COBRA: Congress Provides Partial Protection Against Employer Termination of Retiree Health Insurance†

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Congress recently passed the Consolidated Omnibus Budget Reconciliation Act (COBRA) providing protection for employees against the unilateral abrogation of retiree participation in an employer's group health insurance plan. Though COBRA provides significant inroads for employees, it is not a panacea. This Article examines COBRA, its mechanics, and its shortcomings. This Article also analyzes pre-COBRA judicial decisions relating to retiree health benefits in both the unionized and nonunionized settings and addresses the public policy considerations for the need to further strengthen legal protections for America's aging workforce.

INTRODUCTION

Fifteen years ago, in the landmark case of *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*,[1] the Supreme Court held that retirees were not "employees" within the meaning of the National Labor Relations Act (NLRA).[2] Because retirement benefits for current retirees are not mandatory subjects of bargaining within the mean-

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1. 404 U.S. 157 (1971).
2. National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935), 29 U.S.C. § 151 (1982) [hereinafter NLRA].

ing of the NLRA,[3] the union can neither bargain to impasse nor strike over the benefits provided to current retirees.[4] In 1974, after more than a decade of study,[5] Congress passed the Employee Retirement Income Security Act (ERISA).[6] Primarily designed to protect private sector employees from losing pension rights after long years of service,[7] ERISA set more realistic vesting provisions based on age

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3. 28 U.S.C. § 158(d) (1982).

4. *See* Fanning, *Commentary: Private Pension and Welfare Plans — The Role of the NLRB*, 18 WAYNE L. REV. 1527 (1972).

5. In 1962 President Kennedy created a presidential task force to study national pension problems. Although no remedial legislation was immediately forthcoming, the task force recommended federal legislation to require realistic vesting standards and fiduciary duties to protect private pension plan beneficiaries. 120 CONG. REC. 29934 (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4838, 4843. In 1967 Senator Javitz of New York, the primary architect of ERISA, introduced a comprehensive private pension reform bill. *Id.* For other similar bills introduced in the late sixties and early seventies, see S. 2167, 91st Cong., 1st Sess. (1969); S. 2, 92d Cong., 1st Sess. (1971); H.R. 1045, 91st Cong., 1st Sess. (1969); S. 3421, 90th Cong., 2d Sess. (1968); H.R. 11884, 91st Cong., 1st Sess. (1969). Most of these proposed bills likewise would have liberalized and lowered vesting provisions and would have strengthened fiduciary duties. For summaries of these pre-ERISA legislative proposals, see Levin, *Proposals to Eliminate Inequitable Loss of Pension Benefits*, 15 VILL. L. REV. 527 (1970); Note, *A Reappraisal of the Private Pension System*, 57 CORNELL L. REV. 278 (1972).

6. 29 U.S.C. §§ 1001-1461 (1982).

7. *See* Note, *The Employee Retirement Income Security Act of 1974: Policies and Problems*, 26 SYRACUSE L. REV. 539, 562 (1975):

> In 1973, the Senate Finance Committee concluded that only one out of every three employees participating in employer-financed plans had a 50 percent or greater vested right to accrued benefits. Fifty-eight percent of all employees between the ages of 50 and 60, and 54 percent of those 60 years and older, lacked vested rights to one-half of their accrued benefits. Moreover, the Senate Labor Sub-Committee found that out of almost 1,500 private pension plans, approximately 13 percent contained no provisions whatsoever for vesting of benefits prior to retirement. In plans which lacked pre-retirement vesting, an employee could conceivably work for 40 years, be fired one day prior to retirement, and thereby forfeit all rights to benefits accrued during his working career.

Many graphic instances of employees with long service deprived of their pension benefits are found in ERISA, LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 212-14:

> 'Perhaps the most noted example involves the closing of the Studebaker plant in South Bend, Ind., in 1964 and the accompanying termination of its pension plan. Even though this was a liberal plan which called for the systematic funding of liabilities . . . 4,000 vested employees between the ages of 40 and 60 had received only 15 percent of their anticipated benefits . . . some 2,900 employees under the age of 40, some of whom were vested, were left with absolutely nothing.' When Studebaker closed its plant in 1965, the Studebaker employees lost $14 million, eighty-five percent of the current value of their vested benefits. Although the plan was able to pay those who had already retired, their then-current 1964-65 work force lost from 40 to 100% of its pensions.

See also Chadwick & Foster, *Federal Regulation of Retirement Plans: The Quest for Parity*, 28 VAND. L. REV. 641, 668-69 n.196 (1975). The Studebaker collapse was the single most notorious and devastating incident spurring comprehensive pension law reform.

and service,[8] strengthened fiduciary duties of pension plan administrators,[9] mandated minimum funding requirements[10] and pension plan insurance,[11] and provided effective remedies.[12] Although

8. 29 U.S.C. § 1053(a) (1982). Prior to the passage of the Tax Reform Act of 1986, an employee could vest a nonforfeitable right to 100% of the employer's pension contribution in as little as 10 years of service. That period has been shortened to five years under the new legislation. Section 1113 of the Tax Reform Act of 1986 amends sections 410(a) and 411(a) of the Internal Revenue Code, and sections 1012 of ERISA, to require more rapid vesting in accrued benefits, effective for plan years beginning after December 31, 1988. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1113 (a)-(b), (e), 55 U.S.L.W. 1 (1986). However, for plans maintained pursuant to collective bargaining agreements which were ratified before March 1, 1986, the new provision will not be effective for years beginning before the earlier of (1) the latter of January 1, 1989 or the termination of the collective bargaining agreement, or (2) January 1, 1991. *Id.* § 1113(e).

9. 29 U.S.C. §§ 1101-1114 (1982). ERISA fiduciary duties are comprehensive, meticulously applied, and sweeping in both the scope of fiduciary liability and in the nature of prohibited transactions. *See* Little & Thailkill, *Fiduciaries Under ERISA: A Narrow Path to Tread*, 30 VAND. L. REV. 1 (1977); Osborne, *The Employee Retirement Income Security Act and Fiduciary Responsibility*, 12 WILLAMETTE L.J. 298 (1976).

10. Although no employer is required to have a pension plan, all ERISA pension plans are subject to minimum funding requirements. 29 U.S.C. §§ 1081-1086 (1982). The core provisions are:

> (2) For a plan year, the funding standard account shall be charged with the sum of -
> (A) the normal cost of the plan for the plan year;
> (B) the amounts necessary to amortize in equal annual installments (until fully amortized) —
> (i) in the case of a plan in existence on January 1, 1974, the unfunded past service liability under the plan on the first day of the first plan year to which this part applies, over a period of 40 plan years,
> (ii) in the case of a plan which comes into existence after January 1, 1974 . . . over a period of 30 years.

In 1984 the Bureau of Labor Statistics studied 1499 medium and large firm pension plans, statistically representing 21 million employees in 45,000 firms. Employees retiring January 1, 1984 at age 65 after 30 years of service would receive monthly pensions averaging from $385 for those earning $15,000 in 1983 to $886 for those earning $40,000. Twenty year service retirees at the same salary levels would receive monthly pensions from $263 to $623. Ten year employees earning $15,000 in 1983 would receive $137 per month; 40 year employees earning $40,000 in 1983 would receive $1075. ERISA pension amounts would be further bolstered by Social Security benefits. Schmitt, *Today's Pension Plans: How Much Do They Pay?*, MONTHLY LAB. REV. Dec. 1985, at 19-20.

11. 29 U.S.C. §§ 1301-1453 (1982). The Pension Benefit Guaranty Corporation (PBGC) within the Department of Labor provides for the "timely and uninterrupted payment of pension benefits to participants and beneficiaries" if an ERISA pension plan fails. ERISA pension plans must be insured against failure, and must reimburse the PBGC for any losses. *See* Nicholson, *Collections and Settlement Under ERISA*, 29 LAB. L.J. 364 (1978). The PBGC protects pensions of 30 million workers in 110,000 plans, with a current liability over $1.3 billion. The Reagan Administration has proposed turning private pension plans over to private insurers and dismantling the PBGC. *See* Pean, *U.S. Seeks to Cut Role In Insuring Pension Benefits*, N.Y. Times, Jan. 21, 1986, at A1, col. 1.

12. ERISA provides for minimal penalties of one year imprisonment, fines from

ERISA did not require employers to provide pension plans to their employees, the law substantially improved safeguards for those employees for whom private pension plans were voluntarily provided.[13]

Unfortunately, despite ERISA's enhanced protections of pension benefits, retiree health insurance was not similarly safeguarded. ERISA did not require that the future liability for employer-paid health insurance benefits be funded or be provided or continued upon retirement. Thus, neither the cornerstone of federal labor law, the NLRA, nor the major pension protection law, ERISA, offers direct statutory protection for the health insurance benefits of retired workers. By both narrow case law construction of the parties' "intent" via judicial scrutiny of the pertinent documents, and by legislative failure, retiree health insurance was consigned to legal limbo. As this dangerous vacuum in the law became increasingly obvious in the early eighties, Congress was finally compelled to provide retirees some initial partial protection for continued participation in employer provided health insurance group plans. At long last, Congress constrained the previously untrammeled employer prerogative of unilateral abrogation of retiree participation in the employer's group health insurance plan. In April 1986, Congress passed the Consolidated Omnibus Budget Reconciliation Act (COBRA).[14] The COBRA provisions regarding the new continuation coverage requirements of group health insurance plans are implemented by COBRA's amendments of the Internal Revenue Code and of ERISA.

This Article will first summarize and assess these new statutory protections. COBRA is a very modest, but nevertheless potentially significant, legislative first step toward rectifying the incongruity and injustice of leaving the continuance of retired workers' health insurance benefits to the unbridled discretion of the employer. Unilateral employer authority to abrogate the economic terms of retirement is eerily analogous to the employer's former unilateral ability to likewise abrogate collective bargaining agreements during business reorganization under the Bankruptcy Code.[15] The Article will then ex-

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$5000 (individuals) to $100,000 (corporations), and broad civil remedies. 29 U.S.C. § 1131 (1982). Actions may be brought by participants, beneficiaries, fiduciaries and/or the Secretary of Labor under a variety of circumstances. *Id.* § 1132.

13. H.R. REP. No. 533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4639, 4643.

14. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 222 (1986). For further analysis, see Weckstein, *The Problematic Provision and Protection of Health and Welfare Benefits for Retirees*, 24 SAN DIEGO L. REV. 101 (1987), in this issue.

15. In NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984), the Supreme Court unanimously upheld the employer's unilateral right to abrogate its collective bargaining agreements upon the commencement of chapter 11 reorganization pursuant to the Bankruptcy Code of 1978. The most controversial subpart of the *Bildisco* decision, narrowly

amine the pertinent case law in the federal circuit courts, developed in both unionized and nonunionized environments prior to the COBRA statute. The pre-COBRA case law usually hinged upon judicial assessment of the intent of the parties, without enunciating broad policy.

In conclusion, the Article assesses the policy implications for further strengthening legal protections for retiree health benefits. With increasingly interlocking international markets and the aging of America's post-World War II baby boom work force, this vitally important issue promises to become even more significant as we fast approach the next century.

FEDERAL LEGISLATION: THE CONSOLIDATED OMNIBUS BUDGET RECONCILIATION ACT (COBRA)

By the mid-eighties, Fortune 500 companies had an estimated liability of over two trillion dollars for retiree health care benefits, with only \$1.3 trillion in funded corresponding assets.[16] These largely un-

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adopted by a 5-4 vote of the Court, allowed the employer to terminate its labor contract without first bargaining with the union and without first securing the approval of the bankruptcy court. In June 1984 Congress legislatively overruled these most controversial elements of the *Bildisco* decision. By passage of 11 U.S.C. § 1113, part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Congress now requires the employer to first bargain in good faith with the union and to secure the approval of the bankruptcy court prior to employer abrogation of labor contracts in bankruptcy proceedings. For discussion of the *Bildisco* decision and the 11 U.S.C. § 1113 legislative response, see Gregory, *Labor Contract Rejection in Bankruptcy: The Supreme Court's Attack on Labor in* NLRB v. Bildisco, 25 B.C.L. REV. 539 (1984); Gregory, *Legal Developments Since* NLRB v. Bildisco: *Partial Resolution of Problems Surrounding Labor Contract Rejection in Bankruptcy*, 62 DEN. L. REV. 615 (1985); Gregory, *The Congressional Response to* NLRB v. Bildisco *and the Constitutional Subtleties of the Nondelegation Doctrine*, 62 U. DET. L. REV. 245 (1985); Haggard, *The Continuing Conflict Between Bankruptcy and Labor Law — The Issues That* Bildisco *and the 1984 Bankruptcy Amendments Did Not Resolve*, 1986 B.Y.U. L. REV. 1; West, *Life After* Bildisco: *Section 1113 and the Duty to Bargain in Good Faith*, 47 OHIO ST. L.J. 65 (1986); Note, *Labor Law-Bankruptcy-Collective Bargaining Agreements and Chapter 11 Reorganizations Under Subtitle J of the Bankruptcy Amendments and Federal Judgeship Act of 1984*, 59 TUL. L. REV. 1604 (1985); Note, *Rejection of Collective Bargaining Agreements in Bankruptcy*: NLRB v. Bildisco & Bildisco *and the Legislative Response*, 33 CATH. U.L. REV. 943 (1984); Note, *Rejection of Collective Bargaining Agreements Under the Bankruptcy Amendments of 1984*, 71 VA. L. REV. 983 (1985). For important case law construction of the section 1113 standards now governing labor contract rejection in bankruptcy, see Wheeling-Pittsburgh Steel Corp. v. United Steelworkers, 791 F.2d 1074 (3d Cir. 1986); Century Brass Prod., Inc. v. United Auto Workers, 795 F.2d 265 (2d Cir.), *cert. denied*, 107 S. Ct. 433 (1986); *In re* Royal Composing Room, Inc., 62 Bankr. 403 (Bankr. S.D.N.Y. 1986).

16. Barnes & Mishkind, *Retiree Health and Welfare Benefits; Controversy Over Their Duration*, 10 EMP. REL. L.J. 584 (1985); Stewart & Kelly, *Insurance Premiums for Retirees After the Union Contract Expires*, 44 OHIO ST. L.J. 521 (1983); Bittman &

funded benefits were not directly protected by ERISA. No funding or reserve requirement was imposed. The benefits could be terminated at the discretion of the employer, absent contractual protections. Unilateral employer reductions and terminations of retiree health care plans signaled an impending crisis.[17] In 1984 the House Committee on Aging began hearings on the perilous status of retiree health care.[18] Through the Deficit Reduction Act of 1984,[19] Con-

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Peve, *Health Plans May Leave Retirees Out in the Cold*, Bus. Wk., Dec. 17, 1984, at 105; English, *Who'll Pay For Retirees Health Plans?*, U.S. News & World Rep., Oct. 21, 1985, at 72.

17. Although beyond the purview of this immediate Article, a very important unresolved related problem involves unilateral employer termination of ERISA pension plans. With the strong equity market since Fall 1985, many institutional pension plans are now overfunded. ERISA permits the employer sponsor to terminate the pension plan, with all fund surplus assets reverting to the sole use of the employer.

In early 1986, United Auto Workers estimated that pension reversions from 1980-1985 totalled $3.9 billion. In 1985 the single largest reversion, $962 million, occurred at United Airlines, which used the surplus pension funds for "corporate expansion." Cohn, *The Pension Powder Keg*, Newsweek, Feb. 10 1986, at 63; *see also* Friedman, *Raiding Retirement Funds is Piracy*, N.Y. Times, Sept. 28, 1986 at 2F, col. 1:

> Tempted by overflowing returns on stock in their pension plans, more than 1000 companies have recently siphoned off $12 billion in pension fund assets meant for workers and retirees. The corporations then used the funds to fuel scores of ventures completely unrelated to the employees on whose behalf the plan was established . . . . Clever financial officers discovered a loophole in the [ERISA] law: All they had to do was stop the plan and pay benefits earned up to that point. Then a company could grab what was left — the so-called surplus assets.

But see Klein, *Without Reversion, Business Won't Play*, N.Y. Times, Sept. 28, 1986, at 2F, col. 1:

> In fact, few companies employ the reversion practice. Of the hundreds of thousands of plans in existence between 1980 and 1985, there were only 938 pension plan terminations with reversions in excess of $1 million.
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> More important, there is little evidence that employees experience diminished benefits following a termination/reversion. The Pension Benefit Guaranty Corporation, a quasi-governmental entity that insures the payment of pension benefits, reports that in 70 percent of the cases where a termination/reversion occurred, the employer established a new defined benefit plan. In 15 percent of the cases, the employer established another type of successor pension plan, such as a defined contribution plan. In only 15 percent of the cases was no new plan created. In virtually all of those cases it is safe to conclude that the employer either used the excess assets to keep an ailing company afloat and its workers employed, or ceased operations altogether. Permitting employers to reclaim excess pension assets has been a well-established policy since 1983 when Congress recognized that it was necessary to encourage employers to establish such plans and to fund them adequately. Permitting reversions allows an employer to justify generous funding without fear that accumulated assets will be irrevocably lost.

For further commentary on the debate regarding reversion of surplus funds to the employer following its unilateral termination of pension plans, see Lilly, *The Employee Retirement Income Security Act*, 35 Lab. L.J. 603 (1984).

18. State of the Elderly: The Financial Burden of Health Care, 1984: Hearings Before the House Select Committee on Aging, 98th Cong., 2d Sess. 429 (1984); *see also Senate Committee on Aging Criticizes Lack of Protection for Retiree Health and Life Insurance Benefits*, BNA Daily Report for Executives, Aug. 4, 1986, at A-2.

19. Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984)

gress limited the tax deductions that employers could take for all funded welfare benefit plans,[20] and also limited the reserves that could be held to pay for health and other benefits.[21] In the first major state law, Massachusetts required guaranteed continuance of health insurance benefits for one month by employers who had received state funds.[22]

Congress passed COBRA in April 1986.[23] Prior to COBRA, when employees lost their jobs, they and their families and dependents usually suffered simultaneous loss of employer provided health care insurance. Retirees were also at the mercy of their employer as to whether they could continue to participate in the employer's group health insurance plan, absent contractually binding, vested, nonterminable protections. In 1985 thirty-seven million Americans had no health insurance, a forty-two percent increase since 1980.[24]

Through COBRA, effective July 1, 1986,[25] "covered"[26] employees who lose their job or have their hours reduced[27] for other than gross misconduct,[28] have the statutory right to remain included in their former employer's group health insurance plan for at least eighteen months.[29] Spouses and dependent children deemed the "qualified

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(codified as amended at 26 U.S.C. § 1).

20. *Id.* § 419(5), 98 Stat. at 854-56.

21. *Id.* § 419A(5), 98 Stat. at 856-61.

22. MASS. ANN. LAWS ch. 175, § 110D (Law. Coop. Supp. 1986). Section 110D, entitled "Coverage to Continue for Certain Period After Insured Leaves Group," provides:

> Every policy of insurance issued after January first, nineteen hundred and sixty-eight under the provisions of section one hundred and ten shall contain a provision that, in the event that the insured person leaves the group covered by such insurance, said person shall remain insured under such policy for a period of thirty-one days thereafter unless, during such period, he shall otherwise be entitled to similar benefits.

23. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 222 (1986) [hereinafter COBRA].

24. Saunders, *Cobra's Bite*, Forbes, July 14, 1986, at 84.

25. COBRA, Pub. L. No. 99-272, 100 Stat. 222 (1986). In the case of a group health plan maintained pursuant to a collective bargaining agreement, COBRA will not apply until the expiration of the governing collective bargaining agreement, or January 1, 1987, whichever is later. *Id.* § 10001 (e)(2), 100 Stat. at 227.

26. *Id.* § 10001(c)(k)(7)(A), 100 Stat. at 226: "The term 'covered employee' means an employee who is (or was) provided coverage under a group health plan by virtue of the individual's employment or previous employment with an employer."

27. *Id.* § 10001(c)(k)(3), 100 Stat. at 224: "The term 'qualifying event' means . . . (B) The termination (other than by reason of such employee's gross misconduct) or reduction of hours, of the covered employee's employment."

28. *Id.* § 10001(c)(k)(3)(B), 100 Stat. at 224. *See supra* note 27.

29. *Id.* § 10001(c)(k)(2)(B)(i)(I), 100 Stat. at 224.

beneficiaries"[30] of "covered" employees, may be included for up to thirty-six months following termination of the covered employee's job.[31] By including retirees within COBRA's definition of the "covered employee," they are also eligible to participate in the former employer's group health insurance plan for eighteen months following retirement.[32] For purposes of protecting health insurance coverage, COBRA statutorily equated retirees with employees, and mitigated the harsh impact of *Pittsburgh Plate Glass.*

Each covered employee and spouse must be provided written notice of their rights at the time of commencement of coverage under the group health plan.[33] Following a qualifying event, typically the termination of employment, the covered employee, retiree, and qualified beneficiary have a minimum period of sixty days to elect to participate in continued coverage under the employer's group health insurance plan.[34] Coverage cannot be conditioned upon, or discriminate on the basis of, lack of evidence of insurability.[35] However, both qualified beneficiaries and covered employees electing to continue coverage under the employer's group plan must do so entirely at their own expense.[36] In fact, COBRA permits the employer to charge a 2% surcharge above the 100% applicable premium for those electing continuing coverage.[37] This 102% premium, via the 2% surcharge, is designed to reimburse the employer for related paperwork and administrative expenses.

Even if one elects to pay the premium in monthly installments,[38] the cost can be potentially prohibitive. Comprehensive family health insurance, with good hospitalization and dental coverage, has an annual premium of approximately $2000; comparable individual coverage in an employer's group plan costs approximately $1000.[39]

Nevertheless, those electing to remain group plan beneficiaries, even after fully absorbing the full 102% premium, will still benefit. Participation in the employer's group plan generally allows the individual beneficiary to obtain higher quality, more comprehensive, and less expensive insurance coverage than would otherwise be available

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30. *Id.* § 10001(c)(k)(7)(B)(i), 100 Stat. at 226-27: "The term 'qualified beneficiary' means with respect to a covered employee under a group health plan, any other individual who, on the day before the qualifying event for that employee, is a beneficiary under the plan — (I) as the spouse of the covered employee, or (II) as the dependent child of the employee."
31. *Id.* § 10001(c)(k)(2)(B)(i)(II), 100 Stat. at 224.
32. *Id.* § 10001(c)(k)(7)(A), 100 Stat. at 226; *see supra* note 26.
33. *Id.* § 10001(c)(k)(6), 100 Stat. at 226.
34. *Id.* § 10001(c)(k)(5), 100 Stat. at 225-26.
35. *Id.* § 10001(c)(k)(2)(D), 100 Stat. at 224.
36. *Id.* § 10001(c)(k)(2)(C), 100 Stat. at 224.
37. *Id.* § 10001(c)(k)(2)(C)(i), 100 Stat. at 224.
38. *Id.* § 10001(c)(k)(2)(C)(ii), 100 Stat. at 224.
39. Saunders, *supra* note 24, at 84.

to the individual outside the aegis of the employer's preferential group rate.[40]

Prior to the expiration of the maximum statutory period of continued coverage, which is generally eighteen months for terminated employees and retirees,[41] eligibility for continued coverage will cease upon failure to pay the premium,[42] reemployment under another group health plan,[43] entitlement to Medicare eligibility under title XVIII of the Social Security Act,[44] or remarriage of the qualified beneficiary spouse of the covered employee, when the spouse becomes covered under a group health plan by virtue of remarriage.[45]

If the employer violates COBRA by unlawfully refusing continued coverage in its group plan to eligible individuals, the federal tax consequences for both the corporate employer and its senior executives can be quite adverse. COBRA will be enforced through the federal tax law. For example, an employer's unlawful refusal to continue health plan coverage will result in loss of the company's entire tax deduction for its cost of medical insurance covering all of its employees,[46] via COBRA's amendment of section 162 of the Internal Revenue Code.[47] Further, if the company loses its tax deduction, the company's highly compensated executives are also penalized; COBRA mandates the Internal Revenue Service to treat company-paid health insurance premiums for executives as personal individual income subject to income tax.[48]

Despite these expanded protections for continued health plan insurance and effective sanctions for violations, COBRA is nevertheless only a first step toward comprehensive safeguards against unilateral employer termination of health insurance benefits. There are significant express exceptions in the law, as well as other major problems, that COBRA does not address.

COBRA is limited to firms with twenty or more employees.[49] In

40. "But it is easily worth the price to the beneficiary, who couldn't otherwise obtain the same quality of coverage for anything like that price. Cobra's provisions, says Avery Newmark, Ernst & Whinney's benefits expert, 'give people time to get their feet on the ground'." *Id.*

41. COBRA, Pub. L. No. 99-272, § 10001(c)(k)(2)(B)(i), 100 Stat. 222, 224 (1986).

42. *Id.* § 10001(c)(k)(2)(B)(iii), 100 Stat. at 224.

43. *Id.* § 10001(c)(k)(2)(B)(iv)(I), 100 Stat. at 224.

44. *Id.* § 10001(c)(k)(2)(B)(iv)(II), 100 Stat. at 224.

45. *Id.* § 10001(c)(k)(2)(B)(v), 100 Stat. at 224.

46. *Id.* § 10001(a)(2)(A), 100 Stat. at 222-23.

47. *Id.* § 10001(a), 100 Stat. at 222-23.

48. *Id.* § 10001(b)(1), 100 Stat. at 223.

49. *Id.* § 10001(b)(b)(2)(1), 100 Stat. at 223 (amending I.R.C. § 106); *id.* §

addition, church plans,[50] and the federal government[51] as an employer are excluded from COBRA. Most ominously, if the employer "ceases to provide any group health care plan to any employee,"[52] COBRA offers no protection. The employer can terminate all group health plans for all employees without threat of COBRA sanctions. Perhaps the unilateral prerogatives of the employer have been only marginally constrained by COBRA. If the employer is forced to reorganize or liquidate in bankruptcy and thus terminates all group health plans, COBRA permits such conduct.

Even under the norm of continuing coverage, COBRA provides retirees with continuation of coverage in the employer's group health plan for a maximum of only eighteen months after the termination of employment. When retired for more than eighteen months, the retiree can be summarily denied continued participation in the group health plan. Deprived of the preferential lower group rate just when health care becomes an increasingly important concern, the retired employee can still be faced with the untenable choice of personal bankruptcy by the cost of catastrophic illness, or paying prohibitively expensive individual health insurance premiums. Ultimately, the cruel dilemma faced by the retiree may be whether penury will be realized through a single major illness, or by the interminable economic torture of ineluctably escalating individual rate premiums. Thus, once retired for more than COBRA's limited eighteen months of protection, the retiree can still be consigned to destitution. Admittedly, COBRA does offer the retiree some relative protections from unilateral employer termination of group health insurance for the first eighteen months of retirement. COBRA, despite its many obvious deficiencies, is an improvement over the pre-COBRA period when retirees had no viable statutory protection of group health insurance continuance. COBRA marks a first step toward possible future comprehensive statutory protection of post-employment health care benefits for retirees. Because of both its present safeguards and its potential promise for future statutory improvements, the COBRA legislation is, at least on the margin, an improvement over the former statutory vacuum. It is an important complement to the dubious protections previously afforded only via employer largess, private contract terms, or some collective bargaining agreements.

10002(a), 100 Stat. at 227 (amending ERISA § 601(b)).

50. *Id.* § 10001(b)(b)(2)(c), 100 Stat. at 223.

51. *Id.* § 10001(b)(b)(2)(B), 100 Stat. at 223.

52. *Id.* § 10001(c)(k)(2)(ii), 100 Stat. at 224.

PRE-COBRA CASE LAW REGARDING RETIREE HEALTH INSURANCE

The Role of the Collective Bargaining Agreement in the Judicial Determination of the Status of Retiree Health Insurance Benefits

Although current retiree benefits are not mandatory subjects of bargaining,[53] they are permissive and lawful.[54] If the union has sufficient negotiating leverage and if the employer is amenable, retiree benefits can certainly be negotiated into the collective bargaining agreement.[55] The union can also negotiate to impasse or to an agreement over the mandatory terms of the future retirement benefits of current employees who have not yet retired.[56] These avenues present a variety of viable strategies by which a union can successfully negotiate retirement health insurance provisions into the collective bargaining agreement.

When a collective bargaining agreement is present, it will usually be the court's primary point of reference. Often, the terms of the labor contract will prove dispositive in resolving the legal status of retiree health insurance benefits. Essentially, the courts must ascertain whether retiree health insurance is addressed by the contract. If the contract is express and affirmative, regarding the intent and understanding of the parties, the resolution is unproblematic. However, when the contract is unclear or silent, the courts have not uniformly found either a terminable or interminable right. In the absence of express contractual terms, the courts must ascertain and infer the intent of the parties by looking at the contract language and the relationship of the parties considered as a whole. This is obviously a difficult judicial exercise under any circumstance.

When the collective bargaining agreement has expired, the judicial inquiry into the intent of the parties regarding the status of retiree benefits becomes especially complicated. Courts have generally placed the burden of proof on the plaintiff; correspondingly, the judicial assumption is one of nonvested rights. It is possible for courts to hold that because contract benefits are so crucial, the parties could not have intended that they evaporate with the expiration of the contract, and thus they continue beyond the expiration of the labor

53. *See* Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass, Chem. Div., 404 U.S. 157 (1971).
54. *Id.* at 181-82.
55. *Id.*
56. *Id.* at 180.

agreement.[57] However, it is equally possible for courts to conclude that the retiree health insurance rights simply do not survive the expiration of the collective bargaining agreement; if the parties had intended vested nonterminable benefits, they would have so provided. This latter position is especially bolstered by the general legal presumption that future retirement expectations are not vested rights. Given these various contractual possibilities and the absence of a uniform federal labor law policy in the federal courts, it is not surprising that the pre-COBRA case law reflects this entire spectrum of possibilities regarding the contractual status of retiree health insurance benefits. The Sixth Circuit has provided the most interesting and influential pre-COBRA decisions.

In *United Auto Workers v. Yard-Man, Inc.*,[58] for example, the district court held that the employer unlawfully terminated the health and life insurance benefits of its retirees upon the expiration of the collective bargaining agreement. Relying upon the language of the contract, the district court deemed the employer's purported cancellation of retiree benefits a breach of the labor agreement. The Sixth Circuit affirmed.

The court of appeals began its analysis by highlighting the pivotal importance of the intent of the parties.[59] The court reiterated the axiom that the parties may contractually provide for retiree benefits which survive the expiration of the collective bargaining agreement.[60] If this was the intent of the parties, the court expressly stated that "any such surviving benefit must necessarily find its genesis in the collective bargaining agreement."[61]

The Sixth Circuit outlined the basic principles of contractual interpretation to ascertain the intent of the parties in the collective bargaining agreement. "For example, the court should first look to the explicit language of the collective bargaining agreement for clear manifestations of intent."[62] The court must look to the context in which the language arose, interpret each provision in question as

57. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964); Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers, 430 U.S. 243 (1977) (The Court held that the employer was obliged to arbitrate disputes that had originally arisen under the expired collective bargaining agreement.). For further discussion of the difficulty of judicial ascertainment of the intent of the parties, see Weckstein, *supra* note 14 at 119-27.

58. 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984). For other representative Sixth Circuit decisions construing the terms of collective bargaining agreements to determine the intended duration of union retirees' welfare benefits, see Policy v. Powell Pressed Steel Co., 770 F.2d 609 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1202 (1986); Upholsterers' Int'l Union v. American Pad and Textile Co., 372 F.2d 427 (6th Cir. 1967); Weimer v. Kurz-Kasch, Inc., 773 F.2d 669 (6th Cir. 1985).

59. 716 F.2d at 1479-80.

60. *Id.*

61. *Id.*

62. *Id.*

part of the integrated whole, and avoid rendering terms nugatory or illusory.[63] Throughout the process, the court must review its interpretation to ensure it does "not denigrate or contradict basic principles of federal labor law."[64] Applying these governing principles to the facts of the case, the Sixth Circuit concluded "the parties intended to create nonterminating lifelong insurance benefits for the Yard-Man retirees."[65] Dispositive particular factors were considered by the court. The contract language limiting benefits to "employees" was found not applicable to "retirees"; the limitation of health insurance coverage for the spouse and dependent children in the event of the retiree's death "was meant as an exception to the anticipated continuation of benefits beyond the life of the collective bargaining agreement"; the employer paid the insurance of those who took early retirement from age fifty-five to sixty-five; there were other "specific durational limitations in other provisions of the current collective bargaining agreement, suggest[ing] that retiree benefits, not so specifically limited, were intended to survive the expiration of successive agreements in the parties' contemplated long-term relationship."[66]

The court of appeals then considered a crucial conceptual issue at the heart of all of these cases, namely, whether the retirees had a "vested" right to continued benefits. In this case, the issue was resolved in the affirmative; "it is unlikely that such benefits, which are typically understood as a form of delayed compensation or reward for past services, would be left to the contingencies of future negotiations."[67] The court concluded that "the finding of an intent to create interminable rights to retiree insurance benefits in the absence of explicit language, is not, in any discernible way, inconsistent with federal labor law."[68] The union also is bound by the vested nature of the retiree benefits. Relying on *Pittsburgh Plate Glass*, the court summarized the union's duty regarding these vested retiree benefits:

> Clearly, the union may choose to forego such benefits in future negotiations in favor of more immediate compensation. It may not, however, bargain away retiree benefits which have already vested in particular individuals. Such rights, once vested upon the employee's retirement, are interminable and the employer's failure to provide them actionable under ¶ 301 by the

63. *Id.*
64. *Id.* at 1480.
65. *Id*; *see also* Century Brass Prod., Inc. v. United Auto Workers, 795 F.2d 265, 269 n.2 (2d Cir.), *cert. denied*, 107 S. Ct. 433 (1986) ("We assume . . . that the benefits were of lifetime duration.").
66. 716 F.2d at 1481-82.
67. *Id.* at 1482.
68. *Id.*

retiree.[69]

The court further bolstered this important vested rights analysis; "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 retirement is maintained."[70] The court qualified its explanation of "status" benefits, as a contingent support, once there has been a determination that the retiree benefits are vested.[71] The "vested" and "status" benefits analyses thus form a powerful positive synergy. However, standing alone, the status benefit theory would be insufficient to create nonterminable benefits, because retiree benefits are not legally presumed inherently interminable. The court's construction of the particular collective bargaining agreement supported the judicial inference of the parties' intent that the retirees' insurance "status" benefits were vested and interminable in this case.

Yard-Man is an obviously significant case, seriously dealing with the difficult conceptual analysis of whether benefits are vested and interminable, supplemented by the "status" benefit analysis. This case encapsulates the pivotal conceptual inquiry that the courts must conduct in all such cases, and helpfully suggests appropriate general guidelines to structure this analysis. Ultimately, however, the specific resolution in each particular situation will be fact-contingent, determined primarily by the parties' intent through the pertinent provisions of the collective bargaining agreement.

The Sixth Circuit extensively relied on its influential *Yard-Man* decision one year later in *United Auto Workers v. Cadillac Malleable Iron Co.*[72] Employing *Yard-Man* principles, the Sixth Circuit again concluded that, based on the particular facts, the retirees' insurance benefits continued for their lifetime and could not be terminated by the employer upon the expiration of the collective bargaining agreement under which the right to the benefits was acquired.[73] The parties intended that the benefits were payable for the retirees' lifetime, bolstered by "the inherent duration of the retirement status beyond any particular contract."[74] The court of appeals did, however, accept the employer's argument that the district court erroneously "reversed the burden of proof by applying a presumption that retirement benefits are vested for life in the absence of an explicit showing of a contrary intent."[75] The Sixth Circuit nevertheless affirmed the lower court's decision in favor of the retirees' continued

69. *Id.* at 1482 n.8; *see also supra* note 63.
70. 716 F.2d at 1482.
71. *Id.*
72. 728 F.2d 807 (6th Cir. 1984).
73. *Id.* at 809.
74. *Id.* at 808.
75. *Id.*

benefits. Based on the particular facts, the parties were deemed to have intended that the retirees' insurance benefits were not affected by the expiration of the collective bargaining agreement. 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.

In *Local Union No. 150-A, United Food and Commercial Workers v. Dubuque Packing Co.*,[76] the Eighth Circuit borrowed heavily from the important conceptual guidelines developed in these prior Sixth Circuit cases. In *Dubuque*, an arbitrator held that current employees had vested health and welfare benefits. The union then sought to have this arbitration decision applied to all retirees, including those who had retired before the effective date of the current collective bargaining agreement. The district court found for the union, holding that both current employees and retirees were protected. Affirming the district court, the Eighth Circuit concluded that it could not hold that the retirees' benefits were negotiated out of the agreement. Again, judicial discernment of the intent of the parties through the prism of the collective bargaining agreement was at the heart of the inquiry.[77]

Given the particular facts, the court of appeals in *Dubuque* concluded that the plaintiffs carried their burden of proof and showed that "the parties intended retirees' benefits would be vested and not tied to the agreement which created them."[78] The court emphasized that the rights arose from the retirees' "status" as past employees, and were not dependent on a continued or current relationship with the employer. In addition to the Eighth Circuit's use of the Sixth Circuit's "status" theory, there was no evidence that the parties "did not intend to vest the right to benefits in the retirees."[79] Again, despite the subtle conceptual issues, such as vested or status benefits, at its core "the dispute is simply one of contract interpretation."[80]

There are, however, several other cases holding in favor of the employer's termination of the retirees' health benefits in the context of the collective bargaining agreement. Again, the judicial ascertainment of the intent of the parties in the labor contract's express or

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76. 756 F.2d 66 (8th Cir. 1985).
77. "We must examine the intent of the parties to determine whether the health and welfare benefits terminated at the expiration of each agreement." *Id.* at 69.
78. *Id.* at 70.
79. *Id.*
80. *Id.*

implied terms was the essential inquiry.

In *Turner v. International Brotherhood of Teamsters*,[81] for example, the Ninth Circuit held that the retirees had no vested contractual right to continued health and welfare benefits. The successive bargaining agreements demonstrated that the benefits in this situation were not vested.[82] Therefore, they could be lawfully terminated at the expiration of the collective bargaining agreement.[83] The Ninth Circuit summarized:

> None of the documents establishing the health and welfare benefits made any representation as to the length of the period during which these benefits would continue to be paid, other than 'throughout the term of this agreement.' Under the express provisions of the trust agreement the trustees had the right in their discretion to decrease the benefits.[84]

United Auto Workers v. Roblin Industries, Inc.,[85] conceptually analogous to *Yard-Man*, reached the opposite conclusion. The parties did not intend to confer lifetime insurance benefits for retirees following expiration of the collective bargaining agreement. The court opined that the labor contract did not guarantee the continuance of the parties' labor relationship.[86] Therefore, the court deemed that the rights conferred under the labor contract did not survive its expiration, because the contract did not expressly provide for the continuance of contractual benefits beyond its term.[87] The court refused to presume continuing benefits. Because the parties did not agree or intend to grant lifetime benefits to the retirees, the court was without any power to impose such an obligation on the employer.

The *Roblin Industries* court noted the important distinction between federal labor policy under the NLRA and federal pension policy under ERISA.[88] Rejecting the contention that federal labor policy mandated an implied obligation that retiree insurance benefits survived the term of the collective bargaining agreement, the court noted that this presumption of survivability existed only with regard to pensions under ERISA, and not to retiree health and life insurance benefits.[89] Again, as in the pertinent cases previously discussed, judicial ascertainment of the intent of the parties in the context of the language and spirit of the collective bargaining agreement was most important. Therefore, in this case, the court was "unable to find that the parties ever agreed on or intended to grant lifetime

81. 604 F.2d 1219 (9th Cir. 1979).
82. *Id.* at 1225.
83. *Id.*
84. *Id.*
85. 561 F. Supp. 288 (W.D. Mich. 1983).
86. *Id.* at 298.
87. *Id.*
88. *Id.* at 299-300.
89. *Id.* at 300.

insurance benefits for retirees . . . and [i]n the absence of such intent or agreement . . . , [was] unable to impose such an uncontemplated obligation upon defendant Roblin."[90]

The Status of Retiree Benefits in the Absence of a Collective Bargaining Agreement

Less than twenty percent of the work force is unionized.[91] Therefore, obviously, many cases regarding the employer's termination of retiree insurance benefits occur in the absence of any collective bargaining agreement.

The most recent pertinent pre-COBRA case was decided by the Sixth Circuit on August 25, 1986, in *Gentile v. Youngstown Steel Door Co.*[92] When the employer modified the health and life insurance plans of nonunion retirees, requiring retirees to pay part of their individual premiums,[93] the plaintiff in *Gentile* alleged both breach of contract and ERISA violations. The district court concluded that the employer retained the right to modify its insurance plans.[94] The lower court first reasoned that the employer could unilaterally modify the health benefits of the union-represented hourly retirees.[95] The salaried, unrepresented retirees historically had been treated identically to the union-represented retirees by the employer, regarding benefits status. Therefore, since the employer could modify the benefits of the union-represented retirees, the district court held that the employer could likewise unilaterally change the benefits of the unrepresented retirees.[96]

The Sixth Circuit disagreed with the lower court's analysis that found an implied-in-fact contract between the employer and its salaried retirees under the labor contract.[97] The court of appeals determined that the district court had erred by improperly transforming a course of conduct into an implied-in-fact contract. Instead, the court

90. *Id.* at 301.
91. Weiler, *Milestone or Tombstone: The Wagner Act at Fifty*, 23 HARV. J. ON LEGIS. 1, 3 (1986).
92. No. 84-3648, slip op. (6th Cir. Aug. 25, 1986) (Pursuant to Sixth Circuit Rule 24 this decision is without a published opinion. 802 F.2d 457) (LEXIS, Genfed library, USApp file).
93. "Under the new life insurance plan, retirees over the age of sixty-five pay 50% of their insurance premiums, while retirees under the age of sixty-five pay 30% of their premiums. Previously the company had paid the entire premium." *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*

of appeals rejected the lower court's equation of union and nonunion retirees' status.[98] The Sixth Circuit concluded that the employer's policy of "maintaining rough equality of benefits between salaried and hourly employees, without more, is too indefinite to create an implied-in-fact contract between the company and its salaried retirees."[99] Therefore, in the absence of any implied contract, the court of appeals mandated that the case instead must be resolved without the fallacious judicial equation of the status of the benefits of unionized and nonunionized retirees. Having distinguished the benefit status of the nonunionized retirees from those of the unionized retirees, the Sixth Circuit remanded *Gentile* for a thorough *Yard-Man* analysis. The court of appeals expressly noted that, "on remand, the court must focus on the plan documents which were distributed to the retirees while they were active employees to determine the terms of their contract with the company."[100] The district court previously had failed to scrutinize these documents with sufficient care.

Thus, whether in the context of a collective bargaining agreement as in *Yard-Man*, or the absence of a labor contract as in *Gentile*, the judicial resolution of the status of retiree health benefits and the employer's ability to modify those benefits hinge upon judicial interpretation of documents pertinent to the benefits to ascertain the intent of the parties.

In *Eardman v. Bethlehem Steel Corporation Employee Welfare Benefit Plans*,[101] the issue was again resolved by recourse to the plan documents. The employer contended that it reserved the right to reduce the pensioners' health care coverage and to require retiree payment of contributions.[102] There was no specific language in the program booklets, such as "vested," "nonforfeitable," or "for life," to create any lifetime expectation or entitlement to health care benefits. The employer therefore alleged that the absence of any such language evidenced the parties' intent that the employer retained termination rights. However, the court rejected the employer's rationale. The court deemed that the employer's specification of explicit events, such as loss of citizenship or remarriage, that terminated retiree benefits also operated to render the benefits otherwise immune from employer modification.[103] Citing the Sixth Circuit's influential *Yard-Man* decision, the court in *Eardman* reiterated that "retiree benefits are in a sense 'status' benefits which, as such, carry with them an implication that they continue so long as the prerequisite status is

98. *Id.*
99. *Id.*
100. *Id.*
101. 607 F. Supp. 196 (W.D.N.Y. 1984).
102. *Id.* at 198.
103. *Id.* at 214.

maintained."[104] Although the implication of uninterrupted status benefits was alone insufficient, it combined with the particular facts in *Eardman* to sustain the plaintiff's argument that the retiree health insurance benefits here were generally not unilaterally terminable by the employer.[105]

In its recent April 1986 decision in *White Farm Equipment Co. v. White Motor Corp.*,[106] the Sixth Circuit again led the way. Just as it had in the important *Yard-Man* line of cases, where the court first elucidated the operative standards to guide the lower courts in resolving problems of employer termination of retiree health insurance benefits in the context of labor contracts, the *White Farm* court now examined "serious questions concerning the attempted termination of certain insurance benefits under a welfare benefit plan for retired employees by an employer in the process of reorganization in bankruptcy."[107] Significantly, and unlike the *Yard-Man* line of cases, the benefits in question in *White Farm* were not the subject of any labor contract. Instead, ERISA was the operative standard by which the court was to measure the employer's conduct and the retirees' rights, if any, to unimpeded, uninterrupted benefits.

Plaintiffs were former employees and spouses of deceased former employees. Claiming that their welfare benefits were vested and nonterminable, they sued White Farm, their former employer. The White Farm Insurance Plan for Salaried Employees was a nonfunded, noncontributory welfare benefit plan. It had provided life, health and welfare insurance, prescription drugs, dental care, and hearing aid benefits to retirees and their eligible dependents.

Formed by a merger in 1969, White Farm had been engaged in the manufacture and distribution of farm and material handling equipment. In April 1980 the company suspended its manufacturing operation, given poor sales and insufficient working capital. In September 1980 the employer voluntarily petitioned for reorganization under chapter 11 of the Bankruptcy Reform Act of 1978. The bankruptcy court approved a December 1980 sale of White Farm by White Motor to White Farm U.S.A., Inc., a wholly owned subsidiary of the TIC Investment Company. White Farm assumed White Motor's obligations to employees and retirees under the welfare benefit plan. Simultaneously, White Farm's president sent a letter to

104. *Id.*
105. *Id.* at 215.
106. 788 F.2d 1186 (6th Cir. 1986).
107. *Id.* at 1187.

retirees, and advised them that their "retirement benefits will continue."[108] After funding benefits for the next few months, White Farm notified retirees that the plan would be discontinued May 1, 1981, and that retirees could thereafter obtain identical coverage on a fully contributory basis at group rates.[109]

The only documentary evidence of the terms of the retiree insurance benefit plan were summary booklets from 1970 and 1978 issued to retirees and employees and describing the plan. No formal plan document could be found or produced. Among the explicit language favoring the employer's unilateral right to abrogate the plans and the benefits thereunder, the booklets prominently stated that "your insurance terminates when . . . the group policy terminates . . . ;"[110] and "the Company does reserve the right to change the plans, and, if necessary, discontinue them."[111]

The bankruptcy court found for the employer-defendant's right to terminate the plan,[112] because of the above "unambiguous" language establishing the employer's unqualified right to amend or terminate the plan and the benefits.[113] The bankruptcy court rejected the plaintiffs' argument that the courts adopt as "federal common law" a pre-ERISA Ohio state law "which precluded the termination of retiree benefits as having 'vested' at retirement, notwithstanding a reserved contractual power of termination to the contrary."[114] The bankruptcy court consequently found that there was no breach of any ERISA fiduciary duty by the employer changing the plan from one of complete employer funding to one of full contribution by the participants.

The district court reversed, and held that the termination of the welfare benefit plan violated ERISA under federal common-law principles.[115] The federal district court relied on the Ohio state law urged by the plaintiffs, because ERISA was silent. The district court concluded that the welfare benefits vested upon retirement and could not be terminated, despite the unambiguous and explicit reservation of such right by the employer in the clear language of the pertinent plan documents.[116] The district court in *White Farm*, by establishing a policy of interminable, vested rights in the face of express language to the contrary, did precisely what the Sixth Circuit refused to do in the *Yard-Man* line of cases under collective bargaining agreements.

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108. *Id.* at 1188.
109. *Id.*
110. *Id.*
111. *Id.* at 1189.
112. 23 Bankr. 85 (N.D. Ohio 1982).
113. *White Farm*, 788 F.2d at 1189.
114. *Id.*
115. 42 Bankr. 1005 (N.D. Ohio 1984).
116. *Id.* at 1020-21.

The Sixth Circuit reversed the district court, and remanded the case to the bankruptcy court.[117] The court of appeals decided that "under ERISA an employer may lawfully exercise a reserved power to terminate an employee welfare benefit plan for retired nonunion employees."[118] The appellate court rejected the notion of any ERISA federal common law that could override the clear terms of the plan documents, expressly reserving employer rights to terminate the plan.[119] Therefore, the court could not automatically vest an interminable right to benefits, regardless of contract terms.

The bankruptcy, district, and appellate courts all agreed that the plan at issue was certainly an employee welfare benefit plan as defined by ERISA.[120] Because of ERISA's broad preemption clause,[121] Congress intended that regulation of ERISA employee welfare benefit plans be governed exclusively by federal law, even if ERISA is otherwise substantively silent.[122] Therefore, the Ohio state law was unequivocally preempted by ERISA in this case. The Sixth Circuit concluded that, despite the statutory silence of ERISA on this specific issue of the employer's reserved right to terminate the plan, ERISA "counsels against the imposition by this court of an absolute rule effectively requiring mandatory vesting at retirement of retiree welfare benefits under these circumstances."[123] Thus, in accord with several other decisions,[124] the court stressed the congressionally recognized difference between ERISA welfare benefit plans and ERISA pension plans. Only the latter are presumed to vest and to be interminable. Therefore, the parties may reserve the right to terminate or modify welfare benefit plans. The court of appeals summarized:

> Congress expressly exempted employee welfare benefit plans from stringent vesting, participation, and funding requirements. Congress recognized the differences between welfare benefit plans and pension plans, and we discern no basis for finding mandatory vesting in ERISA of retiree welfare benefits. We believe that the legislature, rather than the courts, should determine whether mandatory vesting of retiree welfare benefits is appropriate.[125]

Ultimately, whether in the labor contract or nonlabor contract/

117. *White Farm*, 788 F.2d at 1190.
118. *Id.*
119. *Id.* at 1193.
120. *Id.* at 1191-92. *See* 29 U.S.C. § 1101(1), (3) (1982).
121. 29 U.S.C. § 1144 (1982). For comprehensive analysis of ERISA preemption of state law, see Gregory, *The Scope of ERISA Preemption of State Law: A Study in Effective Federalism*, 48 U. PITT. L. REV. (forthcoming, 1987).
122. *White Farm*, 788 F.2d at 1191.
123. *Id.* at 1193.
124. *Id.*
125. *Id.*

ERISA/bankruptcy context, the court's fundamental task, in determining whether the employer can, or cannot, modify or terminate retiree health insurance benefits, is to assess all pertinent documents to ascertain the intent and understanding of the parties. The judicial ascertainment of the parties' intent in both the labor contract and ERISA context is quite analogous. The Sixth Circuit expressly elucidated this analogy in *White Farm*:

> We conclude, moreover, that the parties may themselves set out by agreement or by private design, as set out in plan documents, whether retiree welfare benefits vest, or whether they may be terminated. In construing such agreements, courts may draw inferences or make presumptions as this court has done in construing collective bargaining agreements providing welfare benefit plans.[126]

CONCLUSION

In 1986 Congress took an important and long overdue first step toward providing meaningful statutory protections for retiree health insurance benefits. In the absence of any private contractual protections, COBRA now provides most retirees the opportunity to continue participation in the employer's group health insurance plan for at least eighteen months following retirement. The case law in the various circuits provided no certainty of judicial protection for such benefits. Whether or not a labor contract was present, the intent of the parties, expressed within or inferred from pertinent documents, governed the judicial resolution of whether the benefits are vested and interminable, or terminable at the unilateral discretion of the employer. Thus, the courts honored the established labor law policy of not imposing substantive terms upon employers and employees.[127] In retiree health insurance cases, the courts confined their role to interpreting the pertinent documents to ascertain the intent of the parties, if the written terms were not clearly dispositive. If the employer carefully drafted the plan documents and successfully resisted union efforts to negotiate vested, nonterminable benefits on behalf of its retired constituency, the courts generally sustained the employer's prerogative to modify or to terminate retiree benefits at the employer's unilateral discretion. The case law left the protection of retiree benefits to the relative negotiation and collective bargaining strength of labor and employers in the unionized environment. In the nonunionized setting, with the employees unable to exert collective leverage, the status and continuance of employer-paid health insurance benefits upon retirement was unilaterally governed by the employer. Thus, given the courts' narrow reading of the pertinent documents, and refusal to inject broader public policy considerations to

126. *Id.*
127. *See* H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970).

alleviate employer dominance in unilaterally setting and modifying the terms of the post-employment relationship, the "intent" of the parties was usually tantamount to the "intent" of only the employer. Case law construction, according to traditional contract law and labor law policy norms, prohibiting substantive judicial interference with the terms of the employment relationship, can be dysfunctional; in these cases, it did not provide coherent, broad protections for continuance of employer-paid retiree health insurance benefits. With the benefit of some case law, employers were able to refine benefit plan language to reserve the unfettered right to terminate benefits.

The case law painfully obviated the pressing need for rational legislation to remedy the legal limbo to which retiree benefits were consigned. COBRA, a modest initial effort toward a meaningful statutory protection, unfortunately is perhaps more significant for what it fails to address than for the limited protections it does provide. Under COBRA, the retiree's "protection" consists of paying the complete cost of the premium, plus a two percent surcharge, in order to retain participation in the employer's preferential lower group rate for the first eighteen months of retirement. However, after the first eighteen months of retirement elapse, the retiree has no further statutory right to participate in the plan. For many retirees, the average $2000 annual premium for family health insurance or the $1000 rate for the individual under the group plan is already prohibitively expensive. When deprived of group participation after eighteen months of retirement and unable to pay the nongroup rate premium, the retiree without insurance is placed at high risk of personal bankruptcy by a single serious illness. This risk problem is exacerbated by the increased health problems associated with advancing age. If the employer completely terminates the health insurance for all employees and retirees, COBRA specifically exempts such draconian employer action from the statute. COBRA endorses the employer's common tactic in business reorganization or liquidation to terminate health insurance plans to effect significant cost savings.[128] With most health

128. For recent examples of complete termination of retiree health insurance plans at the commencement of employer bankruptcy proceedings, see Greenhouse, *Health Plans Are Feeling A Little Peaked*, N.Y. Times, Aug. 24, 1986, at 5, col. 3:

> Robert Haley said he panicked when the LTV Corporation, the giant [nation's second largest] steelmaker, filed for protection under Federal bankruptcy laws last month and cut off health benefits for 78,000 retired employees. Mr. Haley, who worked 31 years in LTV's Indiana Harbor mill south of Chicago, immediately postponed a double hernia operation because he said he could not afford it without insurance.

However, prompted by the recent LTV bankruptcy, a Senate bill was introduced in insurance liability unfunded, and without any ERISA requirement that such employee welfare benefit plans be funded, it increasingly will be in the employer's interest to terminate such plans completely, stranding retirees without legal protections at an economically vulnerable period of their lives, just as their health care costs begin to skyrocket. If anything, the convergence of narrow case law and minimal statutory law in 1986 highlights the pressing and continuing need to enact meaningful statutory protections for nonterminable comprehensive retiree health insurance at low or no cost to the retiree for the balance of retirement. The retirement and health care systems of most other major Western nations disgrace the paltry de minimus statutory support for retired workers in the United States. Other nations have shown that labor and employment law can powerfully protect fundamental human dignity.[129] COBRA indicates that Congress has finally appreciated the compelling need to protect the health care insurance of retirees. One cautiously hopes that, even in this era of federal fiscal crisis, COBRA will be only the first step toward comprehensive statutory protections.

July, 1986, which would prohibit LTV, which filed for bankruptcy, from discontinuing medical and life insurance benefits to retirees. S. 2690, 99th Cong., 2d Sess. (1986).

For pertinent 11 U.S.C. § 1113 case law regarding employer termination of retiree benefits in bankruptcy, immediately prior to COBRA, see Century Brass Prod., Inc. v. United Auto Workers, 795 F.2d 265 (2d Cir.), *cert. denied*, 107 S. Ct. 433 (1986):

> The bankruptcy and district courts both found that the debtor's proposal to the union to eliminate vested retiree benefits did not constitute a sufficient basis to prevent the debtor from rejecting the labor agreement under § 1113. We agree that vested retiree insurance benefits are a proper subject of bargaining. But since a conflict of interest between active employees and retirees precludes the union from representing both, we remand the case to the bankruptcy court so that it can appoint a representative for the retirees in these negotiations.

Id. at 267; *see also In re* Kentucky Truck Sales, Inc., 52 Bankr. 797 (W.D. Kent. 1985):

> [T]he main reason behind the union's rejection of the debtor's proposal apparently was due to a policy determination that the union could not voluntarily negotiate away the medical coverage provided by its Health and Pension Fund, an entity related to the union. While this is not an unreasonable basis for rejecting the debtor's proposal, it does not constitute "good cause" within the meaning of section 1113(c)(2).

Id. at 805.

129. For example, in Great Britain, section 35 of the Employment Protection Act provides that a woman absent from work due to pregnancy is entitled to maternity pay for up to six weeks, with a right to return to work. *See* W.B. CREIGHTON, WORKING WOMEN AND THE LAW (1979). Great Britain also provides the Industrial Tribunal system to hear the discharge claims for almost all dismissed employees, with near-universal monetary awards and occasional reinstatement as remedies. *See* Rico, *Legislating Against Unfair Dismissal Implications From British Experience*, 8 IND. REL. L.J. 547 (1986). For further discussion of possible future legislation in the United States, see Weckstein, *supra* note 14 at 134-36.