LAW AND BUSINESS: GOOD NEWS FOR RETIREE BENEFIT PLANS AND *YARD-MAN*

I. INTRODUCTION

When Congress passed the Employee Retirement Income Security Act (hereinafter "ERISA") in 1974, retiree welfare benefits took a backseat to pension benefit protections.[1] Retiree welfare benefits were not deemed as important at the time because employees retired at age sixty-five, the benefits were relatively inexpensive, and employers accounted for benefits they were responsible for according to the cash method or a pay-as-you-go basis.[2]

In the 1990s, employers that had previously agreed to pay for vested retiree welfare benefit plans began terminating them due to rising costs in health care for retirees and the rules promulgated by the Financial Accounting Standards Board (FASB).[3]

The FASB's No. 106 mandated a shift from a cash method of accounting for retiree welfare benefits to an accrual method.[4] This meant that any future obligation to pay retiree welfare benefits for active employees must be recognized in the employer's current financial statement.[5] This requirement significantly reduces current income for most companies that provide retiree welfare benefits.[6] As a result of these significant losses and the ever-increasing cost of welfare benefits, many companies modified the scope of their retiree benefit plans or simply ended them.[7]

For obvious reasons, when searching where to decrease costs, employers looked to modify or eliminate their retiree health benefits rather than active employee coverage.[8]

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1. 29 U.S.C. § 1001 (2012).

2. Jason Blumberg, *Bringing Back the Yard-Man Inference*, 4 U. PA. J. LAB. & EMP. L. 195, 195 (2011).

3. Marilyn J. Ward Ford, *Broken Promises: Implementation of Financial Accounting Standards Board Rule 106, ERISA, and Legal Challenges to Modification and Termination of Postretirement Health Care Benefit Plans,* 68 ST. JOHN'S L. REV. 427, 431 (1994).

4. Financial Accounting Standards Board, *Statement of Financial Accounting Standards No. 106: Employers' Accounting For Postretirement Benefits Other Than Pensions*, FASB (1990), *available at* http://www.fasb.org/pdf/fas106.pdf.

5. Ford, *supra* note 3, at 433.

6. *Id.*

7. Gregory J. Rossi, *It Doesn't Add Up: The Broken Promises of Lifetime Health Benefits, Medicare, and Accounting Rule FASB 106 Do Not Equal Satisfactory Medical Coverage for Retirees*, 13 J. CONTEMP. L. & POL'Y 233, 241 (1996).

8. *See* Susan E. Cancelosi, *Revisiting Employer Prescription Drug Plans for Medicare-Eligible Retirees in the Medicare Part D Era,* 6 HOUS. J. HEALTH L. & POL'Y 85, 104 (2005) (referring to "[P]rotecting employee health as a means to enhance productivity and reduce absenteeism obviously does not extend to retirees who, by definition, no longer contribute actively to the workplace.").

Companies who reduce or stop their coverage of employees' health care costs risk losing employees to competitors who provide better benefits.[9] Affected employees who do not leave, moreover, may organize a union, strike, or find other ways to protest against the employer.[10] But retirees facing cutbacks in their coverage enjoy no such influence over their former employers.[11] Therefore, when employers consider their cost saving options related to health insurance coverage, the first to be targeted is often the company's retired group.[12]

In response to these modifications and terminations, waves of retirees sued their former employers in order to protect their bargained-for retiree benefits.[13] Unfortunately, retiree health benefit jurisprudence in the United States, especially regarding collective bargaining agreements (CBA) and the Employee Retirement Income Security Act, has historically favored the employer.[14] It is well settled that courts turn to extrinsic evidence to interpret the terms of an integrated contract only when those terms are ambiguous or the terms are susceptible to more than one reasonable explanation.[15]

However, the divisive query seems to be how to determine whether a term or provision is ambiguous.[16] It is arguably a battle between the "four-corners" or formalistic approach versus the modern approach as to the role of extrinsic evidence in plan interpretation under ERISA.[17] The "four-corners" approach is inherently dismissive of the use of extrinsic evidence because the meaning or intent of the parties is evident by the explicit language of the document even in the face of outside communication that would show otherwise.[18] The modern approach simply promotes a broad view of the context surrounding the written plan document and encourages the use of extra-plan communications to find the intent of the parties.[19]

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9. *Id.* at 103.
10. *Id.* at 105.
11. *Id.* at 103.
12. *Id.*
13. Rossi, *supra* note 7, at 241.
14. *See generally* Henry H. Rossbacher et al., *ERISA's Dark Side: Retiree Benefits, False Employer Promises and the Protective Judiciary,* 9 DEPAUL BUS. L.J. 305, 319 (1997) (noting a scenario where employers may escape liability to their labor force).
15. Int'l Union, United Auto., Aerospace, and Agric. Implement Workers of Am. (UAW) v. Yard-Man, Inc., 716 F.2d 1476, 1480 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 1002 (1984).
16. Blumberg, *supra* note 2, at 204.
17. *Id.*
18. *Id.*
19. *Id.*

In recent years, some courts have been reluctant to consider extrinsic evidence in contract interpretation, particularly for ERISA plans.[20] Some courts have gone so far as to hold that vesting of welfare benefits cannot occur if the express language of the plan does not provide for it.[21] However, there are cases that turn the other way. Examples of such jurisprudence are *Yard-Man* and *Menasha*. In 1974, Yard-Man Incorporated and the union of United Automobile, Aerospace and Agricultural Implement Workers of America Union ("UAW") entered into a three-year collective bargaining agreement that provided for retiree welfare benefits.[22] Yard-Man's plant, though, closed nearly one year later.[23] In 1977, the company notified former employees that their existing health and life insurance benefits would terminate when the three-year collective bargaining agreement expired.[24]

In finding for the retirees, the Sixth Circuit found that the issue turned on the parties' intent and whether there was any extrinsic evidence present to assist in that finding.[25] Therefore, the court focused on the collective bargaining agreement.[26] In examining the agreement, the court relied on the traditional rules of contractual interpretation to ascertain the intent of the parties as to whether the benefits were irrevocable.[27] The Sixth Circuit introduced the concept that retiree benefits are status benefits that carry with them an inference that they continue, or vest, so long as the requisite status is maintained.[28] In instances where the agreement is ambiguous-which, in turn, arguably necessitates the use of extrinsic evidence-there is an inference that the parties probably intended the benefits to vest.[29] This is the "Yard-Man" inference.[30]

Furthermore, in the Sixth Circuit's recent decision in *Moore v. Menasha Corporation*, proponents for retiree benefits seem to

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20. *Id.* at 206.

21. *See, e.g.*, Sprague v. Gen. Motors Corp., 133 F.3d 388, 400 (6th Cir. 1998) (stating that the intent to vest must be found in the plan documents and must be stated in clear and express language); Blumberg, *supra* note 2, at 206.

22. *Yard-Man*, 716 F.2d at 1478.

23. *Id.*

24. *Id.*

25. *Id.* at 1479.

26. *Id.*

27. *Id.*

28. *Id.* at 1482.

29. *Id.*

30. Moore v. Menasha Corp., 690 F.3d 444, 450 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 1643 (U.S. 2013).

have won the day.[31] In *Menasha*, the court employed traditional rules of contract interpretation and the *Yard-Man* inference.[32]

The court laid out its analysis in the following way:

> In deciding whether an employer offered vested healthcare benefits, this Court applies a different standard depending upon whether the promise was negotiated via collective bargaining. Reese, 574 F.3d at 321. When a healthcare plan is not the product of collective bargaining, "the intent to vest must be found in the plan documents and must be stated in clear and express language." Id. (quoting Sprague, 133 F.3d at 400). By contrast, if the healthcare plan was the product of collective bargaining, this Court instead applies "ordinary principles of contract interpretation." Id. (citing Yolton v. El Paso Tennessee Pipeline Co., 435 F.3d 571, 580 (6th Cir.2006)). So long as this Court finds "explicit contractual language or extrinsic evidence" indicating an intent to vest, this Court applies the "Yard–Man inference," which requires "a nudge in favor of vesting" in close CBA cases. Id. (citing Yard–Man, 716 F.2d at 1482).
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> Although retiree healthcare benefits are governed by substantive federal law, we apply traditional rules of contract interpretation as long as their application is consistent with federal labor policies. *Yard–Man,* 716 F.2d at 1479. In performing this analysis, we look first to the CBAs' explicit language for clear manifestations of the parties' intent. *Id.* Each provision of the CBA is interpreted as "part of an integrated whole," meaning that, "wherever possible, each provision is construed consistently with the entire document and the relative positions and purposes of the parties." *Id.* We read the documents in such a manner as to give full meaning and effect to all their text, avoiding constructions that would render provisions illusory. *Id.* at 1480.
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> If, however, the plain language is susceptible to more than one interpretation, we then consider extrinsic evidence to supplement the parties'

31. *Id.* at 448.
32. *Id.* at 450-51.

intent.[33]

More specifically, the Court found that extrinsic evidence was needed to clarify the intent of the parties regarding the 1994 and 1997 CBAs.[34] Furthermore, the court held that outside evidence clarifying collective bargaining agreements signed in 1994 and 1997 indicated Menasha and the union intended to provide retirees and their spouses with vested, lifetime health care benefits.[35] The extrinsic evidence included the 1994 and 1997 summary plan descriptions, oral statements by Menasha Human Resources Representatives, letters updating the retirees on their healthcare coverage, Blue Cross Blue Shield insurance documents, and Menasha's pattern of conduct which included it paying out "the healthcare premiums for the employees and their spouses without interruption from 1994 through 2006 in accordance with the appropriations described in Section 7 of the CBAs."[36]

The Supreme Court's denial of certiorari has the practical effect of allowing the *Yard-Man* inference jurisprudence to endure despite a clear split among the circuit courts. Perhaps even more importantly, the Court had a chance to address the formalistic approach versus modern debate as to the role of extrinsic evidence in plan interpretation under ERISA.[37] At present, the Fourth, Sixth, and Eleventh Circuits have accepted the *Yard-Man* inference.[38] The Third, Fifth, and Eighth Circuits have rejected the *Yard-Man* inference, finding the inference impermissibly shifts the burden to employers.[39]

The Sixth Circuit followed its own precedent by applying the

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33. *Id.*

34. *Id.* at 455.

35. *Id.*

36. *Id.*

37. *See* Blumberg, *supra* note 2, at 206-07.

38. Steven J. Sacher & William Payne, *Retiree Health Benefits: Sixth Circuit Deals the Retirees Out,* 14 LAB. LAW. 475, 484 (1999); *see* Keffer v. H.K. Porter Co., 872 F.2d 60, 64 (4th Cir. 1989) (quoting *Yard-Man* as part of its holding); United Steelworkers v. Connors Steel Co., 855 F.2d 1499, 1515 (11th Cir. 1988) (citing *Yard-Man* to support the finding that the language of the agreement at issue was unambiguous); *Yard-Man*, 716 F.2d at 1479 (opining that the collective bargaining process cannot be bypassed to modify vested pension benefits).

39. *See* Int'l Union, United Auto., Aerospace, and Agric. Implement Workers of Am. (UAW) v. Skinner Engine Co., 188 F.3d 130, 139-41 (3d Cir. 1999) (rejecting the Yard-Man inference and embracing the Eighth Circuit's criticism of the inference); *see also* United Paperworkers Int'l Union v. Champion Int'l Corp., 908 F.2d 1252, 1261 n.12 (5th Cir. 1990) (finding merit in the Eighth Circuit's criticism of Yard-Man); *see also* Anderson v. Alpha Portland Indus., 836 F.2d 1512, 1517 (8th Cir. 1988) (disagreeing with Yard-Man to the extent that it recognizes an inference of an intent to vest).

Yard-Man inference to *Moore v. Menasha*.[40] However, other circuit courts rejected the *Yard-Man* inference by employing ERISA's preemption of state law as an excuse to essentially ignore traditional contract claims. In any event, employees have an uphill battle, whether the health benefits plan was contracted for in a unionized or non-unionized setting, and they usually lose. According to the Sixth Circuit, plans that are contracted for in a unionized setting and covered by collective bargaining agreements are subject to the traditional rules of contract interpretation apply.[41] Nevertheless, some circuit courts group "ambiguous retiree-benefit plan" cases into an ERISA category in order to limit the availability of remedies usually found in state contract law, because of their suspicion of extrinsic evidence of the written plan documents.[42]

In short, most decisions have favored employers because courts have used ERISA, a federal statute, to preempt state contract law and remedies.[43] *Menasha* is significant because it begs the question of why the Supreme Court may be waiting for a more appropriate time to settle this issue. Whatever the majority of federal court system's reasoning for doing so, applying the strict "four-corner" test rather than the extrinsic evidence approach has had the effect of consistently benefiting employers, even when there was evidence indicating otherwise.[44] This has turned into a recurrent struggle between employers and employees so it is not surprising that some circuit courts have chosen sides. That is precisely why the ruling in *Menasha* is noteworthy. The fact that the Supreme Court refused to review a ruling shielding retirees' health benefits suggests that the Court is not yet ready to choose sides.

II. HISTORY OF THE RELEVANT LAW

Retiree health benefits started during World War II as an extension to employer-provided health insurance for active

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40. *Moore*, 690 F.3d at 458.

41. *Id.* at 450-51 (finding that "When a healthcare plan is not the product of collective bargaining, the intent to vest must be found in the plan documents and must be stated in clear and express language. By contrast, if the healthcare plan was the product of collective bargaining, this Court instead applies ordinary principles of contract interpretation. So long as this Court finds explicit contractual language or extrinsic evidence indicating an intent to vest, this Court applies the *Yard-man* inference, which requires a nudge in favor of vesting in close CBA cases").

42. Blumberg, *supra* note 2, at 204-08.

43. *See id.* at 213.

44. *See id.* at 206, 214.

employees,[45] and were later codified in an Internal Revenue Code provision that excluded these types of benefits from employees' taxable income.[46] Generally, during the early development of retiree health benefits, employers were willing to provide retiree benefits to their employees because health care costs were not prohibitively expensive, life expectancy of the average worker was limited, and the actual cost of providing these benefits were deferred until the future.[47]

However, health care costs have continued to increase at a rate that continues to take a significant share of the nation's economy.[48] To add insult to employer woes, the Financial Accounting Standards Board (FASB), through Rule No. 106, began requiring employers to disclose the projected cost of future retiree health benefits.[49]

FASB No. 106 required employers to currently recognize the cost of health care benefits with respect to both current and prospective retirees.[50] In theory, FASB No. 106 represented the accurate financial accounting perspective where incurred costs—including future health care expenses of current employees—

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45. *See History of Health Insurance Benefits,* FACTS FROM EBRI (Mar. 2002), http://www.ebri.org/publications/facts/index.cfm?fa=0302fact; *see also* Scott J. Macey & George O'Donnell, *Retiree Health Benefits at the Crossroads*, 19 J.COMP.& BENEFITS no. 5,(2003).

46. I.R.C. § 106 (2013).

47. *See* MADELON LUBIN FINKEL & HIRSCH S. RUCHLIN, THE HEALTH CARE BENEFITS OF RETIREES 62–64 (1991); s*ee also* G. Lawrence Atkins, *The Employer Role in Financing Health Care for Retirees*, *in* 5 PROVIDING HEALTH CARE BENEFITS IN RETIREMENT 100, 108 (Judith F. Mazo et. al eds., 1994) [hereinafter Atkins, PROVIDING HEALTH CARE].

48. *See* Paul Krugman & Robin Wells, *The Health Care Crisis and What To Do About It*, N.Y. REV. OF BOOKS (Mar. 23, 2006), *available at* http://www.nybooks.com/articles/18802 (noting that the percent of U.S. gross domestic product spent on health care rose from 5.2% in 1960 to 16% in 2004).

49. *See* FIN. ACCOUNTING STANDARDS BD., EMPLOYERS' ACCOUNTING FOR POSTRETIREMENT BENEFITS OTHER THAN PENSIONS, STATEMENT OF FINANCIAL ACCOUNTING STANDARDS NO. 1065 (1990), *available at* http://www.fasb.org/pdf/fas106.pdf ("It will significantly change the prevalent current practice of accounting for postretirement benefits on a pay-as-you-go (cash) basis by requiring accrual, during the years that the employee renders the necessary service, of the expected cost of providing those benefits to an employee and the employee's beneficiaries and covered dependents. The Board's conclusions in this Statement result from the view that a defined postretirement benefit plan sets forth the terms of an exchange between the employer and the employee. In exchange for the current services provided by the employee, the employer promises to provide, in addition to current wages and other benefits, health and other welfare benefits after the employee retires. It follows from that view that postretirement benefits are not gratuities but are part of an employee's compensation for services rendered. Since payment is deferred, the benefits are a type of deferred compensation. The employer's obligation for that compensation is incurred as employees render the services necessary to earn their postretirement benefits.").

50. *Id.*

should be reflected in an employer's financial sheet when that employer assumes responsibility for the costs.[51] However, in practice, FASB No. 106 embodied a sharp break with established practice since most companies do not pre-fund retiree health benefits but have a pay-as-you-go system.[52]

The net effect was devastating for employees because there was now a significant increase in an employer's annual cost of doing business, in some cases, as much as five to ten times the cost on a pay-as-you-go basis.[53] Therefore, cost-cutting measures in the form of reductions to retiree benefits were inevitable.[54] Because employers now had to disclose these huge costs, many companies did not want to face the wrath of shareholders and therefore implemented certain cost-saving measures.[55]

Therefore, since FAS No. 106 now required employers to acknowledge the substantial drain on future profits due to the obligations they had assumed responsibility for with respect to current and future retirees[56], private sector employers may have found that this provides a justifiable reason to reduce retiree health care benefits that were already at risk due to rising health care costs.[57]

It is also important to note that changes in the American workplace have also affected retiree coverage.[58] In the past, manufacturing jobs represented the lion's share of U.S. employment.[59] Now, domestic manufacturing jobs represent an ever-shrinking share of jobs in favor of service industry

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51. *Id.*

52. *Id.*

53. Richard L. Kaplan et al., *Retirees at Risk: The Precarious Promise of Post-Employment Health Benefits*, 9 YALE J. HEALTH POL'Y L. & ETHICS, 287, 297 (2013) (citing ANNA M. RAPPAPORT & CAROL H. MALONE, ADEQUACY OF EMPLOYER-SPONSORED RETIREE HEALTH BENEFIT PROGRAMS, IN PROVIDING HEALTH CARE BENEFITS IN RETIREMENT, at 72-74 (Judith F. Mazo et al. eds., 1994) (noting the cost impact of the FASB pronouncement)).

54. *Id.*

55. Paul Fronstin, *The Impact of the Erosion of Retiree Health Benefits on Workers and Retirees*, EMPLOYEE BENEFIT RESEARCH INST., at 8 (Mar. 2005), *available at* http://www.ebri.org/pdf/briefspdf/0305ib.pdf.

56. Sylvester S. Schieber, *The Outlook of Retiree Health Benefits,* TIAA-CREF INSTITUTE RESEARCH DIALOGUE, at 3 (Sept. 2004), *available at ttp://www1.tiaa-cref.org/ucm/groups/content/@ap_ucm_p_tcp_docs/documents/document/tiaa02029392.pdf.*

57. *See generally* Richard L. Kaplan et al., *Retirees at Risk: The Precarious Promise of Post-Employment Health Benefits*, 9 YALE J. HEALTH POL'Y L. & ETHICS, 287, 299 (2013), *available at* http://digitalcommons.law.yale.edu/yjhple/vol9/iss2/1.

58. *Id.* at 295-96.

59. *Id.* at 295-96; Regina T. Jefferson, *Rethinking the Risk of Defined Contribution Plans,* 4 FLA. TAX REV. 607, 683 (2000).

occupations.[60] Yet, manufacturing companies are much more likely to offer retiree health benefits than new service industry powerhouses like Wal-Mart.[61]

Moreover, the manufacturing industry has reduced its workforce to such an extent that the number of retirees significantly surpasses the number of current employees.[62] This is yet another reason for employers to slash retiree benefits. In other words, not only are health care costs higher and increasing quicker on a per-person basis for retirees than for current employees, there are also far more retirees than current employees.[63]

A. *Statutory Framework: ERISA*

1. Federal Court Plan Interpretation Under ERISA

The courts have placed principal importance on formal written plan documents in cases concerning the termination of retiree welfare benefit programs.[64] Consequently, both verbalized and written communications that fall outside of the plan document are no longer of significant importance in some jurisdictions.[65] Because of such distrust, extrinsic evidence is seldom employed to supplement, amend, or used to determine whether an ambiguity exists in the plan document.[66] This approach has become the principal weapon for employers, who often promise that employee benefits will last for the retiree's life and often does not face liability as long as a provision in the plan reserves certain rights to the employer.[67] Some argue that this is contrary to both the congressional intent in the enactment of

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60. Kaplan, *supra* note 57, at 295.

61. *Id.* at 295-96; GARY CLAXTON ET AL., EMPLOYER HEALTH BENEFITS: 2006 ANNUAL SURVEY 134, *available at* http://kaiserfamilyfoundation.files.wordpress.com/2013/04/7527.pdf (noting disparity in retiree health benefit availability by industry).

62. *See* RAPPAPORT, *supra* note 53, at 59-61 (noting that the ratio of retirees to current workers is three to one).

63. *See* Hewitt Associates, TIAA-CREF Inst., *The Retiree Health Care Challenge*, 2 (2006), *available at* http://www.tiaa-crefinstitute.org/pdf/research/dvds-books/1 10106.pdf (noting that retiree health care costs represent 29% of total health care costs among large employers offering such benefits); *see also* RAPPAPORT, *supra* note 53, at 59-61 (noting that the ratio of retirees to current workers is three to one).

64. Alison M. Sulentic, *Promises, Promises: Using the Parol Evidence in ERISALitigation,* 3 U. PA. J. LAB. & EMP. L. 1, 5 (2000).

65. *See, e.g.*, Nachwalter v. Christie, 805 F.2d 956, 960 (11th Cir. 1986) (disallowing oral modifications of a written agreement).

66. *See* Sulentic, *supra* note 64, at 7.

67. *See generally* Kaplan, *supra* note 53, at 349.

ERISA and pre-ERISA state common law constructs.[68]

2. ERISA Analysis Through the Lens of Contract Law

ERISA preempts all prior existing state law on the subject of retiree welfare benefits.[69] However, Congress intended federal courts to develop a federal common law to fill in the gaps caused by the preemption.[70] In carrying out this charge, nothing stops the courts from using state common law for guidance. Few circuits have done so. Even so, most courts have recognized that the area of pension and welfare benefits should be analyzed under contract and trust law.[71] For this reason, it is important to examine the two opposing approaches to contract analysis and the function of extrinsic evidence within these models.[72]

Inherent distrust of using extrinsic evidence typifies the traditional and formalistic approach championed by Williston.[73] When addressing issues of integrated clauses, the Williston approach is primarily focused on the explicit language of the document, which in turn provides the best evidence of the intent of parties.[74] This type of basic contract interpretation focuses on the 'four corners' of the document in question.[75]

In contrast, the Corbinian approach promotes the notion that extrinsic evidence is essential for the analysis and interpretation of the overall contract, especially when there are

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68. Blumberg, *supra* note 2, at 199-201 (noting that "Congress intended federal courts to develop a federal common law to fill in gaps caused by this [ERISA] preemption. In carrying out this charge, nothing apparently prevents courts from turning to the preempted state common law for guidance. . . . Plan interpretation techniques demonstrate reluctance to resort to extrinsic evidence. Exacerbating the problem is the fact that most circuits have all but abandoned or rejected the *Yard-Man* inference. In sum, retirees are worse-off now than they were before the enactment of ERISA. This is extremely troubling since ERISA was intended to do the opposite").

69. 29 U.S.C. § 1144(a)(2012).

70. 120 Cong. Rec. 29, 942 (1974).

71. *Compare* Brewer v. Protexall, *Inc.*, 50 F.3d 453, 457 (7th Cir. 1995) (stating that health benefit plans governed by ERISA should be interpreted by federal common law rules of contract interpretation), *with* Burnham v. Guardian Life Ins. Co. of Am., 873 F.2d 486, 489 (1st Cir. 1989) (stating that ERISA-regulated group life insurance policies must be interpreted under principles of federal substantive law, including the common sense canons of contract interpretation).

72. Blumberg, *supra* note 2, at 204.

73. *See, e.g.*, John D. Calamari & Joseph M. Perillo, *A Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation,* 42 IND. L.J. 333, 338 (1967) (stating that when a writing appears complete on its face, it is deemed to be a total integration).

74. *Id.*

75. *Id.*

integration issues.[76] In any event, under the Corbinian, or modern approach, courts may consider extrinsic evidence even if the meaning of the plan is plain on its face.[77] Because of ERISA's contractual nature, the friction between the modern and traditional models plays a key role in ERISA plan litigation.

3. Statutory Provisions of ERISA

In general, the Employee Retirement Income Security Act of 1974 (ERISA) establishes minimum standards for "employee welfare benefit" packages such as employer-sponsored retirement and health care plans.[78] For the purposes of ERISA, an "employee welfare benefit plan" is any (1) "plan, fund or program," (2) "established or maintained (3) by an employer," (4) "to provide beneficiaries" (5) "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment."[79]

All plans subject to ERISA require, among other things, that an employer have written plan documents, a Summary Plan Description, annual filings of IRS Form 5500, and an established and maintained reasonable claims procedure.[80] The test of whether any benefits plan is "established and maintained" is dependent not only on the employer's intent, but also on the employer's actions.[81]

In order to determine whether a particular plan is "established or maintained," some federal courts apply a seven-factor balancing test: (1) the employer's representations in internally distributed documents; (2) the employer's oral representations; (3) the employer's establishment of a fund to pay benefits; (4) actual payment of benefits; (5) the employer's deliberate failure to correct known perceptions of a plan's existence; (6) the reasonable understanding of employees; and (7) the employer's intent.[82]

Furthermore, the employer's conduct, coupled with the surrounding circumstances, may satisfy the test to prove that a

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76. ARTHUR L. CORBIN, CONTRACTS § 573-96, at 356 (1960 & Supp. 1999).

77. *Id.*

78. *See* 29 U.S.C. § 1002(1)(2012).

79. *See* Employee Retirement Income Security Act of 1974 § 3; 29 U.S.C. § 1002; *see also Donovan v. Dillingham*, 688 F.2d 1367, 1371 (11th Cir.1982) (breaking ERISA statutory language into elements).

80. 29 U.S.C. §§ 1021-1181 (2012).

81. Butero v. Royal Maccabees Life Ins. Co., 174 F.3d 1207, 1215 (11th Cir. 1999).

82. Kenney v. Roland Parson Contracting Corp., 28 F.3d 1254, 1258 (D.C. Cir. 1994).

plan was established and therefore subject to ERISA.[83] For example, in *Dillingham*, the Eleventh Circuit announced that an ERISA plan exists if "from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits."[84]

This test suggests that the absence of a written plan "indicates a failure to adhere to fiduciary standards," not the absence of a plan altogether.[85] However, even with the *Dillinghman* test, "courts have assumed that the requirement of a written plan document signifies the exclusion of extrinsic evidence in a manner that goes far beyond the manner in which commentators such as Corbin prescribe for the common law."[86]

For example, the Third Circuit has held that section 402 of ERISA operates like any other common law integration clause, barring the introduction of extrinsic evidence to modify the written terms.[87] "In short, courts have interpreted section 402 of ERISA as a strict, statutorily-imposed merger clause that excludes the consideration of extrinsic evidence to vary or augment the terms of the plan, even in the face of numerous extra plan communications on the part of the employer."[88]

In addition, to protect the interests of employees and beneficiaries, ERISA imposes the common law duties of a trustee on the fiduciaries of the employee benefit plan.[89] However, the rights and remedies under ERISA are mainly restricted to reporting, disclosures, and fiduciary responsibilities.[90] ERISA prevents the more broad rights and remedies usually available under state law.[91] Moreover, the Supreme Court has held that employers are allowed to unilaterally change their ERISA health benefit plans as long as an employer does so in a permissible

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83. *See* Donovan v. Dillingham, 688 F.2d 1367, 1372 (11th Cir. 1982) (holding a plan need not be in writing and can be inferred from the surrounding circumstances to have been established).

84. *Id.* at 1373.

85. Sulentic, *supra* note 64, at 44-45 (citing *Dillingham,* 688 F.2d at 1372).

86. *Id.* at 47.

87. *In re New Valley Corp.*, 89 F.3d 143, 149 (3d Cir. 1996).

88. Blumberg, *supra* note 2, at 205(2001) (citing Alison M. Sulentic, *Promises, Promises: Using the Parol Evidence in ERISA Litigation,* 3 U. PA. J. LAB. & EMP. L. 1, 46-48 nn.243-250(2000) (noting that some courts have gone far beyond what Corbin prescribes for common law exclusion of parol evidence to interpret the rule as a statutorily imposed integration clause)).

89. 29 U.S.C. § 1104.

90. Kaplan, *supra* note 53, at 302.

91. *Id.* at 302-03.

manner.[92]

According to the Supreme Court, such an employer is "generally free under ERISA, for any reason at any time, to adopt, modify, or terminate [its] welfare plan."[93] ERISA does not provide any vesting guarantees for welfare plans, unlike its specified mandatory vesting requirements for pension plans.[94] Thus, ERISA's lack of statutory guidance regarding the vesting of health care benefits has produced extensive litigation over whether vesting of welfare benefits can occur in the absence of explicit and unambiguous contractual language in a company's benefits plan agreement.[95]

In these types of cases, retirees must prove that their former employer intended for the retiree health benefits to be vested.[96] Extrinsic evidence about the intent of the parties is considered only when (1) the plan's language is ambiguous because there are conflicting clauses subject to multiple reasonable interpretations or (2) the language is silent as to an employer's intent that the benefits vest.[97] On the other hand, if there is no ambiguity, the provisions must stand by what the language says.[98]

In general, health benefit plans must be reduced to written terms consistent with ERISA requirements.[99] While ERISA allows employers a right to change benefit plans, employers may give up this right by contracting with their employees for vesting of the employees' welfare benefits.[100]

Therefore, in cases where the language of the plan is ambiguous, retirees who want to protect their benefits must prove that the employer promised to vest their benefits without reservation.[101] It is the employees' burden to prove these facts in order to overcome the *Curtiss-Wright* rule that employers are free to modify benefit plans where they have reserved the right to do so.[102] Retirees have not been very successful in prevailing on

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92. Curtiss-Wright v. Schoonejongen, 514 U.S. 73, 78 (1995).

93. *Id.* at 78.

94. 29 U.S.C. §§ 1051-1061, 1081-1086 (2000).

95. *See generally* Blumberg, *supra* note 2.

96. Howe v. Varity Corp., 896 F.2d 1107, 1109 (8th Cir. 1990); *see also* McMunn v. Pirelli Tire, LLC, 161 F. Supp. 2d 97, 122 (D. Conn. 2001).

97. Helen M. Kemp, *The Employer Giveth and Taketh Away: Retiree Health Benefits Under ERISA-Governed Health Plans,* THE BRIEF (Am. Bar Ass'n, Chi., Ill.), at 16, 18 (2005) (discussing employer-employee disputes over benefit vesting).

98. *Id.* at 19-20.

99. *Id.* at 18.

100. *Id.*

101. *Moore*, 690 F.3d at 457-58.

102. *Id.*

such claims, whether in a unionized or non-unionized setting.[103]

It is important to recognize whether the plan was contracted for in a unionized or non-unionized context because some courts will deem the latter as covered by ERISA while the former a product subject to traditional rules of contract interpretation.[104]

B. *Collective Bargaining Agreements*

In a unionized setting, the collective bargaining agreement (CBA) regulates benefit plans and provides the groundwork for deciding the intent of the parties and what benefits are to be vested.[105] Just like in ERISA, a CBA Summary Plan Description will describe in plain language the terms of the collectively bargained benefits.[106] Summary Plan Descriptions typically contain reservation clauses specifying an employer's right to amend benefit plans at a later time, but additional language in the plan frequently suggests that the benefits are clearly vested for the duration of employee's lifetime.[107]

It is in these cases where ambiguous or conflicting provisions result in litigation because employers believe they have the right to change plans after the execution of the CBA and the retirees object by claiming that they bargained for lifetime benefits. In such cases of contractual ambiguity, the traditional rules of contract interpretation allow a court to assess the intent of the parties.[108]

C. *Circuit Split Over The* Yard-man *Inference*

The most controversial federal case addressing contractual ambiguity and the intent of parties regarding vested lifetime

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103. Kaplan, supra note 53, at 305.

104. *Moore*, 690 F.3d at 450 ("Although pension benefits are considered to be a form of deferred compensation that is heavily regulated under ERISA, a promise to provide healthcare coverage does not face the same level of scrutiny. Rather, healthcare coverage is considered a 'purely contractual' 'welfare benefit' that an employer typically may alter or even terminate at its will.").

105. *Id.*

106. *See* 29 U.S.C. § 1022(a)(2000).

107. *Moore*, 690 F.3d at 458-59 ("[A] ROR [reservation of rights] clause must be interpreted as is any other extrinsic evidence; namely, the ROR cannot internally contradict other provisions of the SPD, nor can it contradict the terms of the CBA itself. If the SPD otherwise indicates that it is subject to the provisions of the CBA, the SPD is deemed unqualified and cannot trump the parties' collectively bargained agreement. Likewise, if the CBA states that it is the fully integrated commitment of the parties or that it cannot be amended without signed mutual consent, the ROR will not trump the CBA. Only where the SPD states 'an unqualified assertion of a unilateral right to end retiree medical insurance benefits without regard for existing or future CBAs,' do we allow a later-issued SPD to trump the terms of a bargained-for CBA.").

108. *Id.* at 450-51.

benefits in a unionized context is *UAW v. Yard-Man, Inc.*[109] The case is mostly known for the Sixth Circuit's holding that the CBA's silence as to how long the benefits would last suggested that the employer meant for the benefits to vest.[110] This was subsequently dubbed the "Yard-Man" inference. In *Yard-Man*, the United Automobile Workers (UAW) and the employer agreed to provide retiree welfare benefits in a 1974 CBA.[111] The company then terminated these benefits after the CBA's three-year term expired.[112] In viewing the retiree benefit provision language asserting that the employer "will provide insurance benefits equal to the active group" as ambiguous concerning the benefits' duration, the Sixth Circuit allowed extrinsic evidence to be considered under the rules of contract interpretation.[113]

The court reasoned that retiree benefits "carry with them an inference that they continue so long as the prerequisite status is maintained. Thus, when the parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree."[114] According to the Sixth Circuit, the retirees had a justified expectation of vested lifetime benefits because retirement benefits are "typically understood as a form of delayed compensation or reward for past services [not likely to] be left to the contingencies of future negotiations."[115] In other words, the court argued that the retirees already accumulated the benefits when they sacrificed higher wages as employees for future benefits; therefore, the benefits were not subject to later modifications.[116]

Since *Yard-Man*, the Sixth Circuit's *Yard-Man* standard of applying the "specific controls the general" approach to specific and general duration provisions has been accepted by some courts, including the Eleventh Circuit.[117] In *United Steelworkers of America v. Connors Steel Co.*, the Eleventh Circuit addressed the issue of whether a retiree health benefits plan terminated at

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109. *See* Blumberg, *supra* note 2, at 201.

110. *Id.*

111. *Yard-man*, 716 F.2d at 1478.

112. *Id.*

113. *Id.* at 1480.

114. *Id. at* 1482.

115. *Id.*

116. *See* Douglas Sondgeroth, *High Hopes: Why Courts Should Fulfill Expectations of Lifetime Retiree Health Benefits in Ambiguous Collective Bargaining Agreements*, 42 B.C. L. REV. 1215, 1231-1232 (2001) (explaining and defending the *Yard-Man* inference).

117. Kaplan, *supra* note 53, at 17.

the expiration of the collective bargaining agreement.[118] As in *Yard-Man*, the court held that a specific duration clause overrides a general duration clause.[119] However, there is significant disagreement among the circuit courts since *Yard-Man* regarding the amount of weight accorded to the inference of vesting when a contract is ambiguous. Some circuits, such as the Sixth and Eleventh, deem the inference a strong factor in ascertaining the intent of the parties to a CBA, while others consider it only selectively.[120]

For example, the Fifth Circuit restricts the application of the *Yard-Man* inference to those cases in which retirees lack any influence in negotiating a new CBA.[121] In contrast, the Seventh Circuit does not adhere to the vesting inference.[122] The court held there is a presumption against vesting after the duration of a CBA if the agreement is silent on the issue.[123] In early decisions, some circuit courts rejected the "Yard-Man" inference and demonstrated a suspicion for evidence outside of the written plan documents.[124] These courts employed ERISA's preemption of state law as an excuse to essentially ignore traditional contract claims.[125]

Some courts essentially grouped these cases into the ERISA category, thereby limiting the availability of remedies usually found in state common law.[126] In short, these decisions have favored employers because courts have used ERISA to preempt state contract law and remedies despite "turning to the preempted state common law for guidance."[127]

III. *MOORE V. MENASHA CORP.*

Plaintiffs ("Moore") were a group of retired employees, their spouses, and their union, who alleged that their former employer,

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118. *Id.* (citing United Steelworkers of Am. v. Connors Steel Co., 855 F.2d 1499 (11th Cir. 1988)).

119. United Steelworkers of Am. v. Connors Steel Co., 855 F.2d 1499, 1505 (11th Cir. 1988).

120. *See* Golden v. Kelsey-Hayes Co., 73 F.3d 648, 654 (6th Cir. 1996); *see also* Keffer v. H.K. Porter Co., 872 F.2d 60, 64 (4th Cir. 1989); *see also* United Steelworkers v. Textron, Inc., 836 F.2d 6, 9 (1st Cir. 1987).

121. *See* Int'l Ass'n of Machinists v. Masonite Corp., 122 F.3d 228, 231-32 (5th Cir. 1997); United Paperworkers Int'l Union v. Champion Int'l Corp., 908 F.2d 1252, 1261 n.12 (5th Cir. 1990).

122. Rossetto v. Pabst Brewing Co., 217 F.3d 539 (7th Cir. 2000).

123. *Id.* at 544, 547.

124. Blumberg, *supra* note 2, at 196.

125. *Id.*

126. *See id.* at 200-01.

127. *Id.* at 201.

Defendant Menasha Corporation ("Menasha"), violated the terms of two collective bargaining agreements ("CBA") by denying the employees and their spouses lifetime vested healthcare coverage following the employees' retirement.[128] Moore alleged Menasha violated § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, and § 502(a)(1)(B) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132.[129]

At the trial level, the district court issued a split decision that ruled in Plaintiffs' favor as to employee coverage and in Defendant's favor as to spousal coverage.[130] On appeal, the Sixth Circuit held that extrinsic evidence clarifying collective bargaining agreements signed in 1994 and 1997 indicated Menasha and the union intended to provide retirees and their spouses with vested, lifetime health care benefits.[131]

The main points of contention centered on the language of two collective bargaining agreements (1994 & 1997) between Moore and Menasha.[132] Menasha drafted both agreements, which were substantially similar in content.[133] The provisions at issue in the 1994 CBA were Section 7(a) and 7(b).[134] Section 7(a) provides: "Employees reaching the age of 62 during the term of this agreement shall be provided coverage under the Blue Cross/Blue Shield of Michigan Plan. These employees will pay 20% of the premium for this coverage until they reach 65. At that time, [the] company will pay 100% of premium for this coverage."[135]

Section 7(b) provides: "Effective July 1, 1997, the company will provide medical coverage through Menasha Corporation retiree medical plan for persons retiring at or after age 65. Persons retiring at age 62 will pay 20% of the premium for this

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128. *Moore*, 690 F.3d at 448-49 (noting that "After retiring, the employees and spouses did in fact continue to receive healthcare insurance from Defendant through a plan issued by Blue Cross Blue Shield of Michigan (the BCBS Plan). Over the ensuing years, Defendant sent various communications to Plaintiffs detailing their healthcare benefits, including letters, benefit booklets, and summary plan descriptions. Defendant paid the healthcare insurance premiums without interruption through October of 2006. [I]n mid-October of 2006, Defendant informed Plaintiffs that the company was instituting a new healthcare plan to replace the offerings in place currently for all [its] Coloma retirees, to take effect on January 1, 2007. Defendant announced that it would no longer cover 100% of the healthcare insurance premiums. . . .").

129. *Id.* at 448.

130. *Id.*

131. *Id.*

132. *Id.* at 451.

133. *Id.*

134. *Id.*

135. *Id.*

coverage between ages 62 & 65."[136] Both "parties offer conflicting definitions for the terms "employees" and "persons retiring" used in Sections 7(a) and 7(b), respectively."[137] According to Moore, the term "employees" in Section 7(a) should be interpreted to mean "retired employees."[138] According to Menasha, the term refers only to "active employees."[139]

Moore argued that all of the sections of the article (Article XV) follow a specific pattern: active employees (Sections 1 through 3); followed by inactive employees (Sections 4 and 5); and ending with retired employees (Sections 6 and 7).[140] Menasha, on the other hand, argued that the closeness of the terms "employees retiring" in Section 6 and "persons retiring" in Section 7(b) was an indication that the drafters knew exactly what language to use in conferring retirement benefits, and that by failing to do so, the drafters deliberately chose not to extend healthcare benefits to retired employees.[141]

IV. STATEMENT OF THE COURT'S ANALYSIS AND HOLDING

As for the extrinsic evidence, the court found that there was enough evidence to suggest the parties intended for the retiree health benefits to vest.[142] Such evidence included a summary plan description, statements by Menasha Human Resources representatives, letters by Menasha to Moore regarding updates to their coverage, Blue Cross Blue Shield insurance documents, and payment of premiums by Menasha pursuant to the 1994 and 1997 CBAs.[143] Menasha had no real extrinsic evidence to counter the above.[144] In determining whether the parties intended that the health benefits vest upon retirement, the court employed ordinary principles of contract interpretation.[145]

The court stated that ordinary principles of contract interpretation are properly employed for health plans that are the product of collective bargaining.[146] First, the Court looked at the explicit language for clear manifestations of the parties'

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136. *Id.* at 451.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 451-52.
141. *Id.* at 452.
142. *Id.* at 453.
143. *Id.* at 457.
144. *Id.*
145. *Id.* at 450.
146. *Id.*

intent.[147] However, the plain meaning of the document was ambiguous so the Court felt it necessary to look to extrinsic evidence. The court reasoned: "If, however, the plain language is susceptible to more than one interpretation, we then consider extrinsic evidence to supplement the parties' intent."[148] The court found that all of the extrinsic evidence suggested that the parties' intent was for the health plan to vest.[149]

Summary plan descriptions ("SPD"), documents that provide a plain language explanation of benefits to plan participants as required by ERISA and Department of Labor regulations, are extra-plan communications made by the employer.[150] As such, the Sixth Circuit found that they can be utilized as extrinsic evidence to clear up the ambiguous language found in the 1994 and 1997 CBAs.[151] The SPDs stated:

If you retir[e] on or after June 17, 1994 and before July 1, 1997 you are eligible for the Blue Cross/Blue Shield Group Medical Plan as a retired employee if you retire from Menasha Corporation provided that on the date your employment ceased you are between the ages of 62 and 65 and you are immediately eligible to receive a benefit from the Menasha Corporation Retirement Income Plan. Menasha Corporation shall contribute 80% of the premium when the employee is between the ages of 62 and 65. The retired employee will pay 20%. When the retired employee attains age 65, Menasha Corporation will contribute 100% of the premium. Menasha Corporation shall contribute 80% on behalf of a dependent spouse, the retired employee will pay 20%. When the dependent spouse attains age 65, Menasha Corporation shall contribute 100% of the premium.[152]

Second, some of the plaintiffs offered into evidence affidavits claiming they had met with Menasha human resource representatives to discuss their retirement healthcare benefits. The evidence showed that the representatives told some of the plaintiffs that they would receive lifetime healthcare consistent with the apportionments outlined in Section 7(a) of the 1994 and 1997 CBAs.[153] Menasha offered no evidence to dispute the claims in the affidavits.[154]

Third, plaintiffs also submitted into evidence letters they

147. *Id.* at 451.
148. *Id.*
149. *Id.* at 455.
150. *Id.* at 455-56.
151. *Id.* at 456.
152. *Id.*
153. *Id.*
154. *Id.*

received from Menasha dated October 20, 2005.[155] The purpose of the letters was to "update" the plaintiffs about the details of their "retiree medical benefit program[s]."[156] Finally, Plaintiffs showed that Menasha's pattern of conduct in paying the healthcare premiums for the employees and their spouses from 1994 through 2006, in accordance with the appropriations described in Section 7 of the CBAs, should also be taken into consideration.[157]

Menasha maintained that while it was not legally obligated to provide its retirees with healthcare benefits, it did so solely out of "goodwill."[158] The Sixth Circuit agreed with the district court that "[t]hough it is possible that Defendant's payments resulted solely from goodwill," the admissions contained in the SPDs, the representations made by Menasha's human resources representatives, the letters to various plaintiffs confirming their benefits, and the general economics of the matter, "strongly suggest that the payments resulted from a sense of obligation."[159] Because the extrinsic evidence overwhelmingly showed that Menasha and its retirees negotiated for healthcare insurance benefits, the court found in the retirees' favor under both CBAs.[160]

Another tool that the Sixth Circuit employed was the *Yard-Man* inference, which essentially provides a presumption that retiree health benefits vest upon retirement if there is language that limits benefits to a certain duration in some provisions of the document, and there is no specific language limiting the benefits in other provisions.[157]

In these cases, the latter provisions will be deemed to contain no restriction as to the duration and therefore constitute a vesture of benefits.[161] The court's *Yard-Man* analysis is as follows:

[H]ealthcare benefits are typically considered only to be a "welfare benefit," freely terminable or alterable by the employer at will. *Curtiss–Wright Corp.,* 514 U.S. at 78, 115 S.Ct. 1223. However, if an employer chooses to vest benefits, it renders those benefits "forever unalterable." *Sprague,* 133 F.3d at 400. Particularly in the context of collective bargaining agreements, the intent to vest is a significant bargained-for-term because

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155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 457.
159. *Id.*
160. *Id.*
161. *Id.*

retirees lose much of their bargaining power upon retirement. In deference to that fact, this Court infers vesting only where explicit contractual language or extrinsic evidence indicates an intent to vest. *Reese,* 574 F.3d at 321. In close cases, however, we apply a thumb on the scale in favor of vesting.[162]

In this case, the court found that applying the *Yard–Man* inference was proper because in Sections 2, 3, 4, and 5 of Article XV, the CBAs specify durational limitations, while Section 7, by contrast, contains no such restriction.[163] The Sixth Circuit noted that it "has consistently held that the inclusion of specific durational limitations in some provisions, but not others, suggests that benefits 'not so specifically limited, were intended to survive.'"[164] Applying the ordinary principles of contract interpretation and the "Yard-man" Inference, the Sixth Circuit held that "the plain language and the extrinsic evidence indicate[ed] that the parties bargained for vested healthcare insurance benefits for the retired employees and their spouses."[165] The Supreme Court subsequently denied certiorari.

V. ANALYSIS

The historical events leading up to *Moore v. Menasha* are important to place the future of retiree benefits into context. The point is that the rising cost of health care has combined with larger trends (FASB Rule 106, increase in number of retirees, increase longevity among retirees, ERISA, collective bargaining agreements, and the federal court's pro-employer sentiment regarding retiree health benefit coverage) affecting employer conduct to seriously jeopardize the delivery of retiree health benefits.

According to the Blumberg article, one of the biggest obstacles has to do with conflicting paradigms of contract interpretation.[166] With regard to retiree benefit plans under ERISA, the four corners test usually prevails over Corbin's extrinsic evidence approach.[167] ERISA requires that all employee benefit plans be reduced to writing; some courts have used this rule to protect employers from promises that were never formally made a part of the plan document, but carry great weight with

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162. *Id.* at 457-58.
163. *Id.* at 458.
164. *Id.*
165. *Id.*
166. Blumberg, *supra* note 2, at 204.
167. *Id.* at 204-05.

the employees.[168] Usually, employees believe that what was orally promised outside of the written agreement actually made it to the plan.[169] This is precisely why extrinsic evidence must play an important role in plan interpretation.[170]

As Sulentic states, "ERISA's mandate of a written plan document has come to justify the assertion that the written plan embodies the entire plan."[171] The Blumberg article describes the above proposition as laden with inconsistencies.[172] First of all, most employees do not significantly participate in the drafting of plan documents.[173] How can a written plan embody the intention of the parties if one of the parties was not given the opportunity to participate in a meaningful way?

Second, some plans get it right and do contain all of the promises made in the context of the benefit plan. However, that is obviously not always the case. In latter cases, some employers not only promised certain benefits to their employees, but they acted consistently with those promises until later terminating the promised benefits.[174] Additionally, the actual usefulness of the written plan is limited because many plan participants are not able to sufficiently understand the benefits outlined in the formal plan document even if they were to read it.[175] In other words, the ability to read the plan document should not be the concern- understanding the plan's implications to the employee's benefits should be the primary goal.

Third, Congress intended that the written plan document provision in ERISA protect employees by forcing the employer to reduce the plan to writing, placing the key promises and benefits in one place.[176] Therefore, the requirement that the plan be in writing was not for the lopsided benefit of employers as has been the case.[177] In this way the Sixth Circuit was right in applying Corbin's extrinsic evidence approach and the "Yard-Man" inference. First, the language in the plan suffered from ambiguity, so the appropriate test for ascertaining the true intention of the parties at the time the agreements were executed

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168. Sulentic, *supra* note 64, at 38-39E.

169. *Id.* at 39.

170. *Id.*

171. *Id.*

172. Blumberg, *supra* note 2, at 204-05.

173. *Id.* at 205.

174. *See, e.g.*, Varity Corp. v. Howe, 516 U.S. 489, 492-94 (1996); Degan v. Ford Motor Co., 869 F.2d 889, 895 (5th Cir. 1989).

175. Sulentic, *supra* note 64, at 39.

176. Blumberg, *supra* note 2, at 205.

177. *Id.* at 213–14.

was to look at evidence outside of the four corners of the plan document.

For all the benefits that the "four-corner" test may present, problems with this approach abound.[178] For example, the "four-corner" approach encourages the intrusion of the judges' own subjective experiences.[179] According to this view, in cases where there is ambiguity in the plan, there are arguably two types of extrinsic evidence: extra-plan communication that is inherently tied to a plan document or a judge's knowledge based on his experience outside of the particular case at issue.

The Blumberg article aptly advises that perhaps it would be a vast improvement to rely upon extrinsic evidence that actually relates directly to the plan document itself rather than other extrinsic evidence-a judge's own personal experiences as to what a contract term means.[180] Fortunately, the Corbin approach provides such a remedy: it maintains that any term cannot be deemed unambiguous without first considering the context of the agreement.[181] It arguably follows that the *Yard-Man* inference is a proper tool employed in that type of endeavor.[182]

Still, in recent years judges have been reluctant to consider extrinsic evidence in contract interpretation, particularly for ERISA plans.[183] Even more surprising, some courts have gone so far as to hold that vesting of benefits cannot occur if the express language of the plan does not provide for it.[184]

In spite of the concerns concerning the use of extrinsic evidence in assessing ambiguity, a written plan document that accurately describes the entire agreement faces no threat from misuse or misinterpretation.[185] In any event, this judicial hostility to extrinsic evidence, even in light of an employer's express promises of lifetime benefits, is unwarranted and makes

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178. *Id.* at 206.

179. *See, e.g.*, Mellon Bank v. Aetna Bus. Credit, Inc., 619 F.2d 1001, 1011 (3d Cir. 1980) (stating that "under a 'four corners' approach a judge sits in chambers and determines from his point of view whether the written words before him are ambiguous").

180. Blumberg, *supra* note 2, at 206.

181. *Id.* at 205-206.

182. *Id.* at 206.

183. Sulentic, *supra* note 64, at 60 (stating, "even when the extrinsic evidence strongly suggests that the plan document is ambiguous, there is a deep-rooted reluctance to acknowledge an ambiguity that is not patently obvious on the face of the document").

184. *See, e.g.*, *Sprague*, 133 F.3d at 400 (stating that the "intent to vest must be found in the plan documents and must be stated in clear and express language" (quoting Wise v. El Paso Natural Gas Co., 986 F.2d 929, 937 (5th Cir. 1993)(internal quotation marks omitted))).

185. Sulentic, *supra* note 64, at 63.

the *Yard-Man* inference even more necessary.[186] The *Yard-Man* inference does not serve as the main factor in deciding whether the parties intended the benefits to vest, but it functions as an additional consideration for judges in making the initial determination of ambiguity.[187] The *Yard-Man* inference is simply a counterweight to the current approach.[188] The inference does not, as some courts have described, shift the burden to the employers. To be more precise, the inference determines whether plan documents are ambiguous, and, therefore, whether to allow the introduction of favorable extrinsic evidence to discern intent. Presently, however, federal courts are regularly misusing the ERISA preemption of state law.[189] The *Yard-Man* inference functions as a way to keep these actions in check.[190] At the very minimum, the *Yard-Man* inference assists trial courts to keep ERISA's pro-employee intent in mind.[191]

VI. CONCLUSION

Beginning in early 1990s, employers discovered a timely pretext in FASB Statement No. 106 to justify the elimination of employer-funded retiree benefit programs.[192] The cases discussed above, as well as others, demonstrate "an overriding judicial determination that retiree health care is wildly expensive, threatening the solvency of corporate America."[193] Arguably, protecting the solvency of employers was not Congress's intent in enacting ERISA.[194]

ERISA's preemption of state law that favored retirees did not aim to shift the relative burdens on from employers to the retirees. Actually, the Supreme Court said as much in *Firestone Tire and Rubber.*[195] It could be argued that ERISA was enacted to bring uniformity and to make sure that employers reduced their plans to writing so that employees could reasonably avail themselves of the terms of the plan.

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186. Blumberg, *supra* note 2, at 206.

187. *Id.*

188. *Id.*

189. *Id.* at 213.

190. *Id.*

191. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 113 (1989) (stating that ERISA was enacted to "protect the interests of employees").

192. Blumberg, *supra* note 2, at 213.

193. *Id.* (citing Henry H. Rossbacher et al., *ERISA's Dark Side: Retiree Benefits, False Employer Promises and the Protective Judiciary,* 9 DEPAUL BUS. L.J. 305, 308 (1997)).

194. *Id.*

195. *See* Firestone Tire & Rubber, 489 U.S. at 113.

I assume the Supreme Court will take on this issue in the near future. Just like in *Yard-Man*, the Sixth Circuit in *Menasha* stood by the concept that retiree benefits are status benefits that carry with them an inference that they continue so long as the requisite status is maintained. To be clear, the Sixth Circuit has stated that the *Yard-Man* inference would not by itself establish the intent to create vested benefits.[196] Rather, the court explained that the inference would serve as contextual evidence of the parties' intent in making the agreement.[197]

The *Yard-Man* court, in explaining the role of inference, stated that "as part of the context from which the collective bargaining agreement arose, the nature of such benefits simply provides another inference of intent."[198] However, even though I agree with the Blumberg article that federal courts have consistently misapplied ERISA preemption to the benefit of employers, I believe the Supreme Court will revisit this issue before Congress accomplishes anything through statutory means.[199]

In my opinion, a final ruling on plan interpretation and the *Yard-Man* inference is a solution to the judicial hostility toward retirees regarding plans that do not clearly vest rights. A solution is needed because retirees in the circuits that do not follow *Yard-Man* have no recourse. In any event, *Menasha* currently stands behind the Yard-Man inference and against the recent anti-retiree judicial activism.[200] The Sixth Circuit's approach is simple: instead of unjustly relying on the "four-corners" test and ERISA statutory preemption when interpreting ambiguous plans, courts should apply the basic rules of contract interpretation.

Moises Morales, III

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196. *Yard-Man*, 716 F.2d at 1482.
197. *Id.*
198. *Id.*
199. *See* Blumberg, *supra* note 2, at 213.
200. *See id.*