an unambiguous intent to vest welfare benefits); *Int'l Union, UAW v. Skinner Engine Co*., 188 F.3d 130, 141 (3d Cir. 1999) (finding that phrases like "will continue" and "shall remain" do not unambiguously evince an intent to vest welfare benefits); *Senn v. AMCA Int'l*, No. 87-C-1353, 1989 WL 248487 (E.D. Wis. 1989) (denying plaintiffs' motion for summary judgment and holding phrase "benefits will continue" ambiguous as to intent of parties to vest welfare benefits).

SUMMARY

Whether there is an agreement to vest retiree medical benefits turns on the language contained within the ERISA plan, its related documents, the employer's conduct concerning

these benefits, and any underlying collective bargaining agreement. In many circuits, if the language in a collective bargaining agreement states that retiree medical benefits are to be provided "during the term of the agreement" or can be otherwise amended or terminated then the benefits are not vested. 29 U.S.C. § 1051(1) (providing that ERISA's vesting provisions do not apply to employee welfare benefit plans); *see also Anderson v. Alpha Portland Indus., Inc*., 836 F.2d 1512, 1516 (8th Cir. 1988). Moreover, "all courts agree that if a document unambiguously indicates whether retiree medical benefits are vested, the unambiguous language should be enforced." *Yard-Man*, 716 F.2d at 1479. To support a claim in a few circuits on this issue of whether a retiree has received vested retirement benefits, a retiree does not have to point to unambiguous language in the labor contract. "It is enough to point to written language capable of reasonably being interpreted as creating a promise on the part of the employer to vest the recipient's benefits." *Am. Fed'n of Grain Millers v. Int'l Multifoods Corp*., 116 F.3d 976, 980 (2d Cir. 1997) and *Yolton v. El Paso Tenn. Pipeline Co*., 435 F.3d 571 (6th Cir. 2006), *reh'g* and *reh'g en banc* denied (May 9, 1006), *petition for cert. filed*, 75 U.S.L.W. 3065 (Aug. 3, 2006) (No. 06-176). The courts are guided by general principles of contract interpretation. For instance, all courts agree that if a document unambiguously indicates the employer promised that retiree medical benefits are vested, the unambiguous language should be enforced according to its terms. *Am. Fed'n of Grain Millers, supra*. The circuits disagree, however, as to the proper interpretation of documents containing ambiguous language. While all circuits will admit extrinsic evidence to elucidate ambiguities, they differ as to the burdens, presumptions, and thresholds that they apply.

What follows is a brief survey of each circuit's approach to interpreting ambiguous references to retiree medical benefits in ERISA plan documents and collective bargaining agreements.

First Circuit. The First Circuit has rejected *Yard-Man's* "inference." It will consider extrinsic evidence to ascertain the intent of the parties without applying any presumption favoring vesting. *See Senior v. NSTAR Electric and Gas Corp.*, 499 F.3d 206, 216-17 (1st Cir. 2006). As the First Circuit explained in *NSTAR*:

> We fear that the use of presumptions may interfere with the correct interpretation, under normal LMRA rules, of the understanding reached by the parties. Secondly, the use of presumptions may also be inconsistent with the dynamics of bargaining set up under the National Labor Relations Act, 29 U.S.C. §§ 151-169, and the LMRA. Third, Congress could easily have created interpretive presumptions by statute had it cared to do so. The text of the LMRA does not contain any statutory presumptions.

449 F.3d at 218.

Employees bear the burden of proving that their retiree medical benefits are vested and cannot be changed by the company. *Id*. at 216.

In *Senior*, the plaintiff retirees contended that their company's Early Retirement Program ("ERP") agreement promised lifetime dental benefits. The parties' underlying collective bargaining agreement, however, contained a reservation by the company of its right to change benefits at any time. In its analysis, the court considered the parties' "related agreements, the practices in the company, and the custom and usage as to retiree dental benefits" as extrinsic evidence. *Senior*, 499 F.3d at 219. The court also announced a rule that: "a claim for benefits based on a labor agreement under the LMRA … creates no presumption regarding vesting." *Senior*, 499 F.3d at 218. The court reasoned that the parties negotiated the ERP with the provisions of the collective bargaining agreement in mind; therefore, the employees knew that the benefits in the ERP were subject to termination at any time.

Second Circuit. The Second Circuit has not adopted the *Yard-Man* "inference," but has developed its own approach that has some similarities to the Seventh Circuit's approach. To reach a trier of fact, an employee need not prove an express promise of lifetime medical benefits by the employer. Rather, "it is enough [to] point to written language capable of reasonably being interpreted as creating a promise on the part of [the employer] to vest [the recipient's] benefits." *Am. Fed'n of Grain Millers v. Int'l Multifoods Corp*., 116 F.3d 976, 980 (2d Cir. 1997); see also *Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130, 135 (2d Cir. 1999). Such a showing of ambiguity triggers the introduction of extrinsic evidence.

Where a document contains language that could constitute a promise of lifetime medical benefits but contains a general amendment provision, the Second Circuit will not automatically rule in favor of the employer. *Joyce*, 171 F.3d at 136 (quoting *Spacek v. Maritime Ass'n*, 134 F.3d 283, 293 (5th Cir. 1998) ("we have not joined those circuits that have adopted the position that a general amendment provision in a welfare benefits plan is of itself sufficient to unambiguously negate any inference that the employer intends for employee welfare benefits to vest contractually.")). Rather, the court considers the totality of the communications between the parties to ascertain their intent.

Third Circuit. In the Third Circuit, an employee cannot prevail on a claim for vested welfare benefits unless he or she identifies a "clear and express" statement by the employer promising such benefits. *UAW v. Skinner Engine Co.*, 188 F.3d 130 (3d Cir. 1999) ("An employer's commitment to vest (welfare) benefits is not to be inferred lightly and must be stated in clear and express language."). The "clear and express statement" standard announced in *Skinner* applies regardless of whether the benefits are provided under a collective bargaining agreement, summary plan description, or other document. *Id*. at 139. This substantial burden on employees renders the Third Circuit an employer-friendly forum, at least when compared to the Second Circuit.

The *Skinner* opinion explicitly announces the Third Circuit's rejection of the employee-friendly inference announced in *UAW v. Yard-Man*, 716 F.2d 1476 (6th Cir. 1983). *See Skinner*, 188 F.3d at 140 ("We cannot agree with *Yard-Man* and its progeny that there exists a presumption of lifetime benefits in the context of employee welfare benefits."). The court reasoned that the *Yard-Man* inference contradicts congressional intent. Adopting an inference in favor of vesting is disharmonious with Congress's specific choice not to provide for the vesting of employee welfare benefits under ERISA.

If a document contains both a promise for lifetime medical benefits and a clause reserving the employer's right to amend or terminate the plan, the reservation-of-rights clause trumps. *In re Unisys Corp. Retiree Med. Benefit ERISA Litig*., 58 F.3d 896, 903-04 (3d Cir. 1995). The document is not rendered ambiguous simply because both types of language are present.

Fourth Circuit. The Fourth Circuit does not follow *Yard-Man*. In two 1985 cases, the Fourth Circuit states: "Employer obligations and employee rights, under a collective bargaining agreement, do not survive the expiration of the agreement absent a clear intention of the parties." *District 29, UMW v. Royal Coal*, 768 F.2d 588, 590-91 (4th Cir. 1985), and *District 17, UMWA v. Allied Corp*., 765 F.2d 412, 417 (4th Cir. 1985) (both finding benefits did not continue where language read "benefits for … employees … as well as pensioners … shall be guaranteed during the term of this Agreement."). The Fourth Circuit also requires a clear and express statement providing for vested retiree medical benefits. *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 855 (1994). Because such benefits constitute "extra-ERISA commitments, courts may not lightly infer the existence of an agreement" to provide them. *Id*.

The Fourth Circuit in *Gable* (an ERISA case) found that the relevant plan included language promising lifetime benefits as well as a clause reserving the employer's right to amend the plan. Rather than holding that the presence of both clauses created an ambiguity, the *Gable* court found that an employer's explicit reservation of a right to amend in the official plan document was more than enough to defeat the employee's claim that his or her retiree medical benefits were unchangeable. The court explained that if it held that "other communications could nullify [the] express written [amendment clause], plan documents would no longer serve to ensure predictability as to employers' future liabilities." *Gable*, 35 F.3d at 857.

The Fourth Circuit's approach to collectively bargained for retiree medical benefits is to first look "at the language of the agreement for any clear manifestation of the parties' intent." *Royal Coal,* 768 F.2d at 590. "[T]he intended meaning of even the most explicit language can, of course, only be understood in light of the context which gave rise to its inclusion. *Keffer v. H.K. Porter Co*., l872 F.2d 60, 62 (4th Cir. 1989). In *Keffer* the Circuit Court explained that it was obliged to apply the federal common law of labor policy (*citing Bowen v. USPS*, 459 U.S. 212, 220 (1983)) to resolve a collectively bargained retiree medical benefit dispute. To interpret an ambiguous collective bargaining agreement, the *Keffer* court indicated it must "consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements." *Id*.

A district court within the Fourth Circuit recently rejected a lawsuit by the United Steelworkers claiming that retiree medical benefits were unchangeable. *Chapman v. ACF Industries LLC*, 430 F. Supp. 2d 570 (S.D. W.Va. 2006). Mr. Chapman claimed ACF Industries' decision to require him to pay a monthly premium and its reduction of his lifetime maximum benefit violated LMRA § 301. The district court found the language in the collective bargaining agreement to be ambiguous. It then reviewed the language in all of the employee benefit agreements between the parties. It found that an insurance agreement dealing with life insurance benefits made it clear that a retiree's life insurance benefit was unchangeable. No similar language could be found with respect to retiree medical benefit coverage. Had the parties intended the health benefits to vest and continue unchanged after the applicable insurance agreement expired, the language describing retiree medical benefits would have been the same as that found in the life insurance agreement. *Id*. at 578-79.

Fifth Circuit. This circuit joins the Third and Fourth Circuits in requiring employees to identify clear and express statements promising vested welfare benefits. *Wise v. El Paso Natural Gas Corp*., 986 F.2d 929, 937-38 (5th Cir. 1993) ("to prevail, Plaintiffs must assert strong prohibitory or granting language; mere silence is not of itself abrogation" of an employer's right to amend or discontinue coverage). The Fifth Circuit, however, follows a familiar pattern in examining whether collectively bargained for retiree medical benefits are vested. *Int'l Ass'n of Machinists and Aerospace Workers Div. v. Masonite Corp*., 122 F.3d 228 (1997). In *Masonite* the court found an insurance agreement ambiguous (incorporated by the collective bargaining agreement) that stated retiree medical benefits would be provided "until the death of the retired employee." However, Masonite had also expressly reserved the right in the ERISA plan document to amend or terminate the plan. The court noted that in the absence of a collective bargaining agreement between the parties, the "reservation-of-rights clause granting the company the right to amend or terminate the [p]lan might well end the inquiry in the company's favor." *Id*. at 233. The court recognized, however, that "a reservation-of-rights clause in a plan document … cannot vitiate contractually vested or bargained-for rights. To conclude otherwise would allow the company to take away bargained-for rights unilaterally." *Id*. Several Fifth Circuit decisions have criticized the *Yard-Man* inference to the extent that it can be read as supporting a presumption in favor of vesting, but they stop short of fully rejecting it. *United Paperworkers Int'l Union v. Champion Int'l Corp*., 908 F.2d 1252, 1261, n.12 (5th Cir. 1990). *Masonite*, 122 F.3d at 231 ("this circuit questioned the [*Yard-Man*] inference … [n]evertheless, we recognized that there is also no presumption that retiree health insurance benefits conferred by a CBA are coterminous with that CBA.").

Sixth Circuit. The seminal case for determining whether the bargaining parties intended to vest retiree medical benefits remains *UAW v. Yard-Man*, 716 F.2d 1476, 1479 (6th Cir. 1983). *Yard-Man* detailed seven rules courts should use to examine extrinsic evidence to divine the parties' intent:

1. Traditional rules for interpreting contracts should be applied in a manner consistent with federal labor policies;
2. The court should first look to the explicit language of the contract for clear manifestations of intent;
3. Explicit language should be viewed in light of the context that gives rise to its inclusion;
4. Each contract provision should be interpreted as part of an integrated whole;
5. The contract's terms should be construed so as to render none nugatory and avoid illusory promises;
6. Where ambiguities exist, the court may look to other words and phrases in the contract for guidance;
7. The court should review the interpretation ultimately derived from its examination of the language, context, and other indicia of intent for consistency with federal labor policy. *Id*. at 1479-80.

Decisions of the Sixth Circuit have clarified that *Yard-Man* does not create a legal presumption that retiree medical benefits cannot be changed. *Yolton*, 435 F.3d at 579. Rather, *Yard-Man* is properly understood as creating an inference only if the context and other available evidence indicate an intent to vest. *Id*. When any ambiguity exists in the collective bargaining agreement about the nature or duration of retiree medical benefits, then resort to extrinsic evidence may be had to determine whether the parties intended for the benefits to vest. *UAW v. BVR Liq., Inc*., 190 F.3d 768, 774 (6th Cir. 1999).

ERISA-REGULATED RETIREE MEDICAL DISPUTES

The seminal Sixth Circuit case dealing with the rights of salaried employees to unchangeable lifetime retiree medical benefits began as a dispute at General Motors. The four basic ERISA theories of recovery the General Motors plaintiffs asserted (described below) are the same four theories salaried retirees continue to advance.

The reason retiree medical claims fare worse under ERISA than the LMRA are many. The enactment of ERISA required Congress to strike a balance between employee rights and available employer resources. The ERISA statute draws a difference between two types of employee benefit plans, welfare benefit plans, and pension benefit plans. 29 U.S.C. § 1002(1) and (2). Unlike pension benefits, which are subject to stringent vesting requirements under ERISA, welfare benefits, such as retiree medical benefits, are vested only if so provided by contract. 29 U.S.C. § 1051(1) (providing that ERISA's vesting provisions do not apply to employee welfare benefit plans); *see also Anderson v. Alpha Portland Indus., Inc*., 836 F.2d 1512, 1516 (8th Cir. 1988). Retiree medical benefits are defined as employee welfare benefits. 29 U.S.C. § 1002(2). *Gable, supra*, 35 F.3d at 359. To vest an employee benefit means to make that benefit nonforfeitable. *Nachman Corp. v. Pension Benefit Guaranty Corp*., 446 U.S. 359, 376 (1980). The Supreme Court has explained that benefits provided by an ERISA-regulated welfare benefit plan do not usually vest. *Curtiss-Wright Corp. v. Schoonejonjen*, 514 U.S. 73 (1995). In passing ERISA, Congress determined that requiring employers to provide vested employee welfare benefits "would seriously complicate the administration and increase the cost of plan whose primary function is to provide retirement income." *Hosier v. Midwest Fasteners, Inc*., 908 F.2d 1155, 1160 (3d Cir. 1990) (*citing* H.R. Rep. No. 807, 93d Cong., 2d session 60.

ERISA also contains a statutory command that the written terms of the ERISA plan document will govern any dispute about the plan's benefits. For example, in *Sprague v. General Motors Corp.,* 133 F.3d 388 (6th Cir. 1998) (en banc) the Court considered the challenge of Robert Sprague and 113 other salaried retirees as to the legality of General Motors changes to its retiree medical plan. Annual deductibles and co-pays were to be increased. The thrust of Mr. Sprague's complaint was that General Motors had promised to provide retirees with lifetime medical coverage entirely at General Motors' expense. According to Mr. Sprague, once he retired, his lifetime medical benefits vested and GM had no right to change them. Four arguments were teed up by Mr. Sprague in support of his claim to unchangeable retiree medical benefits: 1) the unilateral contract theory; 2) the bi-lateral contract; 3) the estoppel theory; and 4) the breach of fiduciary duty theory. The Sixth Circuit rejected all four.

The Unilateral Contract Theory. In his contract theory, Mr. Sprague contended that General Motors made the following promise at various times and in various plan descriptions: "Your basic healthcare coverages will be provided at GM's expense for your lifetime." Most of the same booklets, however, also put plan participants on notice of GM's right to amend, modify, or terminate the retiree medical plan at any time. To Mr. Sprague's unilateral contract theory, even an express reservation of the right to amend or terminate a retiree medical plan self-destructs once an employee retires.

Quoting the Supreme Court's decision in *Curtiss-Wright Corp. v. Schoonejongen,* 514 U.S. 73 (1985), the Sixth Circuit explained that employers "are, of course, generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." A retiree medical plan is a welfare benefit plan under ERISA. As vesting of welfare plan benefits is not required by ERISA, an employer's commitment to vest those benefits is not to be lightly inferred; the intent to vest "must be found in plan documents and must be stated in clear and express language." Thus, under ERISA, the Sixth Circuit held it is the plaintiff's burden to prove an employer's intent to vest retiree medical benefits.

The Bi-Lateral Contract Theory. Between 1974 and 1988, General Motors offered, to its salaried employees, a series of early retirement incentive programs. According to the plaintiffs, the statements GM made in connection with these early retirement incentive programs, and the documents the early retirees signed, created binding bi-lateral contracts. These contracts, the plaintiffs asserted, vested their retiree medical benefits and were enforceable either as modifications to the health plan or as separate ERISA plans themselves.
The Sixth Circuit made short shrift of this argument:

> Congress intended that plan document and [summary plan descriptions] exclusively governed the employer's

> obligations under ERISA plans . . . . Therefore, the 'clear terms of a written employee benefit plan may not be modified or superseded by oral undertakings on the part of the employer.' . . . Neither can be accepted the argument that the plan was modified or superseded either by the written statements of acceptance signed by some of the named plaintiffs or by the written representations received by some from GM. 'That the defendants' statements were made in writing is irrelevant as they do not profess to be plan amendments.' . . . The statements of acceptance were not ERISA plans themselves.

Id. at 402-403.

The Estoppel Theory. Sprague's estoppel theory was simple: 1) GM had represented to him, both orally and in writing, that he would receive lifetime medical benefits; 2) he reasonably relied upon GM's representations by continuing to work for GM up to the time of his retirement; and 3) he detrimentally relied on GM's promise because he was now receiving diminished retiree medical benefits and could no longer work for another employer to earn satisfactory coverage.

But the estoppel theory was presumptively dead on arrival as the Sixth Circuit had already rejected this same theory in *Musto v. American General Corp.,* 861 F.2d 897, 907 (6th Cir. 1988).

The Breach of Fiduciary Duty Theory. Mr. Sprague's last theory sprung from the Supreme Court's decision in *Varity Corp. v. Howe,* 516 U.S. 489 (1996), where the Supreme Court held that an employer acted in a fiduciary capacity when making misrepresentations to its employees about its employee benefit plans. Mr. Sprague argued that General Motors failed to affirmatively disclose that it might reduce retiree medical benefits and, thus, breached its fiduciary duty to early retirement plan participants. The Sixth Circuit found, however, that Mr. Sprague could not prove this negative:

> A breach of fiduciary duty claim could not survive because no court of appeals has imposed fiduciary liability for failing to disclose information that is not required to be disclosed. At least three circuits have held that there is no fiduciary duty to disclose plan changes and benefits or even the termination of a plan before those actions become official. A *fortiori,* there can be no fiduciary duty to disclose the [possibility] of a future change in benefits. [Citations omitted.]

Id. at 406.

Seventh Circuit. Thanks to Judge Posner, the rules pertaining to retiree medical benefits are clearly discernible in the Seventh Circuit. His opinion in *Rossetto v. Pabst Brewing Co.* contains a succinct summary of the applicable rules that the court applies today. *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539 (7th Cir. 2000). *See generally Barnett v. American Corp.*, 436 F.3d 830 (7th Cir. 2006) (following the rules announced in *Rossetto*).

First, if a collective bargaining agreement is completely silent on the duration of health benefits, a retiree's entitlement to them expires with the agreement. If, however, the plaintiff can show by objective evidence that the agreement is latently ambiguous, then he is entitled to a trial as to the meaning of the agreement. Therefore, the "presumption against vesting … kicks in only if all the court has to go on is silence." *Id*. at 545. *See also Bidlock v. Wheelabrator Corp*., 993 F.2d 603, 606-07 (establishing presumption against vesting where bargaining agreement is silent).

Second, if an agreement unambiguously states that the entitlement expires with the agreement the plaintiff loses as a matter of law unless he can show a latent ambiguity. If he can, he is again entitled to a trial. *Rossetto*, 217 F.3d at 547.

Third, if there is language in the agreement to suggest a grant of lifetime benefits and the suggestion is not negated by the agreement read as a whole, the plaintiff is entitled to trial. The plaintiff is therefore not required to identify a clear and express statement promising lifetime benefits; rather, he need only show "suggestive language" that creates a patent ambiguity as to vesting." *Id*.

Though this was not mentioned in the summary of rules, Judge Posner declined to apply different presumptions to the collective bargaining agreements and ERISA plans. *Rossetto*, 217 F.3d at 544 ("The distinction between collective bargaining agreements and ERISA plans is not recognized in our cases, and we are not minded to embrace it now and make the law more complicated than it is.").

Eighth Circuit. The Eighth Circuit explicitly rejected the *Yard-Man* inference in *Anderson v. Alpha Portland Indus.*, finding it "not at all inconsistent with labor policy to require plaintiffs to prove their case without the aid of gratuitous inferences." *Anderson v. Alpha Portland Indust.*, 836 F.2d 1512 (8th Cir. 1988).

The existence, however, of "an agreement or other demonstration of employer intent to vest benefits" is sufficient to trigger the introduction of extrinsic evidence. *Barker v. Ceridian Corp.*, 122 F.3d 628, 634 (8th Cir. 1997). Any promise to provide vested benefits must be incorporated in some fashion into the formal written ERISA plan or SPD documents. *Id*. at 633.

The court has repeatedly held that an unambiguous reservation-of-rights clause, without more, is sufficient to defeat a claim that welfare benefits are vested. *Stearns v. NCR Corp*., 297 F.3d 706 (8th Cir. 2002). Sloppy language is always a problem. Where the reservation-of-rights clause is ambiguous, or where it conflicts with other plan provisions (such as language promising vesting, the Eighth Circuit (like all of the circuits) considers extrinsic evidence to ascertain what the parties intended.

Ninth Circuit. The Ninth Circuit recognizes that normally lifetime welfare benefits are "extra-ERISA commitments [and] must be found in the plan documents." *Cinelli v. Security Pacific Corp*., 61 F.3d 1437 (9th Cir. 1995). If, however, retiree medical coverage constitutes a vested benefit under a collective bargaining agreement, that benefit cannot be ended without the retirees' consent. *Bower v. Bunker Hill Co*., 725 F.2d 1221, 1223 (9th Cir. 1984) (*citing Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co*., 404 U.S. 157, 181 n.20 (1971)). Where a collective bargaining agreement unambiguously limits medical benefits to the term of the agreements, no benefits are vested. *Id*. at 1223 (*citing Turner v. Local Union No. 302, Int'l Bhd. of Teamsters*, 604 F.2d 1219, 1225 (9th Cir. 1979)).

A recent opinion from the Northern District of California provides additional insight into the Ninth Circuit's treatment of retiree medical benefits. In *Angotti v. Rexam, Inc*., the court noted that medical benefits that are unambiguously limited to the term of a collective bargaining agreement do not survive the expiration of that agreement. *Angotti v. Rexam, Inc*., 2006 WL 1646735 (N.D. Cal.). However, "a CBA that does not unambiguously limit medical benefits to the term of the agreement does not result in presumptively vested benefits. *Id*. at 8. Nor does such an ambiguous collective bargaining agreement result in a presumption against vested benefits. *See id*. ("the ERISA presumption against vesting does not apply to collectively bargained for welfare benefits if the CBAs are ambiguous").

Tenth Circuit. There is no inference of vesting because no presumptions about vesting of retiree medical benefits apply in the Tenth Circuit. *Joyce v. Curtiss-Wright*, 171 F.3d 130, 134-35 (10th Cir. 1999). As with the Third, Fourth, and Fifth Circuits, the Tenth Circuit requires the plaintiff to identify a clear and express statement of vesting within the plan or related documents in order to prevail. *Chiles v. Ceridian Corp*., 95 F.3d 1505, 1515 (10th Cir. 1996). The presence of a clear and unambiguous reservation-of-rights clause is sufficient to negate an implied promise of vested benefits. *Id*. at 1513. *See also Welch v. UNUM Life Insurance Co*., 382 F.3d 1078 (2004) (benefits did not vest where plan document contained a clear reservation-of-rights clause with no express assurances of vesting).

Eleventh Circuit. There is no *Yard-Man* inference in the Eleventh Circuit. "Because federal labor policy neither favors nor disfavors the vesting of retirees' health benefits, *United Paper Workers Int'l Union v. Champion Int'l*, 908 F.2d 1252, 1256 (5th Cir. 1990); *Anderson v. Alpha Portland Indus.*, 836 F.2d 1512, 1517 (8th Cir. 1988), we apply traditional rules of contract interpretation. *Stewart v. KHD Deutz of America*, 980 F.2d 698, 701 (11th Cir. 1993). The Eleventh Circuit ruled in an ERISA case that a plaintiff must establish that "the plan at issue is at least ambiguous with respect to the relevant benefits for which he claims entitlement" before extrinsic evidence will be considered. *Jones v. American General Life and Accident Insurance Co*., 370 F.3d 1065, 1070 (11th Cir. 2004).

As in the Third and Fourth Circuits, a document containing both a reservation-of-rights clause and language promising benefits is not treated as ambiguous. Rather, an unambiguous reservation-of-rights clause trumps other promissory language and will bar the introduction of extrinsic evidence. *Stewart*, 980 F.2d at 702; *Jones*, 370 F.3d at 1071.

CONCLUSION

While the Sixth Circuit's decision in *Yolton v. El Paso Tenn. Pipeline Co.,* 435 F.3d 571 provides some comfort to employers as to its rejection of the "inference of vesting," the uncertainty about *Yard-Man's* legacy remains. With no lingering "inference of vesting," retiree medical disputes should begin again with the language found in each contract. Given the Circuit Courts' different approaches to silence about vesting or ambiguous language about vesting, the outcome of a retiree medical dispute may, in large measure, depend on where it is litigated.

To avoid the quicksand of extrinsic evidence, employers must be vigilant about how and where they make retiree medical benefit promises. All statements made about these benefits should be reviewed for clarity and consistency. Populating enrollment forms, summary plan descriptions, plan documents, and collective bargaining agreements with a reservation of the right to amend, modify, or terminate the plan is clearly the best medicine. Plan fiduciaries and plan administrators should be mindful of the importance of the reservation of the right to amend or terminate a plan and perhaps consider using prepared scripts in answering recurring questions about retiree medical benefits.

If both administrators and fiduciaries follow these simple guidelines, they may find themselves able to readily change their retiree medical plan benefits rather than wallowing in the hell of "he said/she said" litigation.

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