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# The Problematic Provision and Protection of Health and Welfare Benefits for Retirees

DONALD T. WECKSTEIN\*

*Professor Weckstein explores the conceptual underpinnings of the law governing health and welfare benefits of retired employees. He begins with a discussion of bargaining rights and duties and highlights the legal consequences of an employer modification of bargained-for retiree benefits in various contexts. He asserts that there is no legal prohibition on modification or termination absent proof of a contractual commitment which gives the retiree a vested right to benefits. Recognizing the need for legislation, Professor Weckstein concludes that until the law is changed, a presumption against contractual vesting of retiree benefits should be applied, and extrinsic evidence should be admitted to rebut this presumption.*

## THE SITUATION

Business had been going well for the Company. Demand had been strong and the Company had a major share of the market. Even the presence of a strong union did not interfere with the rosy picture. While, of course, the union wanted more, take home pay was adequate and the leadership was concerned about doing something for its more senior workers and for those who had already retired after working many years for the Company when the pay and benefits were not as good. Under these circumstances, the union was able to persuade the Company to agree to expand the health insurance coverage to include prescription drugs and dental services, and to make

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these services, as well as basic medical and hospitalization insurance, available to already retired employees to the extent they were not already covered by Medicare. The additional insurance coverage was paid for both by a larger company contribution per hour worked to a health and welfare benefit plan trust, and from the unexpectedly higher interest being earned on funds previously contributed to the trust. The senior workers liked that because they could look forward to similar benefits when they retired.

That was ten years ago; before sky-rocketing medical costs, and even more importantly, before the introduction into the American market of new, much less expensive (and some would say, better made) foreign products. Now business prospects were no longer rosy. Despite economies and lower prices (in an attempt to meet the foreign competition), sales and profits were down. This year it was the Company that sought concessions from the union. These included a co-pay provision for current workers' medical benefits and an elimination of health insurance benefits for retired workers. If the concessions were not granted, the Company threatened that they might have to shut down the plant or declare bankruptcy. Then, the Company spokesperson said, "Nobody gets any benefits." Faced with these prospects, the union leadership was most concerned with preserving jobs and take-home pay, and reluctantly was willing to go along with the benefit cuts. Representatives of the retired workers, however, threatened to sue if their health benefits were eliminated. With the aid of a mediator, a deal was reached between the Company and union that authorized the trustees to stop purchasing health insurance for retired employees "if they can legally do so."

Can they? Is it true that nobody will get any benefits if the plant closes or the Company goes bankrupt? Were there legal problems in affording the retired workers health insurance benefits in the first instance? Does a union violate its duty of fairly representing all members of a bargaining unit by trading off retirees benefits for current employee wages? What tribunal should determine these issues: courts, the National Labor Relations Board (NLRB), arbitrators?

This Article explores these and related legal issues arising from granting health and welfare benefits to persons who have retired from active employment. The combination of extraordinary advances in both medical science and medical costs has resulted in an increasingly large number of senior citizens in need of assistance, beyond federal Medicare programs,<sup>1</sup> in meeting the expenses of adequate medical care. Unfortunately, these escalating needs occur while

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1. According to speakers at a recent workshop on health care negotiations: "Actuarial trends, coupled with rising medical costs, mean that the unfunded liabilities of health and welfare plans may dwarf those of pension plans . . ." Estimates range from \$98 billion up to \$2 trillion in unfunded health and welfare plan liability, and the

many employers are currently fighting for economic survival in the face of domestic deregulation, foreign competition, and the challenge of technological innovation. The confluence of these circumstances has given rise to several legal issues, some of which have been inconsistently resolved by courts and other tribunals. Congress also has taken an increasing interest in trying to resolve these problems, so far with only stop-gap measures. Careful analysis is timely and needed. Hopefully, this Article can contribute to that end.

### BARGAINING BENEFITS FOR RETIRED EMPLOYEES

Employers and the labor organizations that represent their employees have a statutory duty to bargain with one another on "wages, hours, and other terms and conditions of employment."<sup>2</sup> The Supreme Court has held that such matters are mandatory subjects of collective bargaining about which either party may insist on its proposals to the point of impasse, and back up its insistence by economic action such as a strike by the union or a lockout by the employer.<sup>3</sup> In addition, an employer who modifies an existing employment term or practice which is a mandatory subject of bargaining, without bargaining with the union or establishing that the union waived its right to bargain concerning that subject, commits an unfair labor practice in violation of its duty to bargain in good faith imposed by section 8(a)(5) of the National Labor Relations

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problem will become worse as the number of retirees grows and they live longer after retirement . . . . Actuarial trends indicate that retirees will make up an increasingly larger segment of the overall population, meaning that more retirees will be supported by proportionally fewer active employees . . . . Cutbacks in Medicare by the federal government mean that health insurance costs increasingly are being shifted to the private sector, adding to the burden on health and welfare plans that cover retirees . . . . Providing health care coverage for retirees poses a huge problem for such plans both because of the rising number of retirees and the increasing cost of health care . . . . [O]ver the past 10 years, medical price increases generally have outpaced increases in overall consumer prices. In 1986, medical prices are projected to increase at a rate more than four times faster than the projected increase in overall prices.

5 EMPLOYEE RELATIONS WEEKLY (BNA) 27-28 (Jan. 5, 1987).

The advantages and disadvantages of the Medicare program are beyond the scope of this Article, but it is relevant to note that Medicare has been criticized as not adequately meeting the health care needs of retired workers in terms of eligibility, coverage of all health care expenses, and required supplemental payments.

2. National Labor Relations (Wagner) Act, §§ 8(a)(5), 8(b)(3), 8(d), 29 U.S.C. § 158 (a)(5), (b)(3), (d) (1982) [hereinafter NLRA].

3. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 348 (1958); see R. GORMAN, LABOR LAW 431-33, 496 (1976); 1 C. MORRIS, THE DEVELOPING LABOR LAW 629-34, 760-63, 770 (2d ed. 1983).

Act (NLRA).<sup>4</sup>

In *Allied Chemical Workers v. Pittsburgh Plate Glass*,<sup>5</sup> the Supreme Court held that an employer did not commit an unfair labor practice by unilaterally changing insurance benefits previously negotiated for already retired workers because retired workers were not “employees” within the meaning of the NLRA. Thus, benefits for previously retired workers were not mandatory subjects of bargaining and employers were not obliged to bargain over them with the union.

Nevertheless, collective “bargaining over pensioners’ rights has become an established industrial practice.”<sup>6</sup> The apparent anomaly of a practice of common bargaining over a subject on which bargaining is not required can exist within the law because the Supreme Court has adopted a classification of potential collective bargaining subjects as (1) mandatory — over which parties must bargain, at least when one party invokes the subject; (2) permissive — over which parties may, but need not, bargain; and (3) illegal — over which parties may not bargain without breaking the law.<sup>7</sup> Health and welfare benefits for already retired workers fall into the second category.<sup>8</sup> It is a subject about which unions and employers need not, but often do, bargain.

By contrast, issues regarding health and welfare, as well as pension, benefits which currently active workers will receive when they retire are considered mandatory subjects of bargaining.<sup>9</sup> This holding is consistent with the Court’s interpretation of the definition of “employee” as one who is currently working,<sup>10</sup> and whose benefits — even upon and after retirement — must be negotiated upon request of either party.<sup>11</sup> Such benefits are regarded as a form of compensation, the receipt of which has been delayed until after retirement, and are in lieu of additional current income.<sup>12</sup> Retired employees, however, by definition, have ceased to work for, and have no expect-

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4. See, e.g., *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964); *NLRB v. Katz*, 369 U.S. 736 (1962); see also R. GORMAN, *supra* note 3, at 439-42, 455-66; 1 C. MORRIS, *supra* note 3, at 563-66.

5. *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157 (1971).

6. *Id.* at 175-76, 182; see also *infra* note 37 and accompanying text.

7. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958). See generally R. GORMAN, *supra* note 3, at 496-531; 1 C. MORRIS, *supra* note 3, at 757-869.

8. *Pittsburgh Plate Glass*, 404 U.S. at 171 n.11, 176, 181 n.20, 187-88; 1 C. MORRIS, *supra* note 3, at 764-65, 779.

9. *Pittsburgh Plate Glass*, 404 U.S. at 180; see also *Bastian-Blessing, Div. of Golconda Corp. v. NLRB*, 474 F.2d 49 (6th Cir. 1973); 1 C. MORRIS, *supra* note 3, at 777-86.

10. *Pittsburgh Plate Glass*, 404 U.S. at 166-68.

11. *Id.* at 180.

12. *Id.* at 180-81; *accord* *Malone v. Western Conference of Teamsters Pension Trust*, 110 Cal. App. 3d 538, 544, 168 Cal. Rptr. 210, 213 (1980).

tation of further employment with, their former employer.<sup>13</sup> Consequently, any addition to their retirement benefits beyond that negotiated or granted while they were active employees would not be a term or condition of their prior employment nor bargained in exchange for wages that might have otherwise been earned while they were active employees.

It would be a mistake, however, to assume that current employees have no interest in whether health and welfare benefits are increased or decreased for retired employees. A number of businesses and unions recognize that the availability of such benefits upon retirement makes employment more attractive. Indeed, these benefits are sometimes used as an incentive to encourage early retirement — a not insignificant consideration to a company that wants to decrease costs (and perhaps increase productivity) by replacing highly compensated older employees with lower paid younger ones.

The distinction between benefits bargained for active employees to take effect upon or after their retirement and benefits granted for the first time to a former worker after retirement is not only key to the classification of the former as a mandatory subject of bargaining and the latter as a permissive one, but was also relied upon by the Supreme Court in rationalizing potential inconsistencies between the definition of employee for purposes of collective bargaining and for purposes of employee trust funds established under another provision of the Labor Management Relations Act (LMRA).<sup>14</sup>

Section 302 of the LMRA prohibits any payment by an employer to a representative of its employees except for limited specified purposes including, under subsection (c)(5), payments “to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents . . . .”<sup>15</sup> The Supreme Court noted, apparently with approval,<sup>16</sup> *Blassie v. Kroger Co.*,<sup>17</sup> an earlier Eighth Circuit decision that “employees” under section 302(c)(5) include current employees as well as persons who were current employees when the trust was established but are now retired. The Court went on, however, to state that the rationale of the *Blassie* case was that retirees remain eligible for benefits of trust funds which were established during

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13. *Pittsburgh Plate Glass*, 404 U.S. at 167-68.

14. *Id.* at 169-71; Labor Management Relations (Taft-Hartley) Act, § 302(c)(5), 29 U.S.C. § 186(c)(5) [hereinafter LMRA].

15. LMRA § 302(a)(5), 29 U.S.C. § 186 (a)(5) (1982).

16. *Pittsburgh Plate Glass*, 404 U.S. at 169.

17. 345 F.2d 58, 70 (8th Cir. 1965) (Blackmun, J.).

their active employment.<sup>18</sup>

As so interpreted, *Blassie*, and its approval by the Court, could be read as limiting to eligible retirees under a section 302(c)(5) trust only those for whom the trust was established while they were active employees. This interpretation, although inconsistent with some broader dicta in *Pittsburgh Plate Glass* that “nothing we hold today precludes permissive bargaining over the benefits of already retired employees,”<sup>19</sup> is consistent with the holding in *Blassie* which reversed a district court ruling that all retired employees were ineligible beneficiaries of benefits granted to them after retirement.<sup>20</sup>

According to *Blassie* a retired person who was an active employee at the time that a health and welfare trust was established, and to which his employer contributed on his behalf, continues to be an employee under the trust after retirement, and may be the recipient of benefits different in amount, and probably in kind, than those provided during his active employment. Nor is his employment status and benefit eligibility lost because he is required to pay, or voluntarily pays, or has paid on his behalf by some entity other than his employer, additional premiums to maintain a desired level of benefits under the trust.

Other courts also have concluded that retirees are employees under LMRA section 302(c)(5), although not under NLRA section 2(3).<sup>21</sup> The Ninth Circuit, for example, reversed a district court holding that retired employees could not receive medical and hospitalization benefits paid for by current assessments against an employer rather than out of an accumulated surplus in the health and welfare trust fund.<sup>22</sup> The court of appeals stated that there was nothing in the language or purpose of section 302(c)(5) which would re-

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18. *Pittsburgh Plate Glass*, 404 U.S. at 169-70.

19. *Id.* at 171 n.11.

20. *Kroger Co. v. Blassie*, 225 F. Supp. 300 (E.D. Mo. 1964), *vacated*, 345 F.2d 58 (8th Cir. 1965). The district court decision is criticized, persuasively, in *Goetz, Employee Benefit Trusts Under Section 302 of the Labor Management Relations Act*, 59 Nw. U.L. Rev. 719, 734-36 (1965). The court of appeals stated:

We conclude that . . . a person for whom employer contributions are made prior to retirement is not barred from receiving benefits of the Trust after retirement, and that this qualification is not nullified by additional contributions made by him or by others on his behalf. We also conclude, however, that a person for whom employer contributions are not made prior to retirement is not entitled under the statute to benefits of the Trust after retirement, and that this disqualification is not cured by contributions made by him or by others on his behalf.

*Blassie*, 345 F.2d at 68.

21. *See, e.g., Toensing v. Brown*, 374 F. Supp. 191 (N.D. Cal. 1974), *aff'd*, 528 F.2d 69 (9th Cir. 1975); *Local No. 688, International Bhd. of Teamsters v. Townsend*, 345 F.2d 77 (8th Cir. 1965); *Crawford v. Cianciulli*, 357 F. Supp. 357 (E.D. Pa. 1973); *Garvison v. Jensen*, 355 F.2d 487 (9th Cir. 1966).

22. *Jensen v. Garvison*, 241 F. Supp. 523 (D. Ore. 1965), *rev'd*, 355 F.2d 487 (9th Cir. 1966).

quire that such benefits be financed by employer contributions made during the period of an employee's active service rather than by current employer payments to the trust fund.<sup>23</sup>

By implication, a more recent Supreme Court decision<sup>24</sup> removes any doubt as to permissible health and welfare trust fund coverage of retirees. Medical insurance coverage had been extended under a trust fund to widows of coal miners and of retired miners. The parties, by their collective bargaining agreement, subsequently extended lifetime benefits to widows of already retired miners, but more limited benefits to widows of miners who were eligible to retire but were still working at the time of their death. The latter class of widows sued claiming unlawful discrimination under LMRA section 302(c)(5). In rejecting this challenge, the Court noted that payments to such trust funds must be for the sole and exclusive benefit of employees of employers making the payments, and for their families and dependents, and concluded that: "None of the conditions places any restriction on the allocation of the funds among the persons protected by section 302(c)(5)."<sup>25</sup> Thus, the Court did not question that retired workers, and their dependents, as well as active employees, and their dependents, were among the persons for whom health and welfare trusts may be provided under LMRA section 302(c)(5).

Nor does the Employment Retirement Income Security Act (ERISA),<sup>26</sup> place any restriction on including already retired workers as beneficiaries of health and welfare trusts. ERISA, which was intended to protect the retirement expectations of employees, provides that a fiduciary of an employee benefit plan must discharge his duties "solely in the interest of the participants and beneficiaries . . . ."<sup>27</sup> A "participant" is defined in ERISA as "any employee or former employee of an employer"<sup>28</sup> and, thus, clearly includes retirees as former employees. A "beneficiary" is defined as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder."<sup>29</sup> Accordingly, trustees under an employee benefit plan must act in the interests of, among others, retired employees and beneficiaries whom

23. *Garvison*, 355 F.2d at 488.

24. *United Mine Workers Health and Retirement Funds v. Robinson*, 455 U.S. 562 (1982) [hereinafter *UMW Plan*].

25. *Id.* at 572.

26. 29 U.S.C. §§ 1001-1461 (1982).

27. *Id.* § 1104(a)(1).

28. *Id.* § 1002(7). See 1 Pens. Plan Guide (CCH) ¶¶ 2427, 2481 (1986).

29. 29 U.S.C. § 1002(8) (1982).



they may designate.

Under other provisions of the Internal Revenue Code, it also is clear that retirees are treated as employees for purposes of employer deductions for contributions on behalf of retired employees to a qualified benefit plan,<sup>30</sup> and such retirees can exclude the value of most such contributions from their personal income tax liability.<sup>31</sup>

That retired persons can be employees for purposes of becoming beneficiaries of health and welfare trusts, but not employees for purposes of bargaining such benefits, is neither nonsensical nor novel. The definition of an "employee" correctly and commonly has been held to vary with the purposes of the law being construed.<sup>32</sup> Although, as noted in *Blassie*,<sup>33</sup> retired persons were not specifically mentioned in the congressional debates leading to the enactment of LMRA section 302(c)(5), the proviso to that subsection requires that the employers' payments be held in trust for the benefit of employees, their families and dependents, to provide medical or hospital care, compensation for injuries, illness, or unemployment, pensions on retirement or death, or insurance to provide such protection.<sup>34</sup> The *Blassie* court rightly observed that: "Misfortune of this kind is not confined to the active employee. It strikes the retired one as well and, because of his age, with greater frequency."<sup>35</sup> The court rejected the inference that the failure to mention retired persons indicates an intent to deprive them of such benefits, and concluded that "the opposite inference — that they are not mentioned because no one conceived them to be excluded — is reasonable."<sup>36</sup> It would certainly be ironic if a statute which contemplates the enjoyment of certain benefits after an employee's retirement excluded such a person from its protections. Thus, the Eighth Circuit observed that the "trend of welfare plans toward the inclusion of retired persons is a fact of today's industrial life."<sup>37</sup>

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30. 26 U.S.C. § 79 (1982); Rev. Rul. 68-577, 1968-2 C.B. 50; Treas. Reg. 1.79-1(b)(1)(ii) (as amended 1983); Rev. Rul. 74-281, 1974-1 C.B. 133; see 3 Pens. Plan Guide (CCH) ¶ 11,232 (1986); 5 *id.* ¶ 18,678 (1975). See *infra* note 31.

31. 26 U.S.C. § 401(c)(1)(B), (h) (1982); Treas. Reg. 401-14 (as amended 1964); Rev. Rul. 62-194, 1962-2 C.B. 57. But see Rev. Rul. 75-539, 1975-2 C.B. 46 (cash payments upon retirement are taxable). See 3 Pens. Plan Guide (CCH) ¶¶ 11,205, 11,700-14 (1979); 5 *id.* ¶ 18,431 (1975). The Tax Reform Act of 1986 has not changed the basic conclusions stated although it and prior legislation has tightened tax deductions and exemptions. Pub. L. No. 99-514 §§ 1151, 1827, 1852(h), 100 Stat. 4810 (1986).

32. See, e.g., *Pittsburgh Plate Glass*, 404 U.S. at 166-74; *NLRB v. Hearst Publications*, 322 U.S. 111 (1944); *Darden v. Nationwide Mutual Ins. Co.*, 796 F.2d 701 (4th Cir. 1986).

33. *Blassie*, 345 F.2d at 70.

34. *Id.*; LMRA § 302(c)(5)(A), 29 U.S.C. § 186(c)(5)(A) (1982).

35. *Blassie*, 345 F.2d at 70.

36. *Id.*

37. *Id.* at 69; see also *supra* note 6 and accompanying text; Note, *Pension Plans and the Rights of the Retired Worker*, 70 COLUM. L. REV. 904, 915 (1970).

## MODIFICATION OR TERMINATION OF RETIREE BENEFITS

Once it is agreed to include retired workers within a health and welfare plan, is there any legal restriction on employers or trustees eliminating or reducing benefits for economic or other reasons? Whether previously granted health and welfare benefits for retirees may become vested, and thus protected from reduction or termination during the life of the retiree, depends both upon potential legal and contractual requirements. On this, the authorities agree; on whether such vesting has taken place in particular situations, the cases present more confusion than consensus.

*Potential Legal Restrictions*

## ERISA and LMRA

Potential legal requirements are sometimes said to exist in LMRA section 302(c)(5) and various provisions of ERISA. In general, however, it has been held that these statutory provisions do not restrict the right of parties to a collective agreement, trustees of a health and welfare trust, or a nonunionized employer from terminating or modifying in a reasonable manner health and welfare benefits previously granted to retired workers.<sup>38</sup>

There is a clear distinction in ERISA between the protection of employee expectations to receive pension plan benefits and health and welfare plan benefits. ERISA defines an employee welfare benefit plan as one which includes provisions for medical, surgical, or hospital care benefits, and excludes "pensions on retirement or death, and insurance to provide such pensions."<sup>39</sup> A "pension plan" or "employee pension benefit plan" is defined as a plan, fund, or program providing retirement or deferred income for employees, and may exclude supplemental income payments to retirees based upon in-

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38. See cases cited *infra* notes 46, 58, 110-14, 151; *White Farm Equip. Co. v. White Motor Corp.*, 788 F.2d 1186 (6th Cir. 1986); *Turner v. Local Union No. 302, International Bhd. of Teamsters*, 604 F.2d 1219 (9th Cir. 1979); *Metal Polishers Local No. 11 v. Kurz-Kasch, Inc.* 538 F. Supp. 368, 374 (S.D. Ohio 1982); *San Diego Floor Coverers Joint Ins. Trust* (1983 unpublished arbitration) (Weckstein, Arb.). Participants must be given timely notice of modifications. See *Palino v. Casey*, 664 F.2d 854, 859 (1st Cir. 1981); *Pierce v. NECA-IBEW Welfare Fund*, 488 F. Supp. 559, 564-65 (E.D. Tenn. 1978), *aff'd on opinion below*, 620 F.2d 589 (6th Cir.), *cert. denied*, 449 U.S. 1015 (1980); *Pete v. United Mine Workers Welfare & Retirement Fund of 1950*, 517 F.2d 1275 (D.C. Cir. 1975) (en banc) (pension plan); *Kosty v. Lewis*, 319 F.2d 744, 748-49 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 964 (1964) (pension plan).

39. 29 U.S.C. § 1002(1) (1982).

creases in the cost of living after retirement.<sup>40</sup>

The Act requires vesting of a pension plan<sup>41</sup> but expressly excludes employee welfare benefit plans, or health and welfare plans, from the vesting requirements.<sup>42</sup> Likewise, pension plans, but not health and welfare plans, are made nonforfeitable<sup>43</sup> and are covered by ERISA's plan termination insurance requirements<sup>44</sup> to safeguard against pension plan defaults. These distinctions are intended both to recognize the dependence of health and welfare plans upon variable funding through contributions of employers and to safeguard the assets of pension funds.<sup>45</sup>

These vesting differences between pension plans and health and welfare plans have been recognized and applied by courts under ERISA as well as section 302(c)(5) of the LMRA.<sup>46</sup> Both of these statutes require that plans subject to their provisions be managed for the sole and exclusive benefit of the participants and their beneficiaries.

In *Turner v. Local Union No. 302, International Brotherhood of Teamsters*,<sup>47</sup> a fund had been previously established by parties to a collective bargaining agreement to provide medical and hospital benefits for employees who retired after the initiation of the fund. The

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40. Such increases could be part of an employee welfare benefit plan. *Id.* § 1002(2).

41. *Id.* §§ 1051-1053, as amended by Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 4810 (1986).

42. 29 U.S.C. § 1051(1). As the Seventh Circuit has stated "welfare benefits do not become vested until a claim arises that is payable under the Plan; these benefits are contractual rights subject to amendment by the parties to the Agreement." *International Ass'n of Iron Workers Local No. 11 v. Douglas*, 646 F.2d 1211, 1215 (7th Cir.), *cert. denied*, 454 U.S. 866 (1981).

43. 29 U.S.C. §§ 1002(19), 1051(1), 1053.

44. *Id.* § 1321(a)(1).

45. Thus, the report to the House of Representatives on ERISA states:

The term 'accrued benefit' refers to pension or retirement benefits and is not intended to apply to certain ancillary benefits, such as medical insurance or life insurance, which are sometimes provided for employees in conjunction with a pension plan, and are sometimes provided separately. To require the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income.

H.R. REP. NO. 807, 93d Cong., 2d Sess., 1974 U.S. CODE CONG. & ADMIN. NEWS 4670, 4726.

46. See, e.g., *Molnar v. Wibbelt*, 789 F.2d 244, 250 (3d Cir. 1986); see also cases cited *supra* note 38, *infra* note 146; *Turner v. Local Union No. 302, International Bhd. of Teamsters*, 604 F.2d at 1225, 1226 (1979); *Pierce v. NECA-IBEW Welfare Trust Fund*, 488 F. Supp. 559, 564 (E.D. Tenn. 1978), *aff'd on opinion below*, 620 F.2d 589 (6th Cir.), *cert. denied*, 449 U.S. 1015 (1980); *Thonen v. McNeil-Akron*, 6 Pens. Plan Guide (CCH) ¶ 23,714B (N.D. Ohio 1986); *Gutting v. Falstaff Brewing Corp.*, 541 F. Supp. 345, 347 (E.D. Mo. 1982); *Petrella v. NL Indus., Inc.*, 529 F. Supp. 1357, 1365-66 (D.N.J. 1982); *Weiss v. United Whelan Corp.*, 158 N.Y.L.J. 17, 2 Pens. Plan Guide (CCH) ¶ 7004 (Sup. Ct. 1967).

47. 604 F.2d 1219 (9th Cir. 1979).

fund trustees subsequently reduced the benefits for retirees pursuant to an amended agreement of the parties authorizing the trustees to determine the level of benefits within the limits of funds available for that purpose.

Previously covered retirees brought a class action seeking restoration of eliminated and reduced benefits. The Ninth Circuit affirmed the district court's granting of summary judgment in favor of the unions and employers.<sup>48</sup> Rejecting the plaintiffs' contention that prior benefits had become vested retirement rights that could not be amended without their consent, the court held that, unlike pension benefits which are paid from an actuarially predetermined fund and are guaranteed for the life of the pensioner, health and welfare benefits "are negotiated periodically and are paid from a fund consisting of employer contributions and last only the life of the collective bargaining agreement."<sup>49</sup> The *Turner* court noted that ERISA distinguished between pension plans, which must meet participation, benefit accrual and vesting requirements based on age and length of service, and employee welfare benefit plans which do not have to meet such requirements, and "were not vested property rights but were instead contractual rights subject to amendment by the parties to the agreement."<sup>50</sup>

Thus in *Turner*, the reduction of retiree health and welfare benefits had been brought about by financial problems attributable to changes in the industry. Under these circumstances, stated the court, the "sole and exclusive benefit of the employees" provision of LMRA section 302(c)(5) was not violated because

there is no intimation of bribery, extortion, or union misuse of funds that would strike at the purposes of section 302, and an amended rule is adopted by trustees in their legitimate interest of protecting the 'long term viability' of the fund and the trust fund is not used for the benefit of anyone other than employees of contributing employers . . .<sup>51</sup>

ERISA also requires that fiduciaries<sup>52</sup> of an employee benefit fund exercise the care and skill that "a prudent man" would exercise under like circumstances,<sup>53</sup> that the plan be managed in accordance with governing documents,<sup>54</sup> and that those provisions not be arbi-

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48. *Id.* at 1222, 1223-24.

49. *Id.* at 1225.

50. *Id.* at 1226.

51. *Id.* at 1228.

52. Who include employers, unions and their appointed trustees.

53. 29 U.S.C. § 1104(1)(B) (1982). See generally Maldonado, *Fiduciary Responsibilities Under ERISA*, 2 LAB. LAW. 819 (1986).

54. 29 U.S.C. § 1104(1)(D) (1982).

trary, capricious,<sup>55</sup> or discriminate in favor of shareholders, officers, or highly compensated employees.<sup>56</sup> Thus, any granting or modification of health and welfare benefits, whether of retired or active employees, may not run counter to these requirements. A reduction in the period of "extended benefits", that is the time in which an employee who has been covered by health and welfare benefits remains eligible for such benefits after an employer ceases to make contributions to a plan on his behalf (because of employment termination or otherwise), by trustees with discretion to conserve the trusts assets has been held not to violate these standards nor those of the LMRA.<sup>57</sup>

Likewise, the Supreme Court in *United Mine Workers v. Robinson (UMW Plan)*, discussed earlier,<sup>58</sup> found no violation of law where an agreement granted more extensive health and welfare insurance benefits to widows of retired miners than to widows of miners eligible to retire but still working at the time of their death. The trust documents limited the discretion of the fund trustees by requiring them to implement the benefit levels fixed in the collective bargaining agreement, unless they were in violation of federal law. The Court held that the trustees' actions were not to be judged by any common-law standard of "reasonableness."<sup>59</sup> The modification of benefits would be upheld so long as the trustees' actions and the collective bargaining agreement giving rise to them did not violate ERISA, the NLRA, or other provisions of federal law such as rules prohibiting discrimination on the basis of race, religion or sex.<sup>60</sup>

Thus, in the *UMW Plan* case, it was permissible to vary the allocation of benefits among different classes of persons protected by LMRA section 302(c)(5), employees (including retired employees), their families and dependents, in the language of the Court, "because finite contributions must be allocated among potential beneficiaries, inevitably financial and actuarial considerations sometimes will provide the only justification for an eligibility condition that dis-

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55. See *Rosen v. Hotel Employees Union of Philadelphia, Local 274*, 637 F.2d 592, 596 (3d Cir. 1981); *Toensing v. Brown*, 528 F.2d 69, 72 (9th Cir. 1975); *Petrella v. NL Indus., Inc.*, 529 F. Supp. 1357, 1366-67, 1368 (D.N.J. 1982); see also *Pete v. United Mine Workers Welfare & Retirement Fund of 1950*, 517 F.2d 1275, 1283 (D.C. Cir. 1975) (en banc) (LMRA § 302(c)(5)); *Malone v. Western Conference of Teamsters Pension Trust*, 110 Cal. App. 3d 538, 168 Cal. Rptr. 210 (1980).

56. 26 U.S.C. § 401(a)(4) (1982); see also *supra* note 30 & 31 and accompanying text.

57. *International Ass'n of Iron Workers, Local No. 111 v. Douglas*, 646 F.2d 1211 (7th Cir.), *cert. denied*, 454 U.S. 866 (1981); *Pierce v. NECA-IBEW Welfare Trust Fund*, 620 F.2d 589 (6th Cir.), *cert. denied*, 449 U.S. 1015 (1980).

58. *UMW Plan*, 455 U.S. 562 (1982). See *supra* notes 24-25 and accompanying text.

59. *UMW Plan*, 455 U.S. at 574.

60. *Id.* at 575.

criminate between different classes of potential applicants for benefits."<sup>61</sup> Such allocations were especially defensible when they were made, as there, as part of a complex collective agreement reached to settle a strike (over other issues).

As the *UMW Plan* Court noted, benefit plans sometimes discriminate in favor of active employees as compared to retired workers.<sup>62</sup> That type of discrimination was challenged in *Toensing v. Brown*<sup>63</sup> when the trustees increased pension benefits for active employees in a greater amount than for already retired workers. The Ninth Circuit affirmed a summary judgment for the trustees, holding that the adoption of such differential was a permissible act of discretion by the trustees, relying, *inter alia*, upon *Pittsburgh Plate Glass*,<sup>64</sup> holding that the subject of retiree benefits was only a permissive subject of collective bargaining whereas benefits for active employees was a mandatory subject. The implication also is clear that a cutting or termination of health and welfare benefits for retirees while maintaining those for active employees is not a violation of LMRA section 302(c)(5) or ERISA.<sup>65</sup> It might be contended, however, that such discrimination may give rise to a breach of other duties of employers or unions under the NLRA.

#### The Duty to Bargain and the Duty of Fair Representation

The *Pittsburgh Plate Glass* case suggests that if an employer terminates or cuts retiree health and welfare benefits, without bargaining with the union, the employer has *not* violated its duty to bargain in good faith. If the employer does bargain, and the union agrees to cut retiree benefits while maintaining those for active employees, the Court also suggested that the union has not breached its duty of fair representation, stating:

Having once found it advantageous to bargain for improvements in pensioners' benefits, active workers are not forever bound to that view or obliged to negotiate on behalf of retirees again. To the contrary, they are free to decide, for example, that current income is preferable to greater certainty in their own retirement benefits or, indeed, to their retirement benefits altogether.<sup>66</sup>

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61. *Id.*

62. *Id.* at 574-75.

63. 528 F.2d 69 (9th Cir. 1975).

64. *See supra* notes 5-13 and accompanying text.

65. *Toensing v. Brown*, 528 F.2d 69 (9th Cir. 1975).

66. The Court continued:

By advancing petitioners' [the retirees'] interests now, active employees, therefore, have no assurance that they will be the beneficiaries of similar representa-

An inference from the Court's holding that retirees are no longer members of the bargaining unit is that the union has no duty of fair representation of already retired workers.<sup>67</sup> Thus, after a footnote reference to an early case on the "duty of fair representation," the Court states: "But whatever its theory, the case obviously does not require a union affirmatively to represent nonbargaining unit members or to take into account their interests in making bona fide economic decisions in behalf of those whom it does represent."<sup>68</sup>

A duty to represent all members of a bargaining unit without discrimination, arbitrariness, or bad faith<sup>69</sup> is more likely to be breached if the union is too solicitous of retirees' concerns at the expense of the interests of active workers. Indeed, one argument for considering retirees' benefits as a mandatory subject of bargaining, although rejected by the Court, was that such benefits vitally affect the terms and conditions of employment of active employees, for example, by decreasing the availability of funds for the current workers.<sup>70</sup> The Court seemed to regard this as a reason for *not* requiring the union to represent retirees along with current employees because of "the potential for severe internal conflicts," and suggested that "the union would be bound to balance the interests of all its constituents, with the result that the interests of active employees might at times be preferred to those of retirees."<sup>71</sup>

Somewhat ironically, the Second Circuit held recently in a bankruptcy proceeding that an employer's attempted modification of an existing collective bargaining agreement to eliminate benefits for retirees was a mandatory subject of bargaining.<sup>72</sup> The court recognized that the cost of benefits for the retirees would significantly reduce the availability of funds for current jobs and wages and would vitally

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tion when they retire. The insurance against future contingencies that they buy in negotiating benefits for retirees is thus a hazardous and, therefore, improbable investment, far different from a cost-of-living escalation clause that they could contractually enforce in court.

*Pittsburgh Plate Glass Co.*, 404 U.S. at 181-82.

67. See *Anderson v. Alpha Portland Indus., Inc.*, 727 F.2d 177, 181-84 (8th Cir. 1984); *United Auto Workers v. Yard-Man, Inc.*, 716 F.2d 1476, 1486 n.16 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *Toensing v. Brown*, 528 F.2d 69, 72 (9th Cir. 1975). Compare *Dwyer v. Climatrol Indus., Inc.*, 544 F.2d 307, 311 (7th Cir. 1976) (union duty to negotiate plant closing agreement).

68. *Pittsburgh Plate Glass*, 404 U.S. at 181 n.20. The court also referred to an article on the subject.

69. See, e.g., *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Vaca v. Sipes*, 386 U.S. 171 (1967); *Local 12, Rubber Workers*, 150 N.L.R.B. 312, *enforced*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967); *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963); see also 1 C. MORRIS, *supra* note 3, at 1285-1358; R. GORMAN, *supra* note 3, at 695-728.

70. *Pittsburgh Plate Glass*, 404 U.S. at 176-82.

71. *Id.* at 173 n.12.

72. *Century Brass Prod., Inc. v. United Auto Workers*, 795 F.2d 265 (2d Cir. 1986).

affect the rights of active employees. The court went on to hold, however, that although the retirees were employees for purposes of the Bankruptcy Code and generally could have a union as an authorized representative thereunder, the conflict of interest between current and retired employees precluded the union from representing the latter group and the bankruptcy court should appoint another representative for the retirees.<sup>73</sup>

While this last case distinguished *Pittsburgh Plate Glass* for purposes of the bankruptcy proceeding,<sup>74</sup> the Supreme Court's holding that benefits of already retired workers are not mandatory subjects of bargaining also allows an employer to unilaterally alter the health insurance benefits of retired workers without committing an unfair labor practice. The Court stated that "just as section 8(d) defines the obligation to bargain to be with respect to mandatory terms alone, so it prescribes the duty to maintain only mandatory terms without unilateral modification for the duration of the collective-bargaining agreement."<sup>75</sup> Furthermore, "[b]y once bargaining and agreeing on a permissive subject, the parties, naturally, do not make the subject a mandatory topic of future bargaining."<sup>76</sup> Therefore, the employer was free to modify a permissive term, such as health and welfare benefits for already retired workers, without any obligation under the NLRA to bargain with the union concerning the modification. "The remedy for a unilateral mid-term modification to a permissive term," suggested the Court, "lies in an action for breach of contract . . . not in an unfair labor-practice proceeding."<sup>77</sup> The reach and ramifications of that remedy will now be explored.

### *Contractual Limitations on Termination of Retiree Health and Welfare Benefits*

In rejecting the claim that an employer commits an unfair labor practice by unilaterally reducing retiree medical benefits, the Supreme Court indicated that this did not mean that the retirees are without protection. The retired workers could invoke common-law contract rights or those provided by federal law for enforcement of collective bargaining contracts. As stated by the Court: "Under es-

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73. *Id.* at 275-76.

74. *Id.* at 274-75.

75. *Pittsburgh Plate Glass*, 404 U.S. at 185-86; see also *Connecticut Light & Power Co. v. NLRB*, 476 F.2d 1079 (2d Cir. 1973).

76. *Pittsburgh Plate Glass*, 404 U.S. at 187.

77. *Id.* at 188.



established contract principles, vested retirement rights may not be altered without the pensioner's consent . . . . The retiree, moreover, would have a federal remedy under section 301 of the LMRA for breach of contract if his benefits were unilaterally changed."<sup>78</sup>

These methods of attack have met with mixed success. The availability of contractual remedies has not been questioned; only the existence and extent of a claimed contractual commitment.

### Forums for the Enforcement of Contract Claims

Several legal remedies are available for a retiree seeking to assert a contractual claim to continuing health and welfare benefits. If the benefits have been established by a collective bargaining agreement, that agreement will most likely also contain a grievance arbitration provision. Although no longer an active employee, and not a member of the bargaining unit, the retiree could request the union to file a grievance with the employer contesting the termination or reduction of his benefits. Upon rejection of this grievance by the employer, the union could invoke arbitration by an impartial third party, even in situations where the collective bargaining agreement has expired because the right being arbitrated had already arisen under the agreement prior to its termination.<sup>79</sup> Decisions of labor arbitrators may be enforced by state or federal courts exercising very limited judicial review.<sup>80</sup>

Either the union or the retirees would have standing to sue under section 301 of the LMRA to enforce a benefits for retirees provision in a collective bargaining agreement.<sup>81</sup> Such a suit may be brought in a federal or state court, but federal law would govern in either

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78. *Id.* at 181 n.20.

79. *See, e.g.,* *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243, 252-53 (1977); *International Bhd. of Elec. Workers, & Local No. 22 v. Nanco Elec., Inc.*, 790 F.2d 59 (8th Cir. 1986); *Hotel & Restaurant Employees, Local 703 v. Williams*, 752 F.2d 1476, 1478 (9th Cir. 1985); *Textile Workers, Local 129 v. Columbia Mills, Inc.*, 471 F. Supp. 527 (N.D.N.Y. 1978); *Johnston Group, Inc.*, 86-2 Lab. Arb. Awards (CCH) ¶ 8503, at 5119 (Jan. 16, 1986) (Cole, Arb.). For one view of the advantages and disadvantages of the use of arbitration for retiree benefit cases, see Barnes & Mishkind, *Retiree Health and Welfare Benefits: Controversy Over Their Duration*, 10 EMPLOYEE REL. L.J. 584, 600, 613 n.20 (1985).

80. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *New Meiji Mkt. v. United Food & Comm. Workers Local 905*, 789 F.2d 1334 (9th Cir. 1986). *See generally* R. GORMAN, *supra* note 3, at 584-86; St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137 (1977); Note, *Judicial Deference to Arbitral Determinations: Continuing Problems of Power and Finality*, 23 UCLA L. REV. 936 (1976).

81. *Pittsburgh Plate Glass*, 404 U.S. at 181 n.20; *Smith v. Evening News Ass'n.*, 371 U.S. 195, 200-01 (1962); *United Auto Workers v. Yard-Man, Inc.*, 716 F.2d 1476, 1484-86 (6th Cir. 1983), *cert. denied*, 485 U.S. 1007 (1984); *Turner v. Local Union No. 302, International Bhd. of Teamsters*, 604 F.2d 1219, 1224 n.4 (9th Cir. 1979); *United Auto Workers v. Acme Precision Prod., Inc.*, 515 F. Supp. 537, 540 (E.D. Mich. 1981). *But cf.* Barnes & Mishkind, *supra* note 79, at 598-99.

forum.<sup>82</sup> Since retirees are not members of the bargaining unit, and the union is not obligated to bargain on their behalf, the union may, but is not required to, process their grievance. Consequently, the normal requirement that parties exhaust their contractual grievance and arbitration procedure before commencing suit may not apply to retirees.<sup>83</sup> When a group of retirees is similarly impacted by a change in benefits, class actions may be certified on their behalf.<sup>84</sup>

If the reduction or termination of benefits was not directly accomplished by the employer, but effected by the trustees of a health and welfare plan, the trustees may be sued for breach of their duties under common law, ERISA, LMRA section 302(c)(5), or the trust instruments themselves.<sup>85</sup> Not infrequently, the trustees, half having been appointed by the union, and half by the employer, will deadlock on voting on a benefit increase or decrease issue, and an impartial umpire, or arbitrator, will be appointed to resolve the deadlock.<sup>86</sup> Although the trustees are not representatives of their appointing party

82. *Local 174, International Bhd. of Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962). A question has been raised as to whether the retirees would have a common-law contract right under state law in addition to, and not preempted by, federal law. See *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669, 675 n.7 (6th Cir. 1985).

83. *Anderson v. Alpha Portland Indus., Inc.*, 727 F.2d 177, 180-85 (8th Cir. 1984); see also *Local Union No. 150-A, United Food & Comm. Workers, Int'l Union v. Dubuque Packing Co.*, 756 F.2d 66 (8th Cir. 1985); *Metal Polishers, Int'l Union v. Kurz-Kasch, Inc.*, 642 F.2d 452 (6th Cir. 1980), cert. denied, 452 U.S. 915 (1981). Compare *Mason v. Continental Group, Inc.*, 115 L.R.R.M. (BNA) 2706, 2707-11 (N.D. Ala.), aff'd, 704 F.2d 361 (11th Cir. 1983) (challenge to plant closing agreement by discharged employees). But see *Johnston Group, Inc.*, 86-2 Lab. Arb. Awards (CCH) ¶ 8503, at 5117-18 (Jan. 16, 1986) (Cole, Arb. 1986); *Anderson*, 727 F.2d at 185-87 (Bright, J., dissenting).

84. E.g., *UMW Plan*, 455 U.S. 562 (1982); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609 (6th Cir. 1985), cert. denied, 106 S. Ct. 1202 (1986); *District 17, United Mine Workers v. Allied Corp.*, 735 F.2d 121, 123 (4th Cir. 1984); *Turner v. Local Union No. 302, International Bhd. of Teamsters*, 604 F.2d 1219 (9th Cir. 1979); see *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669, 677 (6th Cir. 1985); see also *Barnes & Mishkind*, supra note 79, at 599.

85. ERISA § 502, 29 U.S.C. § 1132(a)(1)(B) (1982); LMRA § 301(a)(b), 29 U.S.C. § 185(a)(b) (1982). See, e.g., *District 17, United Mine Workers v. Allied Corp.*, 735 F.2d 121, 130-34 (4th Cir. 1984); *International Ass'n of Iron Workers, Local No. 111 v. Douglas*, 646 F.2d 1211 (7th Cir.), cert. denied, 454 U.S. 866 (1981); *Toensing v. Brown*, 528 F.2d 69 (9th Cir. 1975); *Pierce v. NECA-IBEW Welfare Trust Fund*, 488 F. Supp. 559 (E.D. Tenn. 1978), aff'd, 620 F.2d 589 (6th Cir.), cert. denied, 449 U.S. 1015 (1980).

There is a question, however, of the standing of a union or another trust fund to sue trustees of a fund under ERISA. See *Northeast Dept., ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 152-54 (3d Cir. 1985).

86. LMRA § 302(c)(5)(B), 29 U.S.C. 186(c)(5)(B) (1982). See, e.g., *Hawkins v. Bennett*, 704 F.2d 1157 (9th Cir., 1983); *San Diego Floor Coverers Joint Ins. Trust* (1983 unpublished arbitration) (Weckstein, Arb.).

and must exercise the prudent discretion of a fiduciary,<sup>87</sup> they will often tend to reflect the perspective of the party who appointed them.

Fund trustees may also bring an action against an employer who has unilaterally ceased paying contributions required by a collective agreement to the fund.<sup>88</sup> The Supreme Court has held that trustees, authorized by the trust instruments to enforce obligations thereunder, need not await exhaustion of grievance-arbitration remedies under the collective agreement.<sup>89</sup> An arbitral remedy on a grievance filed by the union seeking delinquent employer payments, however, is not preempted by any public policy embodied in ERISA.<sup>90</sup>

When a collective contract has expired and an employer contends that an impasse has been reached in negotiating a new agreement, thus permitting it to cease making health and welfare fund contributions, the NLRB has primary jurisdiction to determine whether an impasse has in fact been reached, and ERISA does not entitle the fund's trustees to have that labor relations issue determined in a federal court suit.<sup>91</sup> This holding, however, applies to payments on behalf of active employees, and probably not to payments solely for retiree benefits, since, as previously observed, even a mid-term modification of their benefits does not constitute an unlawful refusal to bargain.<sup>92</sup> Accordingly, the NLRB normally would not have jurisdiction to determine an employer's obligation regarding retiree health and welfare benefits since breaches of collective bargaining agreements are not, per se, unfair labor practices.<sup>93</sup>

Retired employees whose entitlement to health and welfare benefits is not the result of collective bargaining may also enforce their alleged contract right to continuing benefits in suits against their former employers or funds created to administer such plans.<sup>94</sup> Retirees and their former employers also could voluntarily agree to arbitrate claims to continuing benefits, subject to the narrow judicial scrutiny

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87. See *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981).

88. See *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984); see also *Central States v. Central Transp., Inc.*, 472 U.S. 559 (1985).

89. See *Schneider Moving & Storage v. Robbins*, 466 U.S. 364 (1984).

90. *United Auto Workers v. Keystone Consol. Indus., Inc.*, 782 F.2d 1400 (7th Cir. 1986).

91. See *U.A. 198 Health & Welfare, Educ. & Pension Funds v. Rester Refrigeration Serv., Inc.*, 790 F.2d 423 (5th Cir. 1986).

92. See *supra* notes 5, 64, 75-77 and accompanying text.

93. See *Pittsburgh Plate Glass*, 404 U.S. at 186-87.

94. *E.g.*, *White Farms Equip. Co. v. White Motor Corp.*, 788 F.2d 1186 (6th Cir. 1986); *Musto v. American Gen. Corp.*, 615 F. Supp. 1483 (M.D. Tenn. 1985); *Eardman v. Bethlehem Steel Corp. Employee Welfare Benefit Plans*, 607 F. Supp. 196 (W.D.N.Y. 1986); *Petrella v. NL Indus., Inc.*, 529 F. Supp. 1357 (D.N.J. 1982); *Metropolitan Life Ins. Co. v. Korneghy*, 71 So. 2d 292 (Ala. Ct. App.), *pet. for cert. stricken*, 71 So. 2d 301 (Ala. 1954); *Skeehy v. Seilon, Inc.*, 10 Ohio St. 2d 242, 227 N.E.2d 229 (1967); *Schlusser v. Allis-Chalmers Corp.*, 86 Wis. 2d 226, 271 N.W.2d 879 (1978).

of commercial arbitrations.<sup>95</sup>

### Proving Contractual Claims

The starting place in proving any contractual right or privilege, of course, is the language of the contract. Occasionally, a collective bargaining agreement or other contract will contain an express provision either clearly giving or denying the right to terminate health and welfare benefits for retirees. Thus, when a series of collective bargaining agreements provided that the "employer agrees to maintain the benefits in effect . . . throughout the term of this agreement" and the unions and employers amended the last agreement, in light of a pending shortage of funds, to give the trustees the authority to provide health and welfare benefits within the limits of available funds, the contractual right to reduce retiree coverage was clear.<sup>96</sup> Likewise, where a collective agreement expressly provided to the contrary, that life insurance premiums "for pensioners shall be paid by the company during the life of the pensioner," it was equally clear that the employer's obligation extended beyond the term of the agreement, and even after the employer had closed its plant and ceased paying insurance premiums for active employees.<sup>97</sup>

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95. See, e.g., Federal Arbitration Act, 9 U.S.C. §§ 2, 10 (1982); California Arbitration Act, CAL. CODE CIV. PROC. §§ 1280(a), 1281, 1286, 1286.2 (West Supp. 1987); Siegal v. Titan Indus. Corp., 779 F.2d 891, 89 (2d Cir. 1985). If the contract in question evidences a transaction involving interstate commerce, federal arbitration law will apply whether suit is brought in federal or state court. Southland Corp. v. Keating, 465 U.S. 1 (1984).

96. Turner v. Local Union No. 302, International Bhd. of Teamsters, 604 F.2d 1219, 1222-23, 1225, 1226 (9th Cir. 1979) (also upholding the legality of the reduction; see *supra* notes 47-51); see also District 17, United Mine Workers v. Allied Corp., 735 F.2d 121, 124, 126 (4th Cir. 1984); United Auto Workers v. Cleveland Gear Corp., 644 F. Supp. 241 (N.D. Ohio 1983), *aff'd*, 746 F.2d 1477 (6th Cir. 1984); United Rubber Workers v. Lee Nat'l Corp., 323 F. Supp. 1181, 1187 (S.D.N.Y. 1971); Barnes & Mishkind, *supra* note 79, at 601, 613 n.21. But see Johnston Group Inc., 86-2 Lab. Arb. Awards (CCH) ¶ 8503, at 5119 (Jan. 16, 1986) (Cole, Arb.) (rejecting a claim that a contract provision that "all the terms of this agreement become null and void as of such expiration date" extinguished retiree health and welfare benefits previously created under the agreement).

97. United Steelworkers v. Midvale-Happenstall Co., 676 F.2d 689 (3d Cir. 1982), *aff'g*, 94 Lab. Cas. (CCH) ¶ 20,940 (W.D. Pa. 1981). That intent would have been made even more conclusive regarding the language just quoted if the court had considered that following a strike in which the employer had ceased paying premiums for retirees' life insurance, the parties substituted the phrase "life of the pensioner" for language in a prior agreement obligating the employer to pay life insurance premiums "for the term of this agreement." Stewart & Kelly, *Insurance Premiums for Retirees After the Union Contract Expires*, 44 OHIO ST. L.J. 521, 525 (1983); see also American Standard, Inc., 57 Lab. Arb. (BNA) 698, 699-700 (1971) (Warns, Arb.).

Clear language addressed to the employer's right to terminate or modify its obligation to continue health and welfare benefits for retirees, however, is the exception. And even when it does occur, other actions or language of the employer may create an ambiguity.<sup>98</sup> While analysis properly begins with the contract language, in a collective bargaining situation, especially,<sup>99</sup> extrinsic evidence may be properly admitted to determine the true intention of the parties.<sup>100</sup> When a contract is silent as to the duration of employer payments, or simply provides that they shall "continue," it is unclear whether the obligation continues only for the life of the agreement or for the life of the retiree, and resort to extrinsic evidence is desirable.<sup>101</sup>

The nature of extrinsic evidence, for example, which has been referred to by courts and arbitrators in support of a holding that retiree health and welfare benefits have become vested, or cannot be reduced or terminated by an employer or trustees, has included: (1) written or oral promises by responsible persons to continue payments for the life of the pensioner,<sup>102</sup> surviving spouse or dependent chil-

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98. See, e.g., *Johnston Group, Inc.*, 86-2 Lab. Arb. Awards (CCH) at 5118-20 (Jan. 16, 1986) (Cole, Arb.) (noting that each party claimed the contract language unambiguously supported its position [a view of language clarity which the arbitrator did not share] and contended that no extrinsic evidence was needed, but each introduced such evidence, which was considered by the arbitrator); see also *Great Atl. & Pac. Tea Co.*, 67 Lab. Arb. (BNA) 125 (1976) (Seitz, Arb.).

99. It is generally recognized that collective bargaining agreements should be interpreted in light of their content as a generalized code for industrial governance and not restricted by common-law contract doctrines. See, e.g., *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Hendricks v. Airline Pilots Ass'n*, 696 F.2d 673, 676 (9th Cir. 1983). But see *Barnes & Mishkind*, *supra* note 79, at 602.

100. See, e.g., *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1202 (1986); *Local Union No. 150-A, United Food Comm. Workers Int'l Union v. Dubuque Packing Co.*, 756 F.2d 66 (8th Cir. 1985); *United Auto Workers v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *United Auto Workers v. Roblin Indus., Inc.*, 561 F. Supp. 288, 300 (W.D. Mich. 1983); *Stewart & Kelly*, *supra* note 97, at 524-26, 530-31, 533-34; see also *White Farm Equip. Co. v. White Farm Motor Corp.*, 788 F.2d 1186, 1191-95 (6th Cir. 1986) (noncollective bargaining contract); *Stewart & Kelly*, *supra* note 97, at 525.

101. See, e.g., *Local Union No. 150-A, United Food & Comm. Workers Int'l Union v. Dubuque Packing Co.*, 756 F.2d 66, 69 (8th Cir. 1985); *United Auto Workers v. Roblin Indus., Inc.*, 561 F. Supp. 288, 298, 300 (W.D. Mich. 1983); *Roxbury Carpet Co.*, 73-2 Lab. Arb. Awards (CCH) ¶ 8521, at 4937 (Oct. 26, 1973) (Summers, Arb.); cf., *Upholsterers' Int'l Union v. American Pad & Textile Co.*, 372 F.2d 427, 428 (6th Cir. 1967). That decision is criticized for limiting its inquiry to the contract language, in *Stewart & Kelly*, *supra* note 97.

102. E.g., *Local Union No. 150-A, United Food Comm. Workers Int'l Union v. Dubuque Packing Co.*, 756 F.2d 66 (8th Cir. 1985); *United Auto Workers v. Cadillac Malleable Iron Co., Inc.*, 728 F.2d 807, 808-09 (6th Cir. 1984); *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1224-25 (9th Cir. 1984). But see *District 17, United Mine Workers v. Allied Corp.*, 735 F.2d 121, 129-30 (4th Cir. 1984) *aff'd on rehearing*, 765 F.2d 412 (4th Cir. 1985), *cert. denied*, 105 S. Ct. 3527 (1985); *Turner v. Local Union No. 302, International Bhd. of Teamsters*, 604 F.2d 1219, 1223 (9th Cir. 1979); *Metropolitan Life Ins. Co. v. Korneghy*, 71 So. 2d 292, 295 (Ala. Ct. App.), *petition for cert. stricken*, 71 So. 2d 301 (Ala. 1954). The absence of such promises in relevant communications can be

dren,<sup>103</sup> or to a specific time beyond the expiration of a collective agreement such as age sixty-five or eligibility for Medicare;<sup>104</sup> (2) past practices of continuing payment of such benefits during strikes or periods when no collective bargaining agreement was in effect;<sup>105</sup> (3) inducements to continue employment in expectation of such benefits upon retirement;<sup>106</sup> (4) language of obligation contained in booklets summarizing insurance coverage or trust fund plans,<sup>107</sup> or corporate or trustee resolutions and communications.<sup>108</sup>

Evidence deemed relevant to support a holding that the employer's obligation is limited to the duration of a current agreement has included: (1) recognition of the need for discretion of plan trustees to modify benefits as financial and other circumstances require;<sup>109</sup> (2) effectuation of prior benefit reductions without objection from the beneficiaries;<sup>110</sup> (3) negotiation history indicating a parity of benefits

evidence of a lack of vesting. *See, e.g.*, *United Auto Workers v. Roblin Indus., Inc.*, 561 F. Supp. 288, 296, 300 (W.D. Mich. 1983); *San Diego Floor Coverers Joint Ins. Trust* (1983 unpublished arbitration) (Weckstein, Arb.).

103. *E.g.*, *Bower v. Bunker Hill Co.*, 725 F.2d 1211, 1224 (9th Cir. 1984).

104. *E.g.*, *Keffer v. Connors Steel Co.*, 6 Pens. Plan Guide (CCH) ¶ 23,717M (S.D. W. Va. 1986); *Johnston Group, Inc.*, 86-2 Lab. Arb. Awards (CCH) ¶ 8503, at 5121 (Jan. 16, 1986) (Cole, Arb.).

105. *E.g.*, *Local Union No. 150-A, United Food & Comm. Workers Int'l Union v. Dubuque Packing Co.*, 756 F.2d 66, 69 (8th Cir. 1985); *Bower*, 725 F.2d at 1225; *United Auto Workers v. Cadillac Malleable Iron Co.*, 113 L.R.R.M. (BNA) 2525, 2529, 2531 (W.D. Mich. 1982), *aff'd*, 728 F.2d 807 (6th Cir. 1984); *see Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669, 676 n.6 (6th Cir. 1985). *But see* District 17, *United Mine Workers v. Allied Corp.*, 735 F.2d 121, 126-27, 129-30 (4th Cir. 1984); *American-Standard, Inc.*, 57 Lab. Arb. (BNA) 698, 700 (1971) (Warns, Arb.) (rejecting a cut-off of benefits during a strike as precluding a finding of vesting based on clear language); *Barnes & Mishkind*, *supra* note 79, at 605.

106. *E.g.*, *United Auto Workers v. Yard-Man*, 716 F.2d 1476, 1481-82 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *Schlosser v. Allis-Chalmers Corp.*, 86 Wis. 2d 226, 271 N.W.2d 879 (1978); *Sheehy v. Seilon, Inc.*, 10 Ohio St. 2d 242, 227 N.E.2d 229, 230 (1967); *Roxbury Carpet Co.*, 73-2 Lab. Arb. Awards (CCH) ¶ 8521, at 4938-39 (Oct. 26, 1973) (Summers, Arb.).

107. *See Bower*, 725 F.2d at 1224. *But see* *Turner v. Local Union No. 302, Internationa Bhd. of Teamsters*, 604 F.2d 1219, 1226 n.11 (9th Cir. 1979).

108. *See Sheehy v. Seilon, Inc.*, 10 Ohio St. 2d 242, 227 N.E.2d 229 (1967). Communications indicating no continuing obligation are evidence of a lack of vesting. *See, e.g.*, *United Auto Workers v. Roblin Indus., Inc.*, 561 F. Supp. 288, 293-94, 296, 300 (W.D. Mich. 1983).

109. *See Turner*, 604 F.2d at 1223, 1225-26, 1228; *Weiss v. United Whelan Corp.*, 158 N.Y.L.J. 17, 2 Pens. Plan Guide (CCH) ¶ 7004 (Sup. Ct. 1967); *San Diego Floor Coverers Joint Ins. Trust* (1983 unpublished arbitration) (Weckstein, Arb.); *cf. UMW Plan*, 455 U.S. at 575; *Palino v. Casey*, 664 F.2d 854, 858 (1st Cir. 1981).

110. *See United Rubber Workers v. Lee Nat'l Corp.*, 323 F. Supp. 1181, 1187-88 (S.D.N.Y. 1971); *Metropolitan Life Ins. Co. v. Korneghy*, 71 So. 2d 292, 296 (Ala. Ct. App.), *petition for cert. stricken*, 71 So. 2d 301 (Ala. 1954); *cf. United Auto Workers v. Cadillac Malleable Iron Co.*, 113 L.R.R.M. (BNA) 2525, 2531 (W.D. Mich. 1982);

for active and retired workers (when the benefits for active employees have been reduced or terminated);<sup>111</sup> (4) calculation or costing-out of benefits in accordance with each contract term;<sup>112</sup> (5) insurance funding and coverage obligations limited to the current term of the agreement.<sup>113</sup>

The holdings in the cases, for or against a continuing retiree benefit funding obligation, do not appear to have varied with the nature of the health and welfare benefit in question, whether life insurance or medical benefits,<sup>114</sup> for example. Nor have they varied with the reasons for the attempted reduction or termination whether due to plant closure,<sup>115</sup> sale or ceasing of a business,<sup>116</sup> expiration of a collective bargaining agreement,<sup>117</sup> bankruptcy or threat of financial

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Johnston Group Inc., 86-2 Lab. Arb. Awards (CCH) ¶ 8503, at 5121 (Jan. 16, 1986) (Cole, Arb.).

111. See *Metal Polishers Local 11 v. Kurz-Kasch, Inc.*, 538 F. Supp. 368, 374 (S.D. Ohio 1982); *United Rubber Workers v. Lee Nat'l Corp.*, 323 F. Supp. 1181, 1188 (S.D.N.Y. 1971); *Kurz-Kasch, Inc.*, 79-1 Lab. Arb. Awards (CCH) ¶ 8109, at 3463 (Dec. 28, 1978) (Chapman, Arb.), *vacated on other grounds*, 642 F.2d 452 (6th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981).

112. *Kurz-Kasch, Inc.*, 79-1 Lab. Arb. Awards (CCH) ¶ 8109, at 3462 (Dec. 28, 1979) (Chapman, Arb.); *cf.* *District 17, United Mine Workers v. Allied Corp.*, 735 F.2d 121, 126-27 (4th Cir. 1984); *Turner v. Local Union No. 302, Int'l Bhd. of Teamsters*, 604 F.2d 1219, 1223, 1225 (9th Cir. 1979); *United Rubber Workers v. Lee Nat'l Corp.*, 323 F. Supp. 1181, 1188 (S.D.N.Y. 1971). *But cf.* *Roxbury Carpet Co.*, 73-2 Lab. Arb. Awards (CCH) ¶ 8521, at 4940-41 (Oct. 26, 1973) (Summers, Arb.).

113. See *District 17, United Mine Workers*, 735 F.2d at 124, 126-27; *Turner*, 604 F.2d at 1225-26; *Metal Polishers Local 11*, 538 F.2d at 374; *United Auto Workers v. Roblin Indus., Inc.*, 561 F. Supp. 288, 296, 300 (W.D. Mich. 1983); *Metropolitan Life Ins. Co. v. Korneghy*, 71 So. 2d 292, 295, 296-300 (Ala. 1954); *Coulter Mfg. Ltd.*, 59 Lab. Arb. (BNA) 1055, 1057-58 (1972) (Weatherill, Arb.).

For a review of relevant factors in determining contractual intent, see *Barnes & Mishkind*, *supra* note 79, at 602-05.

114. Compare *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1202 (1986) (health insurance) and *Roxbury Carpet Co.*, 73-2 Lab. Arb. Awards (CCH) ¶ 8521 (Oct. 26, 1973) (Summers, Arb.) (life insurance) with *Turner v. Local Union No. 302, International Bhd. of Teamsters*, 604 F.2d 1219 (9th Cir. 1979) (health insurance) and *Weiss v. United Whelan Corp.*, 158 N.Y.L.J. 17, 2 *Pens. Plan Guide* (CCH) ¶ 7004 (Sup. Ct. 1967) (life insurance).

115. Compare *United Auto Workers v. Yard-Man*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984) and *Local Union No. 150-A, United Food & Comm. Workers Int'l Union v. Dubuque Packing Co.*, 756 F.2d 66 (8th Cir. 1985) with *United Auto Workers v. Roblin Indus., Inc.*, 561 F. Supp. 288 (W.D. Mich. 1983) and *Metal Polishers Local 11 v. Kurz-Kasch, Inc.*, 538 F. Supp. 368 (S.D. Ohio 1982).

116. Compare *District 17, United Mine Workers v. Allied Corp.*, 735 F.2d 121 (4th Cir. 1984) (sale) and *Box v. Coalite, Inc.*, 6 *Pens. Plan Guide* (CCH) ¶ 23,7152 (N.D. Ala. 1986) (ceased business) with *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984) (ceased business) and *Sheehy v. Seilon, Inc.*, 10 Ohio St. 2d 242, 247 N.E.2d 229 (1967) (sale).

117. Compare *Weimer v. Kurz-Kasch, Inc.* 773 F.2d 669 (6th Cir. 1985) (contract expired and plant closed) and *United Auto Workers v. Cadillac Malleable Iron Co.*, 728 F.2d 807 (6th Cir. 1984) (contract expired) with *Metal Polishers Local 11 v. Kurz-Kasch, Inc.*, 538 F. Supp. 368 (S.D. Ohio 1982) (contract expired and plant closed) and *Kurz-Kasch, Inc.*, 79-1 Lab. Arb. Awards (CCH) ¶ 8109 (Dec. 28, 1978) (Chapman, Arb.), *cert. denied*, 452 U.S. 915 (1981) (same).

problems.<sup>118</sup> When a contract was construed as requiring continuation of existing benefits in the absence of good cause, one court has held that a threat to the financial base of the entire company, rather than the inability of past contributions to pay for the present level of benefits, was required.<sup>119</sup>

In some cases, rather than relying upon extrinsic evidence of the parties' intent, courts have indulged in speculative scrutiny of fine distinctions in contract language to support questionable inferences as to whether a contractual vesting of retiree health and welfare benefits was intended.<sup>120</sup> This has occurred, for example, when an employer decides to go out of business or shut down a plant. Usually, in such cases, for many years, both the company and union would have assumed, or act like they assumed, that the business operation would continue indefinitely. In this situation, Professor Clyde Summers aptly observed:

The difficulty here is that the parties had no intent one way or the other on the specific issue when they negotiated the agreement, or any of those which preceded it. No one at any time even broached the question of what would happen if the Company went out of business. There is no evidence that such a possibility even crossed either party's mind . . . . It is not surprising, therefore, that the words of the Agreement provide no clear guide; if they seemed to, it would only be an illusion, an unintended result . . . . When confronted with such a problem of interpretation, little is gained by dissecting the words of the contract or searching for intent on a matter which no one considered. Whatever intent is found will not be one which

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118. Compare *White Farm Equip. Co. v. White Farm Corp.*, 788 F.2d 1186 (6th Cir. 1986) (bankruptcy sale and reorganization) and *Turner v. Local Union No. 302, International Bhd. of Teamsters*, 604 F.2d 1219 (9th Cir. 1979) (fund depletion) with *Thonen v. McNeil-Akron*, 6 Pens. Plan Guide (CCH) ¶ 23,714B (N.D. Ohio 1986) (financial difficulties) and *Eardman v. Bethlehem Steel Corp. Employee Welfare Benefit Plans*, 607 F. Supp. 196 (W.D.N.Y. 1984) (benefit reduction); see also *Musto v. American Gen. Corp.*, 6 Pens. Plan Guide (CCH) ¶ 23,693W (M.D. Tenn. 1985).

119. *Musto v. American Gen. Corp.*, 6 Pens. Plan Guide (CCH) ¶ 23,693W (M.D. Tenn. 1985).

An amendment to the Bankruptcy Code, 11 U.S.C. § 1113(c)(2) (as amended 1984), authorizes the court to approve a bankrupt employer's modification of a collective bargaining agreement only if, after negotiation, the employees' authorized representative rejects the modification without good cause. These requirements have been applied to a proposal to stop paying for retirement benefits. *Century Brass Prod., Inc. v. United Auto Workers*, 795 F.2d 265 (2d Cir.), cert. denied, 107 S. Ct. 433 (1986).

120. See *infra* notes 122-32, 137-42 and accompanying text; *Upholster's Int'l Union v. American Pad & Textile Co.*, 372 F.2d 427 (6th Cir. 1967) (comparisons of contract language can be useful, but is best supplemented by extrinsic evidence); see also *Keffer v. Connors Steel Co.*, 6 Pens. Plan Guide (CCH) ¶ 23,717M (S.D. W.Va. 1986); *Thonen v. McNeil-Akron*, 6 Pens. Plan Guide (CCH) ¶ 23,714B (N.D. Ohio 1986); *United Auto Workers v. New Castle Foundry, Inc.*, 114 L.R.R.M. (BNA) 3589 (S.D. Ind. 1983); *Johnston Group Inc.*, 86-1 Lab. Arb. Awards (CCH) ¶ 8503, at 5119-20 (Jan. 16, 1986) (Cole, Arb.).



was in the mind of the parties but one which was constructed by the interpretation.<sup>121</sup>

Nevertheless, in recent cases, the Sixth Circuit Court of Appeals appears to have engaged in such creative construction. In *United Auto Workers v. Yard-Man, Inc.*,<sup>122</sup> the Sixth Circuit affirmed a summary judgment that the parties had intended that retirees' health and life insurance benefits survived a plant closing and the expiration of the collective bargaining agreement providing for them. The court properly stated that a grant of lifetime benefits must find its genesis in the parties' agreement, and that the intended meaning of even the most explicit language can only be understood in light of the context which gave rise to its inclusion.<sup>123</sup> Resolution of ambiguities in durational provisions of an agreement could be guided, according to the court, by reference to other words and phrases in the collective agreement.<sup>124</sup> Because the parties sought a summary judgment and presented no extrinsic evidence to the district court, the question of contractual intent was treated as one of law to be determined solely by the terms of the agreement.<sup>125</sup>

The *Yard-Man* court correctly rejected the employer's contention that a contract clause that the company "will provide insurance benefits equal to the active group benefits . . . for the former employee and his spouse" plainly and unambiguously limited the duration of retiree benefits to that of active employees.<sup>126</sup> The clause could refer solely to the nature of the benefits and not to their duration, and an interpretation which was harmonious with the entire document was sought in other contract provisions.<sup>127</sup> Interestingly, the court noted (despite its earlier stated limitation) the extrinsic evidence that the employer in fact paid retiree benefits after the active employees' benefits were to have ceased, as provided in the agreement, with their layoff. The court concluded that the layoff of active employees was an inappropriate criterion for determining the duration of retiree benefits, and explicitly recognized that "the parties never considered or perhaps never resolved the issue of whether retiree benefits would continue after plant closure."<sup>128</sup> Nevertheless, the court went on to "find" the parties' intent in other contract provisions.

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121. Roxbury Carpet Co., 73-2 Lab. Arb. Awards (CCH) ¶ 8521, at 4937 (Oct. 26, 1973) (Summers, Arb.).

122. 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984). For a more sympathetic analysis of *Yard-Man* and other recent Sixth Circuit cases, see Gregory, *COBRA: Congress Provides Partial Protection Against Employer Termination of Retiree Health Insurance*, 24 SAN DIEGO L. REV. 77 (1987), in this issue.

123. *Yardman*, F.2d at 1479.

124. *Id.* at 1479-80.

125. *Id.* at 1480 n.1.

126. *Id.* at 1480.

127. *Id.* at 1480-81.

128. *Id.* at 1481 n.3.

One such provision stated that when a retiree dies, his dependents' health insurance coverage would end with the expiration of the agreement. Although the court acknowledged that that limitation did not preclude an intent to also terminate the retiree's benefits with the expiration of the collective agreement, it concluded — without stated reason or evidence — that “it is more reasonable to infer that the spouse-dependent child provision was meant as an exception to the anticipated continuation of benefits beyond the life of the collective bargaining agreement.”<sup>129</sup> Yet, it seems at least equally reasonable to assume that the parties' intent was to be beneficent in the situation of a retiree's death by not immediately terminating his dependents' coverage but allowing it to continue for as long as his coverage would have continued, that is, to the expiration of the collective agreement.<sup>130</sup>

While other contractual language relied upon by the court may be more convincing,<sup>131</sup> the search for the parties' intent in this dissection of contract language, probably adopted without reference to any thought of the survival of retiree health and welfare benefits upon plant closing, is, in Professor Summers' words, “an illusion.”<sup>132</sup> The court's conclusion as to which of equally plausible, but conflicting, alternative inferences to draw from the words of the agreement was probably significantly influenced by the court's policy orientation on the question of whether, in the absence of clear evidence of the parties' intent, retiree health and welfare benefits should survive beyond the contract providing for them. While *Yard-Man* acknowledges some influence of such policy considerations,<sup>133</sup> to be discussed shortly,<sup>134</sup> a more recent Sixth Circuit opinion, *Weimer v. Kurz-*

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129. *Id.* at 1481.

130. The court also noted that a provision of the agreement concerning another benefit program specifically provided for continuation only for the duration of the collective bargaining agreement, whereas there was no such specific limitation on the duration of retiree insurance benefits. *Id.* at 1481-82. In a footnote, however, the court dismisses, as merely confirming an independent requirement, the specific contract language providing for the continuation beyond the agreement's duration of supplemental pension benefits. *Id.* at 1482 n.7. Why was not the inference equally compelling that since the parties expressly provided for continuation of some benefits beyond the expiration of the agreement, they would have similarly provided for retiree health and welfare benefits, if that was their intention?

131. *Id.* at 1481 (regarding an obligation of early retirees to pay the cost of insurance until picked up by the company at age 65).

132. See *supra* note 121 and accompanying text.

133. See *Yard-Man*, 716 F.2d at 1482-83.

134. See *infra* notes 145-74 and accompanying text.

*Kasch, Inc.*,<sup>135</sup> illustrates this conclusion even more dramatically.

Following an impasse in bargaining for a new contract, and a strike, Kurz-Kasch, Inc., decided to close its South Broadway plant and terminate the life and medical insurance benefits of the plant's retired employees. Unions representing different bargaining units brought two separate suits on behalf of retired workers. In the Metal Polisher's suit, the district court granted summary judgment for the employer on the basis that the company's obligation to pay retiree health and welfare benefits terminated along with the last collective bargaining agreement which had provided for them.<sup>136</sup> That judgment was not appealed. However, in a suit brought by the Moulders and Machinists, the district court's grant of summary judgment for the employer was reversed on appeal<sup>137</sup> with direction to enter summary judgment for the unions because the Sixth Circuit construed essentially the same collective bargaining agreement language as precluding the employer from terminating retiree benefits.<sup>138</sup> The court followed its *Yard-Man* precedent and treated this issue as one of contract interpretation, solely of law, without a need to consider extrinsic evidence or to give any special deference to the trial court's findings.<sup>139</sup>

The court carefully dissected the language in the union agreements, and, contrary to the district's court interpretation of the same language, concluded that a clause in the group insurance plans for retirees which obligated the company to pay the premiums for existing plans "as long as such Employee remains retired and unemployed"<sup>140</sup> granted lifetime benefits to retired workers subject only to the condition that they remain retired and unemployed.<sup>141</sup> The possi-

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135. 773 F.2d 669 (6th Cir. 1985).

136. The Metal Polishers suit was referred *sua sponte* by the district court to arbitration. The arbitrator found for the company and approved its termination of retiree health and welfare benefits. Kurz-Kasch, Inc., 79-1 Lab. Arb. Awards (CCH) ¶ 8109 (Dec. 28, 1978) (Chapman, Arb.). The union's attempt to vacate the award was rebuffed by the district court but granted on appeal by the Sixth Circuit. The court of appeals held that the arbitration award was beyond the scope of arbitrable jurisdiction because the union had never requested arbitration, as required by the collective bargaining agreement. *Metal Polishers, Int'l Union v. Kurz-Kasch, Inc.*, 642 F.2d 452 (6th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981). On remand, the district court again found for the company but without giving any consideration to the arbitrator's award. *Metal Polishers Local 11 v. Kurz-Kasch, Inc.*, 538 F. Supp. 368 (S.D. Ohio 1982); *see also Weimer*, 773 F.2d at 671 n.1; *Stewart & Kelly*, *supra* note 97, at 522-23.

137. *Weimer v. Kurz-Kasch, Inc.*, F. Supp. (S.D. Ohio) (not reported), *rev'd*, 773 F.2d 669, 670-71 (6th Cir. 1985).

138. *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669 (6th Cir. 1985).

139. *Id.* at 671.

140. Similar language was contained in the other union's contract.

141. *Weimer*, 773 F.2d at 673-74. The district court in the *Metal Polishers* case had found language identical to that in the Moulders contract to be "arguably ambiguous" and therefore subject to the express termination clause. *Metal Polishers*, 538 F. Supp. at 372.

bility that this language also was intended to be limited by the term of the collective agreement was expressly rejected, despite the district court's conclusion that the clause, in each contract, providing that "the Agreement and all terms and conditions hereof shall terminate as of the end of the term" in which notice to terminate or amend is given, applied to the retirees' benefits.<sup>142</sup> The appellate court's contrary construction was acknowledged to be influenced by *Yard-Man's* announced disposition that "when parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue so long as the beneficiary remains a retiree."<sup>143</sup>

This is a reasonable inference, but it should be recognized that to the extent such inferences influence the determination of whether retiree health and welfare benefits survive beyond the agreement creating them, it is an external policy of the court that is used to aid contract interpretation, and not a discovery of the parties' intent or even an interpretation that necessarily will, as appropriately suggested by Professor Summers, "achieve their purposes" and "further and not frustrate their values."<sup>144</sup> Consequently, it is appropriate to examine the policy underpinnings of such aids to contract construction.

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142. *Weimer*, 773 F.2d at 675-76. It is true that a general termination clause does not necessarily include retiree benefits, and it is even possible to conclude that a contract provision for retiree benefits will terminate (as applied to the future creation of a right to benefits) without a termination of the right to continuing benefits already created by prior contracts. See *Johnston Group, Inc.*, 86-2 Lab. Arb. Awards (CCH) ¶ 8503, at 5119 (Jan. 16, 1986) (Cole, Arb.). Nevertheless, it is equally plausible to interpret an all-inclusive termination clause as applying to the termination of retiree benefits unless there is an express exclusion of such benefits in the contract or extrinsic evidence indicates the parties' intention to continue them. See *United Auto Workers v. Roblin Indus., Inc.*, 561 F. Supp. 288, 298, 300 (W.D. Mich. 1983); *United Auto Workers v. New Castle Foundry, Inc.*, 114 L.R.R.M. (BNA) 3589, 3590-91 (S.D. Ind. 1983); *Metal Polishers, Local 11 v. Kurz-Kasch, Inc.*, 538 F. Supp. 368 (S.D. Ohio 1982); *United Rubber Workers v. Lee Nat'l Corp.*, 323 F. Supp. 1181, 1188 (S.D.N.Y. 1971); *Kurz-Kasch, Inc.*, 79-1 Lab. Arb. Awards (CCH) ¶ 8109 (Dec. 28, 1978) (Chapman, Arb.), *vacated on other grounds*, 642 F.2d 452 (6th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981); *Coulter Mfg. Ltd.*, 59 Lab. Arb. (BNA) 1055 (1972) (Weatherill, Arb.). See generally *Stewart & Kelly*, *supra* note 97; *Barnes & Mishkind*, *supra* note 79, at 586. The district court in both *Kurz-Kasch* cases adopted such an interpretation of the identical language in all three union agreements and concluded that the retiree benefits were limited to the term of the agreement. See *Metal Polishers*, 538 F. Supp. at 372-73.

143. *Weimer*, 773 F.2d at 673 (quoting *Yard-Man*, 716 F.2d at 1482).

144. *Roxbury Carpet Co.*, 73-2 Lab. Arb. Awards (CCH) ¶ 8521, at 4937 (Oct. 26, 1973) (Summers, Arb.).

## The Use of Policy Presumptions

In cases where the governing contract is silent or ambiguous regarding the duration of retiree health and welfare benefits, and credible evidence of implied obligations is sparse or conflicting, resolution can be aided by public policy presumptions or inferences. Presumptions could be adopted, for or against a lifetime commitment to pay the benefits, which would prevail unless rebutted by persuasive evidence to the contrary. These presumptions can be intelligently developed from the relevant legal, economic and social policies. Courts and arbitrators have adopted and applied such presumptions, but unfortunately in conflicting directions.<sup>145</sup>

Those cases which have presumed, in the absence of contrary overriding evidence, that the right to health and welfare benefits for retirees terminates with the contract which created that right, have relied upon the following policies and factors: (1) the distinction between pension benefits, which do vest upon satisfaction of prerequisites and are actuarially funded, and health and welfare benefits which can only vest upon an express or implied contractual undertaking;<sup>146</sup> (2) the renegotiability of collective bargaining agreement provisions;<sup>147</sup> (3) the interdependence of current and retired employees as members of the same insurance group, and the likelihood that premiums would be higher for a group composed only of retirees;<sup>148</sup> (4) the unfair financial burden on current employees to have employer compensation diverted to the increased cost of retiree benefits,<sup>149</sup> if the business continues, and the unanticipated, and perhaps

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145. Compare *White Farm Equip. Co. v. White Farm Corp.*, 788 F.2d 1186, 1191-93 (6th Cir. 1986) and *Kurz-Kasch, Inc.*, 79-1 Lab. Arb. Awards (CCH) ¶ 8109 (Dec. 28, 1978) (Chapman, Arb.) with *United Auto Workers v. Cadillac Malleable Iron Co., Inc.*, 113 L.R.R.M. (BNA) 2525, 2530 (W.D. Mich. 1982), *aff'd on other grounds*, 728 F.2d 807 (6th Cir. 1984) and *Roxbury Carpet Co.*, 73-2 Lab. Arb. Awards (CCH) ¶ 8521, at 4940 (Oct. 26, 1973) (Summers, Arb.); see also cases cited *infra* notes 146-54; *Stewart & Kelly*, *supra* note 97, at 525-27.

146. See, e.g., *District 17, United Mine Workers v. Allied Corp.*, 735 F.2d 121, 129 (4th Cir. 1984); *Turner v. Local Union No. 302, International Bhd. of Teamsters*, 604 F.2d 1219, 1225 (9th Cir. 1979); *Box v. Coalite*, 6 Pens. Plan Guide (CCH) ¶ 23,715Z (N.D. Ala. 1986); *Kurz-Kasch, Inc.*, 79-1 Lab. Arb. Awards (CCH) ¶ 8109, at 3463 (Dec. 28, 1978) (Chapman, Arb.), *vacated on other grounds*, 642 F.2d 452 (6th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981); see also *White Farm Equip. Co. v. White Farm Corp.*, 788 F.2d 1186, 1191-93 (6th Cir. 1986). See authorities cited *supra* notes 38 to 50 and accompanying text.

147. See, e.g., *District 17, United Mine Workers*, 735 F.2d at 126-27, 129; *United Auto Workers v. Roblin Indus., Inc.*, 561 F. Supp. 288, 300 (W.D. Mich. 1983).

148. See, e.g., *United Auto Workers*, 561 F. Supp. 296, 299; *Metal Polishers Local 11 v. Kurz-Kasch, Inc.*, 538 F. Supp. 368, 374 (S.D. Ohio 1982); *United Rubber Workers v. Lee Nat'l Corp.*, 323 F. Supp. 1181, 1188 (S.D.N.Y. 1971); *Kurz-Kasch, Inc.*, 79-1 Lab. Arb. Awards (CCH) ¶ 8109, at 3463 (Dec. 28, 1978) (Chapman, Arb.). *But see* *Roxbury Carpet Co.*, 73-2 Lab. Arb. Awards (CCH) ¶ 8521, at 4940-41 (Oct. 26, 1973) (Summers, Arb.).

149. See, e.g., *Turner v. Local Union No. 302, Teamsters*, 604 F.2d 1219, 1228

unfair, burden on an employer to continue to pay costs of unfunded retiree health and welfare benefits after the income from the facility at which they were formerly employed has ceased due to plant closure or sale of the business.<sup>150</sup>

Presumptions in favor of a continuing obligation to pay for retiree health and welfare benefits have often rested upon the concept of all retirement benefits as deferred compensation for which a person has qualified by working the requisite number of years and reaching the required age.<sup>151</sup> Retirement benefits have been referred to as "status" benefits which continue as long as the retirement status continues, that is, until the person returns to employment or dies.<sup>152</sup> Other factors contributing to these conclusions have been the relative lack of bargaining power of retirees whose interests their unions are not obligated to protect<sup>153</sup> and the relative hardship of forcing persons on fixed income to pick up the unanticipated and often high cost of continuing benefits or to go without adequate protection of their families and themselves.<sup>154</sup>

Policies of this nature have been influential in the Sixth Circuit decisions in favor of retirees.

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(9th Cir. 1979). See *supra* notes 47-51. For example in *Turner* there were more employees whose benefits had to be paid for by employer contributions based upon a decreased number of hours worked by a lesser number of active employees. See also San Diego Floor Coverers Joint Ins. Trust (1983 unpublished arbitration) (Weckstein, Arb.).

150. See *District 17, United Mine Workers*, 735 F.2d at 128, 130-34 (holding the multi-employer trust responsible for retirees "orphaned" by their former employer's sale of its business). But see *id.* at 134-36 (Sprouse, J., dissenting); *Roxbury Carpet Co.*, 73-2 Lab. Arb. Awards (CCH) ¶ 8521, at 4940-41 (Oct. 26, 1973) (Summers, Arb.).

151. See generally *Stewart & Kelly*, *supra* note 97; *Barnes & Mishkind*, *supra* note 79; see, e.g., *Yard-Man*, 716 F.2d at 1482; *United Auto Workers v. Cadillac Malleable Iron Co., Inc.*, 113 L.R.R.M. (BNA) 2525 (W.D. Mich. 1982), *aff'd*, 728 F.2d 807 (6th Cir. 1984); *Johnston Group, Inc.*, 86-1 Lab. Arb. Awards (CCH) ¶ 8503, at 5119-20 (Jan. 16, 1986) (Cole, Arb.); *Roxbury Carpet Co.*, 73-2 Lab. Arb. Awards (CCH) ¶ 8521, at 4938-39 (Oct. 26, 1973) (Summers, Arb.); see also *infra* notes 155-56 and accompanying text. But see *United Auto Workers v. Roblin Indus. Inc.*, 561 F. Supp. 288, 294-300 (W.D. Mich. 1983); *Barnes & Mishkind*, *supra* note 79, at 588-89, 593.

152. See, e.g., *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1202 (1986); *Local Union No. 150-A, United Food and Comm. Workers Int'l Union v. Dubuque Packing Co.*, 756 F.2d 66, 70 (8th Cir. 1985); *Yard-Man*, 716 F.2d at 1482; *Thonen v. McNeil-Akron*, 6 Pens. Plan Guide (CCH) ¶ 23,714B (N.D. Ohio 1986). See also *infra* notes 164-66 and accompanying text.

153. See, e.g., *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 613 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1202 (1986); *Yard-Man*, 716 F.2d at 1482, 1485-86.

154. See, e.g., *Keffer v. Connors Steel Co.*, 6 Pens. Plan Guide (CCH) ¶ 23,717M (S.D. W. Va. 1986); *Stewart & Kelly*, *supra* note 97, at 533.

## Deferred Compensation

In *Yard-Man*, the court, noting that benefits for retirees are only permissive not mandatory subjects of bargaining, stated that "it is unlikely that such benefits, which are typically understood as a form of delayed compensation or reward for past services, would be left to the contingencies of future negotiations."<sup>155</sup> If current employees "forego wages now in expectation of retiree benefits, they would want assurance that once they retire they will continue to receive such benefits regardless of the bargain reached in subsequent agreements."<sup>156</sup>

The difficulty with this analysis is that it proves too much, some of which does not logically follow. In part, retiree health and welfare benefits may be the result of a conscious decision of current employees to forego present income in expectation of such benefits upon retirement. But this intentional act of financial planning cannot be the basis of an increase in health and welfare benefits for workers who are already retired, and had a more limited trust plan established for them while they were active employees. Such increases may be an act of moral charity or social responsibility,<sup>157</sup> or may be based upon the plan trustees' prudent disposition of fund surpluses accumulated in periods of high return on their investments.<sup>158</sup> Moreover, the current employees may not have acted on the assumption that, once granted, retiree health and welfare benefits may not be reconsidered at future bargaining sessions when conditions have changed.<sup>159</sup>

In a footnote to the *Yard-Man* analysis, the court states: "Clearly, the union may choose to forego such benefits in future negotiations in favor of more immediate compensation. It may not, however, bargain away retiree benefits which have already vested in particular individuals. Such rights, once vested upon the employee's retirement, are interminable . . . ."<sup>160</sup>

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155. *Yard-Man*, 716 F.2d at 1482.

156. *Id.*

157. See, e.g., *Johnston Group Inc.*, 86-2 Lab. Arb. Awards (CCH) ¶ 8503, at 5120-21 (Jan. 16, 1986) (Cole, Arb.).

158. See *San Diego Floor Coverers Joint Ins. Trust* (1983 unpublished arbitration) (Weckstein, Arb.).

159. For example, if, as occurred in the construction industry, fewer active employees are working fewer hours, would it likely be their rational decision to continue to support a high level of health and welfare benefits for a large number of retired workers, and to forego immediate take home pay, in the expectation that when they retire there will be enough unionized construction work to support them in a similar fashion? See *id.*; *Palino v. Casey*, 664 F.2d 854, 856-57 (1st Cir. 1981); see also *Turner v. Local Union No. 302, International Bhd. of Teamsters*, 604 F.2d 1219, 1223 (9th Cir. 1979) (dairy industry).

160. *Yard-Man*, 716 F.2d at 1482 n.8. Interestingly, the employees who have recently forgone current income in favor of anticipated retirement benefits are not likely to

Remarkably, this footnote is subsequently cited in *Kurz-Kasch* to support the conclusion that "this court recognized that normally retiree benefits are vested."<sup>161</sup> The Sixth Circuit panel in *Yard-Man* did not make any such statement. Nor is the statement justified by reference to *Pittsburgh Plate Glass* which stated in dictum that: "Under established contract principles, vested retirement rights may not be altered without the pensioners' consent."<sup>162</sup> In other words, if a contract provides for the vesting of retiree benefits, they cannot be altered without consent. The Court did not say that contractually provided retiree benefits are always, or normally, or more often than not, vested. To conclude otherwise, as the Sixth Circuit has apparently done, also ignores the statutory distinction made in ERISA, and widely recognized, between pension retirement benefits, which do normally vest, and welfare retirement benefits which do not vest absent a contractual undertaking of that nature.<sup>163</sup>

#### "Status" Benefits

*Yard-Man* also concludes that retiree benefits are status benefits which "as such, carry with them an inference that they continue so long as the prerequisite status is maintained,"<sup>164</sup> that is, retirement. The court was careful to add, however, that it knows of no federal labor policy which "presumptively favor[s] the finding of interminable rights to retiree insurance benefits when the collective bargaining agreement is silent."<sup>165</sup> Rather, the status factor "simply provides another inference of intent" to buttress other evidence of such intent in the language of the agreement.<sup>166</sup>

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be the beneficiaries of this vesting protection since they probably have not yet retired, and, under the court's analysis, they may lose such benefits upon future renegotiations by the union, prior to their retirement.

161. *Weimer*, 773 F.2d at 672.

162. *Pittsburgh Plate Glass*, 404 U.S. at 181 n.20. See *supra* text accompanying note 78.

163. See *supra* notes 38-46, 146 and accompanying text.

164. *Yard-Man*, 716 F.2d at 1482.

165. *Id.*

166. *Id.* The Sixth Circuit reinforced this distinction between an inference and a presumption in a subsequent case affirming a holding that retiree health and welfare benefits survived after the expiration and nonrenewal of the collective bargaining agreement which had provided for them. *United Auto Workers v. Cadillac Malleable Iron Co.*, 113 L.R.R.M. (BNA) 2525 (W.D. Mich. 1982), *aff'd*, 728 F.2d 807 (6th Cir. 1984). The court expressly rejected, however, the district court's adoption of a "presumption" in favor of the vesting of retirement benefits. *Id.* at 808. Nevertheless, the circuit court states that the district court's analysis was quite similar to that described in *Yard-Man*, *id.* at 809, and the lower court's opinion earlier had been cited with approval by the Sixth and Ninth Circuits. *Yard-Man*, 716 F.2d at 1482; *Bower v. Bunker Hill Co.*,



*Yard-Man* seemed to draw a distinction between an inference, which arises from the context of the facts of a particular case, and a presumption, which arises from usual policies or practices but not necessarily those followed by the parties in the particular case.<sup>167</sup> The distinction, however, may not be significant. Unless they are considered irrebuttable, and therefore rules of law, the primary function of a presumption is to assign the burden of producing evidence, and provide a basis for a decision in favor of the party benefitting from the presumption in the absence of rebutting evidence. Even if rebutted, an inference (especially when the presumption is based on custom) may remain to be weighed along with other evidence.<sup>168</sup>

In the context of retiree health and welfare benefits, a presumption in either direction, uniformly adhered to, would be defensible and helpful in assigning the burden of proof. In this author's opinion, however, a presumption in favor of no continuing employer or trust fund liability for benefits beyond the expiration of a contract would be more soundly based upon probable intent and relevant policies. In almost all legal contests over the issue, the retirees or their representatives, initiate the suit or arbitration. As such, normal rules would place the burdens of initial production of evidence and of persuasion on them as the moving parties.<sup>169</sup> There does not appear to be any overriding consideration for shifting the assignment of these burdens.<sup>170</sup> Moreover, it is ordinarily presumed that the rights and obligations in a collective bargaining contract do not survive the expiration of the agreement in the absence of proof of a contrary intent

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725 F.2d 1221, 1225 (9th Cir. 1984). The district court's decision in *Cadillac Malleable*, has been criticized as reaching conclusions not supported by the authorities it cites, and confusing the nature of vacation benefit entitlement, which may vest as earned by the requisite period of employment, and that of health and welfare benefits such as medical and life insurance. See Stewart & Kelly, *supra* note 97, at 526-27, 528 n.34; San Diego Floor Coverers Joint Ins. Trust (1983 unpublished arbitration) (Weckstein, Arb.). Compare *Schneider v. Elec. Auto-Lite Co.*, 456 F.2d 366 (6th Cir. 1972); *Suastez v. Plastic Dress-Up Co.*, 31 Cal. 3d 774, 647 P.2d 122, 183 Cal. Rptr. 846 (1982).

167. See *Yard-Man*, 716 F.2d at 1482; *Cadillac Malleable*, 728 F.2d at 808-09. Nevertheless, the *Kurz-Kasch* case cites the "status" inference and the "delayed" compensation" characterization in *Yard-Man* as "two factors weighing in favor of an interpretation that retiree benefits survive expiration of the collective bargaining agreement." *Weimer*, 773 F.2d at 672. These factors also have been emphasized by other courts in determining the issue along with other interpretative guides to an unclear contractual intent. See authorities cited *supra* notes 151 & 152.

168. See generally K. BROUN, G. DIX, E. GELLHORN, D. KAYE, R. MEISENHOLDER, E. ROBERTS & J. STRONG, *McCORMICK ON EVIDENCE* 965-84 (3d ed. 1984); see also O. FAIRWEATHER, *PRACTICE AND PROCEDURE IN LABOR ARBITRATION* 280-90 (2d ed. 1983); M. HILL & A. SINICROPI, *EVIDENCE IN ARBITRATION* 24-27 (1980).

169. *Barnes & Mishkind*, *supra* note 79, at 600; Stewart & Kelly, *supra* note 97, at 525-26; see, e.g., *United Auto Workers v. Roblin Indus., Inc.*, 561 F. Supp. 288, 297 (W.D. Mich. 1983).

170. As is done, for example, in arbitrations challenging employee discipline when the pertinent facts are more likely to be most available to the employer. See M. HILL & A. SINICROPI, *supra* note 168, at 13-14.

as to specific provisions.<sup>171</sup> Requiring retirees, or their representatives, to prove a continuation of their health and welfare benefits is a fair and logical application of this common understanding of participants in collective bargaining. This conclusion also is consistent with current law which distinguishes between the mandatory vesting of pension benefits, for which accrued funding is required, and nonvesting of health and welfare benefits in the absence of contract.<sup>172</sup> Perhaps that law should be changed, but until it is, a party asserting contractual vesting can be reasonably asked to prove it.

### Economic Hardship

The comparative economic hardships on fixed income retirees, on the one hand, or on financially strapped employers, and perhaps their current employees, on the other, seem almost equally balanced. Both retirees and employers may justly claim detrimental reliance on their legitimate expectations.<sup>173</sup> Indeed, if employer expectations were otherwise, they might be unwilling to bargain about this permissive subject,<sup>174</sup> and that would hardly benefit their retirees. Obviously, an employer who agrees to fund health and welfare benefits for employees during their retirement must do so in good faith. But if unexpected downturns in business make a continuing fulfillment of that expectation financially infeasible, the employer should be entitled to renegotiate or readjust future payments, unless the employer has knowingly committed itself to an obligation that survives existing collective bargaining or employment contracts.

A better solution, of course, would be to provide some form of accrued funding or cost sharing which would protect the expectations of all parties. Legislation may be required to accomplish these ends, and as indicated in the next section, it is both desirable and feasible.

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171. See, e.g., *District 17, United Mine Workers v. Allied Corp.*, 735 F.2d 121, 127 (4th Cir. 1984); *United Auto Workers v. Roblin, Ind., Inc.*, 561 F. Supp. 288, 298, 300 (W.D. Mich. 1983); *Coulter Mfg. Ltd.*, 59 Lab. Arb. Awards (CCH) 1055, 1057 (1972) (Weatherill, Arb.); *Stewart & Kelly*, *supra* note 97, at 530-33; *Barnes & Mishkind*, *supra* note 79, at 601.

172. See *supra* notes 38-50, 146 and accompanying text.

173. See *Metal Polishers Local 11 v. Kurz-Kasch*, 538 F. Supp. 368, 374 (S.D. Ohio 1982); *Barnes & Mishkind*, *supra* note 79, at 610-11; *Stewart & Kelly*, *supra* note 97, at 533; see also cases cited *supra* notes 148-50 & 54.

Compare the arguments in favor of presuming the vesting of severance benefits in *Shawe & Swerdlin, You Promised! — May an Employer Cancel or Modify Employee Severance Pay Arrangements?*, 44 MD. L. REV. 903, 924-25 (1985).

174. See *supra* notes 7-8 and accompanying text.

## LEGISLATIVE BAND-AIDS AND SUPPORTING CASTS

There are a large number of retired employees who depend upon their former employers' financial assistance in meeting increasing medical and other health and welfare costs.<sup>175</sup> These include employees who are on disability retirement, those who are induced to retire early as a cost saving measure by the company's promises, among other things, to pay medical insurance premiums, or who discover, upon age sixty-five retirement, that Medicare fails to adequately address their medical needs.<sup>176</sup> If their former employer subsequently encounters financial problems, goes into bankruptcy, or ceases business entirely, the retirees' health and welfare benefits frequently become vulnerable.

Congress has become increasingly aware, and concerned, about the plight of these retired workers as well as those current employees and their dependents who lose health insurance benefits through lay-off or other reasons beyond their control. One such situation which has prompted legislative action is the chapter 11 Bankruptcy proceedings of LTV Corporation (the former Republic Steel and Jones & Laughlin Steel companies). LTV has 78,000 retirees, whose benefits the company sought to terminate when it filed for bankruptcy. After the Senate passed a bill requiring LTV to continue paying for the retired steelworkers' health benefits, the company did so, pursuant to a bankruptcy court order issued over the objection of other creditors who were unhappy with the payment preference given to the retirees.<sup>177</sup> Subsequently, Congress did enact a stop-gap measure which requires that companies who enter chapter 11 proceedings, and do not yet have a court confirmed reorganization plan, continue to pay for medical benefits of retired former employees until May 15, 1987.<sup>178</sup> In addition, Congress extended the health insurance continuation provisions of the Consolidated Omnibus Budget Reconciliation Act (COBRA) to retirees of companies in chapter 11 proceedings.<sup>179</sup>

COBRA<sup>180</sup> generally requires that an employer which maintains a

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175. See *supra* notes 1, 6, 37 and accompanying text. A recent survey of public employers indicated that 73% of the respondents provided medical benefits to retirees, usually on a cost sharing basis. 4 *Employee Relations Weekly* (BNA) 1307, 1308 (Oct. 20, 1986); see also Barnes & Mishkind, *supra* note 79, at 584-85; Gregory, *supra* note 122, at 81-82 n.16-18.

176. See *supra* note 1; 4 *Employee Relations Weekly* (BNA) 1489-90 (Dec. 1, 1986); *id.* 1448 (Nov. 24, 1986); *id.* 1145 (Sept. 15, 1986).

177. *Id.* at 1271 (Oct. 13, 1986).

178. Continuing Appropriations Act of 1986, Pub. L. No. 99-500, 100 Stat. (1986). This might be characterized as general legislation with a very specific application, or "special interest" legislation.

179. Pub. L. No. 99-509, 100 Stat. 222 (1986), amending Pub. L. No. 99-272, Tit. X, § 10001, 100 Stat. 222 (1986).

180. *Id.* For a more detailed explanation, see Gregory, *supra* note 122.

group health insurance plan offer continuing coverage, for eighteen months, to former employees (other than those terminated for gross misconduct) and their dependent spouse or children, for thirty-six months, upon termination of the employed spouse, or if dependent coverage would otherwise be lost due to divorce, death of the employee spouse, or his or her eligibility for Medicare. Continuation coverage is at the expense of the former employee or dependent at rates up to 102% of the group premium, and may be cut short due to reemployment under another health plan, eligibility for Medicare, nonpayment of premiums, or termination of the employer's group health coverage for all of its employees. In addition, upon completion of the continuation coverage period, the employee or dependent must be offered an opportunity to enroll in an individual conversion health plan provided under the employer's group plan.

Legislation such as COBRA does enable retired workers to continue their health insurance coverage at group rates and without a showing of insurability (which could be important to elderly persons), but at their own expense. It is a step in the right direction but still a long way from a solution.

The 100th Congress which convenes in 1987 will be considering more broadly-based reforms.<sup>181</sup> Under the Deficit Reduction Act of 1984, the Secretary of the Treasury was directed to study possible means of providing minimum standards for employee participation, vesting, accrual, and funding of welfare benefit programs for current and retired employees.<sup>182</sup> The study was to have been completed by February 1, 1985, but the completion date has been extended by the Tax Reform Act of 1986 to October 22, 1987 (one year after the Bill's enactment).<sup>183</sup> Recommendations coming out of that study could lead to amendments of ERISA providing for insured funding and vesting of employer health and welfare plans similar to the protection now given to pension plans. In that manner, advance and secure funding, at a time when the employer could afford the payments (and benefit from the income tax deduction), would protect the legitimate expectations of employees upon and through their

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181. See 5 *Employee Relations Weekly* (BNA) 3 (Jan. 5, 1987); *id.* at 37 (Jan. 12, 1987); 4 *id.* at 1489-90 (Dec. 1, 1986); *id.* at 1448 (Nov. 24, 1986); *id.* at 1145 (Sept. 15, 1986); Barnes & Mishkind, *supra* note 79, at 610-11. The states also may get into the act until and unless preempted by federal legislation. See, e.g., MASS. GEN. ANN. LAWS. ch. 151A, § 71G, ch. 175 § 110D, ch. 176G, § 4A (Supp. 1986) (extending group policies and H.M.O. coverage for limited periods following plant closings or layoffs).

182. Pub. L. No. 98-369, § 560(b), 98 Stat. 494, 901 (1984).

183. Pub. L. No. 99-514 § 1167, 100 Stat. 4810 (1986).

retirement.

Other approaches could include expanding eligibility and coverage for Medicare benefits, a program of national health insurance, or more limited protection aimed at workers who are laid off due to plant closures, and perhaps retirees of such companies who had been receiving health and welfare benefits. While the political attitude during the past few years has favored less government regulation and spending, the new Congress convenes with Democrats in control of both houses, and Senator Edward Kennedy, who has supported such government assistance in the past, as Chairman of the key Labor Committee.<sup>184</sup>

Choosing between imposing financial hardships on retired employees or their former employers (and perhaps current employees) when the cost of retiree health and welfare plans becomes oppressive is neither easy nor pleasant. So far courts and arbitrators have been the key decisionmakers in this win-lose game. Now the playing field shifts to Congress and the hope that it can devise a win-win solution, or at least a remedy that is more equitable by providing for cost sharing and planning without placing the financial burden solely on one of the parties when it can least afford it.

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184. See 5 Employee Relations Weekly (BNA) 35, 37 (Jan. 12, 1987); 4 *id.* at 1510-11 (Dec. 8, 1986). S. 2402, 99th Cong., 1st Sess. (1986), introduced by Senator Kennedy, provided for four month's continuing health insurance for laid-off workers. President Reagan also has recognized a need for at least some additional legislative protection of retiree health care in his recently introduced Medicare Catastrophic Illness Coverage Act. See 5 Employee Relations Weekly (BNA) 264-65 (Mar. 2, 1987).