

Journal of Civil Rights and Economic Development

Volume 25
Issue 4 *Volume 25, Summer 2011, Issue 4*

Article 8

June 2011

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Recommended Citation

Raymond A. Franklin (2011) "Vesting Retirement Benefits: Revisiting Yard-Man and Its Unacknowledged Presumptions," *Journal of Civil Rights and Economic Development*: Vol. 25 : Iss. 4 , Article 8.
Available at: <https://scholarship.law.stjohns.edu/jcred/vol25/iss4/8>

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VESTING RETIREMENT BENEFITS: REVISITING *YARD-MAN* AND ITS UNACKNOWLEDGED PRESUMPTION

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What started out as a potential inference became an omnipresent presumption and now appears to have become a clear-statement rule. Unless a company can point to explicit language in the relevant agreement stating that “retiree benefits” terminate at a particular date or do not vest, the benefits seem to vest as a matter of law. What we continually disclaim presuming we continually seem to presume. – Judge Jeffrey Sutton¹

What a drag it is getting old. – Mick Jagger²

INTRODUCTION

While retirement seems like the time to relax and unwind after years of slaving over your job, coasting off to the vacation spot with your nest egg and gold watch is becoming less of a given and more of a luxury. Playing that lazy round of golf might have to wait, as today, many workers feel the financial need to either remain at a job several years longer than they ever expected, or seek entirely different work in retirement, thus postponing the relaxation that retirement was supposed to offer. One of the reasons for this sad reality is the increasing lack of health care provided to employees by their employers. A study by the Department of Labor found that only 34% of retirees over age 55 were covered by employer-sponsored health care plans in 1994, a decrease of 10% from 1988.³ Other reports indicate

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¹ *Noe v. PolyOne Corp.*, 520 F.3d 548, 565-67 (6th Cir. 2008) (Sutton, J., dissenting) (describing a presumption that the Sixth Circuit seems to employ towards the vesting of retirement benefits at the expiration of collective bargaining agreement, despite its claims that it does not apply such a presumption).

² Mick Jagger & Keith Richards, *Mother’s Little Helper*, AFTERMATH (Decca Records, 1966).

³ See MARK A. ROTHSTEIN & LANCE LIEBMAN, *EMPLOYMENT LAW: CASES AND MATERIALS* 1239 (6th ed. 2007) (citing U.S. Dep’t of Labor, *Retirement Benefits of American Workers*, 27, 29 (2006)).

that this number has decreased yet again since the early 1990s.⁴ Much of this decrease in providing of retirement health coverage is due to the precarious financial status of our nation. The United States has been mired in its worst economic crisis of the past 60 years,⁵ and employers are trying to make financial decisions that will increase profits, even at the expense of those who have worked to build the company to its current status.

The nation as a whole is getting older, as “baby boomers”⁶ are aging and moving towards retirement.⁷ As those individuals eventually retire, employers likely face a tremendous burden of paying retirement and health benefits to all of them. According to the Census Bureau, between the years 2005 and 2025, the number of people 55 to 64 will increase by 36.4%, and those aged 65 and older will increase by 73.1%, while those between the ages of 25 and 54 will increase by only 3.8%.⁸ Those aged 65 and older will make up nearly 19% of the population, and many of them will be retired, or heading towards retirement.⁹ Along with the increase in retirement-aged individuals, the life expectancy of Americans has steadily increased and now stands at more than 78 years.¹⁰ This increase means that Americans are spending more time living in those retirement years, and thus costing more for employers who pay for health benefits.

As a result, many employers are keeping older employees in lesser capacities in an attempt to avoid losing tremendous numbers of workers to retirement¹¹ and to avoid paying retirement benefits to all of those workers

⁴ See William Payne & Pamina Ewing, *Union-Negotiated Lifetime Retiree Health Benefits: Promise or Illusion*, 9 MARQEA 319, 319 (2008) (discussing the increase in the number of employers reducing or terminating benefits).

⁵ See Laura Meckler & Jonathan Weisman, *Obama to Call for a New Era of Responsibility*, WALL ST. J., Jan. 20, 2009, at A1 (noting that the United States is suffering its “worst economic crisis since the Great Depression”); *World Bank: Economy Worst Since Depression*, CNNMONEY.COM, Mar. 9, 2009, http://money.cnn.com/2009/03/09/news/international/global_economy_world_bank/ (highlighting the fact that the global economy, in addition to the U.S. economy, is experiencing its “worst performance since the Great Depression”).

⁶ See PATRICK PURCELL, CONGRESSIONAL RESEARCH SERV., OLDER WORKERS: EMPLOYMENT AND RETIREMENT TRENDS 2 (2006), available at <http://aging.senate.gov/crs/pension34.pdf> (defining “baby boomers” as those individuals born between 1946 and 1964).

⁷ *Id.* (noting that the demographics of the United States will change when the “baby boomers” reach retirement age).

⁸ *Id.* at 2 (giving statistics showing the drastic changes in the percentage of older Americans in the coming years, in comparison to the younger generation).

⁹ *Id.* (showing evidence of the aging of America’s Population).

¹⁰ See David Brown, *Life Expectancy Hits Record High in United States*, WASH. POST, June 12, 2008, at A4 (defining life expectancy as “the calculation of how long a newborn could expect to live if the mortality rates at birth prevailed for a lifetime”); CENTRAL INTELLIGENCE AGENCY, *Life Expectancy at Birth*, in THE WORLD FACTBOOK, available at https://www.cia.gov/library/publications/the-world-factbook/fields/print_2102.html (declaring that the life expectancy of the total United States population is 78.11 years as of 2009).

¹¹ See PURCELL, *supra* note 6, at 1-2 (“The age-distribution [of] those 25 to 64 years old already is

once they are gone.¹² So far, some major companies have actually taken steps to eliminate altogether the distribution of health benefits to retirees.¹³ This type of action can strike fear into the minds of those who are counting on those employee benefits once they retire.

I. COLLECTIVE BARGAINING AGREEMENTS AND THE VESTING OF RETIREMENT BENEFITS

Amidst the financial struggles of employee and retiree compensation, one issue that has long split federal circuits, and still does today, is what to do with retirement benefits at the end of a collective bargaining agreement. Particularly, courts have diverged over whether retirement benefits become vested for a lifetime upon the expiration of the collective bargaining agreement (CBA) when the agreement is silent or ambiguous on how to handle those benefits. Most of the courts that have looked at the issue have based their decisions on their agreement or disagreement with the 1983 Sixth Circuit decision *International Union, UAW v. Yard-Man, Inc.*¹⁴

The courts that follow *Yard-Man* choose to interpret the collective bargaining agreement in a contract-style method; examining whether the intent of the parties, based on language and context of the agreement, was to have the retirement benefits vest beyond the expiration of the agreement.¹⁵ Alternately, a majority of courts have held that once the collective bargaining agreement ends, there should be a presumption against the vesting of the benefits.¹⁶ This note will address the circuit split, particularly the most recent cases on the subject, and argue that the

undergoing a substantial shift toward a greater number of older individuals and a relative scarcity of young people entering the labor force.”); U.S. GENERAL ACCOUNTING OFFICE, OLDER WORKERS: DEMOGRAPHIC TRENDS POSE CHALLENGES FOR EMPLOYERS AND WORKERS, UNITED STATES GENERAL ACCOUNTING OFFICE 19 (2001) (stating that older workers are less likely to lose their jobs than younger workers).

¹² PURCELL *supra* note 6, at 13 (indicating that many employers are having their older employees work part-time or part-year schedules, to avoid having them retire); ROBERT HUTCHENS & KERRY L. PAPPS, DEVELOPMENTS IN PHASED RETIREMENT (2004) (exploring why employers keep employees working in order to avoid paying all retirements benefits).

¹³ Nick Bunkley, *Some White Collar G.M. Retirees Scramble as Health Care is Cut Off*, N.Y. TIMES, Nov. 10, 2008, at B1 (describing how General Motors decided to cut the health benefits of many of its workers, in order to save \$1.5 billion at a time when the corporation was struggling); EMPLOYEE BENEFITS SECURITY ADMINISTRATION, U.S. DEP’T OF LABOR, CAN THE RETIREE HEALTH BENEFITS PROVIDED BY YOUR EMPLOYER BE CUT? 1 (2010), available at <http://www.dol.gov/ebsa/pdf/retireehealthbenefits.pdf> (“[N]othing in federal law prevents them from cutting or eliminating those benefits – unless they have made a specific promise to maintain the benefits.”).

¹⁴ 716 F.2d 1476 (6th Cir. 1983) (holding that retirees were entitled to continuing benefits despite the expiration of the collective agreement).

¹⁵ See *infra* Part III, A (discussing the contractual approach to examining the collective bargaining agreement).

¹⁶ See *infra* Part III, B (discussing the presumption against vesting).

presumption against vesting is not desirable. The note will also explore a third method, a presumption *towards* the vesting of retirement benefits when a collective bargaining agreement expires. No circuits claim to directly subscribe to this method, but this note will argue that the Sixth Circuit, despite its consistent claims to the contrary, actually does apply a presumption towards the vesting of retirement benefits, and that this is the correct approach.¹⁷

II. BACKGROUND

The rewarding of retirement benefits can be a highly sensitive matter for retirees and their former employer. If a unionized group of workers reach a collective bargaining agreement, that agreement usually remains in effect for a determined period of time.¹⁸ When that period ends, the agreement expires and a new accord must be negotiated and agreed upon between the two parties.¹⁹ When a collective bargaining agreement ends, often the current employees' rights under that agreement expire immediately or shortly thereafter.²⁰ A question has arisen in many circuits as to whether the rights and benefits of the retirees, which were also negotiated under that agreement, vest for the retirees' lifetime or whether they expire as well.²¹ There has been much debate over the topic.

According to the National Labor Relations Act,²² a collective bargaining agreement is an agreement for the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.²³

¹⁷ *Noe v. PolyOne Corp.*, 520 F.3d 548, 567 (6th Cir. 2008) (describing a presumption that some courts seem to unwillingly employ towards the vesting of retirement benefits).

¹⁸ *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 607 (7th Cir. 1993) (referring to a collective bargaining agreement as "invariably three years"); *Yard-Man*, 716 F.2d at 1478 (noting that the agreement began in 1974 and was to end in 1977).

¹⁹ See National Labor Relations Act, 29 U.S.C. § 151 (2006).

²⁰ *Yard-Man*, 716 F.2d at 1480 (noting that employees' benefits could be interpreted to end with the expiration of the collective bargaining agreement); *Wheelabrator*, 993 F.2d at 607 (presuming that a collective bargaining agreement stops when the term is up).

²¹ *Yard-Man*, 716 F.2d at 1480 (noting that benefits of *Yard-Man*'s employees could end when the collective bargaining agreement expired); *Wheelabrator*, 993 F.2d at 604 (examining whether collective bargaining agreements conferred a lifetime right to health benefits in the seventh circuit).

²² 29 U.S.C. §§ 151-169.

²³ See *id.* at § 158(d) (defining the act of bargaining collectively as a mutual obligation between employer and the representative of the employees); see also Charles J. Morris, *A Blueprint for Reform of the National Labor Relations Act*, 8 Admin. L.J. Am. U. 523-24, n.19 (quoting the National Labor Relations Act and noting that the Act only gives a bare bones procedural description of the collective bargaining process).

The Employee Retirement Income Security Act (ERISA),²⁴ which was passed in 1974 is a federal law geared towards protecting retirees by setting “minimum standards for most voluntarily established pension and health plans in private industry to provide protection for individuals in these plans.”²⁵ Aside from retirement benefits provided by an employer, there are other types of support for workers who are retired or unemployed, such as Social Security and COBRA,²⁶ however, those programs will not be the focus of this note.

III. METHODS FOR RESOLVING RETIREMENT BENEFITS AT THE EXPIRATION OF A CBA

A. *The Yard-Man Inference and the Contractual Approach*

The landmark case, *International Union, UAW v. Yard-Man, Inc.*,²⁷ is a Sixth Circuit decision that affirmed the district court holding that an employer, Yard-Man, breached its collective bargaining agreement when it terminated the health and life insurance benefits of its unionized retirees.²⁸ The circuit court held that those benefits of the retirees had vested upon the expiration of their agreement.²⁹ As the contract in the CBA did not specifically spell out what should be done with the retirement benefits at the end of the agreement, the court used a contractual interpretation approach to reach its conclusion.³⁰ The approach that the *Yard-Man* court used to determine whether the benefits should vest has made *Yard-Man* a starting point for many courts when making judgments in the same

²⁴ 29 U.S.C. § 1001 (2006).

²⁵ U.S. Dep’t of Labor, *Retirement Plans, Benefits and Savings: Employment Retirement Income Security Act (ERISA)*, www.dol.gov/dol/topic/retirement/erisa.htm (last visited Feb. 20, 2011).

²⁶ See David L. Gregory, *COBRA: Congress Provides Partial Protection Against Employer Termination of Retiree Health Insurance*, 24 SAN DIEGO L. REV. 77, 83-84 (1987) (describing the history and significance of the Consolidated Omnibus Budget Reconciliation Act (COBRA) plan for former workers); see also Brian J. Harrigan, *Erosion of Retiree Health Benefits: Impact on Health Status of Near-Elderly*, 8 GEO. PUBLIC POL’Y REV. 85, 88-90 (2003) (noting the presence of COBRA as an option for aging retirees).

²⁷ 716 F.2d 1476 (6th Cir. 1983).

²⁸ See *id.* at 1478 (holding that Yard-Man breached its collective bargaining agreement with its employees by terminating the benefits of retired employees at the agreement’s expiration).

²⁹ See *id.* (stating that Yard-Man and the Union intended to create vesting benefits to retirees that would outlive the duration of the bargaining agreement); see also *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669, 672 (6th Cir. 1985) (explaining that the fact that retiree benefits are vested, as a response to the lack of protection retirees have in the collective bargaining process, is a factor that supports the interpretation that retiree benefits do survive the expiration of the collective bargaining agreement).

³⁰ See *Yard-Man*, 716 F.2d at 1480 (noting that because the agreement was ambiguous the Court was required to look to other provisions of the agreement for evidence of intent); see also Gregory, *supra* note 26, at 88-89 (discussing the principles of contractual interpretation used in *Yard-Man*).

situation; some have referenced the opinion positively, while others have decried the methods used in that case, instead choosing to take an alternate approach.³¹

In *Yard-Man*, a 1974 collective bargaining agreement was reached between the United Automobile, Aerospace and Agricultural Implement Workers (UAW) and the employer, Yard-Man. The agreement covered employees at a plant in Jackson, Michigan.³² It was set to expire in 1977, but the Jackson plant closed in 1975.³³ Yard-Man informed the retirees from the plant that once the collective bargaining agreement expired, health and life insurance benefits of the active employees and the retirees would terminate.³⁴ The retirees eventually filed a lawsuit seeking specific performance of Yard-Man to pay the health and life insurance benefits beyond the CBA. The District Court found that Yard-Man breached its contractual obligations in canceling the insurance and benefit plans of the Jackson retirees upon the collective bargaining agreement's expiration.³⁵

The Court of Appeals for the Sixth Circuit affirmed the District Court decision that Yard-Man violated the agreement by stopping payment of retiree health benefits.³⁶ The court stated that the intent of the parties should be considered in deciding whether retiree insurance benefits vest and continue once the CBA expires.³⁷ *Yard-Man* also held that in determining whether the parties' intent was to vest, courts should look at the explicit language of the collective bargaining agreement and the context which gave rise to its inclusion.³⁸ Also, those provisions should be construed with the entire document and the parties' purposes in mind.³⁹ The court stated that the terms of an agreement must be interpreted in a way that renders none of them "nugatory" and in a way that avoids "illusory promises."⁴⁰ The court importantly noted that the contractual interpretation is applied, as long as that interpretation is consistent with

³¹ See *infra* Part III, B (identifying the various Circuits that do not subscribe to the *Yard-Man* approach).

³² *Yard-Man*, 716 F.2d at 1478.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 1479 ("The District Court properly recognized that whether retiree insurance benefits continue beyond the expiration of the collective bargaining agreement depends upon the intent of the parties.").

³⁸ *Id.*

³⁹ See *id.* (declaring "[t]he court should also interpret each provision in question as part of the integrated whole. If possible, each provision should be construed consistently with the entire document and the relative positions and purposes of the parties.").

⁴⁰ See *id.* at 1480 (emphasizing the damaging nature of illusory or inconsistent promises).

federal labor policies.⁴¹

In *Yard-Man*, the relevant sections of the parties' collective bargaining agreement provided that for former employees aged 65 or older, "the company will provide insurance benefits equal to the active group benefit . . . for the former employee and his spouse."⁴² The court noted that if an agreement is ambiguous or silent regarding how to interpret the intent of the parties, then the court must look to other portions of the agreement as determining factors.⁴³ In *Yard-Man*, the court stated that the language of the contract in question was indeed ambiguous.⁴⁴ It was determined that the wording could be construed to simply say that the retirees get the same benefits that the employees receive.⁴⁵ However, it could also be construed to state that retirees get the same benefits as the employees for the same duration as those employees.⁴⁶ Due to this ambiguity, other portions of the agreement were to be examined.⁴⁷

Part of the *Yard-Man* decision which has been very controversial, and has been responsible for much of the circuit split, is the wording of the opinion that states that,

retiree benefits are in a sense 'status' benefits which, as such carry with them an inference that they continue so long as the prerequisite status is maintained. Thus when the parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree.⁴⁸

One reason the *Yard-Man* court gave for finding that the retirement

⁴¹ See *id.* (stating "the court should review the interpretation ultimately derived from its examination of the language, context and other indicia of intent for consistency with federal labor policy.").

⁴² *Id.*

⁴³ See *id.* (noting that "where ambiguities exist, the court may look to other words and phrases in the collective bargaining agreement for guidance").

⁴⁴ *Id.* (agreeing with the district court).

⁴⁵ *Id.* If interpreted this way, the benefits, while they existed, were to be the same for the retirees as for the active employees. *Id.*

⁴⁶ See *id.* The wording could "reasonably be construed...as...an incorporation of some durational limitation..." If interpreted this way, the benefits would be the same for retirees and active employees, and would last only as long as those of the active employees. *Id.*

⁴⁷ See *id.* (stating that looking to other provisions of the collective bargaining agreement would be for the purposes of obtaining evidence of intent and an interpretation which would be harmonious with the entire agreement); see also *Refinery Employees' Union v. U.S. Dist. Court, W. Dist. of La.*, 160 F. Supp. 723, 731 (W.D. La. 1958) (noting that "where there is doubt as to the meaning of certain words, they may be explained by referring to others words and phrases used [in the contract]"); cf. *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 591 (6th Cir. 2006) (making clear that extrinsic evidence may not be used if the terms of a contract are unambiguous).

⁴⁸ *Yard-Man*, 716 F.2d at 1482.

benefits should exist beyond the termination of the collective bargaining agreement was the presence of specific durational limitations in other parts of the agreement.⁴⁹ Within the agreement, several other portions were subject to specific limitations on duration, while no such specific durational limitation was present for the distribution of retiree benefits.⁵⁰ The court saw this as evidence that the parties intended to maintain the retiree benefits beyond the expiration of the agreement.⁵¹ The Court also held that a finding of intent to create everlasting rights to insurance benefits for retirees, minus explicit language in the agreement, is not inconsistent with federal labor law.⁵²

In determining that the benefits of the retired workers vested, the court noted that it seemed impractical to base the existence of benefits for retirees on the possibility that active workers might or might not be laid off.⁵³ In emphasizing this point, the court referenced the Supreme Court case, *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*⁵⁴ In *Pittsburgh Plate Glass*, the Supreme Court determined that when an individual is already retired, his retirement benefits are a permissive, not mandatory, subject of bargaining.⁵⁵ Because of that fact, the court in *Yard-Man* noted that it is not likely 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.”⁵⁶

⁴⁹ *Id.* at 1481-82. For example, Article XIX of the agreement provided that savings and pension plan programs would only continue until the end of the collective bargaining agreement. *Id.*

⁵⁰ *See id.* at 1481-82. For example, the agreement stated that savings and pension plan programs would only continue until the end of the collective bargaining agreement, at which point they would expire. Nothing of this nature existed for the health and insurance benefits. *Id.* at 1482. In determining whether other evidence points to a vesting of retirement benefits in this case, the court also determined that limiting health insurance for a retiree’s family upon the retiree’s death only to the expiration of the CBA is an exception to the anticipated continuation of retiree benefits beyond the life of the CBA. *Id.* at 1481.

⁵¹ *See id.* at 1481-82 (discussing the Sixth Circuit’s holding in *Yard-Man*); *see also Mioni v. Bessemer Cement Company*, 1986 U.S. Dist. LEXIS 19219, 12-14 (holding that a finding of intent to create everlasting rights to insurance benefits is not inconsistent with federal law).

⁵² *See Yard-Man*, 716 F.2d at 1482 (discussing the Sixth Circuit’s holding in *Yard-Man*); *see also Mioni v. Bessemer Cement Company*, Civ. Action No. 82-2377, 1986 U.S. Dist. LEXIS 19219, at 12-14 (W.D. Penn. 1986) (explaining federal laws).

⁵³ *See Yard-Man*, 715 F.2d at 1481 (noting how the tenuous nature of employee status seems too unreliable for the retirees to base the existence of their benefits); *see also Gregory P. Rogers, Rethinking Yard-Man: A Return to Fundamental Contract Principles*, 37 EMORY L.J. 1033, 1041-49 (1988) (explaining the difficulty of determining whether retiree’s benefits vested).

⁵⁴ 404 U.S. 157 (1971) (holding that the term “employee” excludes “retirees”).

⁵⁵ *See id.* at 181-82 (discussing the nature of insurance benefits after retirement); *see also Yard-Man*, 716 F.2d at 1482 (exploring the nature of insurance benefits after retirement).

⁵⁶ *See Yard-Man*, 716 F.2d at 1482. “If [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.” *Id.*

After *Yard-Man*, numerous cases followed and held in favor of the retirees in similar situations, based on the *Yard-Man* inference.⁵⁷ Amongst them was a Sixth Circuit decision *Weimer v. Kurz-Kasch, Inc.*,⁵⁸ in which the court held that the benefits denied to retirees at the expiration of their collective bargaining agreement should have been considered vested based on the intent of the parties.⁵⁹

While some over the years have read the *Yard-Man* inference to provide a presumption in favor of vesting for retirees, many recent cases have argued that the *Yard-Man* inference is not a presumption, and should simply be used as a determination of whether parties showed intent to vest.⁶⁰ In *Golden v. Kelsey-Hayes Co.*,⁶¹ the court noted that the inference is designed to “simply guide courts faced with the task of discerning the intent of the parties from vague or ambiguous CBAs.”⁶² In a 2006 case, *Yolton v. El Paso Tenn. Pipeline Co.*,⁶³ the Sixth Circuit court addressed how it believed that the *Yard-Man* inference should be construed.⁶⁴ The court noted in *Yolton* that the parties (as well as some of the previous opinions of the Sixth Circuit) seemed to be misinterpreting the term “inference” used in *Yard-Man* to mean a legal presumption towards the vesting of the benefits of the retirees.⁶⁵ Circuit Judge Boyce F. Martin Jr. spoke of how numerous employers had been dismayed over the presumption of vesting they assumed was provided in *Yard-Man*.⁶⁶ Martin

⁵⁷ See *United Auto Workers v. Cadillac Malleable Iron Co.*, 728 F.2d 807, 809 (6th Cir. 1984) (affirming the Sixth Circuit’s *Yard-Man* method); see also Gregory, *supra* note 26, at 91 (“Thus, although the court of appeals rejected any lifetime presumption, its heavy and express reliance on *Yard-Man* strongly indicated a judicial disposition to construe retiree benefits grounded in collective bargaining agreements in a fashion most beneficial to the retirees.”).

⁵⁸ 773 F.2d 669 (6th Cir. 1985) (holding that benefits denied to retirees after the expiration of their collective bargaining agreement should have vested due to the intent of the parties).

⁵⁹ See *Weimer*, 773 F.2d at 676 (discussing that benefits should vest based on the intent of the parties); see also Nathanael Berneking, *Don’t Mow Over the Yard-Man Inference: Guarding Against Improper Modification of Welfare Benefits Provided in a Collective Bargaining Agreement* 45 ST. LOUIS L.J. 261, 273 (2001) (“Thus the court continued *Yard-Man*’s trend of considering the existence of retiree benefits in light of other factors.”).

⁶⁰ See *Payne & Ewing*, *supra* note 4, at 331 (demonstrating that *Yard-Man* is not a presumption of vested benefits); *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 656 (6th Cir. 1995) (explaining that *Yard-Man* did not establish a presumption that benefits vest).

⁶¹ 73 F.3d at 656 (noting that *Yard-Man* is misinterpreted as a presumption of vested benefits).

⁶² *Id.* (stating that *Yard-Man* did not shift the burden of proof to the employer).

⁶³ 435 F.3d 571 (6th Cir. 2006).

⁶⁴ *Id.* at 580. (“Rather, the inference functions more to provide a contextual understanding about the nature of labor-management negotiations over retirement benefits.”).

⁶⁵ *Id.* (quoting *Maurer v. Joy Technologies Inc.*, 212 F.3d 907, 917 (6th Cir. 2000)).

⁶⁶ *Id.* at 579–80 (explaining how the *Yard-Man* decision has led to controversy); see also *United Auto Workers v. Cadillac Malleable Iron Co.*, 728 F.2d 807 (6th Cir. 1984) (clarifying the proper interpretation of an inference that the parties intended the retirement benefits to continue as long as one remains a retiree).

said that “[t]his Court has never inferred an intent to vest benefits in the absence of either explicit contractual language or extrinsic evidence indicating such an intent.”⁶⁷ *Yolton* explained that *Yard-Man*’s instruction is for the courts to “apply ordinary principles of contract interpretation.”⁶⁸

Finally, the *Yolton* court pointed to federal retirement law ERISA⁶⁹ which provides that there are two types of employee benefits.⁷⁰ One type, pension plans, is subject to mandatory participation and vesting according to ERISA’s rules.⁷¹ The other type, welfare benefits, is not subject to the same mandatory participation and vesting requirements.⁷² Under ERISA, health insurance benefits for retirees fall into the category of welfare benefits.⁷³ As such, *Yolton* held that retiree health insurance benefits were not mandatorily vested under ERISA.⁷⁴ As previously seen in *Pittsburgh Glass* though, something that is not a mandatory subject of bargaining can still be permissively bargained for.⁷⁵

Even within the circuits that support the *Yard-Man* inference, the validity of the law has been challenged many times, but those courts continue to uphold its validity, spurning those efforts to reverse *Yard-Man*.⁷⁶ For example, the Sixth Circuit has seen several cases that presented such challenges in situations where the *Yard-Man* inference was then determined to be inapplicable. Some argued that *Sprague v. General Motors*,⁷⁷

⁶⁷ See *Yolton*, 435 F.3d at 580.

⁶⁸ *Id.*

⁶⁹ ERISA is the Employee Retirement Income Security Act of 1974. See 29 U.S.C. § 1001 (2006); U.S. Dep’t of Labor, *supra* note 25 (explaining that ERISA “is a federal law that sets minimum standards for most voluntarily established pension and health plans in private industry to provide protection for individual in these plans”).

⁷⁰ *Noe v. PolyOne Corp.*, 520 F.3d at 552 (6th Cir. 2008); *Yolton*, 435 F.3d at 578.

⁷¹ 29 U.S.C. § 1002(1), (2)(a); *Yolton*, 435 F.3d at 578, n.4.

⁷² See 29 U.S.C. § 1051 (stating that employment welfare benefit plans are exempt from vesting requirements); *Yolton*, 435 F.3d at 578 n.4 (noting that welfare benefits are not subject to vesting requirements).

⁷³ See 29 U.S.C. § 1002(1) (including insurance benefit plans in the definition of welfare benefit plan); *Yolton*, 435 F.3d at 578 n.4 (indicating that insurance plans are classified as welfare benefit plans under ERISA).

⁷⁴ See *Yolton*, 435 F.3d at 578 n.4 (remarking that while pension plans are subject to mandatory participation, vesting, and funding requirements, welfare benefits are not subject to the same requirements); *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 654, n.7 (6th Cir. 1996) (maintaining that there is no right to lifetime health insurance benefits under ERISA).

⁷⁵ See *supra* notes 54–56, and accompanying text.

⁷⁶ See *Maurer v. Joy Techs., Inc.*, 212 F.3d 907 (6th Cir. 2000) (holding that the benefits of retirees vested upon expiration of their collective bargaining agreement); *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. BVR Liquidating, Inc.*, 190 F.3d 768, 772 (6th Cir. 1999) (rejecting the defendant’s argument against applying the *Yard-Man* inference within the case, and noting that the inference is still useful).

⁷⁷ 133 F.3d 388 (6th Cir. 1998).

appeared to overrule the *Yard-Man* decision.⁷⁸ In *Sprague*, employees complained of being denied lifetime retiree health care benefits.⁷⁹ The employer's benefits booklets did mention lifetime coverage for retirees, however the plan also gave General Motors the right to reserve the right to amend or terminate the plan.⁸⁰ The court held that the unambiguous right of the employer to amend the plan made it clear that the retiree benefits did not vest.⁸¹ However, *Sprague* featured a distinct factor that distinguished that case from the law established in *Yard-Man*.⁸² *Yard-Man* and the cases that have followed it dealt with two-party contracts, while *Sprague* dealt with a plan unilaterally implemented and thus controlled by General Motors.⁸³

In 2009, the vesting of retiree benefits became an issue again in the Sixth Circuit in *Winnett v. Caterpillar, Inc.*⁸⁴ In *Winnett*, a collective bargaining agreement was reached in 1988 between the union and the employer, Caterpillar.⁸⁵ The agreement expired in 1991, and a new collective bargaining agreement was not reached until 1998.⁸⁶ Caterpillar unilaterally implemented caps on the amount it would pay for retiree health coverage for employees who retired after January 1, 1992.⁸⁷ Between 1992 and 1998, several employees retired and brought claims that their no-cost retiree medical benefits were vested based on the 1988 agreement, and that

⁷⁸ See *id.* at 404 (refusing to consider evidence that GM had stated that retirement health benefits would have lifetime tenure because written documents contained language stating otherwise, and GM had never said that benefits were vested or fully paid-up); *Yolton*, 435 F.3d at 580, n.5 (rejecting defendant's argument that *Sprague* overruled *Yard-Man*).

⁷⁹ See *Sprague*, 133 F.3d at 392 (highlighting plaintiff's claim).

⁸⁰ See *id.* at 393–94 (discussing excerpts from benefit booklets); see also Alicia Mazurek, *Class Certifications to Modify Retiree Healthcare Benefits Met the Requirements of Federal Rule of Civil Procedure 23 of Fair, Reasonable and Adequate*, 86 U. DET. MERCY L. REV. 39, 41–42 (highlighting the facts of *Sprague*).

⁸¹ See *Sprague*, 133 F.3d at 404 (concluding that plaintiff's estoppel claims failed because GM unambiguously reserved the right to amend or terminate the health plan); see also Mazurek, *supra* note 80, at 41–42 (noting that the retiree benefits had not vested because GM has unambiguously reserved the right to modify the health plan).

⁸² See *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. BVR Liquidating, Inc.*, 190 F.3d 768, 773 (6th Cir. 1999) (clarifying that the holding in *Sprague* only applied to situations where the employer imposed a unilateral agreement on its employees, which would allow it to amend or terminate the benefits); see generally *Sprague*, 133 F.3d at 399 (holding that the retirees made an enforceable unilateral contract with General Motors).

⁸³ See *Maurer v. Joy Techs.*, 212 F.3d 907, 919 (6th Cir. 2000) (distinguishing *Sprague* from cases involving two-party contracts); see generally *Sprague*, 133 F.3d at 410 (noting that in 1985 General Motors became self insured).

⁸⁴ 553 F.3d 1000 (6th Cir. 2009).

⁸⁵ See *id.* at 1003 (referring to the 1988 bargaining agreement).

⁸⁶ See *id.* (discussing the 1998 comprehensive successor collective labor agreement).

⁸⁷ See *id.* (“On November 20, following more unsuccessful negotiations, Caterpillar advised the UAW that, effective December 1, it would unilaterally and retroactively implement caps on the amount Caterpillar would pay for retiree health coverage for employees who retired after January 1, 1992.”).

the caps added unilaterally in 1992 should not apply to them.⁸⁸ The court noted that the retirees bringing the suit were still active employees when the 1988 agreement expired.⁸⁹ Based on the intent of the parties, the court determined that under the 1988 agreement, retirement benefits vested when a worker was retired, not when a worker became *eligible* for retirement.⁹⁰ Like the *Sprague* case, the court held that the *Yard-Man* inference did not apply in *Winnett* because *Winnett* dealt with employees who were still active, as opposed to actual retirees.⁹¹ Though *distinguishing Yard-Man* specifically for purposes of that case, the court again failed to overturn the long-running holding of the circuit.⁹² *Yard-Man* remains good law.⁹³

Although reading *Yard-Man* to say that the inference is not a presumption of vesting retiree benefits⁹⁴ creates a more arduous process for retirees to argue for the vesting of their benefits, courts have found this goal attainable for retirees. In 2008, *Noe v. PolyOne Corp.*,⁹⁵ another Sixth Circuit decision, revisited the topic of whether the parties in a collective bargaining agreement intended for the benefits of retirees to vest upon expiration of the agreement.⁹⁶ In basic terms, the plaintiffs were retirees who felt that the Employee Benefits Agreements (EBAs) that provided them with no obligation to pay for health insurance premiums, reimbursement for Medicare and \$1 prescriptions, were vested and would last for life.⁹⁷ Soon, the employer, PolyOne, implemented a Flexible Benefit Program, also known as a flex program, which altered the benefits of employees and soon required the retirees to pay higher prescription prices, contribute to insurance premiums and pay for Medicare.⁹⁸ The court

⁸⁸ See *id.* at 1008 (arguing that any changes to plaintiffs' medical benefits could not be changed absent their consent).

⁸⁹ *Id.*

⁹⁰ See *id.* at 1012 (reversing the lower court decision).

⁹¹ See *id.* at 1011 (rejecting the *Yard-Man* rule under the circumstances in *Winnett*).

⁹² See *id.* (noting that the *Yard-Man* inference did not apply, but not overruling *Yard-Man*); Nat'l Chamber Litigation Center, U.S. Chamber of Commerce, *Winnett, et al. v. Caterpillar Inc.: Lifetime Retiree Benefits Under Collective Bargaining Agreement*, <http://www.chamberlitigation.com/winnett-et-al-v-caterpillar-inc> (last visited Feb. 20, 2011) (noting that the court in *Winnett* "clarified" the *Yard-Man* inference).

⁹³ See *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 580 (6th Cir. 2006) (finding "no need to revise, reconsider, or overrule *Yard-Man*."); see also *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. BVR Liquidating, Inc.*, 190 F.3d 768, 773 (6th Cir. 1999) (finding the *Yard-Man* inference applicable on the given facts).

⁹⁴ See *infra* Part III, B.

⁹⁵ 520 F.3d 548 (6th Cir. 2008).

⁹⁶ *Id.* at 550-51.

⁹⁷ *Id.* at 551 (noting that the plaintiffs' union, Distillery, Rectifying, Wine and Allied Workers' International Union of America, negotiated the terms collectively for the employees).

⁹⁸ *Id.* (instituting the new Flexible Benefit Program in 1988 to replace the EBAs).

determined that the retiree benefits were intended to vest, and thus vacated the district court's award of summary judgment in favor of the defendant employer.⁹⁹

The court's decision included several important reasons for determining that the parties intended the retirees' benefits to vest.¹⁰⁰ First, the court looked at the language which gave no indication that the parties did not intend for the benefits to vest.¹⁰¹ Second, the court noted that the durational provisions were of a general nature, and thus do not bar a finding that there was an intent to vest.¹⁰² If a durational provision is general, then that provision should be perceived to apply a durational length to the overall agreement, and not specific parts of the agreement.¹⁰³ The *Noe* court recalls that "[a]bsent specific durational language referring to retiree benefits themselves, courts have held that the general durational language says nothing about those retiree benefits."¹⁰⁴ Thus, a provision that deals with the agreement, but fails to mention the specific retirement benefits discussed, is considered only a general durational provision and does not have any impact on the duration of the retirement benefits.¹⁰⁵ Plus, if specific durational language is mentioned, regarding other specific parts of the agreement but not referencing retiree benefits, there is further evidence that there might be an intent to vest.¹⁰⁶ If there was intent to preclude vesting of benefits, the benefits section might include durational language similar to the limiting durational language of those other sections.¹⁰⁷

⁹⁹ See *id.* at 564 (declaring that the district court erred in finding that the health benefits did not vest).

¹⁰⁰ See *id.* at 553 (summarizing the "numerous reasons" upon which the court based its decision).

¹⁰¹ *Id.* (referring to the EBA health benefit provisions).

¹⁰² See *id.* ("Second, the durational provisions relied on by Polyone and the district court are general in nature and do not preclude a finding that the parties intended Plaintiffs' benefits to vest.").

¹⁰³ See *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 581 (6th Cir. 2006) ("Absent specific durational language referring to retiree benefits themselves, courts have held that the general durational language says nothing about those retiree benefits."); see also *Schalk v. Teledyne*, 751 F. Supp. 1261, 1265 (W.D. Mich. 1990) ("The court stated that the existence of a general durational clause which provide[s] that the collective bargaining agreement should remain in effect until a certain date [does] not demonstrate an intent that all benefits described in the agreement also terminate on that date.").

¹⁰⁴ See *Noe*, 520 F.3d at 554 (citing *Yolton*, 435 F.3d at 581).

¹⁰⁵ See *id.* (noting that the MOA speaks generically of all benefits for all employees and does not speak specifically to retirement benefits); see also *Yard-Man*, 716 F.2d at 1482 (holding that the clause of the agreement fails to specifically refer to duration of benefits).

¹⁰⁶ See *Noe*, 520 F.3d at 553 ("The district court held that the retiree health benefits provisions in the EBAs clearly and unambiguously established that the parties did not intend for the Plaintiffs' health benefits to vest."); see also *Yard-Man*, 716 F.2d at 1481-82 ("[T]he inclusion of specific durational limitations in other provisions of the current collective bargaining agreements suggests that retiree benefits, not so specifically limited, were intended to survive the expiration of successive agreements in the parties' completed long term relationship.").

¹⁰⁷ Based on the court's understanding in *Noe*, it seems clear that if there was a specific intent to have the benefits vest, the durational language would have accompanied that provision.

A third thing that the *Noe* court held was that the agreement expressly tied the eligibility of retiree health benefits to that of pension eligibility.¹⁰⁸ Since pensions are determined to be mandatorily vested,¹⁰⁹ it should be presumed that if retirement health benefits are linked to the pensions, then the retirement benefits would also be treated in the same fashion.¹¹⁰ Fourth, the court said that the method argued by the defendant (a presumption against the vesting of retirement benefits), would make some of the agreement's promises illusory.¹¹¹

Few other courts have supported *Yard-Man* as strongly as the Sixth Circuit. The Fourth, Eleventh and First Circuits have all accepted *Yard-Man*, but some observers claim that they are fully aligned with the Sixth Circuit decision,¹¹² while others claim that those circuits accept *Yard-Man* only in bolstering fashion for other findings, not as the main thrust of its decisions.¹¹³

B. Presumption Against Vesting

Most circuit courts have held that at the expiration of a collective bargaining agreement which is silent on the issue of the vesting of retirement benefits, there should be a presumption against the vesting of retirement benefits for life.¹¹⁴ Those circuits do not subscribe to the *Yard-Man* inference. In *Bidlack v. Wheelabrator Corp.*,¹¹⁵ Seventh Circuit Judge Richard Posner implemented such a presumption against the vesting of benefits, but only in those situations where the collective bargaining

¹⁰⁸ See *Noe*, 520 F.3d at 553 (explaining that a tie between the eligibility of benefits and pensions is something the court has "repeatedly held evinces an intent to vest").

¹⁰⁹ See *supra* notes 69–75 and accompanying text.

¹¹⁰ See *Noe*, 520 F.3d at 553 ("Third, provisions in the EBAs expressly tie eligibility for retiree health benefits to eligibility for a pension, which we have repeatedly held evinces an intent to vest.").

¹¹¹ See *id.* (admitting that illusory promises in an agreement can "result in violation of our precedent"); see also *Yard-Man*, 716 F.2d at 1481–82 (stating that "the inclusion of specific durational limitations in other provisions of the current collective bargaining agreements suggest that retiree benefits . . . were intended to survive the expiration of successive agreements").

¹¹² See *Payne & Ewing*, *supra* note 4, at 332–33 (arguing that Eleventh and Fourth circuits have fully embraced the *Yard-Man* decision of the Sixth Circuit through cases such as *United Steelworkers of Am. v. Connors Steel Co.*, 855 F.2d 1499, 1501 (11th Cir. 1988) and *Keffer v. H. K. Porter Co., Inc.*, 872 F.2d 60, 64 (4th Cir. 1989)).

¹¹³ See Douglas Sondgeroth, *High Hopes: Why Courts Should Fulfill Expectations of Lifetime Retiree Health Benefits in Ambiguous Collective Bargaining Agreements*, 42 B.C. L. REV 1215, 1237–38 (2001) (arguing that the Eleventh and Fourth Circuits have found other reasons for retirement benefits to vest, and use *Yard-Man* to "buttress" those findings); see also *Keffer*, 872 F.2d at 64 (discussing the factors relevant to the court's decision).

¹¹⁴ See *infra* notes 117–35, and accompanying text.

¹¹⁵ 993 F.2d 603 (7th Cir. 1993).

agreement was silent on the vesting of retirement benefits.¹¹⁶ Posner wrote that in negotiating a written contract with a definite expiration date, there is an implication of limited liability for the parties, and looking outside of the CBA, to presume the vesting of rights, would deprive the participants of the protections that the contract provides.¹¹⁷

In *Rossetto v. Pabst Brewing Co.*,¹¹⁸ the Seventh Circuit again held firmly in favor of a presumption against lifetime retirement benefits. In *Rossetto*, a group of retired machinist workers (and their spouses) received retirement benefits under a collective bargaining agreement.¹¹⁹ Once the agreement ended and the brewery closed, the plaintiffs argued that their retirement benefits should continue on rather than expiring.¹²⁰ In *Rossetto*, the Seventh Circuit court broke down a four part rule for how it would determine whether or not retirement benefits should be vested upon the expiration of collective bargaining agreements:

1. If a collective bargaining agreement is completely silent on the duration of health benefits, the entitlement to them expires with the agreement, as a matter of law (that is, without going beyond the pleadings), unless the plaintiff can show by objective evidence that the agreement is latently ambiguous, that is, that anyone knowledgeable about the real-world context of the agreement would realize that it might not mean what it says. This is the *Bidlack* presumption and its latent-ambiguity rebuttal.
2. If the agreement makes clear that the entitlement expires with the agreement, as by including such a phrase as “during the term of this agreement,” then, once again, the plaintiff loses as a matter of law unless he can show a latent ambiguity by means of objective evidence. This is a general rule of contract law, independent of but consistent with *Bidlack*.
3. If there is language in the agreement to suggest a grant of lifetime benefits, and the suggestion is not negated by the

¹¹⁶ See *id.* at 608 (noting the likely outcome if the collective bargaining agreements were silent regarding the duration of benefits); Sondgeroth, *supra* note 113, at 1240 (commenting on Judge Posner’s presumption).

¹¹⁷ See *Bidlack*, 993 F.2d at 608 (holding that there should be a presumption against the vesting of retirement benefits at the end of a collective bargaining agreement, but that this presumption could be rebutted by the retiree if he can prove that the contract is ambiguous); Sondgeroth, *supra* note 113, at 1239-40 (noting Judge Posner’s desire to protect “the limitation of liabilities” implicit in a fixed term agreement).

¹¹⁸ 217 F.3d 539 (7th Cir. Wis. 2000).

¹¹⁹ See *id.* at 542.

¹²⁰ See *id.*

agreement read as a whole, the plaintiff is entitled to a trial. Of course, if the agreement expressly grants such benefits, the plaintiff is entitled, not to a trial, but to a judgment in his favor. We are speaking of a case in which merely suggestive language creates a patent ambiguity.

4. If the plaintiff is entitled to a trial by reason of either a patent or a latent ambiguity, the normal rules of evidence will govern the trial, and so the parties will not be limited at trial to presenting *objective* evidence of meaning.¹²¹

The *Rossetto* court determined that the language of the collective bargaining agreement was indeed latently ambiguous, and thus remanded the case back to the lower court.¹²² Per the first part of the four-part test, if the plaintiffs sought the possibility of having their benefits vest, they had to rebut the presumption against vesting of benefits at termination of the collective bargaining agreement.¹²³ They succeeded in rebutting this presumption.¹²⁴ If they had not done so, their rights would have terminated at that point.¹²⁵

The Fifth Circuit is among the other circuits that have held that there is a presumption that retirement benefits do not vest when a collective bargaining agreement ends.¹²⁶ In *Nichols v. Alcatel USA, Inc.*,¹²⁷ the court held that if ambiguity exists in the terms of the contract, only then may the court look at outside evidence to determine the intent of the parties in the agreement.¹²⁸ There was no such ambiguity in this case, according to the court, and the benefits were deemed unvested.¹²⁹ The *Nichols* court also reiterated what the Fifth Circuit had said before – that it does not follow the *Yard-Man* inference.¹³⁰ The Third Circuit has also held against the vesting of retirement benefits. In *Int'l Union v. Skinner Engine Co.*,¹³¹ the circuit

¹²¹ See *id.* at 547.

¹²² See *id.* at 545-46.

¹²³ See *id.*

¹²⁴ See *id.*

¹²⁵ See *id.*

¹²⁶ *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 379 (5th Cir. Tex. 2008).

¹²⁷ 532 F.3d 364 (5th Cir. 2008).

¹²⁸ See *id.* at 377.

¹²⁹ See *id.* (holding that the CBAs were not ambiguous and in this case the Union Retirees don't have any vested rights to benefits).

¹³⁰ See *id.* at 378. The court holds that the plaintiff's reliance on the Sixth Circuit's opinion in *Cole v. ArvinMeritor, Inc.*, 516 F.Supp.2d 850 (E.D. Mich. 2005), was thus misplaced, as the *Cole* case "relies on the inference that retiree benefits vest unless there is language in the CBA to the contrary." *Nichols*, 532 F.3d at 378.

¹³¹ 188 F.3d 130 (3d Cir. 1999).

court rejected *Yard-Man*, holding that it “cannot agree with *Yard-Man* and its progeny that there exists a presumption of lifetime benefits in the context of employee welfare benefits.”¹³² The court goes on to argue that “the *Yard-Man* inference may be contrary to Congress’ intent in choosing specifically not to provide for the vesting of employee welfare benefits.”¹³³

IV. THIRD METHOD OF ADDRESSING RETIREE BENEFITS UPON THE EXPIRATION OF A CBA, AND ARGUMENT SUPPORTING THAT METHOD

Although several courts have decided against the *Yard-Man* inference, which originated in the Sixth Circuit, and has been followed by a number of other circuits,¹³⁴ a retiree-friendly approach is more appropriate. When a collective bargaining agreement expires, and the agreement is silent or ambiguous on the issue of whether retiree benefits vest upon the agreement’s expiration, the proper method for dealing with the legal struggle is a presumption in favor of vesting retirement benefits.

A. Arguments Supporting Presumption in Favor of Retirement Vesting

A majority of courts have rejected the *Yard-Man* inference completely, and presume that retirement benefits do not vest unless explicit language orders it; the Sixth Circuit, which nobly favors *Yard-Man*, has interpreted that the inference is not a presumption towards the vesting of retiree benefits.¹³⁵ However, a presumption *towards* the retirees is a valid and necessary method of handling agreements that are ambiguous on the matter of vesting retiree benefits. While the Sixth Circuit court has arrived at appropriate results of vesting in many of the cases it has heard regarding whether retirement benefits vest at the end of a CBA, the court’s reasoning is faulty. The court fails to correctly interpret the fact that in the way it reaches those conclusions of vesting of retirement benefits, it is actually applying a presumption towards vesting of those benefits.¹³⁶

If language of an agreement specifically states that benefits will not be vested, then the benefits are intended not to vest. However, when there is silence or ambiguity in the language on the topic, a legal presumption

¹³² *Id.* at 140-41.

¹³³ *Id.* at 141.

¹³⁴ See *supra* notes 114-15, and accompanying text (showing how other courts have dealt with *Yard-Man*).

¹³⁵ See *supra* Part III, A. (explaining the *Yard-Man* inference and the contractual approach).

¹³⁶ See *infra* notes 140-209, and accompanying text. (arguing the principles of vesting).

against the vesting of retiree benefits, which other circuits practice,¹³⁷ is advantageous to employers, but potentially degrading to the individual who has spent his career working for that employer. There are several reasons why the retiree's benefits should vest, including legal precedent, retirees' desire to control their own fate, public policy towards the retired workers and their expectations and reliance on benefits, and avoiding a slippery slope towards the diminishing of all benefits.

a. Precedent for a Presumption towards Vesting

Some circuit courts have supported the *Yard-Man* inference, but have read it only to require an interpretation of the collective bargaining agreement to determine if it shows the parties' intentions to have retirement benefits vest upon the expiration of the agreement.¹³⁸ No courts explicitly claim to read the *Yard-Man* inference as a presumption towards vesting of retirement benefits, but some courts' actions speak differently than their words. Principally, the Sixth Circuit has consistently affirmed *Yard-Man* since its origin, but it claims that there is no presumption towards vesting.¹³⁹ This and other courts that have used the *Yard-Man* approach of interpreting the parties' intent, have found a smart and thorough way of viewing the *Yard-Man* inference – much more humanitarian than a presumption against vesting. But, when the Sixth Circuit has applied its style of interpreting the parties' intent in these cases, it actually *has* consistently applied a presumption towards vesting, and should continue to do so.

While opining against the vesting of retiree benefits in the case,¹⁴⁰ Judge Jeffrey Sutton's dissenting opinion in *Noe*¹⁴¹ included a substantial argument about the way that the Sixth Circuit has actually treated the *Yard-Man* inference.¹⁴² As did the majority in *Rossetto*¹⁴³ and the concurrence in

¹³⁷ See *supra* Part III, B. (showing the courts with hold a presumption against vesting).

¹³⁸ See *Noe v. PolyOne Corp.*, 520 F.3d 548, 552 (6th Cir. 2008) (clarifying the Sixth Circuit's interpretation of *Yard-Man*); see also *Maurer v. Joy Techs., Inc.*, 212 F.3d 907, 914 (6th Cir. 2000) (noting that the parties' intent determines whether retiree benefits continue following expiration of the CBA).

¹³⁹ See *supra* notes 60-76, and accompanying text (discussing numerous cases in which the Sixth Circuit consistently ruled that there is no inference).

¹⁴⁰ See *Noe*, 520 F.3d at 564, 551 (holding to apply the *Yard-Man* inference, which resulted in a vesting of the retiree plaintiffs' benefits).

¹⁴¹ See *id.* at 564 (Sutton, J., dissenting) (criticizing the majorities interpretation of the *Yard-Man* inference).

¹⁴² See *id.* at 567 (Sutton, J., dissenting) (arguing that having a conclusive presumption is impractical and will lead to instability in an array of situations that might cause the retiree to only attain benefits from the company without expecting any depletions).

¹⁴³ See *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 547 (7th Cir. 2000) (describing the methods

Bidlack,¹⁴⁴ Sutton's dissent in *Noe* describes some defined options for dealing with the retirement benefits and expiring CBAs, each of which are addressed at length throughout this note.¹⁴⁵ First, courts can create a presumption against vesting.¹⁴⁶ Sutton opined that this method is appropriate because it is a significant, and perhaps unusual, decision for a company to make an unchangeable promise to pay health-care benefits for life when the agreement is for such an abbreviated time.¹⁴⁷ Another approach Sutton brings up to deal with the inference is to not adopt any presumption at all. He feels that this method is beneficial because the absence of a presumption will lead to proper traditional contract interpretation and a lack of interference with proper interpretation.¹⁴⁸ The third option Sutton presents for the court is to adopt a presumption in favor of the vesting of retiree benefits.¹⁴⁹ Among the positives Sutton lists for this approach is the fact that it aids those retirees who lose their benefits and are often unable to return to work in an effort to receive benefits.¹⁵⁰ Although Sutton does not favor this method, it is the most compassionate alternative towards those who have put in years of hard labor and laid the groundwork for the current employees.

Most importantly, in his dissent, Judge Sutton points to the fact that although in recent cases, the Sixth Circuit has disclaimed that any presumption towards the vesting of healthcare benefits for retirees exists in

to deal with the vesting benefits issue in different circumstances).

¹⁴⁴ *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 613 (7th Cir. 1993) (J., Cudahy, concurring) (discussing an array of methods to interpret the current jurisprudence); *see infra* notes 197-201 and accompanying text.

¹⁴⁵ *See Noe*, 520 F.3d at 568 (Sutton, J., dissenting) (proposing three different avenues which could be applied if there were no existing case law).

¹⁴⁶ *See id.* (Sutton, J., dissenting) (arguing, if left to the courts sole discretion they can apply a presumption against vesting); *Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Skinner Engine Co.*, 188 F.3d 130, 139 (3d Cir. 1999); *Bidlack*, 993 F.2d at 606-07 (J., Cudahy, concurring) (discussing the unchangeable nature of vested rights vs. the brief nature of a CBA).

¹⁴⁷ *See Noe*, 520 F.3d at 568 (Sutton, J., dissenting) (proposing that "a company's unchangeable promise to pay healthcare benefits for life is a significant and unusual one—particularly when it arises from a three-year contract").

¹⁴⁸ *See id.* (arguing that "contracts should be interpreted no differently from other collectively bargained contracts ... applying the traditional principles of labor contract interpretation"); *see also*, *Senior v. NSTAR Elec. & Gas Corp.*, 449 F.3d 206, 218 (1st Cir. 2006) (expressing the court's fear "that the use of presumptions may interfere with the correct interpretation, under normal LMRA [Labor Management and Relations Act] rules, of the understanding reached by the parties").

¹⁴⁹ *See Noe*, 520 F.3d at 568 (Sutton, J., dissenting) (stating that while no circuit has yet taken this position, the Sixth Circuit has been applying such a presumption in recent cases); *see also*, *Int'l Union v. Skinner Engine Co.*, 188 F.3d 130, 140 (3d Cir. 1999) (noting that pursuant to the Yard-Man inference, and "its progeny" there exists a presumption that retiree benefits are vested).

¹⁵⁰ *See Noe*, 520 F.3d at 568 (Sutton, J., dissenting) (noting that many of these retirees are not able to require their union to negotiate new benefits for them either).

the *Yard-Man* inference,¹⁵¹ the Sixth Circuit actually has treated the inference as a presumption.¹⁵² While Sutton's end result, an opinion against a vesting presumption, is incorrect, his claim that the Sixth Circuit's behavior has often indicated an unspoken presumption is exactly right.¹⁵³ Sutton notes that due to the decision record of the Sixth Circuit when dealing with retirement benefits at CBA expiration situations, numerous observers and courts have recognized the Sixth Circuit's treatment of the inference as a presumption.¹⁵⁴ Sutton makes a tremendous statement about the definitive nature that the Sixth Circuit seems to have moved towards in applying the *Yard-Man* inference:

What started out as a potential inference became an omnipresent presumption and now appears to have become a clear-statement rule. Unless a company can point to explicit language in the relevant agreement stating that "retiree benefits" terminate at a particular date or do not vest, the benefits seem to vest as a matter of law. What we continually disclaim presuming we continually seem to presume.¹⁵⁵

Despite the fact that the Sixth Circuit has deliberately elected not to recognize a presumption, the Circuit consistently applies a presumption to these cases.¹⁵⁶ This is the approach that should be adopted by other circuits as well. The crucial element in finding a rebuttable presumption towards vesting in these cases is the aforementioned issue of durational clauses.¹⁵⁷ Based on those Sixth Circuit decisions, the presumption in favor of vesting

¹⁵¹ See *id.* at 567 (Sutton, J., dissenting). Sutton points to the majority's claim that *Yard-Man* does not create a legal presumption of interminable retiree benefits and that *Yard-Man* creates an inference "only if the context and other available evidence indicate an intent to vest." See *id.* at 552 (quoting *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 579 (6th Cir. 2006)).

¹⁵² See *id.* at 567 (Sutton, J., dissenting). Sutton contends that while the Circuit claims not to presume, it does so anyway, as their actions and language, such as "healthcare benefits vest as a matter of law," suggest that "the *Yard-Man* inference has become a rebuttable presumption." See *id.* at 568 (Sutton, J., dissenting).

¹⁵³ See *id.* at 567 (Sutton, J., dissenting) (highlighting several cases that have referred to the *Yard-Man* inference a presumption); see also, *Int'l Union v. Skinner Engine Co.*, 188 F.3d 130, 140 (3d Cir. 1999) (acknowledging that the Sixth Circuit "adopted what has become commonly known as the "*Yard-Man* inference," pursuant to which courts presume that the parties intended retiree welfare benefits to continue for life, notwithstanding the expiration of a collective bargaining agreement," and that the "*Yard-Man* inference continues to represent the state of the law in the Sixth Circuit").

¹⁵⁴ See *Noe*, 520 F.3d at 567-68 (Sutton, J., dissenting) (pointing to the language from several courts including the Seventh, Third, and Second Circuits).

¹⁵⁵ See *id.* at 568 (Sutton, J., dissenting).

¹⁵⁶ See *id.* (noting that "observers, looking at what we have said *and* done in applying the *Yard-Man* inference have called it a presumption); Roger Siske et al., *What's New in Employee Benefits*, SH011 ALI-ABA 59, 322 (2002) (stating "[t]he Sixth Circuit presumes vesting").

¹⁵⁷ See *Noe*, 520 F.3d at 567 (Sutton, J., dissenting) (mentioning how the durational language affects the presumption).

of retirement benefits at expiration of a CBA may be rebutted only by language that specifically goes against the vesting.¹⁵⁸ Much of the substantiation for existence of this presumption comes from the language the court has used regarding durational limitations.¹⁵⁹ The Sixth Circuit has claimed that the *Yard-Man* inference does not shift the burden to the employer to show that there was no intent to vest,¹⁶⁰ but the court stated in its *Yolton* opinion that “[a]bsent specific durational language referring to retiree benefits themselves, courts have held that the general durational language says nothing about those retiree benefits.”¹⁶¹ This language clearly indicates that the court will not find an intention to preclude vesting unless there is durational language that specifically mentions the non-vesting of retirement benefits. This means that a presumption exists that the benefits do vest. In several cases, the court has read the *Yard-Man* language about durations to mean that the general duration clauses of the agreements were designed for the agreements as a whole, and not designed to also create a specific duration for retiree benefits provided in the agreement.¹⁶²

For example, in its *Maurer* opinion, the Sixth Circuit court noted that although the collective bargaining agreement in the case was to terminate after three years, that termination did not extend to the benefits provided under the agreement.¹⁶³ Even the majority in *Noe*, which combats the dissent’s claim that the Sixth Circuit has applied the *Yard-Man* inference as a presumption,¹⁶⁴ still shows itself to be cognizant of the overwhelming

¹⁵⁸ See *id.* (suggesting “the *Yard-Man* inference has become a rebuttable presumption—one that may be overcome only by a clear-statement reservation of rights”); See Siske, *supra* n.156, at 322 (mentioning how “[t]he Sixth Circuit ... requires a clear statement of termination to prove otherwise”).

¹⁵⁹ *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 581 (6th Cir. 2006) (discussing the specific language used in *Yard-Man*); *Schalk v. Teledyne, Inc.*, 751 F.Supp. 1261, 1265 (W.D. Mich. 1990) (discussing *Yard-Man*’s rejection of the durational clause).

¹⁶⁰ See *Yolton*, 435 F.3d at 580 (insisting that the inference does not operate as a presumption, but rather, requires the support of explicit language or extrinsic evidence of intent); *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 656 (6th Cir. 1996) (“*Yard-Man* does not shift the burden of proof to the employer . . .”).

¹⁶¹ *Yolton*, 435 F. 3d at 581.

¹⁶² See *Maurer v. Joy Techs., Inc.*, 212 F.3d 907, 917-18 (6th Cir. 2000) (interpreting *Yard-Man* to hold that general durational clauses are not necessarily meant to include retiree benefits); *Weimer v. Kurz-Kasch, Inc.*, 773 F.3d 669, 676 (6th Cir. 1985) (interpreting *Yard-Man* to hold that a general durational clause governing a collective bargaining agreement does not demonstrate intent that all benefits described in the agreement terminate as of the date set in the clause).

¹⁶³ *Maurer*, 212 F.3d at 918 (reaching this conclusion despite the clarity of the durational clause, as compared to the less clear indications that the retirement benefits were intended to vest).

¹⁶⁴ See *Noe v. PolyOne Corp.*, 520 F.3d 548, 563-64 (6th Cir. 2008) (maintaining that the court merely follows precedent and comes to its determination by applying traditional principles of contract interpretation); see also *Yolton*, 435 F. 3d at 579-80 (explaining that unlike a presumption, which would shift the burden of proof to the employer or require specific anti-vesting language in order to be rebutted, the *Yard-Man* inference merely allows the court to infer intent to vest from the context of the agreement and other evidence).

tendency the circuit has had towards recognizing the vesting of retirement benefits upon the expiration of collective bargaining agreements.¹⁶⁵ The majority notes that “of the eleven most pertinent Sixth Circuit cases addressing whether retiree health benefits have vested, this court found evidence of vesting in ten.”¹⁶⁶ Recognizing this presumption towards vesting in the Sixth Circuit opinions provides powerful legal precedent in support of benefits vesting in future cases (at least within that circuit).

Aside from circuit court cases, other courts have also opposed presumptions against vesting of contractual elements in cases where explicit terms do not exist. In *Litton Fin Printing v. NLRB*,¹⁶⁷ the United States Supreme Court held that an arbitration clause continued after the agreement’s termination in order to apply the clause to disputes that arose under the contract.¹⁶⁸ The Supreme Court noted that rights survive termination of an agreement if explicit terms say so, but also that vested benefits can also exist despite a lack of explicit terms.¹⁶⁹

One important thing to note is the sway that Judge Sutton might have on the landscape of the issue of retirement benefits at the expiration of a CBA. Judge Sutton has been an influential judge in regards to labor and employment issues, as he provided a well documented concurring opinion in *Michigan Family Resources Inc. v. SEIU Local 517M*.¹⁷⁰ In that opinion, Sutton favored the limiting of judicial review of labor arbitration decisions to arbitrable disputes where the arbitrator exercised bias, a conflict of interest, or an effort to dispense his own brand of industrial justice.¹⁷¹ Sutton’s 2008 dissent in *Noe* might have some influence on the other judges who take notice of the presumption in the application of the *Yard-*

¹⁶⁵ See *Noe*, 520 F.3d at 564, n.5 (recognizing that the vast majority of pertinent Sixth Circuit cases regarding retiree health benefits have concluded that those benefits were vested); see also, *Yolton*, 435 F. 3d at 584-85 (concluding that retiree health care benefits were vested based on the agreement language linking those benefits to pension benefits, the context in which the agreement was made, and extrinsic evidence); *Maurer*, 212 F.3d at 917-18 (concluding that the language of the agreements, although unclear, indirectly indicated that retirement benefits were intended to vest); *Weimer*, 773 F.3d at 676 (determining that retiree insurance benefits had vested based on a contract interpretation approach to the agreement’s insurance provision, as well as the lack of specification that those benefits were meant to expire with the agreement).

¹⁶⁶ See *Noe*, 520 F.3d at 564 n.5.

¹⁶⁷ 501 U.S. 190 (1991).

¹⁶⁸ See *id.* at 211 (announcing the holding of the Court); see also *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 612 n.2 (7th Cir. 1993) (Cudahy, J., concurring) (discussing the Supreme Court’s holding in *Litton*).

¹⁶⁹ See *Litton*, 501 U.S. at 207–08 (noting that explicit language can ensure that benefits continue after agreement expiration); see also *Bidlack*, 993 F.2d at 612 n.2 (Cudahy, J., concurring) (commenting on the effect of explicit language under the Supreme Court’s *Litton* opinion).

¹⁷⁰ 438 F.3d 653 (6th Cir. 2006).

¹⁷¹ *Id.*

Man inference. As the circuits are split on the issue, one would imagine that the Supreme Court would eventually weigh in on the topic, particularly if substantial circuit court judges are drawing attention to the conflict that still exists.

b. Retirees' Desire to Control Their Own Fate

With the U.S. economy struggling mightily in recent years,¹⁷² employers and active employees both are in positions to look out for themselves. When a long-time employee negotiates retiree benefits as part of a collective bargaining agreement, he would likely want to have those benefits for his entire retirement, not for just three years. But when a young employee is left to negotiate the rights and benefits of an already retired worker, there might not be much motivation for him to advance the interests of those who came before him.¹⁷³ As *Yard-Man* explained, retirees would certainly not want to leave their fate up to the negotiating power of current and future employees.¹⁷⁴ *Pittsburgh Plate Glass* addresses the matter of leaving the negotiations for retirees' benefits to active workers, by noting that the active employees do not have tremendous incentive to negotiate for the benefits of retirees, especially if they know that their retiree benefits will someday be negotiated by then-active employees.¹⁷⁵ The Supreme Court in *Pittsburgh Plate Glass* stated that "benefits that active workers may reap by including retired employees under the same health insurance contract are speculative and insubstantial at best."¹⁷⁶

A smart union representative might try to establish some sort of firm

¹⁷² Laura Meckler & Jonathan Weisman, *Obama to Call for a New Era of Responsibility*, WALL ST. J., Jan. 20, 2009, at A1 (noting that the United States is suffering its "worst economic crisis since the Great Depression"); see also, *World Bank: Economy Worst Since Depression*, CNNMONEY.COM, Mar. 9, 2009, http://money.cnn.com/2009/03/09/news/international/global_economy_world_bank/ (discussing the World Bank's assessment of the United States economy).

¹⁷³ *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 581 (6th Cir. 2006) ("Retirees who have left their bargaining unit, and can no longer rely on their union to maintain their benefits, are not likely to leave their benefits alterable based on the changing whims and relative bargaining power of their former union and employer."); see *Golden v. Kelsey-Hayes Company*, 845 F. Supp. 410, 413 (E. D. Mich. 1994) (noting that retirees can rely on their former union to protect their benefits after retirement).

¹⁷⁴ See *Int'l Union, UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1482 (6th Cir. 1983) (stating that it would be unusual to subject delayed compensation to the "contingencies of future negotiations"); *Cantor v. Berkshire Life Ins. Co.*, 171 N.E.2d 518, 520-21 (Ohio 1960) (discussing the enforceable rights of an employee who has met all the plans conditions).

¹⁷⁵ See *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181-182 (1971) ("By advancing pensioners' interests now, active employees, therefore have no assurance that they will be the beneficiaries of similar representation when they retire. The insurance against future contingencies that they may buy in negotiating benefits for retirees is thus a hazardous and therefore, improbable investment.").

¹⁷⁶ See *id.* at 180.

retirement (post-employment) benefits while the employees are still active, because when a worker is still active, the retirement benefits established are a mandatory subject of bargaining.¹⁷⁷ Once the workers are retired, the rights become permissive (no longer mandatory), and the employer can alter or eliminate the rights and benefits of the already retired employees, without being compelled to bargain for that ability.¹⁷⁸ A union is permitted to choose current compensation over future retirement benefits for its employees, but once the retirement benefits are vested in a person, the union may no longer bargain those benefits away.¹⁷⁹ Thus, a union representative likely wants clear language of vesting in the agreement, but if that language is not present, the *Yard-Man* decision indicates that retirees would surely want to have the benefits last beyond the end of the agreement.¹⁸⁰ As discussed above, ERISA does not require welfare benefits (including health insurance benefits) to vest as it does for pension benefits.¹⁸¹ However, despite ERISA not requiring that health insurance benefits vest, ERISA does not say that the benefits *may* not vest.¹⁸² Therefore, benefits can vest and still meet the requirements of the federal ERISA law.¹⁸³

Another reason that the employees would likely want retirement benefits to continue beyond the expiration of a collective bargaining agreement is the fact that often a union does not claim to represent the employees once they are retired.¹⁸⁴ If that is the case, then the union is not in the position of

¹⁷⁷ See *id.* at 159-60 (discussing mandatory bargaining subjects under NLRA); see *N.L.R.B. v. Scam Instrument Corp.*, 394 F.2d 884, 887 (7th Cir. 1968) (noting how benefits can become “terms and conditions of employment”).

¹⁷⁸ See *Yard-Man*, 716 F.2d at 1484 (stating that benefits were a permissive subject of bargaining so the employer may negotiate over the retiree benefits if the parties so choose); see also *Pittsburgh Plate Glass Company v. Allied Chemical Workers*, 177 N.L.R.B. 911, 912 (1969) (explaining that the obligation to discuss statutorily mandated subjects of collective bargaining ends at retirement).

¹⁷⁹ See *Yard-Man*, 716 F.2d at 1482 n.8 (clarifying that unions may not negotiate away retirement benefits that have already vested in specific individuals); *Allied Chemical Workers*, 404 U.S. at 181 n.20 (“[V]ested retirement rights may not be altered without the pensioner’s consent.”).

¹⁸⁰ See *Yard-Man*, 716 F.2d at 1481-83 (arguing that the union and *Yard-Man* intended benefits to continue after the CBA terminates); see also *Upholsters Int’l Union of N. Am. v. Am. Pad & Textile Co.*, 372 F.2d 427, 428 (6th Cir. 1967) (finding that retiree benefits fully vested upon completion of employment).

¹⁸¹ See *supra* notes 70-76, and accompanying text.

¹⁸² See *Maurer v. Joy Techs., Inc.*, 212 F.3d 907, 917 (6th Cir. 2000) (noting that “parties may agree to create and vest [welfare benefits]”); *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 655 (6th Cir. 1996) (highlighting cases beyond *Yard-Man* that also say employers can “adopt, modify, or terminate such [ERISA] plans at will”).

¹⁸³ See *Maurer*, 212 F.3d at 917 (explaining that ERISA does not “mandate minimum vesting requirements”); *Golden* 73 F.3d at 655 (stating that “The Court simply noted that ERISA does not mandate minimum vesting requirements”).

¹⁸⁴ William Rhoden, *After Peace, Can Upshaw Fight for NFL Players Past or Present?*, N.Y. TIMES, Feb. 2, 2006, at 3D (quoting Gene Upshaw who stated that he does not represent retired

needing to fight any longer for benefits for those workers who are retired, thus leaving the retirees out to dry.¹⁸⁵ In speaking to the Charlotte Observer, the late Gene Upshaw, Pro Football Hall of Famer and former union president for the National Football League Players Association, said of retired NFL players, “The bottom line is, I don’t work for them. They don’t hire me and they can’t fire me. They can complain about me all day long. They can have their opinion. But the active players have the vote. That’s who pays my salary.”¹⁸⁶

There is also no great incentive for an employer to help retirees or potential retirees. Health care costs have climbed to very high levels,¹⁸⁷ and as a result, the typical employer seeks to avoid dealing with the high rates.¹⁸⁸ Employers that do not want to eliminate retirement benefits have looked to increase retiree contributions or perhaps offer less liberal retiree health benefits to active employees.¹⁸⁹ As mentioned above, if active employees know that their benefits are at risk, it might be beneficial for them to push for smaller benefits for retirees and larger immediate compensation for themselves. Other active employees might simply be apathetic about the retirees and not care about what type of coverage current retirees are getting, or what type of coverage they themselves will receive when it is time for them to retire. While it might be noble for an active employee to give up some of his earnings to benefit those who came before him, it is often a rarity.¹⁹⁰

players). See *Allied Chemical & Alkali Workers of Am. v. Pittsburgh Plate Gladd Co.*, 404 U.S. 157, 182 n.20 (1971) (stating that “Since retirees are not members of the bargaining unit, the bargaining agent is under no statutory duty to represent them in negotiations.”).

¹⁸⁵ See Rhoden, *supra* note 184, at 3D; see also *Allied Chemical*, 404 U.S. at 182 (noting that retirees are not part of the “bargaining unit”).

¹⁸⁶ Rhoden, *supra* note 184, at 3D.

¹⁸⁷ See ROTHSTEIN & LIEBMAN, *supra* note 3, at 1239-40 (noting that the cost of health care is skyrocketing); see also WILLIAM J. WIATROWSKI, U.S. DEPT. OF LABOR STATISTICS, RETIREE HEALTH CARE BENEFITS: DATA COLLECTION ISSUES 2 (2003), available at <http://www.bls.gov/opub/cwc/print/cm20030711ar01p1.htm> (revealing that health care spending increased from 5.1% of gross domestic product in 1960 to 13% in 1999).

¹⁸⁸ See ROTHSTEIN & LIEBMAN, *supra* note 3, at 1239 (pointing out that employers are trying to cut down their retiree health care costs); see also WIATROWSKI, *supra* note 187, at 3 (explaining that the rising cost of health care benefits led employers to look for ways to control the costs).

¹⁸⁹ See ROTHSTEIN & LIEBMAN, *supra* note 3, at 1239 (listing ways that employers cut retiree health care costs, including increasing employee contributions and offering less retiree benefits to current employees); see also WIATROWSKI, *supra* note 187, at 3 (positing that employers control health care costs by offering managed care plans, increasing cost to employees, and limiting coverage for some services).

¹⁹⁰ An example of active employees’ apathy toward retirees of their business was recently reflected in the events occurring within National Football League. Aging retired players of the League voiced their concerns over the lack of pension and health benefits the union, the National Football League Players’ Association, provided to them. See Ron Kroichick, *Pensions in Pro Sports: An Age-Old Issue for All the Big Leagues*, SAN FRANCISCO CHRONICLE, Mar. 18, 2007, at C1. Some of them are damaged physically or mentally due to the toll the game took on them, and many struggle to make

c. Public Policy Towards Retired Workers and their Expectations/Reliance

There is a public policy argument that society wants retirees to be taken care of and not have to struggle for medical and financial security after a lifetime of work.¹⁹¹ One concern about the reduction or termination of benefits at the end of a collective bargaining agreement is the fact that retired employees are old and often can no longer work for themselves. The elderly are commonly not in the position to look for new jobs or to fight for what they feel is a proper award of benefits.¹⁹² Nor are employers anxious to hire the aged. Many workers feel the need to work longer for a long-time employer to avoid the risk of dealing with the loss of retirement benefits once their careers are over.¹⁹³ Many people do not know how to go about preparing for retirement, so employer-sponsored health plans are great aids to those individuals through their older years. One study shows 42% of those people 55 and over have not given “a lot of thought” to how to manage their money in retirement so they do not outlive their savings.¹⁹⁴ Even more alarming is that due to the expectations workers have in the health care that is provided for them, 60% of people 55 or older have not given “a lot of thought” to how to pay for long-term care in a nursing home or health care costs not covered by Medicare.¹⁹⁵

Many employees heavily rely on employer-provided benefits for their retirement and have expectations that once they retire, the work that they

ends meet. See Mike Lopresti, *NFL Players Ignore Birk's Plea, Chance to Aid Their Brethren*, USA TODAY, Feb. 2, 2009, available at www.usatoday.com/sports/columnist/lopresti/2009-02-02-nfl-gridiron-greats_N.htm. Some active players, like Matt Birk of the Baltimore Ravens (then of the Minnesota Vikings), have made efforts to persuade his NFL colleagues to contribute to the cause of helping retirees, but has had mixed results. See *id.* Birk attempted to collect money from fellow active players, some of whom are multi-millionaires, to aid the retirees, but Birk received only a smattering of support. See *id.*

¹⁹¹ See Gregory, *supra* note 26, at 99 (noting that enactment of COBRA indicates that the United States is starting to follow other nations in recognizing the “compelling need” to protect retirees’ access to health care); see also WIATROWSKI, *supra* note 187, at 2 (stating that there is a “need for health care benefits during retirement”).

¹⁹² See Harrigan, *supra* note 26, at 86 (explaining causes of the reduction of benefits and seniors’ difficulties in collecting sufficient income); see also Marsha Mercer, *Older Workers: The ‘New Unemployables’*, AARP BULLETIN, Nov. 18, 2010, available at http://www.aarp.org/work/job-hunting/info-11-2010/older_workers_the_new_unemployables.html [hereinafter *Older Workers*] (discussing the difficulty seniors have finding new work).

¹⁹³ See Harrigan, *supra* note 26 at 85-86 (summarizing the reasons behind eroding retiree health benefits); see also *Older Workers*, *supra* note 192 (discussing seniors that need to continue to search for work after their original careers).

¹⁹⁴ See Ruth Helman and Variny Paladino, *Will Americans Ever Become Savers? The 14th Retirement Confidence Survey, 2004*, 268 EMPLOYEE BENEFIT RESEARCH INSTITUTE 1, 10 (2004). This study also finds that 66% of people of all ages have not given “a lot of thought to how to manage their money in retirement so they do not outlive their savings.” *Id.*

¹⁹⁵ See *id.*

have done for years will lead to benefits for the duration of their retirement. Judge Richard Cudahy, in his concurring opinion to *Bidlack*, noted that years ago, both employers and employees seemed to be of the belief that benefits were designed to last a lifetime and that it was economics that led employers to start reconsidering that position, first in reductions, and eventually in limitations.¹⁹⁶ Cudahy opined that a presumption in favor of the vesting of retirement benefits is appropriate for a collective bargaining agreement that contains ambiguity on how to handle those benefits.¹⁹⁷ Cudahy said,

Before about 1980, I seriously doubt that it occurred to many employers to grant retiree health benefits on anything less than a lifetime basis. The overwhelmingly prevalent trend of labor contracts was to continue or improve retiree benefits from contract to contract. It was only in the eighties, with spiraling medical costs, heightened foreign competition, epidemic corporate takeovers and the declining bargaining power of labor, that thought was first given to reducing retiree benefits from contract to contract or even (though this seems more implausible) to eliminating such benefits entirely. I think that, at least before the eighties were in full swing, prevailing conditions suggested a presumption among unions and management alike that retiree health benefits vested unless there was agreement to the contrary.¹⁹⁸

Cudahy also wrote that sometimes parties have expectations that are so fundamental that negotiating about those expectations is unnecessary.¹⁹⁹ He notes that in not specifically addressing particular issues, “sometimes silence says more than words.”²⁰⁰ Retirees will often rely on the benefits that were provided in their collective bargaining agreement. The expectation that comes with doing so can leave them desperately in need if those benefits are negotiated away with no recourse for the retiree that is being deprived.

¹⁹⁶ *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 613 (7th Cir. Ind. 1993) (J., Cudahy, concurring) (noting the changing realities of between the present and when the agreements were made); *see also* Paladino, *supra* note 194, at 7 (discussing the need of employees to change their financial expectations of retirement).

¹⁹⁷ *See Bidlack*, 993 F.2d at 613 (J., Cudahy, concurring) (arguing that there should be a presumption of vested benefits unless there is an agreement to the contrary); *see also* Sondgeroth, *supra* note 113, at 1234 (summarizing Judge Cudahy’s position).

¹⁹⁸ *See Bidlack*, 993 F.2d at 613 (J., Cudahy, concurring).

¹⁹⁹ *See id.* at 612 (Cudahy, J., concurring) (citing ARTHUR CORBIN, CORBIN ON CONTRACTS § 570 (Colin K. Kaufman ed., Supp. 1984)).

²⁰⁰ *See id.*

Finally, a presumption towards vesting provides some legitimacy to long-term employees who have spent their lives working for a single company. In *Yard-Man*, the Sixth Circuit court maintained that a CBA's terms must be interpreted to avoid illusory promises.²⁰¹ *Yard-Man* offered to cover retirement insurance when retirees reached 65, but as retirees were allowed to retire at 55, the retirees would have to pay for the insurance for those ten years.²⁰² The court noted that if those insurance benefits "were terminated at the end of the collective bargaining agreement's three-year term, this promise is completely illusory for many early retirees under age 62."²⁰³ This lack of delivering upon the beliefs and expectations of its workers epitomizes the drawbacks to the denial of vesting in these situations.

d. Avoiding the Slippery Slope

Another problem with the termination of retirement benefits at the end of a collective bargaining agreement is the very real risk of a slippery slope. The denial of vested retirement benefits at the expiration of a CBA can open the door to more denials and deprivations for retired workers. When a company knows that its jurisdiction provides for a presumption against vesting, the presumption can potentially lead to gradual attempts by the employer to push for increasing leverage against the retirees. A decision by a court that allows the limitation or extermination of benefits at the end of a collective bargaining agreement can lead to an employer trying to limit benefits in broader situations, or trying to eliminate them altogether – something many employers have already attempted.²⁰⁴ The less the retirees receive, the easier it is to take from them in the future. Baby boomers are

²⁰¹ See *Int'l Union v. Yard-Man, Inc.*, 716 F.2d 1476, 1480 (6th Cir. 1983) ("[T]he collective bargaining agreement's terms must be construed so as to render non nugatory and avoid illusory promises.").

²⁰² See *id.* at 1481.

²⁰³ See *id.*

²⁰⁴ ROTHSTEIN & LIEBMAN, *supra* note 3, at 1239. Even the words "lifetime benefits" do not mean anything in certain courts. See also *Vallone v. CNA Fin. Corp.*, 375 F.3d 623, 633 (7th Cir. 2004), which notes that "the problem for the plaintiffs is that 'lifetime' may be construed as 'good for life unless revoked or modified.'" *Id.* at 633. The court found summary judgment in favor of the defendant company, when a collective bargaining agreement that called for "lifetime benefits" for its employees was subject to elimination of those "lifetime" benefits if the company wanted to alter it. *Id.* at 634. The court did not find the existence of both a reservation rights clause and a promise of "lifetime benefits" to be enough of an ambiguity to defeat the presumption that the Seventh Circuit holds against the vesting of benefits. *Id.* This decision, while contractually sound, makes things much tougher for the retirees who took early retirement, believing that they were signing up for lifetime benefits. *Id.* at 642; Jennifer Claire Sprague, *How Secure are Your Lifetime Benefits?*, 30 S. ILL. U. L. 195, 217-18 (2005). The court in *Vallone* even noted how the wording of the contract might have been difficult. See *Vallone*, 375 F.3d at 642.

reaching retirement age and will soon be flooding the retirement system.²⁰⁵ American employers will have to make decisions about how, or whether, to provide benefits for the influx of retirees, and limiting or eliminating benefits altogether are growing possibilities.²⁰⁶ When a company like General Motors can cut health benefits for retirees, it can open the door for countless other companies to enhance their cost-cutting measures to the detriment of those who have dedicated their lives to the companies.²⁰⁷ One GM employee said, “In 34 years with General Motors, I had many opportunities to go in other directions that were much more lucrative, but the promise of health care and pension for life was something that I had to consider.”²⁰⁸ Retirees have falsely been led to believe that they have earned some security and protection in their later years, but now they are forced to fear for what else can be taken away from them.

CONCLUSION

When people retire, they want, and often expect, benefits that will last for the lifetime of their retirement. This seems to be a thing of the past, as older workers and retirees face tough roads ahead. Employers’ greed and negligence towards retirees is partially responsible, but employers cannot solely be blamed for the lack of support for retirees; current employees²⁰⁹ and the government play a hand as well.²¹⁰ The difficult economic landscape of the past several years leaves everyone in the working world in an unpredictable lurch, but everyone points the finger at everyone else.²¹¹

²⁰⁵ See *supra* notes 6-13, and accompanying text (discussing baby-boomers).

²⁰⁶ See *supra* notes 11-13 (explaining how General Motors’ decisions are hurting retirees).

²⁰⁷ See *supra* notes 11-13 (showing the trend of employees receiving a declining percentage of income from employer pension plans and retirement savings plans since 1990).

²⁰⁸ Nick Bunkley, *Some White Collar G.M. Retirees Scramble as Health Care is Cut Off*, N.Y. TIMES, Nov. 10, 2008, at B1.

²⁰⁹ See *supra* notes 173-190 and accompanying text.

²¹⁰ For example, the Pension Benefit Guaranty Corporation only guarantees \$4,500 per month in 2009. See PENSION BENEFIT GUARANTY CORPORATION, *Maximum Monthly Guarantee Tables*, <http://www.pbgc.gov/workers-retirees/benefits-information/content/page789.html#2009> (last visited Feb. 20, 2011). While that it is better than nothing, it does not do much to halt the financial worries and concerns for aging retiring employees. See *id.*; Javier C. Hernandez, *Bill Would Extend Time to Fund Pension Plans*, N.Y. TIMES, Oct. 30, 2009, at B4.

²¹¹ Catherine Fisk, *Lochner Redux: The Renaissance of Laissez-Faire Contract in the Federal Common Law of Employee Benefits*, 56 OHIO ST. L.J. 153, 166 (1995) (“Given that employee expectations of continued health coverage are being disappointed . . . Congress may have expected the courts to fashion protections,” but “because Congress did not create protections, the courts have seemed to assume that employees were to be left unprotected.”); Jana K. Strain & Eleanor D. Kinney, *The Road Paved with Good Intentions: Problems and Potential for Employer-Sponsored Health Insurance Under ERISA*, 31 LOY. U. CHI. L.J. 29, 44-45 (1999) (describing the 105th Congress’ failure to pass serious reform of ERISA due to the finger-pointing between members of Congress).

Unfortunately, retirees are easy targets when cuts have to be made because they are often out of sight, and out of mind, with little clout.

As the *Yard-Man* opinion said, retirement benefits are status benefits.²¹² People retire for life. It is hard to imagine that many of them would sign up for particular retirement benefits if those benefits were only designed to last three years, but that is what many courts have held.²¹³ When collective bargaining agreements end, and the language is ambiguous or silent as to whether retiree health benefits under the agreement vest, the courts have traditionally recognized either a presumption against vesting, or a contract-style interpretation of the agreement to determine the intent of the parties on the issue. A third method should be adopted in those situations: a presumption in favor of the vesting of retirement benefits.

The *Yard-Man* decision more than 25 years ago, and those cases that have followed, have held on to humanity and awarded aging workers with the respect that they have earned. Although the Sixth Circuit has refused to claim that it is rightfully applying a presumption in favor of the vesting retirement benefits, it should continue what it is doing, because it is indeed creating a presumption in favor of vesting for retirees.²¹⁴

²¹² See *Int'l Union, UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1482 (6th Cir. 1983) (“[R]etiree benefits are in a sense ‘status’ benefits.”).

²¹³ See *supra* Part III, B

²¹⁴ See *supra* Part IV.