

Retiree Health Benefits: Legal Developments In A Changing Global Economy*

Andrew M. Kramer
Jones Day
Washington, D.C.

Evan Miller
Jones Day
Washington, D.C.

Richard F. Shaw
Jones Day
Pittsburgh

*An earlier version of this outline was prepared by Jones Day attorneys Andrew M. Kramer, Stanley Weiner, Juliet Karastelev, and Sara McClure.

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I. Introduction

Over the last fifteen years, the spiraling inflation and unpredictability associated with the cost of retiree health benefits have caused such benefits, which at one time were commonplace, to significantly threaten employers' cash flow and balance sheets. Consequently, employers are taking an array of measures to address those costs, from restricting future eligibility and requiring greater retiree cost sharing, to eliminating retiree health benefit coverage altogether. When retiree health benefits are collectively bargained, however, the practical and legal options available to employers to curb costs are more limited. Resort is sometimes taken to the courts to affect change, and where retiree health benefit costs are but one of many pressing liabilities, bankruptcy protection may be sought.

This paper discusses the rapidly changing landscape of retiree health benefits. When making changes, employers are either opting to implement these changes unilaterally, which may often result in litigation, or to negotiate them with the retirees and/or the affected union. This paper sets forth the legal and strategic issues posed by each of these approaches, and further discusses the groundbreaking arrangements entered into in 2007 and 2008 by The Goodyear Tire & Rubber Company ("Goodyear") with the United Steelworkers AFL-CIO ("USW"), by General Motors Corporation ("GM"), Ford Motor Company ("Ford"), and Chrysler Motor Corporation ("Chrysler") with the United Auto Workers ("UAW"), and by Dana Corporation with both the UAW and the USW, to eliminate corporate sponsorship of retiree health benefits.

II. Rising Health Care Costs and FAS 106

Over the last thirty years, health care costs have been steadily increasing. Since 1970, health care spending has grown at an average annual rate of 9.8%, or 2.5% faster than the growth rate for the gross domestic product (“GDP”). *See* The Henry J. Kaiser Family Found., *Health Care Costs A Primer: Key Information on Health Care Costs & Their Impact 3* (2007) (hereinafter *Health Care Costs*), available at <http://www.kff.org/insurance/7670.cfm>. In 2007 alone, the cost of health care coverage increased by 6.1%, which is more than double the overall rate of inflation (2.6%). *See* The Henry J. Kaiser Family Found. & Health Research & Educ. Trust, *Employer Health Benefits 2007 Annual Survey 18* (2007), available at <http://www.kff.org/insurance/7672/index.cfm>. Health care as a share of GDP has risen from 5.2% in 1960 to 16% in 2005, and is projected to be 19.6% (nearly one fifth) of GDP in 2016. *See* *Health Care Costs 2*. In a recent survey of large employers, total retiree health benefit costs were estimated to be \$20.9 billion in 2006. The Henry J. Kaiser Family Found. & Hewitt Assocs., *Retiree Health Benefits Examined: Findings From the Kaiser/Hewitt 2006 Survey on Retiree Health Benefits 11* (2006) (hereinafter *Kaiser/Hewitt 2006 Retiree Survey*), available at <http://www.kff.org/medicare/7587.cfm>.

But the greater problem for employers in providing retiree health benefits is the obligation to account for the present value of the future liability on the corporate balance sheet. In 1990, the Financial Accounting Standards Board (“FASB”) adopted Financial Accounting Statement No. 106 (“FAS 106”), “Employers’ Accounting for Postretirement Benefits Other Than Pensions,” which requires private sector companies to project their future health benefit liabilities based on employees’ life expectancy and anticipated health care inflation, and to report the discounted present value on the companies’ balance sheets in current dollars. (This amount is known as the accumulated post retirement benefit obligation, or “APBO.”) Recognition of these future liabilities on the balance sheets dramatically affects a company’s net assets, shareholders’ equity, and current profits. That, in turn, may significantly affect corporate credit ratings and a company’s cost of capital.

Employers have responded to rising health care costs and the FAS 106 reporting requirements in several different ways. For example, for active employees not yet retired, employers are restricting or declining to extend retiree health benefits upon those employees’ future retirement. Between 1988 and 2006, the share of large employers (those companies with 200 or more employees) offering retiree health benefits declined from 66% to 35%. *Id.* at 1. Among those companies that provide retiree health benefits, the levels of coverage have changed significantly. Employers may offer less rich benefits to active employees yet to retire, and less rich still to new hires. Or, employers may require longer years of service to be eligible for retiree health benefits. For example, one study estimated that in 1984, almost 90% of firms were providing coverage to Medicare-eligible retirees with five or fewer years of service; by 2001, only 25% of firms were providing coverage to this group. *See* Mark Merlis, George Washington Univ. Nat’l Health Policy Forum, *Health Benefits in Retirement: Set for Extinction?* 5 (2006), available at <http://nhpf.ags.com/pubs/pubs.htm>.

In addition, employers have long since abandoned bearing the full cost of a retiree health benefit plan. Retirees are typically paying a far higher annual deductible before the plan begins paying benefits, and higher co-payments. More significantly, according to the Kaiser/Hewitt 2006 Retiree Survey, only 8% of large employers (1,000 or more employees) reported paying 100% of the monthly premium costs for newly-retired, pre-65 retirees, and only 9% of large employers reported paying 100% of the monthly premium costs for retirees age 65+. Kaiser/Hewitt 2006 Retiree Survey 15. Thus, the vast majority of large employers require retirees to make premium contributions, averaging \$227 for younger retirees (pre-65), and \$110 for Medicare-eligible retirees (age 65+). *Id.*

Another response to rising health care costs and FAS 106 is the pre-funding of retiree health benefits, typically through a tax-exempt trust known as a Voluntary Employees’ Beneficiary Association

("VEBA") authorized by section 501(c)(9) of the Internal Revenue Code. Pre-funding is attractive because it reduces the liability employers must report on their financial statements.

Employer contributions to VEBAs are also a deductible business expense and distributions to pay for benefits are tax exempt. Some exceptions, such as the Unrelated Business Income Tax, may apply on the investment earnings on the VEBA. *See* 29 U.S.C. § 512. A more significant drawback is that, in connection with non-union retirees, the deductibility of employer contributions to VEBAs for the costs of covering future retiree health benefits may not make any allowance for future inflation or utilization changes; rather, those contributions are based on the current expenses for current retirees. *See* 29 U.S.C. § 419A(c). Thus, outside of the unionized employee context, the tax rules effectively discourage employers from pre-funding all but a portion of the true expected future costs.

Finally, for existing retirees, employers are modifying or terminating retiree health benefits and/or enforcing existing plan provisions, such as employer caps on contribution to premiums. Since 2005 and the addition of the Medicare Part D prescription drug benefit, many employers are amending their retiree health plans to eliminate drug coverage, or merely to subsidize a portion of the basic Medicare Part D benefit cost.

Employers are either making such changes unilaterally or negotiating them with unions and/or retirees. But each approach has its own unique legal and strategic issues, which are discussed fully below.

III. Litigating Unilateral Modification of Retiree Health Benefit Plans

The issue of an employer's right to modify health benefits for retired employees is regulated by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, and, in the case of collectively bargained benefits, by Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §§ 141 *et seq.* Typically, a complaint alleging that an employer has improperly modified retiree health benefits includes claims pursuant to §§ 502(a)(1)(B) and (a)(3) of ERISA. *See* 29 U.S.C. § 1132(a)(1)(B), (a)(3). Section 502(a)(1)(B) provides a remedy for improper denial of benefits, and § 502(a)(3) provides equitable relief in cases of violation of the terms of the benefit plan or ERISA itself. In the union context, a claim also is brought under § 301 of the LMRA, which provides a remedy for a "violation of contracts between an employer and a labor organization." *Id.* at § 185(a). But, no matter the statutory source for a claim respecting modification or termination of retiree health benefits, the fundamental question in retiree health benefit litigation is whether the benefits are legally vested, and thus immutable, by virtue of contract. *See, e.g., Noe v. PolyOne Corp.*, -- F.3d --, 2008 WL 723769 (6th Cir. Mar. 19, 2008); *Senior v. NSTAR Elec. & Gas Corp.*, 449 F.3d 206 (1st Cir. 2006); *McCoy v. Meridian Auto. Sys., Inc.*, 390 F.3d 417 (6th Cir. 2004); *Rosetto v. Pabst Brewing Co.*, 217 F.3d 539, 544 (7th Cir. 2000); *DeGeare v. Alpha Portland Indus., Inc.*, 837 F.2d 812 (8th Cir. 1988), *vacated on other grounds*, *DeGeare v. Slattery Group, Inc.*, 489 U.S. 1049 (1989).¹

¹ The law is clear that neither ERISA nor the LMRA creates a statutory right to vesting. Absent a contractual agreement that vests retiree health benefits, an employer may modify or terminate benefits unilaterally at any time. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). An employer's power to modify or terminate benefits stems from the unique nature of welfare benefits. Under ERISA, *welfare* benefits are not subject to the mandatory participation, vesting, and funding requirements applicable to *pension* benefits. 29 U.S.C. §§ 1051(1), 1053; *see also Helwig v. Kelsey-Hayes Co.*, 93 F.3d 243, 248 (6th Cir. 1996); *Senior*, 449 F.3d at 216. As the Supreme Court has held, this statutory distinction between pension and welfare benefits reflects a deliberate congressional policy to "[g]iv[e] employers th[e] flexibility" to amend or eliminate welfare benefits in order to "encourage[] them to offer more generous benefits at the outset, since they are free to reduce benefits should economic conditions sour." *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510, 515 (1997); *see also Musto v. Am. Gen. Corp.*, 861 F.2d 897, 912 (6th Cir. 1988); *Moore v. Metro. Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988); *United Paperworkers Int'l Union v. Jefferson Smurfit Corp.*, 961 F.2d 1384, 1385-86 (8th Cir. 1992).

Some circuit courts make an analytical distinction based upon whether the plan benefits are conferred by a collective bargaining agreement (“CBA”), and thus claimed under the LMRA, or not. *See Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998) (en banc) (requiring clear and express statement of vesting in pure ERISA cases), and *Maurer v. Joy Techs., Inc.*, 212 F.3d 907, 915-16 (6th Cir. 2000) (not requiring express statement of vesting in LMRA case despite en banc decision in *Sprague*). Nonetheless, since the passage of ERISA, courts generally have tended to use the same contract interpretation tools in analyzing whether benefits have vested. Outside of the collective-bargaining context, the key documents will be the formal benefit plan document and the summary plan description. But for bargained retiree health benefit plans, the bargaining agreement itself often and/or the benefits supplement often becomes the key document to determine the parties’ intent respecting vesting, and benefit plan documents are often considered extrinsic evidence of that intent.

In the case of collectively bargained-for benefits, courts will find that retiree welfare benefits survive termination of a CBA only if there is evidence the parties intended the CBA to create a vested contract right. *See, e.g., Bitteringer v. Tecumseh Prods. Co.*, 83 F. Supp. 2d 851, 857 (E.D. Mich. 1998), *aff’d*, 201 F.3d 440 (6th Cir. 1999) (quoting *Am. Fed’n of Grain Millers v. Int’l Multifoods Corp.*, 116 F.3d 976, 979 (2d Cir. 1997)); *accord Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 606 (7th Cir. 1993) (en banc) (agreeing that “ordinarily when a contract expires, it [] expires. It is at an end. The parties have no more rights or duties under it.”). Employers may, of course, contract to provide vested benefits that extend beyond the term of a CBA. But most courts have stressed that an employer is obligated to provide welfare benefits after the expiration of the CBA only where there is evidence that the employer has affirmatively agreed to do so. *See, e.g., Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 82 (2d Cir. 2001), *cert. denied*, 537 U.S. 1170 (2003), *Senior*, 449 F.3d at 207; *Int’l Ass’n of Machinists & Aerospace Workers, Woodworkers Div. v. Masonite Corp.*, 122 F.3d 228, 232 (5th Cir. 1997); *see also Int’l Union, United Auto., Aerospace & Agric. Implement Workers v. Yard-Man, Inc.*, 716 F.2d 1476, 1479 (6th Cir. 1983) (“Any such surviving benefit must . . . find its genesis in the [CBA].”).

In the collectively bargained retiree health benefits context, the court will first look to the explicit language of the CBA, and thereafter to related plan documents, for clear manifestations of vesting intent, construing the documents using basic principles of contract interpretation. *See, e.g., Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1516 (8th Cir. 1988); *Yard-Man*, 716 F.2d at 1479; *In re Unisys Corp. Retiree Med. Benefit “ERISA” Litig.*, 58 F.3d 896, 902 (3d Cir. 1995). A court may not consider extrinsic evidence in determining the parties’ intent if the CBA is unambiguous. *See Anderson*, 836 F.2d at 1517; *see also, e.g., Maurer*, 212 F.3d at 915; *Rosetto*, 217 F.3d at 543-44. In any event, a court will not find that benefits are vested absent an affirmative showing of intent.

A. Key Factors in Retiree Health Benefit Vesting Analysis

Because welfare benefits do not automatically vest under ERISA, it is the retirees and/or the union that bear the burden of showing that the parties intended welfare benefits to vest. *See, e.g., Anderson*, 836 F.2d at 1517; *Senior*, 449 F.3d at 216; *Int’l Union, United Auto., Aerospace & Agric. Implement Workers v. Skinner Engine Co.*, 188 F.3d 130, 138-39 (3d Cir. 1999).

The circuit courts are largely homogenous in whether to grant inferences or presumptions about intent in the context of retiree health benefits for former non-union, salaried retirees. But for unionized retirees, for whom retiree health benefits were collectively bargained, courts vary dramatically as to whether retiree benefits are inferred to be vested; whether express language is required to vest benefits; and what interpretation or weight should be given to certain types of language contained in the operative documents. The courts generally hold (with the exception of the Sixth Circuit) that where the terms of the benefit plans and/or CBAs unambiguously demonstrate that the parties did not intend for benefits to vest, the court may not consider extrinsic evidence and the benefits are not vested. However, if the court deems the contract language to be ambiguous, the court will permit an

examination of extrinsic evidence (*i.e.* bargaining notes or proposals, alleged oral statements by managers, conduct by the parties, etc.) to determine whether the parties intended the benefits to vest.

When analyzing the operative documents to make the initial determination whether the parties intended retiree health benefits would be vested, courts tend to look at the following types of language:

Reservation-of-rights language: Reservation-of-rights language expressly reserves the employer's right to amend or terminate welfare benefits. As set forth below, most circuit courts hold that an explicit and unambiguous reservation of rights is sufficient, without more, to defeat a claim that retiree health plan benefits are vested. Reservation-of-rights language is found, however, only in the benefit plan documents; it is rarely, if ever, included in the CBAs. Union negotiators simply will not allow it. Some courts, however, will look to language in the applicable plan documents to determine whether there was an intent to vest benefits, even in the face of unambiguous reservation-of-rights language.

Durational language: Durational language ties the provision of welfare benefits to a specific term. As set forth below, many courts consider such language to be strong evidence that the parties did not intend the benefits to last beyond the stated term.

Termination of coverage provisions: Termination of coverage provisions typically provide that the benefit coverage set forth in the plan may terminate upon a given event. Courts often hold that this is evidence that parties did not intend the benefits to last for life.

"Lifetime" language: "Lifetime" language arguably suggests that benefits could last for a lifetime. Some examples include language providing that a retiree will never pay more than a certain dollar amount in his lifetime or that benefit coverage continues until the retiree's death or the surviving spouse's "death or remarriage." As set forth below, the circuit courts vary in how they interpret such language and the importance they attach to it.

"Pension-tying" language: "Pension-tying" language defines eligibility for retiree health benefits based on pension eligibility or status. Such language often is found in CBAs as well as in the benefit plan documents. For example, a plan may provide that if a retiree is eligible for the company's pension program, he is eligible for retiree health benefits. As discussed below, such language is very problematic for employers in some circuits whereas it has little meaning in other circuits.

Coordination with Medicare provisions: These provisions reduce retiree health benefits in coordination with Medicare benefits. At least one circuit court holds that this is evidence of intent not to vest because such a provision effectively reserves to the employer the right to modify health benefits. However, another circuit court finds that such provisions must be evidence of vesting because some retirees will not be 65 years old at the time of the contract's expiration, so without vesting, such promise of benefits would be illusory.

B. Circuit Court Differences in Applying Presumptions Or Inferences, and Language Interpretation, When Determining Vesting

As mentioned above, the circuit courts vary, often significantly, in terms of the legal presumptions, inferences, and language interpretation that the circuit courts employ in conducting an analysis of whether retiree health benefits are vested, specifically for collectively bargained retiree health benefits. The following discussion summarizes how the different circuit courts have addressed these issues.

First Circuit: Although the First Circuit does not have an extensive body of law relating to vested retiree health benefits, the First Circuit has staked out its position on a number of important topics — including presumptions and express-statement requirements. For non-unionized retirees, interpretation of an ERISA benefit plan is guided by "common sense principles of contract interpretation." *Balestracci v. NSTAR Elec. & Gas Corp.*, 449 F.3d 224, 230 (1st Cir. 2006). The court, however, rejected any presumption that vesting can only be found with a clear and express statement indicating

such vesting. *Id.* at 231. More simply stated, the court found that ERISA does not mandate a presumption against vesting. *Id.* The court also held that “lifetime” language in an ERISA plan with a reservation-of-rights clause did not prove vesting. *Id.* at 232-33. Rather, the “only reasonable reading” of a plan that contained both forms of language was that the company would provide lifetime benefits subject to its reservation-of-rights to modify, alter, or terminate the plan. *Id.* at 233.

Respecting collectively bargained agreements, the First Circuit has rejected any form of presumption—whether for or against vesting—preferring instead to utilize basic principles of contract interpretation. *Senior v. NSTAR Elec. & Gas Corp.*, 449 F.3d 206, 217-18 (1st Cir. 2006). Under the court’s case-by-case approach, “the question will usually be one of the degree of clarity that benefits were or were not unalterably vested.” *Id.* at 218. The First Circuit likewise has rejected a “clear and express statement test,” under which benefits are said to vest only if there is a clear and express statement of an intent to provide such unalterable benefits. *Id.* at 216. Similar to its instruction regarding non-unionized retirees, the court has held that the mere presence of a “lifetime benefits” clause, located within individualized benefits summaries, does not create a triable issue of fact where the summaries specifically referred to plan documents, which in turn contained an unambiguous reservation-of-rights provision. *See id.* at 223.

Second Circuit: The Second Circuit’s views are slightly more refined than the First’s. For non-unionized retirees’ claims, the court does not apply presumptions, and it has specifically rejected the clear and express statement test. *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 83 (2d Cir. 2001). Therefore, a plaintiff can reach a trier of fact if he can “point to written language *capable of reasonably being interpreted* as creating a promise [of lifetime benefits].” *Id.* (emphasis in original; internal citation and quotation omitted). *See also Bouboulis v. Transp. Workers Union of Am.*, 442 F.3d 55, 60 (2d Cir. 2006) (to raise a triable issue, a claimant must identify “specific written language that is *reasonably susceptible* to interpretation as a promise”) (internal quotation marks omitted; emphasis added). In *Devlin*, prior to 1987, the SPDs at issue did not include reservation-of-rights language. 274 F.3d at 79. The SPDs also stated that “retired employees, after completion of twenty years of full-time permanent service and at least age 55 will be insured.” *Id.* The court found that this language could be reasonably interpreted as creating a promise of lifetime benefits, so that summary judgment was inappropriate. *Id.* at 84. The fact that later SPDs included reservation-of-rights language did not negate the earlier documents. *Id.* Instead, the pre-1987 SPDs were, in effect, “unilateral contracts” that the plaintiffs accepted by continuing to work under their terms. *Id.* The employer could not “revoke” its offer set forth in the SPDs (with subsequently issued reservation-of-rights language) once the employee had begun to perform. *Id.*

The Second Circuit follows a similar approach for unionized retirees. A claimant need not point to “unambiguous language” that establishes a vested right to create a triable issue of fact. *Am. Fed’n of Grain Millers v. Int’l Multifoods Corp.*, 116 F.3d 976, 980 (2d Cir. 1997). The claimant need only point to language “capable of reasonably being interpreted” as creating a promise of lifetime benefits. *Id.* The claimant must meet this burden, even if the contract does not contain language rejecting the concept of vesting. *Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130, 135 (2d Cir. 1999). Regarding reservation-of-rights clauses, the Second Circuit has not joined those circuits that have adopted the position that a general reservation-of-rights clause is, of itself, sufficient to unambiguously negate any inference that the employer intended to provide vested benefits. *Am. Fed’n of Grain Millers*, 116 F.3d at 983 (reserving the question). However, the Second Circuit has enforced those provisions where the plan documents do not contain affirmative language establishing a vested right. *Id.*; *see also Joyce*, 171 F.3d at 136. The court also has enforced an unambiguous duration clause. *Am. Fed’n of Grain Millers*, 116 F.3d at 981 (“Promising to provide benefits for a certain period of time necessarily establishes that once that time period expires, the promise does as well.”). Finally (and contrary to the Sixth Circuit) the Second Circuit has held that the act of tying welfare benefits to pension eligibility “cannot reasonably be read as binding [the employer] to vest the benefits at issue.” *Joyce*, 171 F.3d at 134.

Third Circuit: Regarding non-unionized retirees, the Third Circuit requires a claimant to point to “clear and express language” conferring the right to receive the unalterable benefit in order to establish a vested benefit under ERISA. *In re Unisys Corp. Retiree Med. Benefit “ERISA” Litig.*, 58 F.3d 896, 902 (3d Cir. 1995). The Third Circuit also has held that a broad and unambiguous reservation-of-rights clause negates any inference to provide vested benefits. *Id.* at 904 (“An employer who promises lifetime medical benefits, while at the same time reserving the right to amend the plan under which those benefits were provided, has informed plan participants of the time period during which they will be eligible to receive benefits *provided* the plan continues to exist.”).

In the unionized context, the Third Circuit applies traditional rules of contract interpretation. *Int’l Union, United Auto., Aerospace & Agric. Implement Workers v. Skinner Engine Co.*, 188 F.3d 130, 138 (3d Cir. 1999). The Third Circuit has expressly rejected any inference or presumption in favor of vesting. *Id.* at 139-40. Further, the court has found that language stating, for example, that benefits “will continue” or “shall remain” does not unambiguously demonstrate an intent that benefits would vest. *Id.* at 141-42. Instead, these phrases must be read only in their context. *Id.*

Fourth Circuit: Regarding non-unionized retirees, the Fourth Circuit has recognized that “any participant’s right to a fixed level of lifetime benefits must be found in the plan documents and must be stated in clear and express language.” *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 855 (4th Cir. 1994) (internal quotation and citation omitted). With this framework, the Fourth Circuit held that an express reservation-of-rights clause, “standing alone, is more than sufficient to defeat plaintiffs’ claim that the company provided vested benefits” *Id.* at 856. Further, the court instructed that the express reservation-of-rights clause in the official plan document could not be overridden by later “informal communications” describing benefits. *Id.* at 857.

In the unionized context, the Fourth Circuit has not indicated whether it applies any presumption for, or against, vesting. In a decision in the late 1980s, the court cited with approval the Sixth Circuit’s decision in *Int’l Union, United Auto., Aerospace & Agric. Implement Workers v. Yard-Man, Inc.*, 716 F.2d 1476, 1479 (6th Cir. 1983), which is largely credited as the lead case establishing—or, at the very least, suggesting—an inference in favor of vesting. *See Keffer v. H.K. Porter Co.*, 872 F.2d 60, 64 (4th Cir. 1989) (citing and quoting with approval *Yard-Man*, 716 F.2d at 1479). The Fourth Circuit, however, never went so far as to explicitly adopt a presumption. *Id.* Subsequent to *Keffer*, the Fourth Circuit recognized that the question of vesting is subject to contract interpretation without any comment regarding the *Yard-Man* presumption. *Dist. 29, United Mine Workers v. Royal Coal Co.*, 768 F.2d 588, 590 (4th Cir. 1985). In *Dist. 29*, the court held that a company’s obligation to provide health coverage under CBAs did “not extend beyond the expiration of those Agreements.” *Id.* at 592.

Fifth Circuit: For non-unionized retirees, the Fifth Circuit has imposed a “clear and express” language requirement, meaning that an employer must clearly express a promise of lifetime benefits in the plan documents. *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir. 1993). Therefore, the lack of a reservation-of-rights clause is not fatal to an employer’s right to modify benefits. *Id.* at 938 (evaluating SPDs without any reservation-of-rights clause and finding no basis in the plan language to dispute the employer’s right to change benefit plan).

In the unionized context, the Fifth Circuit has criticized any presumption or inference in favor of the vesting of health benefits, but it has neither rejected outright such a presumption or inference, nor adopted a presumption against the vesting of such benefits. *Int’l Ass’n of Machinists & Aero. Workers, Woodworkers Div. v. Masonite Corp.*, 122 F.3d 228, 231 (5th Cir. 1997). The Fifth Circuit also has held that neither a durational provision nor a reservation-of-rights clause in a plan document can divest retired employees of vested benefits as set forth in a CBA. *Id.* at 233. Thus, it appears that, at least in the Fifth Circuit, competing provisions (*i.e.*, durational clauses and statements that benefits are to be provided “until the death of the retiree”) are likely to give rise to the sort of ambiguity that warrants the consideration of extrinsic evidence and may preclude the entry of summary judgment. *See id.* at 233-34.

Sixth Circuit: The Sixth Circuit is in accord with most circuits in regard to non-unionized retirees. The court requires “clear and express language” of vesting when claims for benefits are brought under ERISA. *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998). As far as specific language is concerned, the Sixth Circuit has indicated that, at least in the context of ERISA, a general reservation-of-rights clause may negate an intent to provide lifetime benefits. *Id.* at 401. In *Sprague*, the Sixth Circuit upheld the employer’s right to modify the plan, as stated in the plan document, even when SPDs did not include similar language. *Id.* at 401. Further, again in the non-unionized context, the Sixth Circuit held that benefits were not vested, even in the absence of reservation-of-rights language and even considering language that a surviving spouse shall receive benefits “until death or remarriage.” The court reached this conclusion because there was no language expressly demonstrating vesting. *Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660, 667-68 (6th Cir. 2000).

However, in the unionized context, the Sixth Circuit has held that “[c]ourts can find that rights have vested under a CBA even if the intent to vest has not been explicitly set out in the agreement,” *Maurer v. Joy Techs., Inc.*, 212 F.3d 907, 915 (6th Cir. 2000). Indeed, the Sixth Circuit has been universally regarded as the most claimant-friendly circuit when it comes to vesting of collectively bargained retiree health benefits. In *Int’l Union, United Auto., Aerospace & Agric. Implement Workers v. Yard-Man, Inc.*, 716 F.2d 1476, 1479 (6th Cir. 1983), the court held that the nature of collectively bargained benefits gives rise to an inference in favor of vested retiree health benefits. *See Yard-Man*, 716 F.2d at 1482 (stating that “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”); *see also Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 616 (6th Cir. 1985) (“This court has recognized . . . that retiree benefits normally vest as a matter of course upon an employee’s retirement and are interminable.”); *but see Int’l Union, United Auto., Aerospace & Agric. Implement Workers v. Cadillac Malleable Iron Co.*, 728 F.2d 807, 808 (6th Cir. 1984) (stating that “there is no legal presumption based on the status of retired employees”). Despite the *Yard-Man* decision creating an inference of vesting, until recently the Sixth Circuit effectively applied a de facto presumption of vesting. *E.g.*, *Maurer*, 212 F.3d 907; *McCoy v. Meridian Auto. Sys., Inc.*, 390 F.3d 417 (6th Cir. 2004).

In 2006, the Sixth Circuit backed away from the suggestion that *Yard-Man* established a formal presumption in favor of vesting, explaining that, despite iterations to the contrary, the court “has never inferred an intent to vest benefits in the absence of either explicit contractual language or extrinsic evidence indicating such an intent.” *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 580 (6th Cir. Jan. 17, 2006), *cert. denied*, 127 S. Ct. 555 (Nov. 6, 2006). Instead, “[a]ll that *Yard-Man* and subsequent cases instruct is that the court should apply ordinary principles of contract interpretation.” *Id.* The Supreme Court denied certiorari in *Yolton*. In a more recent case, the Sixth Circuit again affirmed that *Yard-Man* “does not create a legal presumption that retiree benefits are interminable.” *Noe v. PolyOne Corp.*, --- F.3d ---, 2008 WL 723769, at *2 (6th Cir. Mar. 19, 2008) (citing *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” and “resort to extrinsic evidence may be had to ascertain whether the parties intended for . . . benefits to vest.” *Id.* But the reality is that a body of case law has developed in the years since *Yard-Man* that routinely finds collectively bargained-for benefits to be vested based on language routinely found in CBAs with industrial unions.

In the Sixth Circuit, a general duration clause does not negate an intent to provide vested benefits under a CBA. *See Noe*, 2008 WL 723769, at *4 (“[A]bsent specific durational language referring to retiree benefits themselves, . . . general durational language says nothing about those retiree benefits.”) (quoting *Yolton*, 435 F.3d at 581). To be effective as to retiree health benefits, the duration clause must refer specifically to the benefits at issue. *See id.*; *see also Maurer*, 212 F.3d at 917-18 (“These clauses are general durational provisions for the entire agreement, and are not clearly meant to include retiree benefits.”). Additionally, vesting is presumed with pension tie-in provisions. *See Noe*, 2008 WL 723769, at *8; *see also Yolton*, 435 F.3d at 580; *McCoy*, 390 F.3d at 422; *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 656 (6th Cir. 1996). The Sixth Circuit has also concluded that lifetime language and

coordination with Medicare provisions are evidence of an intent to vest. *Noe*, 2008 WL 723769, at *11, *32-*33; *see also Policy*, 770 F.2d at 615.

Seventh Circuit: The Seventh Circuit claims that it makes no distinction between claims for vested benefits by non-unionized and unionized retirees. *Rosetto v. Pabst Brewing Co.*, 217 F.3d 539, 544 (7th Cir. 2000) (“The distinction between [CBAs] 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.”). In the non-unionized context, the Seventh Circuit has held that an ERISA claimant must point to “clear and express language” establishing a vested benefit. *Vallone v. CNA Fin. Corp.*, 375 F.3d 623, 632 (7th Cir. 2004), *cert. denied*, 543 U.S. 1021 (2004). Silence indicates that benefits are not vested. *Id.* With regard to specific language, the Seventh Circuit has held that, “when ‘lifetime’ benefits are granted by the same contract that reserves the right to change or terminate the benefits, the ‘lifetime’ benefits are not vested.” *Id.* at 634-35. Without a reservation-of-rights clause, “the presence of ‘lifetime’ language in several of the . . . plan documents—language uncontradicted by the agreement read in its entirety—defeats summary judgment.” *Bland v. Fiatallis N. Am., Inc.*, 401 F.3d 779, 786-87 (7th Cir. 2005).

For unionized retirees, if a CBA is silent as to vesting, then the Seventh Circuit will presume that the benefits were intended to expire with the agreement. *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 606-07 (7th Cir. 1993). Yet, under a CBA, a triable issue is presented where the contract contains “suggestive” language sufficient to establish an ambiguity as to the parties’ intent. *Rossetto*, 217 F.3d at 547. The Court will uphold a reservation-of-rights clause. *UAW v. Rockford Powertrain, Inc.*, 350 F.3d 698, 703 (7th Cir. 2003) (“Reading the document in its entirety, the clauses explain that although the plan in its current iteration entitles retirees to health coverage for the duration of their lives . . . the terms of the plan—including the plan’s continued existence—are subject to change at the will of [the employer].”). And the Seventh Circuit has stated that it will enforce a duration clause, unless the claimant can “show a latent ambiguity by means of objective evidence.” *Rossetto*, 217 F.3d at 547.

Eighth Circuit: For non-unionized retirees, the Eighth Circuit has explicitly rejected any presumption that favors vesting. *Howe v. Varsity Corp.*, 896 F.2d 1107, 1110 (8th Cir. 1990), *aff’d*, 516 U.S. 489 (1996). To prove vested benefits, an ERISA claimant must point to an express promise “incorporated, in some fashion, into the formal written ERISA plan,” *Hughes v. 3M Retiree Med. Plan*, 281 F.3d 786, 790 (8th Cir. 2002) (citation omitted). The Eighth Circuit has “repeatedly held that an unambiguous reservation-of-rights provision is sufficient without more to defeat a claim that retirement welfare plan benefits are vested.” *Stearns v. NCR Corp.*, 297 F.3d 706, 712 (8th Cir. 2002), *cert. denied*, 537 U.S. 1160 (2003). The Court also has explained that the use of predictive language—e.g., “[t]he Company fully intends to continue this Plan indefinitely”—“does not indicate finality” and, therefore, is not indicative of vesting. *Hughes*, 281 F.3d at 792 (emphasis added).

The Eighth Circuit follows a similar approach for unionized retirees. The court has expressly disagreed with the *Yard-Man* holding and any inference of vesting. *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d at 1517 (“[W]e believe that it is not at all inconsistent with labor policy to require plaintiffs to prove their case without the aid of gratuitous inferences.”) The Eighth Circuit has found that reservation-of-rights clauses must be given their “plain and obvious” meaning; i.e., benefits can be changed. *United Paperworkers Int’l Union*, 961 F.2d at 1385-86. Similarly, duration clauses are considered “inconsistent with an intent to vest health benefits for life.” *John Morrell & Co. v. United Food & Commercial Workers Int’l Union*, 37 F.3d 1302, 1307 (8th Cir. 1994); *see also Anderson*, 836 F.2d at 1519 (“It would render the durational clauses nugatory to hold that benefits continue for life even though the agreement which provides the benefits expire on a certain date.”). And the Eighth Circuit has held that a coordination-of-benefits clause is “inconsistent with vesting.” *John Morrell & Co.*, 37 F.3d at 1307; *Anderson*, 836 F.2d at 1519.

Ninth Circuit: For non-unionized retirees, the Ninth Circuit does not apply a presumption in favor of vesting. It does appear to apply the clear and express statement requirement. *See Babikian v. Paul Revere Life Ins. Co.*, 63 F.3d 837, 842 (9th Cir. 1995) (“We hold that, under the terms of the group

policy, Babikian's benefits did not vest. *No express language in the policy* states that it was intended to provide vested, lifetime benefits.") (emphasis added); *see also Cinelli v. Sec. Pac. Corp.*, 61 F.3d 1437, 1441 (9th Cir. 1995) (citing and quoting in a parenthetical sentence the Fifth Circuit's opinion in *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir. 1993) ("Such extra-ERISA commitments must be found in the plan documents and must be stated in clear and express language."). The Ninth Circuit has taken a circumspect view of lifetime-benefits clauses: "[T]he use of the word 'lifetime' in a policy does not create maximum lifetime coverage but rather defines the maximum benefit allowed if one is insured throughout his or her lifetime." *Babikian*, 63 F.3d at 840 (internal quotation marks, citation, and ellipses omitted). It has enforced a reservation-of-rights clause, even though another provision within the documents at issue provided for "lifetime" benefits. *Pisciotta v. Teledyne Indus.*, 91 F.3d 1326, 1330-31 (9th Cir. 1996). Finally, the Ninth Circuit has stated that the existence of a termination clause "weighs heavily against concluding" that the employer intended to provide vested benefits. *Babikian*, 63 F.3d at 841.

While there is not an extensive body of law regarding retiree health claims of unionized retirees, the Ninth Circuit appears to apply the principles of ordinary contract interpretation to determine if anything "in the language of the [CBA] . . . would prevent amendment by the unions and the employers." *Turner v. Local Union No. 302, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers*, 604 F.2d 1219, 1226 (9th Cir. 1979). The court has enforced durational language, holding that a series of CBAs, each of which provided that health benefits would be provided for "throughout the term of this agreement," indicated that "benefits were subject to termination at the end of any of the [CBAs]." *Id.* at 1225.

Tenth Circuit: For benefit claims of non-unionized retirees, the Tenth Circuit does not appear to apply any sort of presumption—for or against vesting. The court, however, has explained that, because welfare benefits represent "an extra-ERISA commitment," "clear and express language" is required to vest such benefits. *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1515 (10th Cir. 1996). Although the court has not gone so far as to hold that a *general* reservation-of-rights clause can trump a more specific provision suggestive of vested benefits, *see id.* at 1511-12 & n.2 (recognizing that the "weight of case authority" supports the conclusion that a *general* reservation-of-rights provision is controlling), it has enforced the terms of a *specific* reservations-of-rights clause—that is, where the company stated that it "retained the right to change" the *specific* benefits at issue. *Id.* at 1512; *see also Welch v. Unum Life Ins. Co.*, 382 F.3d 1078, 1086 (10th Cir. 2004) (enforcing the terms of such a clause where there was no affirmative evidence supporting vesting).

In regard to unionized retirees, the Tenth Circuit offers limited guidance. It appears that the Court will not enforce a durational clause if a CBA also includes some kind of "lifetime" language. *Aguilar v. Basin Res., Inc.*, 49 Fed. App'x 872, 875 (10th Cir. 2002) (finding a CBA that provided benefits "for life" while also guaranteeing benefits for the "term" of the agreement to be ambiguous). With such competing language, the Tenth Circuit will evaluate extrinsic evidence such as the structure of the agreement, the parties' past practices, the parties' negotiation history (including bargaining notes), and the "common law of the shop." *Id.* at 875-76.

Eleventh Circuit: The Eleventh Circuit does not apply presumptions in analyzing claims for benefits brought by non-unionized employees. But it also does not apply the clear and express language test. *Jones v. Am. Gen. Life & Accident Ins. Co.*, 370 F.3d 1065, 1070, *reh'g, en banc, denied*, 116 Fed. App'x. 254 (11th Cir. 2004) ("Because we apply the doctrine of *contra proferentem* to resolve ambiguities in ERISA-governed plans, an ERISA plaintiff is generally not required to demonstrate his entitlement . . . in clear and express language in the relevant provisions . . . in order to make out a Section 502(a)(1)(B) 'breach of contract' claim.") (citation omitted). Instead, a claimant can proceed "if he can establish that the plan at issue is at least ambiguous with respect to the relevant benefits for which he claims entitlement." *Id.* The Eleventh Circuit has followed those circuits that hold that an unambiguous reservation-of-rights clause forecloses a claim of vesting based on a lifetime benefits provision. *Id.* at 1070-71.

In the unionized context, the Court also follows traditional rules of contract interpretation. *Stewart v. KHD Deutz of Am., Corp.*, 980 F.2d 698, 702 (11th Cir. 1993). However, it has found ambiguity in a provision that appeared to admit to only one conclusion: “‘Upon the expiration or termination of this Agreement, the Company shall have the right to continue the Plans covered herein or to amend, modify, suspend or discontinue the Plans.’” *Id.* at 701. The court held this provision was ambiguous because it “[did] not specify whether the right to modify the plan after the CBA expire[d] include[d] the right to adjust the benefits received by workers who retired . . . or only permit[ed] [the company] to change the benefits future retirees [would] receive.” *Id.* at 703. The court has not addressed the other types of language recounted above.

District of Columbia Circuit: The District of Columbia Circuit has not issued an opinion addressing whether an employer agreed to provide its employees or retirees with vested health benefits.

C. Strategic Issues in Litigating Unilateral Modification or Termination of Retiree Health Benefits

1. Should the Employer File a Declaratory Judgment Action?

A relatively novel option for employers who want to amend retiree health plans is to file a declaratory judgment against a defendant class consisting of retirees. In such an action the employer would seek a ruling that the employer’s actions are allowed under the applicable collective bargaining agreement or ERISA plan. Such a declaratory action may be brought pursuant to ERISA or LMRA. There are strategic advantages to be gained by such an action, the first of which is gaining control over the forum. As explained above, the Sixth Circuit is an inhospitable forum in which to litigate the vesting issue for collectively bargained retiree health benefits. Preemptive action can allow an employer to avoid undesirable jurisdictions, such as the Sixth Circuit. Additionally, a declaratory judgment action can be used as a bargaining tool. Retirees may desire to compromise rather than risk an adverse court ruling. There is, however, risk in pursuing declaratory judgment actions. First, they can antagonize unions and/or retirees. Second, it is impossible to predict their success. Few courts have dealt with preemptive declaratory judgment actions in this context, and the law is, at best, unsettled.

Viability of Declaratory Judgment Actions Based on ERISA. There are several hurdles that employers need to overcome to successfully bring a declaratory judgment action under ERISA. As set forth above, there are few published decisions involving declaratory judgment actions in this context. Nonetheless, the keys to success are fairly discernable.

A claim for a declaratory judgment under ERISA should be brought pursuant to § 502(a)(3) and must allege that the employer is a (1) “fiduciary” of the plan that (2) seeks “other appropriate equitable relief” (3) “to enforce [] provisions” of the plan. Thus, one of the keys to a successful declaratory judgment action is to ensure the employer is suing in its fiduciary capacity as plan administrator, and not merely as an employer-sponsor; the allegations in the complaint must make that clear.

A second issue is the creation of a true case or controversy to satisfy Article III standing. A declaratory judgment action should not be brought unless the employer has undertaken conduct to demonstrate Article III standing. Practically speaking, the employer should at least clearly manifest its intent to modify retiree health benefits, and the better course is to actually and formally amend the plan to affect the changes. If an employer wishes to bring a declaratory judgment action to avoid being sued first and have more control over venue, the more aggressively such employer acts to establish a controversy prior to filing its action the more likely retirees or a union will, in response, bring their own preemptory lawsuit. In other words, once “the cat is out of the bag,” the employer needs to move very swiftly to the courthouse.

Decisions Prohibiting ERISA Declaratory Judgment Actions. In *Pabst Brewing Co., Inc., v. Corrao*, 176 F.R.D. 552, 561 (E.D. Wis. 1997), *aff'd*, 161 F.3d 434 (7th Cir. 1998), the lower court found, and the Court of Appeals affirmed, that the Declaratory Judgment Act does not grant subject matter jurisdiction for a declaratory judgment action based on an employer-initiated ERISA action. *See Pabst*, 176 F.R.D. at 559-60. Specifically, the court reasoned that ERISA does not allow for an employer as such to bring a section 502(a) action, inasmuch as ERISA jurisdiction is limited to cases brought by plan participants, beneficiaries, or fiduciaries. *Id.* at 559-61.

Also, in *Crown Cork & Seal Co. v. Int'l Ass'n of Machinists & Aerospace Workers*, No. 8:03CV222, slip op. (D. Neb. Jan. 20, 2004), the district court dismissed an employer's declaratory judgment action for failure to state a claim. The court ruled that "in seeking a declaration . . . to determine if it is warranted to modify (that is, reduce) retiree's [sic] benefits, [the employer] has not stated a cause of action to 'enforce' the plan" under Section 503(a)(3). *Id.* at *8. Rather, the employer merely sought clarification of its rights under the plan and "ERISA reserves such a cause of action exclusively to participants and beneficiaries." *Id.* at *7 (citing 29 U.S.C. § 1132(a)(1)(B)). On appeal, the Eighth Circuit did not address the propriety of the employer's request for declaratory judgment. Instead, it held that the retiree health benefits at issue did not vest, so that the employer did not violate the terms of the contracts by modifying those benefits. *Crown Cork & Seal Co. v. Int'l Ass'n of Machinists & Aerospace Workers*, 501 F.3d 912, 919 (8th Cir. 2007). With such a ruling, the Court held that it would be "impossible" to address the district court's dismissal of the declaratory judgment action, "regardless of how [the Court] might decide. . . ." *Id.* at 920.

Decisions Permitting ERISA Declaratory Judgment Actions. Other courts have permitted ERISA-based declaratory judgment actions to proceed. For example, in *Rexam, Inc. v. United Steelworkers of America*, No. 03-2998, 2003 WL 22477858 (D. Minn. Oct. 30, 2003), a district court held that a declaratory judgment action by an employer for declaratory relief was an appropriate vehicle for determining the permissibility of proposed benefit modifications under the terms of the plans. *Id.* at *1. Denying the defendants' motion to dismiss, the court noted that "federal courts have 'regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question.'" *Id.* at *2 (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 19 (1983)). In the context of ERISA, the court stated that "federal courts have held that the [Declaratory Judgment] Act provides federal question jurisdiction in cases where insurers seek declaratory relief regarding ERISA-governed policies, since insurance recipients could bring coercive actions under ERISA." *Rexam, Inc.*, 2003 WL 22477858, at *2 (citing *Prudential Ins. Co. v. Doe*, 76 F.3d 206, 210 (8th Cir. 1996); *Transamerica Occidental Life Ins. Co. v. Digregorio*, 811 F.2d 1249, 1253 (9th Cir. 1987)).

Applying this framework, the District Court concluded that Rexam adequately stated a claim for declaratory relief because there was a viable Article III controversy, and because the defendant retirees could have brought a coercive action against Rexam to enjoin the modifications to their benefits. (This dispute has since resulted in a joint settlement agreement approved by the district court. *Rexam, Inc. v. United Steelworkers*, 2007 U.S. Dist. LEXIS 68654 (D. Minn. 2007).)

Similarly, in *John Morrell & Co. v. United Food & Commercial Workers Int'l Union*, 825 F. Supp. 1440, 1442-43 (D.S.D. 1993), *aff'd*, 37 F.3d 1302 (8th Cir. 1994), the court allowed an employer's declaratory judgment claim under ERISA against a class of defendant retirees to proceed to judgment where the employer sought a declaration "that it is entitled to unilaterally modify or terminate programs of health benefits provided to its retired hourly employees."

Likewise, in *Rodriguez v. Tenn. Laborers Health & Welfare Fund*, 463 F.3d 473 (6th Cir. 2006), the Sixth Circuit affirmed the propriety of declaratory judgment actions under ERISA, albeit in the context of a claim for relief by a participant against a fund. On appeal, the fund argued that the district court lacked subject matter jurisdiction "because neither part (A) nor part (B) [of section 502(a)(3)] confers jurisdiction over a claim for declaratory relief." *Id.* at 475. In rejecting this claim, the Sixth

Circuit recognized that “in many actions for declaratory judgment, the realistic position of the parties is reversed” in that “[t]he plaintiff is seeking to establish a defense against a cause of action which the declaratory [judgment] defendant may assert” *Id.* at 476 (quoting *Pub. Serv. Comm’n v. Wycoff Co.*, 344 U.S. 237, 248 (1952)).

Viability of Declaratory Actions Based on LMRA. Unlike declaratory actions brought under ERISA, there is little doubt that employers may file declaratory actions under LMRA. *See Stevens Constr. Corp. v. Chicago Reg’l Council of Carpenters*, 464 F.3d 682 (7th Cir. 2006) (affirming lower court’s grant of declaratory judgment in favor of employer that termination provision of contract was not arbitrable); *Mack Trucks, Inc. v. Int’l Union, United Auto., Aerospace & Agric. Implement Workers, UAW*, 856 F.2d 579 (3d Cir. 1988) (affirming lower court grant of declaratory relief for employer who brought action under Section 301 of LMRA); *Bulkmatic Transp. Co. v. Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers & Union Local 407*, 213 F. Supp. 2d 946 (N.D. Ind. 2002) (granting in part motion for declaratory judgment that collective bargaining agreement at one facility did not apply to employees at another facility). While courts may exercise discretion in whether to hear declaratory judgment actions under LMRA, as one court stated, “[t]he discretionary nature of the district court’s exercise of jurisdiction in declaratory judgment actions does not mean that the decision to abstain can be made as ‘a matter of whim or personal disinclination.’” *U.S. Fid. & Guar. Co. v. Murphy Oil USA*, 21 F.3d 259, 261 (8th Cir. 1994) (quoting *Pub. Affairs Ass’n., Inc. v. Rickover*, 369 U.S. 111, 112 (1962) (per curiam)). Courts should exercise jurisdiction when doing so (1) will serve a useful purpose in clarifying the legal questions in issue, and (2) will terminate and afford relief from the uncertainty and controversy giving rise to the proceedings. *See Alsager v. Dist. Ct. of Polk County (Juvenile Div.)*, 518 F.2d 1160, 1163-64 (1975), *aff’d*, 545 F.2d 1137 (8th Cir. 1976).

Thus, where the employer can argue that the collective bargaining agreement allows the employer to make changes to retiree health benefits, it is possible for the employer to file a declaratory action under LMRA. This may be a particularly viable option where the CBA incorporates by reference ERISA plan documents. It is not clear what effect a ruling under LMRA would have on retiree’s ERISA claims. Complex issues of claim preclusion, *stare decisis*, full faith and credit and *res judicata* might be involved, and courts have not yet been faced with deciding such issues in a similar context.

2. Potential Union/Retiree Responses to Declaratory Judgment Actions

File Parallel Action in Favorable Circuit. One of the principal ways unions and retirees have sought to attack preemptive declaratory actions is to file parallel actions in more favorable jurisdictions (such as the Sixth Circuit), and attempt to have the cases transferred to their choice forum. For example, in *Sloan v. BorgWarner Diversified Transmission Prods. Inc.*, No. 06-10861, 2006 WL 1662634 (E.D. Mich. June 9, 2006), the employer, BorgWarner Diversified Transmission Products (“DTP”) filed a preemptive declaratory action in the Southern District of Indiana. *Id.* at *1. A few weeks later, Sloan, a retiree representing a class of retirees, filed a parallel action in the Eastern District of Michigan. *Id.* The employer filed a motion to transfer the case filed by the retirees in Michigan to Indiana, where the first action was filed. *Id.* The retirees claimed that the first to file rule did not apply to declaratory actions and the employer could not meet its burden in showing a transfer was proper. *See id.* Because the employer filed three days after announcing cuts to retiree benefits, the court concluded the employer’s action was likely a preemptive strike, and refused to transfer the case to the employer’s choice venue. *See id.* at *2. After analyzing several other factors, including convenience of the witnesses, locus of operative facts, access to sources of proof, availability of process to compel unwilling witnesses, costs and the interest of justice, the court granted the motion to transfer. *See id.* at **3-9. Considering the differences in jurisprudence between the Sixth and Seventh Circuits, there can be no question it was an advantage to the employer to be able to litigate the merits of its action in the Southern District of Indiana.

Similarly, in *Rexam, Inc. v. United Steelworkers*, No. Civ. 03-2998 ADM/AJB, 2003 WL 22477858 (D. Minn. Oct. 30, 2003), the union filed suit in the Northern District of Ohio after the employer filed

a declaratory judgment action in the District of Minnesota. The employer asked the Minnesota court to enjoin the union's action in Ohio. In deciding whether to grant the employer's motion, the court examined whether there was any indicia that the employer's action was filed solely to deprive the natural plaintiffs of their choice of venue. The court granted the employer's motion. First, the employer's action was filed several months after the parties had ceased communicating and after litigation had been threatened, thus, there was no "race to the courthouse" that could be inferred from the employer's actions. *See id.* at *3. Second, the court credited the employer's assertion that it needed to file the declaratory action to resolve several pending grievances filed by retirees, and to make changes to the benefits that would have an immediate impact on the company's financial status, affecting its ability to obtain loans. *Id.* Finally, the court reasoned that since the employer had nationwide operations, there was no reason why one venue would be more appropriate than another. *See id.* at **3-4. The employer had substantial operations in Minnesota and more than 100 retirees lived in Minnesota. *Id.* As in *Sloan, supra*, the employer obtained the benefit of litigating the merits of its action in a substantially more favorable jurisdiction by initiating a declaratory judgment action.

However, in *Crown Cork & Seal Co., Inc. v. United Steelworkers*, No. 03-CV-1381, 2004 WL 117923 (W.D. Pa. Jan. 9, 2004), the court found that the employer's filing of a declaratory judgment action was a preemptive strike because it was filed three days after the company announced changes to retiree benefits, effectively foreclosing the union's option of filing in the forum of its choice. *See id.* at **2-3. The court therefore dismissed the action before it, allowing the parallel action filed by the union in Ohio to proceed.

Move to Dismiss on Grounds that Dispute is Arbitrable. Another possible response to an employer initiated declaratory judgment action is a motion to dismiss by the union on the grounds that the dispute is arbitrable. When a court is asked to determine whether a dispute over changes to retiree health plans is arbitrable, it must first determine whether the arbitration provision in the parties' contract encompasses the dispute. *See United Steelworkers v. Duluth Clinic, Ltd.*, 413 F.3d 786, 788 (8th Cir. 2005); *Indep. Lift Truck Builders Union v. Hyster Co.*, 2 F.3d 233, 235-36 (7th Cir. 1993) (reversing in part lower court's decision compelling arbitration of changes to retiree health plan because lower court failed to first determine whether collective bargaining agreement applied to retirees). Generally, the rights of retirees to health benefits are part of a collective bargaining agreement, such that the arbitration provision encompasses the dispute.

Because the dispute at issue is typically a post-contract expiration grievance, the court will next determine whether the obligation to arbitrate outlasts the expiration of the agreement. Generally, the Supreme Court has held that a post-arbitration grievance is arbitrable only if it relates to a right or obligation that survives the expired agreement, and thus continues to "arise under the contract." *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190 (1991); *Nolde Bros., Inc. v. Bakery & Confectionery Workers Union*, 430 U.S. 243 ("Nolde"), *reh'g denied*, 430 U.S. 988 (1977). Post-expiration grievances can be said to arise under the contract where they involve facts that arose before expiration, where an action taken after expiration infringes a right that was accrued or vested under the agreement, or where the disputed contractual right survives expiration of the remainder of the agreement. *Litton*, 501 U.S. at 205-06. The determination of whether or not a post-expiration grievance is arbitrable will turn largely on whether the right at issue accrued and vested during the course of the contract.

For example, in *Local Lodge 470 of Dist. 161 v. PPG Indus., Inc.*, No. Civ.A. 01-2110, 2006 WL 901927 (W.D. Pa. Mar. 31, 2006) in which the union sued the employer to compel arbitration of a grievance based on the employer's unilateral changes to retiree health benefits, the court carefully analyzed whether the rights at issue had vested during the life of the contract. *See id.* at *8. Because the contracts at issue stated the employer would continue benefits "for the duration of such agreement . . .," the court concluded that the rights at issue expired at the end of the contract and were thus not vested rights. *Id.* The court also concluded there was no obligation for the employer to arbitrate the violation of rights that did not survive the contract. *Id.* at *2. *See also Crown Cork & Seal Co. Inc. v. International Ass'n of Machinists & Aerospace Workers, AFL-CIO*, 2007 U.S. App. Lexis

22207 (8th Cir. Mar. 28, 2007) (reversing the district court's order to compel arbitration of a dispute regarding retiree health care benefits by holding that, under the language of the relevant plan documents, the benefits at issue did not vest and could be modified); *International Chemical Workers Union Council of the United Food and Commercial Workers Union, Local 45C and 776C v. PPG Indus., Inc.*, 236 Fed. App'x 789 (3d. Cir. 2007) (affirming district court's decision that court must first determine if retiree benefits had vested before compelling arbitration, and finding that under terms of contracts, benefits were not vested).

D. Unilateral Enforcement of Employer Caps

In addition to modifying or terminating retiree health benefits for existing retirees, some employers enforce side letters to collective bargaining agreements that place a cap on the amount the employer will contribute ("cap letters"). As more employers hit their cap and decide to require contributions from retirees to make up the shortfall, litigation has ensued. Retirees, or unions, argue that the caps were never meant to be enforced but were merely an accounting accommodation. Some cap letters specifically state they are entered into as a response to FAS 106. *See, e.g., Wood v. Detroit Diesel Corp.*, 213 Fed. App'x 483, 469 (6th Cir. Jan. 17, 2007) ("[T]he purpose [of the cap letter] was to alter [the company's] method of funding health care coverage in order to meet the new accounting requirements of 'Financial Accounting Standard 106' while simultaneously minimizing any negative impact of such accounting disclosures on its ability to attract investors."). Employers, however, routinely claim that cap letters are subject to future enforcement. *See, e.g., Yolton*, 435 F.3d at 575 n.3 (employers "intended the Letter to be a 'cost-sharing agreement'" with its retirees whereby their obligations for retiree health benefits would be limited effective a date certain).

In *Lemon v. BWX Techs., Inc.*, 442 F. Supp. 2d 460 (N.D. Ohio 2006), the court held that the employer did not breach the terms of its CBA when it sought to enforce its cap letter. The court found "there [was] no ambiguity" in the language of the cap letter, which "clearly require[d] that the Retirees pay for any costs above the cap amounts." *Id.* at 470. Thus, the retirees' Section 301 LMRA claim for breach of contract failed. Employers will want to rely on this reasoning in future cap litigation.

E. Employer's Modification of Retiree Health Benefits in Bankruptcy

For companies in bankruptcy, the power to unilaterally modify non-vested retiree health benefits may be limited by Section 1114(e)(1) of the Bankruptcy Code. 11 U.S.C. § 1114(e)(1). That provision provides that "[n]otwithstanding any other provision of this title, the debtor in possession, or the trustee if one has been appointed under the provisions of this chapter . . . , shall timely pay and shall not modify any retiree benefits" without either judicial approval following a noticed hearing or consent of retirees' representatives.

Section 1114 as a Potential Obstacle to Unilateral Modification. The courts are mixed as to whether Section 1114 imposes an obstacle to otherwise valid modification of retiree benefits. Several courts have held that an employer in bankruptcy need not comply with Section 1114(e)(1)'s requirements where the employer has reserved its right to modify or terminate retiree health benefits. *See, e.g., In re New Valley Corp.*, Civ. A. No. 92-4884, 1993 WL 818245, at *5 (D.N.J. Jan. 28, 1993) (affirming bankruptcy judge's ruling that Section 1114 did not apply to cutbacks in retiree health benefits employer implemented as part of its proposed reorganization where employer had expressly reserved the right to modify or terminate retiree health benefits); *In re Doskocil Cos.*, 130 B.R. 870, 877 (Bankr. D. Kan. 1991) (ruling that Section 1114 did not apply to employer's adjustments to retiree health benefit plan whose description unambiguously allowed amendment, modification, or termination of benefits).

Other courts, however, have held that an employer in bankruptcy must comply with Section 1114's rules and procedures, regardless of whether the debtor otherwise has the right to unilaterally terminate retiree health benefits. *See, e.g., In re Farmland Indus., Inc.*, 294 B.R. 903, 914 (Bankr. W.D. Mo.

2003) (“In this Court’s view, § 1114 prohibits a debtor from terminating or modifying any retiree benefits (as defined in that section) during a Chapter 11 case unless the debtor complies with the procedures and requirements of § 1114, regardless of whether the debtor has a right to unilaterally terminate the benefits.”); *In re Hanlin Group, Inc.*, Case No. 91-33872 (Bankr. D.N.J. May 26, 1992) (holding that a reservation of right to terminate should not limit the application of Section 1114).

At least one court has drawn a distinction between modification of a retiree health benefit plan and termination of that plan, ruling that Section 1114(e)(1) restricts an employer’s right to modify but not to terminate the plan. *See In re N. Am. Royalties, Inc.*, 276 B.R. 860, 866 (Bankr. E.D. Tenn. 2002) (stating that “Section 1114 limits the debtor’s contractual right, if any, to modify retiree benefits without consulting the retirees. It says nothing about whether the debtor can exercise a power reserved in the contract to terminate it Despite § 1114, the debtor can terminate the contract as allowed by its terms.”).

Given the above, an employer in bankruptcy wishing to unilaterally modify retiree health benefits will need to determine whether the bankruptcy law in the jurisdiction requires that Section 1114 procedures be followed even where the retiree health benefits are not vested.

Procedural Considerations. Although Section 1114 may permit an employer to modify its retiree benefit obligations, once invoked, there is nothing unilateral about the 1114 process. Before a debtor employer may request the bankruptcy court to order modification or termination of retiree benefits, the employer must negotiate with the authorized representative of the retirees – either the union pursuant to whose contract the benefits are provided, or a committee of retirees appointed by the U.S. Trustee. *See* 11 U.S.C. §§ 1114(c), (d). Under Section 1114, it is only through agreement with the authorized representative or, if the debtor and authorized representative do not reach an agreement, with court authorization pursuant to the standards set forth in Sections 1114(g) or (h) of the Bankruptcy Code, that such modifications or termination may be made.

The procedure requires the debtor to make a written proposal to the authorized representative, which must be based on the most complete and reliable information available at the time of the proposal. The proposal must contain only those modifications that are “necessary to the reorganization of the debtor,” and that assure that all creditors, the debtor, and all of the affected parties are treated fairly and equitably. 11 U.S.C. § 1114(f)(1)(A). After the proposal is made, the debtor must meet at reasonable times with the authorized representative, confer in good faith to reach agreement on modifications, and provide the authorized representative with all relevant information necessary for it to evaluate the proposal. *Id.* at §§ 1114(f)(2), (f)(1)(B). Only if the authorized representative refuses to accept the proposal without good cause may the employer seek to have the court order the modifications, which the court may do only if it determines after a hearing that the requirements have been met and the equities clearly favors modification or termination. *In re Ionosphere Clubs, Inc.*, 134 B.R. 515, 519-20 (Bankr. S.D.N.Y. 1991) (adopting *In re American Provision Co.*, 44 B.R. 907, 909 (Bankr. D. Miss. 1984)). The moving debtor has the burden of proof on all elements, and each must be proven by a preponderance of the evidence. *See Nat’l Forge Co. v. Indep. Union of Nat’l Forge Emples. (In re Nat’l Forge Co.)*, 289 B.R. 803, 810 (Bankr. W.D. Pa. 2003); *In re Bowen Enterprises, Inc.*, 196 B.R. 734, 741 (Bankr. W.D. Pa. 1996); *In re Liberty Cab & Limousine Co.*, 194 B.R. 770, 776 (Bankr. E.D. Pa. 1996). Once a debtor has established prima facie satisfaction of these requirements, the burden shifts to the authorized representative to prove the debtor’s failure to meet one or more of the elements. *American Provision*, 44 B.R. at 909-10.

Section 1114 deals only with retiree benefits. Where the workforce is unionized, it is likely that the debtor employer will need to terminate or modify not only the benefits of current retirees, but also those of future retirees who are currently active employees. Although there was once a debate concerning the application of Section 1114 to the retiree benefits of former employees then retired and actives who would retire in the future, courts recognize that Section 1114 protects only the retiree benefits of pre-petition retired employees. *See Farmland Indus.*, 294 B.R. at 919; *In re Crafts*

Precision Indus., Inc., 244 B.R. 178, 184 (B.A.P. 1st Cir. 2000) (“the legislative history of the Act clearly reveals that the statute is intended to benefit retirees specifically”). If the employer is to terminate benefits for future retirees, it will have to use the Section 1113 process to modify or reject the collective bargaining agreement(s) providing for such benefits. As a practical matter, most debtor employers with unionized workforces that attempt to modify or terminate retiree benefits will be hard pressed to avoid a combined Section 1113/1114 process. For one thing, to be “fair and equitable” to all constituencies, 11 U.S.C. § 1114(f)(1)(A), the employer would likely need modifications in the economic terms and conditions of active employees, which are in the labor contract.

Section 1113 contains the same requirements regarding proposals and negotiations, and applies the same general standards as are applied in Section 1114, which is not surprising, considering that Section 1114 was modeled on Section 1113. *See In re Ionosphere*, 134 B.R. at 519-20. Also not surprising is that the party on the other side of the table from the employer in Section 1113 negotiations is the union that represents its employees. This is likely the same party involved in the Section 1114 negotiations relating to retiree benefits for unionized retirees. *See* 11 U.S.C. § 1114(c)(1). As a result, these discussions and proposals often tend to merge.

Practical Considerations. While the intricacies of the standards and procedures applicable to bankruptcy proceedings is beyond the scope of this paper, a cursory reading of the statute might suggest that the Section 1113/1114 process in bankruptcy provides an orderly and expedited way to shed retiree medical benefits liabilities. In fact, modifying or eliminating retiree benefits obligations may be more difficult in bankruptcy than outside of it.

First, the process is not expedited. Because of the information requirements, the union/authorized representative is entitled to any information available to the debtor that will aid evaluation of the proposal. This includes financial information, operational information, and information about future production plans. Since the eventual plan of reorganization and the financial and operational restructuring of the debtor will likely be based on a business plan projecting years into the future, the union/authorized representative will be entitled to receive information relating to those plans and any background data that might help them to understand such information. They will engage professionals to aid them in this process, who likely will request and analyze a much broader range of information than the employer is normally accustomed to provide to unions. Moreover, inasmuch as the business plan and the plan of reorganization are ever-evolving and dependent upon the progress of the reorganization, there is every incentive for the union/authorized representative to reach agreement later rather than sooner, once the overall landscape and the contributions of other constituencies toward improving the debtor’s financial condition are clearer.

Second, because of the obligation that the proposal must treat all constituencies in a fair and equitable manner, the union/authorized representative will inquire into, and negotiate about, a host of issues that an employer outside of bankruptcy might not have an obligation to bargain over. Matters that concern a core entrepreneurial concern over which the employer may not be obligated to bargain, see *First Nat’l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), terms and conditions of non-bargaining unit employees, compensation of executives, union participation on boards of directors – these are but examples of items that have been subjects of bargaining under Sections 1113 and 1114.

Third, unlike normal collective bargaining, the bargaining under Sections 1113 and 1114 involves others besides the two parties at the table. Since bankruptcy traditionally involves a zero sum game, in which an amount paid to one creditor potentially comes out of the pocket of another, any agreement reached will be subject to challenge – by committees of unsecured creditors, bondholders, or other interests. For example, a creditor group might have a different view of the validity of an employer’s claim that retiree benefits are not vested than does either the debtor or the union/authorized representative. As a result, it is not uncommon to find that alliances form and shift during the negotiations, which can affect the substance and the speed with which they can be accomplished.

Fourth, because of the above-described merger of the Section 1113/1114 process, the price of achieving the employer's savings goals with respect to retiree benefits may be modifications to the terms and conditions in the labor agreement, including restrictions on outsourcing or subcontracting, profit sharing, union participation in workplace decisionmaking, or other contractual changes that the employer might otherwise wish to leave alone. It is unlikely that the union will permit the employer to play off the interests of retirees against those of active employees. Rather, it will attempt to use its bargaining leverage of the combined process to the advantage of both constituencies.

Fifth, if agreement cannot be reached on the contract issues, and the debtor succeeds in persuading the court to grant Section 1113 relief, the relief granted is rejection of the labor agreement, not its modification by the court. Once a court authorizes rejection of the labor agreement, the debtor is not rid of the union; it is simply rid of the contract, and must then head back to the table — the same contentious table at which discussions broke down thereby causing the debtor to move the court for rejection authorization — and try again. Thus, while the employer is authorized to unilaterally make the changes to terms and conditions contained in its final proposal, *see Hi-Way Billboards*, 206 NLRB 22, 23 (1973), it still has an obligation to bargain with the union over a new contract.

Rejection of a labor contract under Section 1113 also brings termination of some of its provisions: arbitration provisions, dues check-off provisions and any no strike clause. A union is therefore free to engage in an economic strike, perhaps engage in a sympathy strike at other locations, marshal retirees to picket or otherwise disrupt production through protected activities. *But see Northwest Airlines Corp. v. Ass'n of Flight Attendants-CWA, AFL-CIO*, 483 F.3d 160, 166-68 (2d. Cir. 2007) (upholding district court's preliminary injunction and holding that in circumstances involving application of the Railway Labor Act ("RLA"), the RLA forbids an immediate strike subsequent to a bankruptcy court's Section 1113 rejection of a CBA; only once the re-negotiation and dispute resolution processes are fully exhausted does the CBA expire, "freeing the parties from their contractual obligations" and the RLA's rules requiring preservation of the *status quo*). The union can also work with other constituencies in the bankruptcy and apart from it, such as seeking to negotiate with the creditors, as occurred in the LTV bankruptcy. The union may form alliances with other constituencies to oppose actions proposed by management. It may also engage in corporate campaigns aimed at customers, suppliers or the public. The debtor, on the other hand, theoretically has the same rights it would under the NLRA outside of bankruptcy. In a strike situation, it may temporarily replace employees to maintain production. *See Capitol-Husting Co.*, 252 NLRB 43, 45 (1980). In an economic strike, it may permanently replace striking employees. *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938). If the union does not strike, the debtor may engage in a lockout. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965). And of course, if impasse is reached after returning to the table, the employer may implement its last, best and final offer. *See Hi-Way Billboards*, 206 NLRB at 23. Practically speaking, however, a debtor's options are more limited in bankruptcy, as the traditional collective bargaining calculus is wholly different. In the traditional setting, the company ordinarily uses such economic weapons and absorbs short term costs to achieve long term gains. In bankruptcy, the debtor is a fiduciary for the interests of creditors who likely have a shorter term focus -- specifically, successful emergence.

Thus, although Sections 1113 and 1114 appear to be a strong tool for the employer in bankruptcy to use to litigate a modification of its benefits obligations, in practice, they are arguably more effective when they are used to effectuate a negotiated resolution, as they were recently in *In re Dana Corp.*, Case No. 06-10354 (Bankr. S.D.N.Y. July 26, 2007) (Docket No. 5879). There, the employer proposed the termination of the company's obligation to provide retiree benefits. After initial unsuccessful negotiations, the company filed motions under Sections 1113 and 1114 to modify labor contracts and retiree benefits. While the litigation progressed, the parties negotiated on a parallel track. After agreement was reached with the official Retiree Committee and the IAM, the UAW, USW and Dana eventually reached an agreement that permitted Dana to eliminate its retiree benefits obligations upon the establishment of two VEBAs upon emergence from bankruptcy, each run by a mixture of independent and union-appointed trustees. In total, Dana agreed to a post-reorganization payment of a

maximum of \$765 million: \$465.8 million to a VEBA established for UAW retirees and certain disabled employees and \$299.2 million to a separate VEBA established for USW retirees and disabled employees. These contributions were to be decreased by the amount Dana paid in benefits between July 1, 2007 and the effective date of the VEBAs. The global settlement agreement between the parties further provided for modifications to a multitude of collective bargaining agreements, including modifications to wages and benefits. Taken together, the global settlement agreement reached with all unions and the Retiree Committee representing salaried and non-union retirees resulted in modifications that saved Dana over \$100 million annually, and eliminated an OPEB obligation of over \$1.4 billion. The U.S. Bankruptcy Court for the S.D.N.Y. granted approval of the settlement agreements between Dana, the UAW and the USW on July 26, 2007. *In re Dana Corp.*, Case No. 06-10354 (Docket No. 5879). On December 26, 2007, the court confirmed Dana's Plan of Reorganization reflecting, *inter alia*, these agreements, *In re Dana Corp.*, 2007 Bankr. LEXIS 4404 (Dec. 26, 2007). On January 31, 2008, Dana emerged from bankruptcy.

As discussed in the next section, the Dana case was not the first to use the VEBA structure as a means to eliminate an employer's retiree benefits obligations. However, in addition to enabling Dana to emerge from bankruptcy, the settlements paved the way for later settlements involving the UAW and non-bankrupt automobile industry employers that were groundbreaking.

IV. Negotiation and Settlement of Retiree Health Benefit Modification Disputes

A. Advantages of Negotiation and Settlement of Retiree Health Benefit Disputes

Given the risks involved in litigation over unilateral termination of retiree health benefits, it is not surprising that some large employers are choosing to negotiate and settle vesting disputes. The most obvious advantage is that a settlement agreement saves both parties the considerable costs of litigation. Although obtaining court approval of the settlement does entail litigation, it is not as expensive as aggressive adversarial litigation for at least two reasons. First, the due diligence process is more circumscribed than full-scale discovery. Relevant documentation is exchanged without excessive rancor and the parties do not delve into extrinsic evidence. Second, motion practice is more limited because the parties often stipulate to, rather than contest, various aspects of the settlement process.

A less obvious, but perhaps more important advantage to negotiation is the impact of settling such disputes on the employer's relationship with its active workforce. In the unionized context, active workers' willingness to compromise on wages, benefits, or other aspects of employment may be influenced by how they perceive they will be treated in retirement. Unilateral action taken to reduce or eliminate retiree health benefits may negatively impact an employer's ability to gain concessions from actives that may be equal to continued payment of retiree health. For example, as amply demonstrated by the three-month United Steelworkers (USW) strike at Goodyear in 2006, active workers may strike over cutbacks in retiree health benefits, thereby damaging an employer's business. *See also Allied Chemical & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178, n.17 (1971) (It is undeniable that "current employees have a legitimate interest in assuring that negotiated retirement benefits are . . . paid and administered in accordance with . . . their contracts").

B. Union's Standing to Negotiate on Behalf of Retirees

One of the threshold issues related to negotiating changes to retiree health benefits is whether a union has the authority to represent retirees in such negotiation. The Supreme Court's decision in *Allied Chemical & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), is frequently invoked for the proposition that a union does not represent retirees because retirees are not members of the bargaining unit. *Id.* at 182 n.20. But *Allied Chemical* held only that a union "is under no statutory duty to represent [retirees] in negotiations with [an] employer." *Id.* (emphasis added). It does not automatically follow that a union is prohibited from doing so. Indeed, the Supreme Court

expressly noted that “nothing in this opinion precludes” a union bargaining on behalf of retirees if the employer agrees. *Id.*

The rationale for union representation of retirees in negotiations over health benefits is that the union, as a party to the collective bargaining agreement, has an interest in enforcing the agreement that created the benefits in the first place. As the Sixth Circuit recently reaffirmed, a “union would have standing to bring suit on behalf of [] retirees to enforce their bargained-for benefits because the union ha[s] a ‘direct interest in maintaining the integrity of the retiree benefits created by the collective bargaining agreement.’” *Cleveland Elec. Illuminating Co. v. Util. Workers Union, Local 270*, 440 F.3d 809, 816 (6th Cir. 2006) (quoting *Yard-Man*, 716 F.2d at 1486-87). Other circuits are in accord. *See, e.g., Paper, Allied-Indus. Chem. & Energy Workers Int’l Union, Local 8-192 v. TXI Riverside Cement Co.*, 244 Fed. App’x 116, 119 (9th Cir. 2007) (“As a general matter, ‘a union [does not lose] all interest in the fate of its members once they retire.’”); *Rossetto v. Pabst Brewing Co.*, 128 F.3d 538, 539 (7th Cir. 1997) (“[A] union has standing . . . to arbitrate the meaning of a collective bargaining agreement that grants rights to . . . retirees simply by virtue of the fact that the union is a party to the contract.”); *United Steelworkers v. Canon, Inc.*, 580 F.2d 77, 80-81 (3d Cir. 1978) (“[U]nder accepted contract principles the union has a legitimate interest in protecting the rights of the retirees and is entitled to seek enforcement of the applicable contract provisions.”).

But courts have also determined that a union that bargains for retirees does not become their *exclusive* representative such that the retirees then *must* proceed through the union rather than deal directly with the employer. *See, e.g., Rossetto*, 128 F.3d at 540 (“[A]ny claims for benefits . . . belong to the retirees individually, and the retirees may deal directly with [the company] in pursuing such claims.”); *Meza v. Gen. Battery Corp.*, 908 F.2d 1262, 1270 (5th Cir. 1990) (“[A]n ex-employee/ex-union member is free to pursue his own claims and make his own settlements with the former employers.”); *Yard-Man*, 716 F.2d at 1486 (observing that individual retirees have the right to “resolve disputes over contractual benefits directly with the former employer without [] union[] involvement”). Thus, although retirees “might choose the union as their agent for purposes of implementing or compromising claims arising under a collective bargaining agreement,” they “need not accept the offer of representation.” *Merk v. Jewel Cos.*, 848 F.2d 761, 766 (7th Cir. 1988).

If retirees do not consent to union representation, or a retiree class action is not certified as part of a global settlement, employers run the risk of defending numerous duplicative lawsuits by individual retirees even if they have already negotiated a resolution with the union. The union, in turn, faces the prospect that an individual retiree who sues the employer obtains a better deal, thereby reflecting poorly on the union’s compromise. The wisest course for employer and union in negotiating or arbitrating retiree health disputes that affect a relatively small number of retirees is to obtain their consent. *See, e.g., Cleveland Electric*, 440 F.3d at 818 (“In order to arbitrate a retiree’s benefits, the Union must obtain the consent of the retiree.”); *Goodrich Corp.*, 410 F.3d at 212 (in an arbitration matter union could represent 52 retirees who had given the union their express authorization); *Rossetto*, 128 F.3d at 540 (“any right [the union] has to pursue arbitration of the retirees’ grievance must come from the retirees”); *see also United Steelworkers v. Cooper Tire & Rubber Co.*, 474 F.3d 271, 283 (6th Cir. 2007) (finding that union may arbitrate on behalf of retirees, but only after they consent to such representation). For global settlements affecting larger pools, a non-opt out, class action suit is the best vehicle.

C. Class Action Settlements of Retiree Health Benefit Disputes

Class action settlements emerged as the preferred solution to large scale retiree health benefit disputes after General Motors (“GM”) concluded the biggest settlement of this kind in March 2006. *See UAW v. General Motors Corp.*, No. 05-CV-73991, 2006 WL 891151 (E.D. Mich. Mar. 31, 2006), *aff’d*, 497 F.3d 615 (6th Cir. 2007) (“*General Motors I*”). GM agreed to make a \$3 billion cash contribution to a VEBA that would mitigate the effects of new deductibles, monthly premium contributions, and other cost-sharing payments that would be required of more than 470,000 UAW-represented retirees,

surviving spouses, and dependents. Following the GM model, Ford Motor Company (“Ford”) negotiated a similar deal with the UAW and a class of Ford retirees, although the VEBA was significantly smaller (\$108 million cash contribution) and affected 170,000 former employees, surviving spouses, and dependents. *See UAW v. Ford Motor Co.*, Nos. 05-74730, 06-10331, 2006 WL 1984363 (E.D. Mich. July 13, 2006), *aff’d*, 497 F.3d 615 (6th Cir. 2007) (“*Ford I*”). Both the GM and Ford settlements were affirmed by the Sixth Circuit in a single decision, following the companies’ consolidated appeal to the court. *See UAW v. General Motors Corp.*, 497 F.2d 615 (6th Cir. 2007).²

D. The Retiree Health Benefits “Buy-Out” Solution: Use of Class Action Settlements & VEBAs to Shift Responsibility For Retiree Health Benefits to Unions and Eliminate FAS Liability

The big news respecting retiree health benefits is the effort to cede retiree health plan sponsorship to unions through funded VEBAs. This negotiated solution is, in effect, a retiree health benefit buy-out solution, and has as its core objective the elimination of the employer’s FAS 106 liability. Under this approach, the employer ceases to be responsible for sponsoring or maintaining a retiree health plan. The employer negotiates an agreement in which the employer terminates the existing retiree health benefit plan and, in its place, a new plan is created to cover the same persons, except that the new plan is sponsored by the union, or by an employees’ beneficiary association comprised of union and retiree representatives. The employer would have an initial contribution obligation, and potentially fixed obligations in the future. But the employer’s obligations would be fixed and it would have no future responsibility to sponsor or fund retiree health beyond what it commits to in the buy-out transaction.

In late 2006, the USW and Goodyear agreed to a memorandum of understanding on retiree health benefits that would form the basis for a global settlement in 2007. A non-opt out class action lawsuit was filed to obtain judicial imprimatur for that agreement. *See Redington v. The Goodyear Tire & Rubber Co.*, No. 5:07-cv-1999 (N.D. Ohio 2007). On December 14, 2007, the court granted preliminary approval. The Goodyear agreement would create a new VEBA, operated and controlled by an independent committee, which would become the sole and permanent source for paying for retiree health liabilities. Goodyear will terminate its sponsorship and maintenance of a retiree health plan, with the goal of “clean” FAS 106 accounting treatment and elimination of its prior liability.

Additionally, on February 21, 2008, the United States District Court for the Southern District of Ohio granted final approval of a settlement between AK Steel Corporation (“AK Steel”) and a class of 4,872 of its retirees, who were represented by the Armco Employees Independent Federation (“AEIF”), or IAM (AEIF’s successor union). *See Bailey v. AK Steel Corp.*, No. 1:06-cv-468, 2008 WL 495539 (S.D. Ohio Feb. 21, 2008). Under the agreement, AK Steel will fund a VEBA trust, making contributions totaling \$663 million, *id.* at *5, and transfer its retiree health obligations for the covered retirees to the VEBA. *AK Steel*, No. 1:06-cv-468 (S.D. Ohio Oct. 25, 2007) (motion for preliminary approval of settlement agreement 3-4). The trust will be managed by the retirees’ designees and AK Steel will have no further liability to pay health benefit costs of retirees covered by the agreement. *Id.*

A similar transaction between the UAW and Chrysler also occurred. *See UAW v. Chrysler LLC*, No. 2:07-cv-14310 (E.D. Mich. Apr. 10, 2008) (order granting preliminary approval of settlement).³ And GM and Ford are in the process of obtaining final approval of new settlement agreements with the UAW that would replace the settlements reached in *General Motors I* and *Ford I* and provide final resolution of their dispute with the union over retiree health benefits. *See, e.g., UAW v. General*

² GM hourly retirees who were formerly represented by the IUE-CWA also obtained court approval of a class settlement of their benefit dispute. *See IUE-CWA v. General Motors Corp.*, 238 F.R.D. 583, 594-600 (E.D. Mich. 2006) (“*IUE-CWA v. GM*”).

³ Chrysler is expected to contribute \$9.746 billion to a VEBA in its settlement with the UAW. *See Chrysler*, No. 2:07-cv-14310 (E.D. Mich. Apr. 10, 2008) (order granting preliminary approval of settlement 20-21).

Motors Corp., No. 07-CV-14074-DT (E.D. Mich. Mar. 5, 2008) (order granting preliminary approval of settlement) (“*General Motors I*”); *UAW v. Ford Motor Co.*, No. 2:07-cv-14845 (E.D. Mich. Apr. 7, 2008) (motion for preliminary approval of settlement) (“*Ford I*”).

The impetus for these settlements was the rising health care costs within the context of a shrinking unionized manufacturing sector. Companies like GM and Ford were facing astronomical legacy costs. For example, GM’s accumulated post-employment benefit obligation (APBO) was \$81.2 billion in 2005, which was larger than the total APBO of any other U.S. company. *IUE-CWA v. GM*, 2006 WL 3147739, at *4. “[G]iven the more than four-to-one ratio of UAW retirees, surviving spouses and dependents to active workers, concessions by active workers would not reduce GM’s APBO enough to keep GM viable” *General Motors I*, 2006 WL 891151, at *4. Ford’s APBO was equally burdensome. *See Ford I*, 2006 WL 1984363, at *6-7 (“Ford’s APBO was nearly 300% of the value of the company itself”). The critical situation brought the companies and the unions to the table.

In *General Motors II* and *Ford II*, the companies have returned to the court seeking to replace the earlier settlements with new ones that would provide a final resolution. Under its proposed new settlement, GM plans to contribute between approximately \$38.5 and \$41.9 million to fund a new VEBA under which GM will no longer have responsibility or liability for retiree health care benefits. Instead, the benefits would be funded solely by the new VEBA, controlled by an independent committee as representative of an employees’ beneficiary association. *General Motors II*, No. 07-CV-14074-DT (E.D. Mich. Feb. 21, 2008) (motion for preliminary approval of settlement). Likewise, Ford has reached an agreement for a new VEBA that would likewise entirely shift responsibility for retiree health care benefits to the union, as well as place responsibility for the management of the new VEBA with the union through an independent committee comprised of “eleven members: five appointed by the UAW (and not affiliated with Ford) and six ‘Public Members’ initially approved by the Court.” *Ford II*, No. 2:07-cv-14845 (E.D. Mich. Apr. 7, 2008) (motion for preliminary approval of settlement 7). “On and after January 1, 2012, the Committee will have sole responsibility to determine the scope and level of benefits and may, in its discretion and based on financial, actuarial, clinical, and/or efficiency considerations, raise or lower the level of post-retirement medical benefits available to Class members.” *Id.* Thus, the significance of the new GM and Ford settlements is that they will relieve the companies of FAS 106 accounting obligations.

The major points of negotiation were the nature and timing of the companies’ financial contribution, the structure of the VEBA, and the benefit plan design. The amount and kind of payments to an independent, dedicated VEBA for retiree health benefits was the subject of intense talks. The unions pushed for the largest cash contribution possible. *See, e.g., Ford I*, 2006 WL 1984363, at *9 (describing Ford’s attempts to limit its VEBA cash contribution to \$35 million, but eventually agreeing to \$108 million). *See also Goodyear*, No. 5:07-cv-1999 (E.D. Mich. Oct. 29, 2007) (union rejected Goodyear’s initial offer to fund the VEBA with \$460 million; agreement reached with \$1 billion Goodyear contribution). But union members also offer “give-backs” such as diverting cost of living and wage increases to fund the VEBAs. UAW active workers at both GM (for *General Motors I*) and Ford (in *Ford I*) agreed to contribute about \$2,000 per worker to the VEBA in the initial plan year. *See Ford I*, 2006 WL 1984363, at *12; *General Motors I*, 2006 WL 891151, at *7. In *Ford II* and *General Motors II*, active employees again agreed to divert their cost of living adjustments and defer their wage increases to fund the new VEBAs. *See Ford II*, No. 2:07-cv-14845 (E.D. Mich. Apr. 7, 2008) (Settlement Agreement R.19-3 at 17-18); *General Motors II*, No. 07-CV-14074-DT (E.D. Mich. Feb. 21, 2008) (Settlement Agreement R.27-3 at 21-22). Chrysler active employees made similar agreements regarding deferral of wage increases and reduction of cost of living adjustments. *See Chrysler*, No. 2:07-cv-14310 (E.D. Mich. Apr. 10, 2008) (Settlement Agreement R.26-3 at 25-26). And in *Goodyear*, active USW employees agreed to contribute certain profit-sharing amounts and cost-of-living wage increases. *Goodyear*, No. 5:07-cv-1999 (N.D. Ohio Oct. 29, 2007) (Settlement Agreement, R.28 at 13-14).

A crucial element of the negotiation is the extent to which the fixed contribution into the VEBA is made at the outset of the new plan (effectively, a one-time contribution), or over time. The greater the continued financial responsibility of the employer to the newly-structured VEBA, the greater the risk that clean FAS 106 accounting treatment will be jeopardized.

The structure of the VEBA is an equally important point of negotiation. In a retiree health benefit buy-out transaction, the VEBA serves as the sole and exclusive financing mechanism for future retiree health benefit payments. Moreover, the VEBA needs to be designed and administered so that the arrangement will provide clean accounting treatment for the employer (*i.e.*, the employer's FAS 106 liability is removed from its balance sheet).⁴ In both the first GM and Ford settlements, the VEBA was designed to mitigate cost-sharing payments but the health benefit plan itself was still administered by the companies. By contrast, for a retiree health benefit buy-out to provide the employer with the anticipated FAS 106 treatment, the employer cannot be deemed to be "establishing" or "maintaining" the new retiree health benefit plan. Thus, GM and Ford's anticipated new VEBAs in *General Motors II* and *Ford II* will be controlled committees selected by the union or the Court and independent of the companies. Likewise, in the Goodyear-USW settlement, administration of the VEBA will be controlled by parties independent of the companies. *See Goodyear*, No. 07-1999 (N.D. Ohio Oct. 29, 2007) (motion for preliminary approval of settlement 10) ("[t]he VEBA will be administered by a Committee consisting of four Public Members, three USW Members and two Class Representative Members"). Chrysler has followed suit in negotiating its VEBA. *See Chrysler*, No. 2:07-cv-14310 (E.D. Mich. Apr. 10, 2008) (motion for preliminary approval of settlement agreement 9-10). The company may not be involved in selection of VEBA committee members because that could be regarded as sufficient involvement in plan management to eliminate clean FAS 106 treatment.

Finally, because the company's VEBA contributions could not be returned in the event that the settlement agreement was terminated, the parties would need to provide that in such circumstances, the VEBA assets would be used to provide for retiree health care benefits. Relatedly, the company would seek language to cancel its VEBA contribution obligation if the settlement agreement was terminated.

Counsel for the union and the class will likely take the lead on drafting a trust agreement that would outline the procedures for selection of the VEBA trustee, and the composition of the VEBA governing committee, specifically whether some number would be appointed by the union, while others, with particular areas of expertise (in ERISA, employee benefits, health care, or asset management), would be identified through the settlement negotiation process and approved as part of the settlement agreement. A mechanism for selection of successor VEBA committee members is also necessary.

As for the design of the new retiree health benefit plans, the trend appears to be that the unions seek to have the new plan maintain the existing design for several years following the transition. In *Goodyear*, for example, the current health benefit plan provided to the retirees would be continued, but after 2009 (or 2012 for certain retirees) the VEBA committee would have the sole discretion to determine the benefits to be provided by the VEBA, including the form, amount and conditions of such benefits, and the contributions that retirees must make to help defray the cost of their coverage. *Goodyear*, No. 5:07-cv-1999 (N.D. Ohio Oct. 29, 2007) (Settlement Agreement, R.28). In *General Motors II*, GM will continue to provide retiree health benefits through January 1, 2010, and then the VEBA will take over. *General Motors II*, No. 07-CV-14074-DT (E.D. Mich. Feb. 21, 2008) (motion for preliminary approval of settlement). Likewise, in *Ford II*, Ford will continue to provide retiree health benefits

⁴ An employer may use a VEBA without completely removing its FAS 106 liability, however. Continental Tire of North America Incorporated (Continental) recently reached a settlement agreement with the USW utilizing a VEBA, but under the agreement Continental will retain an obligation to provide a base \$3000 retiree medical benefit to current retirees, future retirees, and surviving spouses, thereby retaining FAS 106 accounting liability. *Pringle v. Continental Tire N. Am. Inc.*, No. 06-2985 (N.D. Ohio Apr. 12, 2008) (motion for preliminary approval). The Court granted preliminary approval on April 29, 2008.

“until the date when all legal challenges and appeals regarding the proposed . . . Settlement Agreement have been resolved or exhausted or, if later, December 31, 2009. Benefits will thereafter be provided and funded under the New Plan and New VEBA.” *Ford II*, No. 2:07-cv-14845 (E.D. Mich. Apr. 7, 2008) (motion for preliminary approval of settlement 16). And Chrysler will continue to provide retiree health benefits at a cost of approximately \$1.5 billion dollars until its VEBA goes into effect on January 1, 2010. *Chrysler*, No. 2:07-cv-14310 (E.D. Mich. Apr. 10, 2008) (order granting preliminary approval of settlement 6).

Other topics that may be covered in negotiations include indemnification, dispute resolution procedures, payment of fees and expenses, and provisions for interim or transition benefits while the settlement process is underway. These issues if not addressed in the memorandum of understanding will undoubtedly arise during settlement negotiations.

Due Diligence For A Retiree Health Benefit Buy-Out Transaction. Prior to sitting down at the negotiating table, the employer and the union will already have a good grasp of the strength of their respective positions with regard to whether retiree health benefits would be regarded as vested in the relevant circuit. The union will have had ready access to the relevant plan documentation and is certainly familiar with the circuit case law described in Section III.A of this paper. Because the impetus for modifying the retiree health benefit plan is likely the employer’s financial condition and long term prospects to continue the plan’s current design, the employer will have provided some financial data to the union to make its case for change. Notwithstanding this preliminary review of documentation, a formal due diligence process is necessary so that class counsel can investigate and pursue the class’ interests during settlement negotiations.

Class counsel would be free to hire outside financial advisors to make an independent assessment of the validity of the company’s claims with regard to the financial imperative of making changes to the retiree health benefit plan. Class counsel would also make its own determination as to the strength of the retirees’ legal argument that their benefits could not be changed, and weigh that against the risk to the retirees of losing such litigation. *See, e.g., AK Steel*, 2008 WL 495539, at *3 (finding that “the formal and informal discovery conducted in [the] case demonstrates that the parties reached a settlement based on a full evaluation of the strengths of their cases and the advantages of settlement”); *General Motors I*, 2006 WL 891151, at *19 (finding that GM had made “full disclosure” to the UAW and Class Counsel regarding its business condition, health care liability, and health care plan documents, and that UAW and Class Counsel’s experts had performed “independent analyses” of this information).

The Litigation Complaint in Retiree Health Benefit Buy-Out Transactions. Retiree health benefit buy-out transactions cannot be accomplished without judicial intervention. This is essentially for two reasons. First, as mentioned above in Section IV.B, a union cannot bind existing retirees’ ERISA rights; and therefore, in order to bind existing retirees to a permanent agreement on retiree health benefits there needs to be judicial imprimatur in the form of a non-opt out class action settlement (*see* discussion below, at “*The Importance of Class Certification*”). Second, payments to a union-operated VEBA may well be criminally unlawful under section 186(a) of the Taft Hartley Act, 29 U.S.C. § 186(a). But section 185(c)(2) of the Act exempts such payments if made “in satisfaction or a judgment of any court . . . or in compromise . . . settlement or release of any complaint in the absence of fraud or duress.” 29 U.S.C. § 186(c)(2). Thus, a settlement of a complaint requiring payments to a VEBA ordinarily would qualify under 185(c)(2)’s exception.

Accordingly, in a retiree health benefit buy-out transaction, the union and a class of retirees will need to file a complaint seeking a declaratory judgment that the employer cannot unilaterally modify or terminate retiree health benefits. Because the union and employer may have already agreed in principle to the overall framework of a settlement, retiree objectors or intervenors may argue there is no genuine case or controversy and the court lacks jurisdiction. Such arguments had little traction in the first GM and Ford settlements. *See, e.g., UAW v. General Motors Corp.*, No. 05-CV-73991, 2006

WL 334283, at *3 (E.D. Mich. Feb. 13, 2006) (“[T]he court cannot find that there is an absence of an actual case or controversy merely because the parties have chosen to work toward a settlement to avoid the risks and uncertainties inherent in any litigation.”).

Likewise, in an asbestos class action, the Fifth Circuit held that the fact that the parties “filed their proposed settlement agreement on the same day as the plaintiff class filed its complaint” did not “change the adversarial nature of the disputes” nor “contradict the district court’s finding that settlement negotiations were heated, difficult and conducted at arm’s length.” *Flanagan v. Ahearn (In re Asbestos Litigation)*, 90 F.3d 963, 988 (5th Cir. 1996), *rev’d on other grounds sub nom. Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). *See also In re Diet Drugs Prods. Liab. Litig.*, Nos. 1203, 99-20593, 2000 WL 1222042, at *40 (E.D. Pa. Aug. 28, 2000) (finding that “the court’s jurisdiction over this settlement class does not violate the Article III case or controversy requirement” even though the complaint “was filed for settlement purposes only”). Some cases may settle “before . . . even a class action complaint has been filed,” *Manual for Complex Litigation* § 21.131 (4th ed. 2006), and this does not deprive the court of jurisdiction to certify the class.

The Importance of Class Certification. As mentioned above, in order for the proposed retiree health benefit buy-out settlement to be binding on the affected class of retirees, the litigation should be brought on a class-wide basis and named plaintiffs will need to file a motion for class certification and appointment of class counsel. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, the plaintiffs will need to demonstrate that the proposed class meets the 23(a) requirements. Numerosity may be satisfied if the proposed class is greater than 40 members; thus, for large employers, this requirement is easily met. *See, e.g., Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 884 n.1 (6th Cir. 1997) (finding “frivolous” an objection that 1,000 member retiree class was not so large as to satisfy numerosity requirement). Likewise, the complaint will raise a common question of whether the employer has the ability to unilaterally change benefits or whether the benefits are vested. *Id.* at 884 (holding that all that is required under Rule 23 is that the class members share a common “claim[] that the original collective bargaining agreement guaranteed them lifetime, fully-funded benefits”). The named plaintiffs should be typical retirees, who have claims based on the same employer action and legal theory as the other class members whom they intend to represent. Finally, the named plaintiffs’ counsel must have the necessary experience and expertise to prosecute the class action.

Once the prerequisites of Rule 23(a) have been met, the action should also meet one of the alternate, non-opt out provisions of Rule 23(b). Subdivision (b)(2) is frequently invoked for class actions concerning retiree health benefit claims under ERISA or LMRA. Specifically, the class must show the employer “acted . . . on grounds generally applicable to the class, thereby making appropriate . . . declaratory relief with respect to the class as a whole.” Fed. R. Civ. P. 23(b)(2). Because an employer that threatens unilateral action over retiree health benefits does so with respect to the class as a whole, this requirement is also easily met. *See UAW v. General Motors Corp.*, 497 F.3d at 625 (employer “has threatened to modify all retiree healthcare benefits unilaterally, ‘thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole’”).

Putative intervenors or objectors will undoubtedly contest class certification, relying on *Ortiz v. Fibreboard*, 527 U.S. 815 (1999), for the proposition that the district court should undertake an independent and rigorous review of potential intra-class conflicts before certifying a settlement class, and that class members should have opt-out rights. These concerns were easily disposed of in the first GM and Ford cases. The UAW retiree class did not present the kind of intra-class conflicts inherent in asbestos cases, which involved a limited fund and claimants who were divided among: (1) those who were already suffering from asbestos exposure, and (2) those who had the risk of developing an asbestos-related sickness in the future. *See General Motors I*, 2006 WL 416192, at *3 (holding that there was no intra-class conflict because the “class is made up entirely of retirees”). Moreover, *Ortiz* did not control because the first GM and Ford settlements did not involve a limited fund in a mass tort action, but rather concerned declaratory and injunctive relief. *See Ford I*, 2006 WL 1984363, at *32.

Moreover, the courts have recognized that “retiree health benefit class actions are routinely brought as mandatory classes, not as opt out’s.” *AK Steel*, 2008 WL 495539, at *8. In *AK Steel*, the district court explained that a court would not be inclined to allow opt outs in a retiree health benefits case because “[t]he extreme odds against a class member getting a better result on his own cannot outweigh the nonobjecting majority’s interest in preserving the settlement.”) *Id.* (internal quotation and citation omitted); see also *General Motors I*, 2006 WL 891151, at *32 (“allowing opt outs is not only unnecessary, but would destroy the very basis of the Class’ claims and requested relief”); *Ford I*, 2006 WL 1984363, at *33.

Motions to Intervene. The filing of the complaint, and/or motion to certify the class, will likely attract the interest of potential class members who are unhappy about the anticipated settlement, and/or plaintiff class action specialists who seek to renegotiate the arrangement in return for significant fee awards. The parties can thus expect to address a motion to intervene by individuals who did not participate in the negotiation of the memorandum of understanding. In *General Motors I* and *Ford I*, the parties successfully defended against such challenges.

In considering such motions, a court considers four factors: “(1) [the] timeliness of the application . . . ; (2) the applicant’s substantial legal interest in the case, (3) impairment of the applicant’s ability to protect that interest in the absence of intervention; and (4) inadequate representation of that interest by parties already before the court.” *General Motors I*, 2006 WL 334283, at*1 (paraphrasing Rule 24(a) of the Federal Rules of Civil Procedure). In the first GM and Ford settlements, the named parties did not contest the timeliness, nor the intervenors’ interest in the case. The principal challenges concerned whether the intervenors’ interest was being adequately protected by class counsel.

The putative intervenors contended that the proposed settlement agreements in the first GM and Ford cases were the product of collusion. They further argued that the UAW was inherently conflicted because its duty was to represent active employees, whose interests are purportedly antagonistic to those of the retirees. See, e.g., *Allied Chem. & Alkali Workers*, 404 U.S. at 174 (“[T]he risk cannot be overlooked that union representatives on occasion might see fit to bargain for improved wages or other conditions favoring active employees at the expense of retirees’ benefits.”) The intervenors also claimed that class counsel was hand picked” by the UAW and not sufficiently involved in preliminary negotiations of the settlement, which rendered their representation inadequate.

In denying the motion to intervene in *General Motors I*, the court held that “[t]he fact that negotiations are conducted outside of the public eye, does not make a settlement agreement collusive” *General Motors I*, 2006 WL 334283, at *3. Because the intervenor could not point to any credible evidence of collusion, the court rejected this argument. *Id.* The court further held that the intervenor could not overcome the presumption that representation of the retiree class by the named plaintiffs was adequate when the intervenor and named plaintiffs shared the same interest and ultimate objective. *Id.* See also *United States v. City of New York*, 198 F.3d 360, 367 (2d Cir. 1999) (“Representation is not inadequate simply because ‘the applicant would insist on more elaborate . . . pre-settlement procedures or press for more drastic relief.’”) (citation omitted).

Moreover, the court found that the intervenor failed to demonstrate that class counsel did not have the relevant legal expertise to adequately defend the class. *Id.* The courts have rejected complaints about the involvement of class counsel in the preliminary negotiations, because the proper inquiry is whether class counsel has identified and investigated the claims in the action, counsel’s experience in handling complex litigation or class actions regarding claims, and the resources counsel can commit to representing the class. Fed. R. Civ. P. 23(g)(1)(i). If these requirements are satisfied, and class counsel has participated in due diligence and final settlement negotiations, such challenges may be withstood. See *Ford I*, 2006 WL 1984363, at *20; see also *UAW v. General Motors Corp.*, 497 F.3d 615 (6th Cir. 2007) (recognizing that class counsel acted reasonably in approving the settlement and recognizing that he could have rejected it and proceeded to trial).

In approving the first GM and Ford settlements, the court also dismissed the argument that the UAW's duty to represent its active members created an insurmountable conflict. The court catalogued the UAW's "long and storied history of defending the interests of retirees . . . both at the bargaining table and in the courtroom," and noted that active members have sacrificed "their bargaining leverage, their dues, and . . . their scheduled wage increases[] to the cause of retiree health benefits . . ." *Ford I*, 2006 WL 1984363, at *7; *see also UAW v. General Motors Corp.*, 497 F.3d 615 (6th Cir. 2007) ("The UAW's alleged conflict of interest does not affect the fairness of either settlement because the named class members, not the UAW, legally represented the class and made the final decision to accept each proffered settlement.")

Settlement Negotiations and Preliminary Approval of Agreement and Class Certification.

Although the parties will have hammered out the framework for the settlement in a preliminary document, such as the memorandum of understanding ("MOU"), transforming the MOU into a settlement that will constitute a binding agreement between employer, union, and retirees will require more negotiations. If class counsel had not been an active participant in the initial discussions between employer and union, it is particularly important that class counsel engage in the necessary due diligence and contribute to the final settlement. Then the court may easily find at the fairness hearing that "Class Counsel diligently investigated the proposed settlement, acted solely in the interest of the Class, and concluded based upon the expert opinions available to them . . . that the settlement is fair, reasonable, and adequate." *General Motors I*, 2006 WL 891151, at *9. *See also UAW v. General Motors*, 497 F.3d 615 (6th Cir. 2007) (recognizing that class counsel was prepared to go forward, as he had reviewed financial information from GM and Ford and hired his own independent financial consultant). Once the parties have reached a mutually satisfactory settlement agreement, it will be presented to the court for preliminary approval, along with the motion for class certification and the proposed class notice.

Class Notice. The settlement of a class action over retiree health benefits is subject to the Class Action Fairness Act of 2005, 28 U.S.C. § 1711. Accordingly, the employer is required to serve appropriate federal and state officials with notice of the proposed settlement within ten days of filing the proposed settlement agreement with the court. 28 U.S.C. § 1715(b). The documents to be served include a copy of the Complaint and attachments, notice of scheduled judicial hearings, any proposed notification to class members of certain rights with respect to exclusion, the proposed settlement, and the names of the class members. *Id.* CAFA does not specify how these government officials are to be served, but courts have approved service of the materials on disk in electronic, fully searchable form.

Separate from notice to the U.S. and states' attorneys general of the proposed settlement, notice will have to be provided to the class members. The notice must describe the scope and terms of the settlement. For example, the class notice sent to the approximately 470,000 members of the GM class, defined who was a class member, described what the settlement provided, including the terms of the new retiree health benefit plan, and informed the class of their legal rights and the representation provided by class counsel. The notice told the class members that they had a right to obtain further information by calling a 1-800 number, that they could mail formal written objections to the court by a particular date, and appear and be heard at the Fairness Hearing. In addition to the individual mailings, GM also published the notice in *USA Today* and the Detroit newspapers. The Sixth Circuit found this notice was sufficient. *UAW v. General Motors Corp.*, 497 F.3d at 630.

Fairness Hearing. In preparation for the Fairness Hearing the parties will need to prepare declarations and other documentation in support of final approval of the settlement agreement. *See, e.g., General Motors I*, 2006 WL 891151, *14 ("The court may consider briefs, declarations, affidavits and the arguments of counsel and need not conduct an evidentiary hearing or take live testimony.") Such declarations may include statements by: (1) actuaries representing the employer and union respectively, to describe the mechanics and expected long-term benefits under the settlement; (2) a company finance officer regarding the company's financial status and the impact of its APBO on company finances; (3) an independent health care expert's evaluation of the fairness of the benefit

plan changes; (4) an independent financial expert's analysis of the employer's finances and whether the proposed changes are reasonably related to ensuring the company's long-run fiscal health; and (5) representatives of the parties' negotiating teams with regard to the arms' length and adversarial nature of the negotiations. Some judges may insist that one or more of these individuals testify in court respecting the opinion and facts set forth in their statements.

The parties also will need to be prepared to answer the objections filed with the court with regard to the fairness of the settlement. In both the first GM and Ford settlements, very few class members objected, and most of them were organized by the plaintiff class action law firm that unsuccessfully sought to intervene and/or substitute itself as class counsel. *General Motors I*, 2006 WL 891151, at *20 (finding that "minimal level of opposition," i.e., 1,250 members of the 470,000 member class, "is evidence of class members' general acceptance and support for the Settlement Agreement"); *Ford I*, 2006 WL 1984363, at *16 (reporting that there were only 794 objections out of the 170,000 class members, and only 286 stated a reason for objecting); see also, *AK Steel*, 2008 WL 495539, at *5 (noting that of the 4,872 class members, only 229 (4.7%) filed timely objections).

In *General Motors I* and *Ford I*, the majority of the objections were based on the retirees' claim that their benefits were vested. A disagreement over the merits of the parties' dispute is not, however, a basis for disapproving the settlement. See *Ford I*, 2006 WL 1984363, at *27; *General Motors I*, 2006 WL 891151, at *22. The other objections addressed at the fairness hearings in the first GM and Ford cases were those previously raised by the putative intervenor (and dismissed by the court). The court in *AK Steel*, likewise rejected arguments from putative objectors that the proposed settlement should not be approved because the settlement violated the objectors' rights to lifetime health benefits and the process for the selection of VEBA Trustees was fatally flawed (among other objections). *AK Steel*, 2008 WL 495539, at *5-*8.

It can also be expected that objectors will attack specific settlement agreement terms and the parties must be prepared to defend. See, e.g., *Ford I*, 2006 WL 1984363, at *35 (rejecting objection that Ford's cash contribution to the VEBA was inadequate as compared to GM's contribution to similar VEBA); *AK Steel*, 2008 WL 495539, at *5-*6 (also rejecting challenge that VEBA was not sufficiently funded); see also *General Motors I*, 2006 WL 891151, at *31 (finding that objection to the "hold harmless" provision of the new retiree plan was "no basis for disapprov[al]" because it was a "well-established feature" of health care plans). The employer's health care and financial experts need to be able to respond to any specific objections in the event the judge wants a more complete record.

Final Approval of the Settlement Agreement. A court shall give final approval of a settlement agreement if, following a fairness hearing, the court determines that the settlement is "fair, reasonable, and adequate." *AK Steel*, 2008 WL 495539, at *1 (citing Fed. R. Civ. P. 23(e)(1)(c)). The court's role "is not to decide the merits of the case or resolve unsettled legal questions," rather "[t]he ultimate question . . . is whether the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued." *Id.* (citing *General Motors I*, 2006 WL 891151, at *15). Several factors are considered in determining whether a proposed settlement agreement is fair, reasonable, and adequate, including: "1. the likelihood of success on the merits; 2. the complexity, expense and likely duration of the litigation; 3. the amount of discovery engaged in by the parties; 4. the opinions of class counsel and class representatives; 5. the risk of fraud or collusion; 6. the reaction of absent class members; and 7. the public interest." *AK Steel*, 2008 WL 495539, at *1. An employer will need to be prepared to assert how its settlement agreement, and the settlement process meets these criteria at the fairness hearing and in proposed findings of fact and conclusions of law.

In both the first GM and Ford cases, the district court found that these factors were satisfied and approved the final settlement agreement. With regard to the likelihood of success on the merits, the district court in both cases concluded that "[t]he parties adequately assessed the strengths of their respective positions on the merits and reasonably decided that the issue of vesting is not so one-sided so as to make any settlement unreasonable." *General Motors I*, 2006 WL 891151, at *17. The Sixth

Circuit agreed. See *UAW v. General Motors Corp.*, 497 F.3d at 632 (“it is no wonder that both district courts approved the final settlements as “fair, reasonable, and adequate” We see it the same way.”) Specifically, the courts in both *General Motors I* and *Ford I* concluded that it was reasonable for the companies to conclude that, in light of their dire financial condition, the interest of their retirees lay “not in achieving a possibly hollow victory in court but in continuing to receive their health benefits, and that the best means to do that lay in making modest concessions in settlement now” to increase the likelihood that the companies could continue to provide retiree health benefits. *Ford I*, 2006 WL 1984363, at *23; *General Motors I*, 2006 WL 891151, at *16.

The courts in *General Motors I* and *Ford I* also found that the settlements provided substantial benefits to the class by accomplishing significant (and necessary) cost savings for the companies while maintaining virtually the same comprehensive level of coverage for class members with only a slight increase in their share of the cost. *General Motors I*, 2006 WL 891151, at *17; *Ford I*, 2006 WL 1984363, at *23. The court in both cases also gave considerable weight to the collective judgment of counsel in favor of the settlement, particularly because full disclosure had been made with regard to the companies’ business and financial condition, and the process was entirely arms’ length. *General Motors I*, 2006 WL 891151, at *19-*21; *Ford I*, 2006 WL 1984363, at *22-*26.

More recently, in *AK Steel*, the district court likewise granted final approval of AK Steel’s proposed settlement agreement with a class of the company’s retirees after considering the factors listed above and determining that the settlement was fair, reasonable, and adequate. *AK Steel*, 2008 WL 495539, *1-*4. Specifically, the district court determined that “plaintiff’s likelihood of success on the merits at trial, and upon appeal, was not overwhelming” and continued litigation would be complex, expensive, and lengthy. *Id.* at *3. The court also concluded that the parties had conducted extensive discovery and reached the settlement “based on a full evaluation of the strengths of their cases and the advantages of settlement.” *Id.*

The successes of the GM, Ford, and AK Steel settlements serve as models for other employers seeking to accomplish a retiree health benefit buy-out solution. Indeed, GM and Ford are following their previous course toward settlements in another set of disputes with the UAW regarding retiree health benefits. In fact, the Eastern District of Michigan recently granted preliminary approval of GM’s proposed settlement agreement in *General Motors II*, No. 07-CV-14074-DT (E.D. Mich. Mar. 5, 2008) (order granting preliminary approval of settlement). A fairness hearing is scheduled for June 3, 2008. *Id.* Likewise, Goodyear is moving toward final approval of the proposed settlement agreement reached in 2007. See *Goodyear*, No. 5:07-cv-1999 (N.D. Ohio Dec. 14, 2007) (order granting preliminary approval of settlement). *Id.* Ford and Chrysler (each in a dispute with the UAW) are also pursuing VEBA settlements and have started toward final approval by filing class actions currently pending in the Eastern District of Michigan. See *Ford II*, No. 2:07-cv-14845 (E.D. Mich. 2007); *UAW v. Chrysler LLC*, Case No. 2:07-cv-14310 (E.D. Mich. 2007). Ford has filed a motion for preliminary approval. See *Ford II*, No. 2:07-cv-14845 (E.D. Mich. Apr. 7, 2008) (motion for preliminary approval of settlement). The court has granted preliminary approval of Chrysler’s proposed settlement and a fairness hearing is scheduled for June 30, 2008. See *UAW v. Chrysler LLC*, Case No. 2:07-cv-14310 (E.D. Mich. Apr. 10, 2008) (order granting preliminary approval of settlement).

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ABOUT THE PRESENTERS

Andrew M. Kramer

Andy Kramer has a wide range of experience in a number of phases of labor and employment law. He has represented employers in state and federal courts and before administrative agencies. He has negotiated collective bargaining agreements and has provided counseling and advice on the development of employment and labor relations strategies for a broad group of employers across many industry lines. Representative industries that Andy has worked for include automotive, automotive parts, aluminum, steel bearings, newspapers, tires, electrical, insurance, hospitality, shipbuilding, packaging, banking, and oil and gas. Andy has been directly involved in how companies and unions reshape their health care plans, with particular emphasis on retiree health care benefits. He has been one of the lead negotiators and/or advisors on this issue for a number of major companies in several different industries, and he has been at the forefront in establishing VEBAs in the automotive and rubber industries that significantly impact how retiree health benefits are provided for workers in those industries.

Andy is the Firm's Client Affairs Partner. He is a member of The College of Labor and Employment Lawyers and the ABA (Labor and Employment Law Section) and previously served on the National Manufacturers Association Labor Law Advisory Committee, the National Labor Relations Board Management Advisory Panel, and the Johns Hopkins Advisory Council on Environment and Health. He was appointed to and served on the Commission on State Department Personnel from 1992 through 1993 and was executive director of the Illinois Office of Collective Bargaining from 1973 through 1974. He has authored or co-authored law review articles and texts in the labor and employment law field, including "Forum: Labor Law Reform," 20 B.C.L. Rev. 4 (1978) and Operating During Strikes (coauthor) University of Pennsylvania, Wharton School (1982). Andy has lectured extensively on labor and employment law matters at numerous conferences throughout the U.S. He has been listed in the labor and employment law section of The Best Lawyers in America, The National Law Journal's list of the country's best employment/labor lawyers, Who's Who in American Law, Who's Who in America, and Who's Who in the World and was identified by Legal Times in 2004 as one of the D.C. area's top labor and employment lawyers.

Evan Miller

Evan Miller provides employee benefits counsel and represents companies in complex ERISA litigation cases. He advises plan sponsors and administrators on ERISA's reporting and disclosure requirements, counsels health and pension plan service providers on ERISA fiduciary duty and prohibited transaction rules, and routinely advises on plan assets issues. In his ERISA litigation practice, Evan represents companies in fiduciary audit and other benefit-related investigations and litigation conducted at the regional and national level by the U.S. Department of Labor and in excise tax matters before the IRS. In private party litigation, he has been involved in a variety of stock drop cases, fiduciary duty class action litigation against health plan service providers, and has handled numerous defined benefit pension plan and retiree health cutback cases and Taft-Hartley plan contribution and withdrawal liability matters.

Evan lectures and publishes frequently on ERISA matters. He is currently management cochair of the board of editors of Employee Benefits Law (Bureau of National Affairs), a publication of the Labor & Employment Law Section of the ABA; and he served as cochair of the Employee Benefits Committee of the section between 2004 and 2006. Evan is recognized as a "leading individual" in employee

benefits & executive compensation in Chambers USA for Washington, D.C. and is listed in The Best Lawyers in America, Who's Who in America, and Who's Who in American Law.

Richard F. Shaw

Rick Shaw's practice is focused on representing management in traditional labor relations matters and in employment-related counseling and litigation. On the traditional labor side of his practice, Rick represents companies and advises them in developing creative solutions to address all aspects of labor law litigation, including unfair labor practice cases, representation hearings relating to unit determination and placement, and compliance, injunction, and high-stakes arbitration proceedings. In addition, he has significant experience in negotiating collective bargaining agreements and in counseling clients in such traditional labor issues as election campaigns, operating during strikes, analyzing successorship and other obligations in the context of acquisitions and divestitures, and decision and effects bargaining in conjunction with plant relocations and shutdowns. Over the past decade Rick has become increasingly involved in advising restructuring companies with rejection and modification of collective bargaining agreements and retiree benefits in bankruptcy and in the negotiations and litigation with unions, creditors, governmental agencies, and employee representatives that often become necessary in bankruptcy.

Rick is a management member of the ABA, Section on Labor and Employment Law, Committee on Practice and Procedure Under the National Labor Relations Act, and a member of the Pennsylvania Bar Association and the Allegheny County Bar Association. He is a contributing chapter editor to the treatise *How To Take A Case Before The NLRB*, 2002 Supplement (BNA).