

## Until Death Do Us Part: Vesting of Retiree Insurance

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*While the passage of the Employee Retirement Income Security Act ("ERISA") established assurances that promised pension benefits would be received by retirees, similar protections do not exist with respect to retirees' medical and health insurance benefits. The author notes that in fact many employers have reduced or eliminated insurance benefits promised to retirees. She discusses the development of case law, both prior to and following the passage of ERISA, which does provide some protections for retired employee insurance recipients. She also explores disclosure requirements and fiduciary liability imposed by ERISA. She concludes that further protections are in order and advocates amendments to ERISA which would require similar standards for retiree medical and life insurance benefits as exist for pension benefits.*

### INTRODUCTION

Passage of the Employee Retirement Income Security Act ("ERISA")<sup>1</sup> in 1974 provided some assurance that employees would receive the pensions promised by their employers. In recent years, employers have reduced or terminated other retirement benefits, particularly medical and life insurance.<sup>2</sup> Retirees and their representatives challenged these actions, arguing that under ERISA and federal labor law retire-

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1. Pub. L. No. 93-406, 88 Stat. 829 (codified as amended largely at 29 U.S.C. §§ 1001-1461 (1982 & Supp. III 1985) and in scattered sections of Titles 5, 18, 26, 29 & 31 U.S.C. (1982 & Supp. III 1985)).

2. Although retiree insurance plans often provide medical and life insurance, this Article will concentrate primarily on medical benefits. Because of the increase in medical costs, medical benefits have been more of a problem than life insurance in recent years. See *infra* cases cited in note 3.

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ment insurance "vests" or becomes nonforfeitable once the employee retires.<sup>3</sup> While most cases have held that retiree insurance vests when the employee retires, there is little consensus about the analysis employed in reaching this result. Several lines of analysis have emerged, each with different implications for employers and retirees.

This Article will argue that courts should apply a highly protective analysis for all retirees under ERISA and that Congress should amend ERISA to incorporate this analysis by creating a presumption that retiree insurance vests when the employee retires. The principal effect of this approach would be to limit the circumstances under which employers could terminate or reduce benefits. They could do so only (1) if they incorporate clear, explicit language in plan documents and employee brochures indicating that they reserve the right to do so, *and* (2) if a severe financial emergency actually arose. This presumption would protect the expectations of employees while providing that the employer may reduce benefits after retirement when circumstances warrant.

Although there have been retiree insurance cases in the past, the number has risen rapidly in recent years due to various economic and demographic factors.<sup>4</sup> Most of the cases have occurred in declining or troubled industries where ailing companies have reduced or terminated

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3. The major cases include: *Allied Chem. Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971); *In re Century Brass Prods.*, 795 F.2d 265 (2d Cir. 1986); *In re White Farm Equip. Co.*, 788 F.2d 1186 (6th Cir. 1986), *reversing* *Hansen v. White Farm Equip. Co.*, 5 Empl. Ben. Cas. (BNA) 2130 (N.D. Ohio 1984); *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669 (6th Cir. 1985); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1202 (1986); *District 29, UMW v. Royal Coal Co.*, 768 F.2d 588 (4th Cir. 1985); *UFCW Local 150A v. Dubuque Packing Co.*, 756 F.2d 66 (8th Cir. 1985); *District 17, UMW v. Allied Corp.*, 735 F.2d 121 (4th Cir. 1984), *rev'd*, 765 F.2d 412 (1985) (en banc), *cert. denied*, 105 S. Ct. 3527 (1985); *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325 (3d Cir. 1984); *UAW v. Cadillac Malleable Iron Co.*, 728 F.2d 807 (6th Cir. 1984), *affirming* 3 Empl. Ben. Cas. (BNA) 1369 (W.D. Mich. 1982); *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984); *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *Turner v. Local 302, Int'l Bhd. of Teamsters*, 604 F.2d 1219 (9th Cir. 1979); *Hoefel v. Atlas Tack Corp.*, 581 F.2d 1 (1st Cir. 1978), *cert. denied*, 440 U.S. 913 (1979); *In re Erie Lackawanna Ry.*, 548 F.2d 621 (6th Cir. 1977); *Upholsterers' Int'l Union v. American Pad & Textile Co.*, 372 F.2d 427 (6th Cir. 1967); *Mioni v. Bessemer Cement Co.*, No. 82-2378 (W.D. Pa. Oct. 10, 1986); *Musto v. American Gen. Corp.*, 615 F. Supp. 1483 (M.D. Tenn. 1985); *UAW v. White Farm Equip. Co.*, 5 Empl. Ben. Cas. (BNA) 2449 (D. Minn. 1984); *Eardman v. Bethlehem Steel Corp.*, 607 F. Supp. 196 (W.D.N.Y. 1984); *Piech v. Midvale-Heppenstall Co.*, 594 F. Supp. 290 (E.D. Pa. 1984), *aff'd mem.*, 770 F.2d 1074 (3d Cir. 1985); *Bomhold v. Pabst Brewing Co.*, 5 Empl. Ben. Cas. (BNA) 2315 (C.D. Ill. 1984); *UAW v. New Castle Foundry, Inc.*, 4 Empl. Ben. Cas. (BNA) 2455 (S.D. Ind. 1983); *UAW v. Roblin Indus.*, 561 F. Supp. 288 (W.D. Mich. 1983); *Metal Polishers Local 11 v. Kurz-Kasch, Inc.*, 538 F. Supp. 368 (S.D. Ohio 1982); *United Steelworkers v. Midvale Heppenstahl Co.*, 94 Lab. Cas. (CCH) ¶ 13,528 (W.D. Pa. 1981); *United Rubber Workers v. Lee Nat'l Corp.*, 323 F. Supp. 1181 (S.D.N.Y. 1971).

4. See *Barnes & Mishkind, Retiree Health and Welfare Benefits: Controversy Over Their Duration*, 10 EMPL. REL. L.J. 584, 585 (1985); *Fillion, Survival of Retiree Insurance Benefits After Contract Expiration*, in PROCEEDINGS OF THE NEW YORK UNIVERSITY THIRTY-EIGHTH ANNUAL NATIONAL CONFERENCE ON LABOR § 6.01; *Making Retirees Share the Pain of Rising Health Care Costs*, BUS. WK., April 16, 1984, at 50 [hereinafter *Making Retirees Share*]; *Mamorsky & Zimmerman, The Curtailment of Postemployment Welfare Benefits: A Legal Perspective*, 8 CORP. L. REV.

insurance benefits to reduce liabilities and cut costs.<sup>5</sup> In many cases, the plant or factory had closed and the employer believed that its obligation to employees was at an end.<sup>6</sup> In addition, the costs of retiree insurance, especially medical insurance, have rapidly increased in recent years for several reasons, including aging of the workforce,<sup>7</sup> the increased number of employees taking early retirement,<sup>8</sup> increased use of medical services,<sup>9</sup> and cutbacks in Medicare.<sup>10</sup> Some sources have estimated that employer liability for retiree benefits is currently more than \$2 trillion.<sup>11</sup> Not sur-

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294, 294-95 (1985); Rabkin, *Recent Developments in Retiree Health Benefits*, 36 LAB. L.J. 675, 675 (1985). See also *supra* cases in note 3.

5. WASHINGTON BUSINESS GROUP ON HEALTH, POST-RETIREMENT MEDICAL BENEFITS: SURVEY REPORT 1-2 (1985) [hereinafter POST-RETIREMENT MEDICAL BENEFITS SURVEY]; Barnes & Mishkind, *supra* note 4, at 610-11; Fillion, *supra* note 4, at § 6.01.

6. Krotseng, *Judicial and Arbitral Resolution of Contractual Plant Closing Issues*, 35 LAB. L.J. 393, 400-06 (1984).

7. POST-RETIREMENT MEDICAL BENEFITS SURVEY, *supra* note 5, at 2; *Health Plans May Leave Retirees Out in the Cold*, BUS. WK., Dec. 17, 1984, at 105-06 [hereinafter *Retirees Out in the Cold*].

8. English, *Who'll Pay for Retirees' Health Plans?*, U.S. News & World Rep., Oct. 21, 1985, at 72 [hereinafter *Who'll Pay?*]; *Retirees Out in the Cold*, *supra* note 7, at 105-06; *Making Retirees Share*, *supra* note 4, at 50; Wayne, *Steel's Pension Funding Woes*, N.Y. Times, July 30, 1986, at D1, cols. 3-5, and at D4, cols. 4-6.

9. POST-RETIREMENT MEDICAL BENEFITS SURVEY, *supra* note 5, at 2.

10. *Id.* at 3; see also *Retirees Out in the Cold*, *supra* note 7, at 105; MARTIN E. SEGAL CO., 29 NEWSLETTER 1 (Autumn 1985) [hereinafter MARTIN SEGAL NEWSLETTER]. Changes in the Medicare program affect retirees over age 65. However, many companies allow employees to retire before age 65. If a person retires as early as 55, there is then a 10-year wait for Medicare benefits. As a result, medical benefits often cost more for early retirees because after 65 most companies offer insurance that supplements Medicare. POST-RETIREMENT MEDICAL BENEFITS SURVEY, *supra* note 5, at 5-7.

11. Barnes & Mishkind; *supra* note 4, at 585; *Who'll Pay?*, *supra* note 8, at 72; *Retirees Out in the Cold*, *supra* note 7, at 105; Rabkin, *supra* note 4, at 685; POST-RETIREMENT MEDICAL BENEFITS SURVEY, *supra* note 5, at 2.

The \$2 trillion estimate is conservative and only covers the liability of Fortune 500 companies. POST-RETIREMENT MEDICAL BENEFITS SURVEY, *supra* note 5, at 2. If small and medium-sized companies are included, the cost will obviously be much higher.

There are conflicting figures on how many companies provide retiree insurance benefits for employees. The Bureau of Labor Statistics reports that 63% of employees in medium and large firms have some retiree insurance coverage, though the study does not provide detailed information on the employees covered or the type of coverage. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR BULLETIN NO. 2237, EMPLOYEE BENEFITS IN MEDIUM AND LARGE FIRMS 5 (1984).

The Washington Business Group on Health surveyed 200 large Fortune 500 companies on "the type, costs and funding of retiree health benefits." Of the 131 companies responding to the survey, 95% offered medical coverage for retirees over age 65, and 98% offered benefits for retirees under age 65. POST-RETIREMENT MEDICAL BENEFITS SURVEY, *supra* note 5, at 1-5. The survey covered a range of manufacturing and service sector companies. Of the firms which offered retiree insurance benefits, slightly more than one-half offered benefits to all employees who retired over age 65. *Id.* at 4. Other companies required pension eligibility, age and service requirements, and other criteria. *Id.* Almost all companies tied eligibility for benefits to eligibility for early retirement pension benefits and other criteria for retirees under age 65. *Id.* at 5. In general, medical plans for retirees under age 65 were similar to benefits for active employees. Medical benefits for retirees over age 65 supplement Medicare benefits. To varying degrees, the plan paid those expenses not covered by Medicare. *Id.* at 3-5. The survey does not clearly indicate whether these benefits were concentrated among manage-

prisingly, employers often want to escape from their share of this liability. For their part, retirees fear the loss of medical benefits at a time when they are least able to afford private alternatives. An individual policy of health insurance can cost more than \$300 a month, an amount that many retirees on fixed incomes cannot afford.<sup>12</sup> Small wonder that retiree insurance benefits have become a controversial and much litigated issue.

Unfortunately, federal case and statutory law provide little guidance in resolving these disputes. ERISA was primarily concerned with pension benefits; its provisions pertaining to health and welfare benefits do not address the issue of vesting of retiree insurance.<sup>13</sup> As a result, courts look to pre-ERISA contract, trust and labor law for guidance.

Part I of this Article examines the application of these doctrines in termination of benefits cases. Although retiree insurance benefits for unionized employees are a matter of federal law, courts have often analyzed nonunion and union cases in similar ways.<sup>14</sup>

Part II of the Article analyzes the ERISA provisions which govern health and welfare plans, and recent case law applying ERISA and other labor law to benefit reductions or terminations. Although ERISA does not require funding and vesting of health and welfare plans, most decisions hold that the Act does not prohibit courts from finding that retiree insurance can vest under certain circumstances and indeed, offers some support for the vesting approach.<sup>15</sup> In deciding whether vesting occurs, courts apply pre-ERISA benefits decisions that are incorporated through federal common law. As a result, many court decisions involving union and nonunion retirees brought under section 301 of the Labor Management Relations Act ("LMRA")<sup>16</sup> and section 502 of ERISA<sup>17</sup> reach the same results, although the analysis is somewhat different.

ERISA also contains extensive provisions for disclosure to plan par-

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rial as opposed to blue collar and clerical employees. In general, lower paid employees had fewer benefits than managerial employees, and unionized employees had more benefits than nonunion employees.

12. Interview with William Payne, Assistant General Counsel, United Steelworkers of America, in Pittsburgh, Pa. (Oct. 15, 1985). See Ansberry, *Broken Promises: Retirees Learn to Live Without Pension Benefits*, Wall St. J., July 29, 1986, at 29, cols. 4-6.

The effects of the loss of insurance are discussed in some detail in *Mamula v. Satralloy, Inc.*, 578 F. Supp. 563, 577 (S.D. Ohio 1983) (loss of coverage despite urgent medical needs, inability to afford cost of converting a group policy to an individual policy).

13. See *infra* notes 100-08, 166-72 and accompanying text.

14. In particular, see § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185 (1982). See also *infra* notes 32-68 and accompanying text.

15. See *infra* notes 154-215 and accompanying text.

16. 29 U.S.C. § 185(a) (1982). Section 301 creates a cause of action for breach of a collective bargaining agreement. Retiree insurance and other employee benefits for unionized employees are always a part of the collective bargaining agreement.

17. ERISA § 502, 29 U.S.C. § 1132 (1982).

ticipants and beneficiaries<sup>18</sup> and stringent standards for plan fiduciaries.<sup>19</sup> Part II further examines the applicability of these provisions to benefit reductions and terminations. Although only a few cases have applied the disclosure and fiduciary standards to retiree insurance cases, these provisions may affect the liability of employers in the future.<sup>20</sup>

Part III proposes legislative changes to clarify the rights and responsibilities of all parties who provide or receive retiree insurance benefits.<sup>21</sup> ERISA should be amended to create a presumption that retiree insurance vests at retirement unless the employer<sup>22</sup> can show clear language and bargaining history which indicate that the benefits could be changed. Even then, ERISA should restrict reductions and permit terminations only under extraordinary circumstances. Although this presumption will increase the cost of doing business, it is necessary to protect retiree expectations. A presumption will also create some measure of consistency in the case law and clarify the rights and liabilities of employers and employees. The Article also proposes that Congress amend ERISA to provide protection for retiree insurance benefits on a footing similar to that for pensions. Specifically, this Article recommends that retiree insurance benefits be funded as is required for pension plans. The rash of plan terminations and reductions in recent years indicates that such protection is also needed for health and welfare benefits. Even if employers are required to provide lifetime retiree insurance benefits, that requirement will mean little to retirees if the company goes out of business and there are no funds to pay for coverage. Funding these benefits may make it more likely that retirees will receive the benefits they were promised.

## I

### RETIREMENT BENEFITS PRIOR TO ERISA

Before passage of ERISA, courts fashioned a number of contract

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18. These terms will be used in accordance with the ERISA definitions, ERISA § 101, 29 U.S.C. § 1021 (1982). ERISA § 3(7), 29 U.S.C. § 1002(7) (1982), defines a "participant" as: any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

ERISA § 3(8), 29 U.S.C. § 1002(8) (1982), defines a "beneficiary" as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder."

19. ERISA § 404, 29 U.S.C. § 1104 (1982). For a detailed discussion of ERISA's fiduciary duties, see *infra* notes 246-63 and accompanying text.

20. See *infra* notes 247-306 and accompanying text.

21. See *infra* notes 307-37 and accompanying text.

22. Most benefits are administered and provided by the employer except in the case of jointly administered or "Taft-Hartley" trusts. With Taft-Hartley trusts, collectively bargained plans are administered by a jointly administered trust fund consisting of an equal number of union and management trustees. For the purposes of this Article, "employer" will be used except when discussing a trust fund. For a discussion of Taft-Hartley trusts, see *infra* notes 30, 69-89.

law theories to decide disputes concerning retirement benefits.<sup>23</sup> In general, the courts held that, absent clear understandings to the contrary, employees who worked for years to earn certain benefits ought to receive them. Although the distinction became important later under ERISA, courts did not distinguish between pensions and retiree insurance because there was no reason to do so since vesting and funding requirements for pensions did not exist.<sup>24</sup> As with pensions, employees became

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23. Earlier cases treated pension benefits as gratuities. See, e.g., *McNevin v. Solvay Process Co.*, 32 A.D. 610, 53 N.Y.S. 98 (1898), *aff'd without opinion*, 167 N.Y. 530, 60 N.E. 1115 (1901). B. AARON, LEGAL STATUS OF EMPLOYEE BENEFIT RIGHTS UNDER PRIVATE PENSION PLANS 5-9 (1961); Comment, *Consideration for the Employer's Promise of a Voluntary Pension Plan*, 23 U. CHI. L. REV. 96, 97-99 (1955); Note, *Legal Problems of Private Pension Plans*, 70 HARV. L. REV. 490, 494-95 (1957). It was not unusual for pension plans to contain provisions to the effect that no contract was created and no rights conferred on any employee; that the terms of the plan both allowed employers to discharge employees without owing them any benefits and established that all decisions made by plan administrators were conclusive. B. AARON, *supra* at 7. *McNevin*, 32 A.D. at 611, 53 N.Y.S. at 99 ("the sums set apart are expressly declared to be . . . and remain the property of the defendant until they are actually paid over to the employe[s]"). See also *Menke v. Thompson*, 140 F.2d 786 (8th Cir. 1944); *In re Missouri Pac. R.R.*, 49 F. Supp. 405 (E.D. Mo. 1943); *Dolan v. Heller Bros. Co.*, 30 N.J. Super. 440, 104 A.2d 860 (1954).

While the gratuity theory continued long into the twentieth century, many courts began to enforce pensions as well as other benefits as contracts. Retiree insurance cases are fairly new. The earliest cases date to the 1950's. See *infra* cases in notes 25-89 and accompanying text. Employee benefit plans did not become widespread until after the growth of union representation in the 1930's and 1940's. For example, pension benefits grew at a rapid pace after pension benefits were declared to be a mandatory subject of collective bargaining in *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949); Note, *Pension and Retirement Matters—A Subject of Compulsory Collective Bargaining*, 43 ILL. L. REV. 713 (1948); C. MORRIS, THE DEVELOPING LABOR LAW 777-80 (2d ed. 1983).

Not long after *Inland Steel*, health and welfare plans were also declared to be mandatory subjects of bargaining. See *W.W. Cross & Co. v. NLRB*, 174 F.2d 875 (1st Cir. 1949).

24. Prior to the enactment of ERISA, there were essentially three federal statutes substantially affecting employee benefit plans. Section 302 of the LMRA, 29 U.S.C. § 186 (1982), established fundamental requirements for establishment and operation of joint union-management employee benefit trust funds, so-called "Taft-Hartley trusts." See *infra* note 30. Section 302, however, failed to provide standards for vesting of benefits, funding adequacy, security of investments by the trust or fiduciary standards of conduct.

The Internal Revenue Code of 1954, Pub. L. No. 83-591, 68A Stat. 134, codified at 26 U.S.C. §§ 401-404, 501-503, provided tax incentives for employers to maintain qualified plans. To attain qualified status, a plan was required to be established (1) for the exclusive benefit of the participants; (2) for the purpose of distributing the corpus or income to the participants; and (3) for employees other than just officers, stockholders, or highly compensated or supervisory employees. The only sanction for failure to meet these requirements was the denial of tax benefit status for the benefit plan.

The Welfare and Pension Plans Disclosure Act of 1958 ("WPPDA"), Pub. L. No. 85-836, 72 Stat. 997, codified at 29 U.S.C. §§ 301-309, was the first federal statute specifically regulating employee benefit plans. In 1962, Congress added criminal sanctions for theft, embezzlement, bribery and kickbacks, along with vesting limited enforcement powers in the Secretary of Labor. Pub. L. No. 87-420, 76 Stat. 35, 37, 41-43 (1962). However, the WPPDA remained a disclosure statute without substantive fiduciary standards and was repealed by ERISA. Pub. L. No. 93-406, 88 Stat. 851 (1974). In 1974, ERISA was passed in order to assure the fairness and financial soundness of employee benefit plans which Congress had intended and which those acts failed to accomplish. H.R. REP. NO. 533, 93d Cong., 1st Sess. 1, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS

eligible for retiree insurance after years of service during which they accepted lower earnings in return for benefits after retirement. Courts applied this contract approach to pension and insurance benefits alike.<sup>25</sup>

The source of the law applied to retirement benefits for organized or unionized retirees differed from that applied to nonunion retirees. When the employer terminated retirement benefits provided in a collective bargaining agreement, the union or retirees<sup>26</sup> could bring a contract action under section 301 of the LMRA for breach of the collective bargaining agreement.<sup>27</sup> In a section 301 action, courts applied federal, not state law,<sup>28</sup> while nonunion employees brought actions under state contract law.<sup>29</sup> However, this difference in forum and substantive law had little impact on either the mode of analysis or the outcome of cases. For that

4639; H.R. REP. NO. 807, 93d Cong., 2d Sess. 1, reprinted in U.S. CODE CONG. & ADMIN. NEWS 4670; S. REP. NO. 127, 93d Cong., 1st Sess. 1, reprinted in U.S. CODE CONG. & ADMIN. NEWS 4839.

25. See, e.g., Upholsterers' Int'l Union v. American Pad & Textile Co., 372 F.2d 427 (6th Cir. 1967) (retiree life insurance for employee vested when employee fully performed the service required by the plan); Hunter v. Sparling, 87 Cal. App. 2d 711, 197 P.2d 807 (1948) (where employer had pension plan and an employee knew of it, continued employment constituted consideration for the promise to pay the pension); Sheehy v. Seilon, Inc., 10 Ohio St. 2d 242, 227 N.E.2d 229 (1967) (per curiam) (after employee complied with all of the conditions of employment and reached retirement age, he acquired a vested right to the insurance promised, notwithstanding a clause in the contract reserving to the employer the right to cancel the insurance); Rose City Transit Co. v. City of Portland, 271 Or. 588, 533 P.2d 339 (1975) (employee pension or disability plan held to be an offer of a unilateral contract which is accepted by the employee's continued service).

26. For a detailed discussion of the status of retirees under the National Labor Relations Act ("NLRA"), see *infra* notes 130-34 and accompanying text.

27. 29 U.S.C. § 185(a) (1982).

28. In *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), the Supreme Court held that § 301(a) authorized the federal courts to fashion a body of federal common law to apply in suits for breach of collective bargaining agreements. *Id.* at 457. The federal courts may look to state law for guidance if state law is compatible with the purposes of § 301. State law can then be incorporated into federal law. *Id.* See also *Massachusetts Mut. Life Ins. Co. v. Russell*, 105 S. Ct. 3085, 3098 n.18 (1985) (Brennan, J., concurring):

Where the courts are required themselves to fashion a federal rule of decision, the source of that law must be federal and uniform. Yet, state law where compatible with national policy may be resorted to and adopted as a federal rule of decision . . . Here, of course, there is little federal law to which the court may turn for guidance. State regulation of insurance, pensions, and other such programs, however, provides a preexisting source of experience and experiment in an area in which there is, as yet, only federal inexperience . . . State statutory sources of law will no doubt play a major role in the development of a federal common law under ERISA, particularly in defining rights under employee benefit plans.

*Accord* *Musto v. American Gen. Corp.*, 615 F. Supp. 1483, 1497 (D.C. Tenn. 1985); *Hansen v. White Farm Equip. Co.*, 5 Empl. Ben. Cas. (BNA) 2130, 2140-42 (N.D. Ohio 1984), *rev'd on other grounds*, 788 F.2d 1186 (6th Cir. 1986); *Wayne Chem. Inc. v. Columbus Agency Serv. Corp.*, 426 F. Supp. 316, 325 (N.D. Ind. 1977), *modified on other grounds*, 567 F.2d 692 (7th Cir. 1977).

29. Since the passage of ERISA, any state law relating to employee benefit plans is preempted by ERISA § 514(a), 29 U.S.C. § 1144(a) (1982). Any cause of action arising after the passage of ERISA is controlled by the provisions of the statute and a body of federal common law of employee benefit plans. See *Murphy v. Heppenstall Co.*, 635 F.2d 233 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982) (citing III LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 4771 (remarks of Sen. Javits during floor debate on conference report, Aug. 22, 1974)).

reason, pre-ERISA section 301 and state contract cases will be discussed together.

In addition to what section 301 provides, union retirees may have a cause of action if their benefits are administered by Taft-Hartley or jointly administered trust funds.<sup>30</sup> Section 302(c)(5) of the LMRA incorporated basic common law trust principles to enable plan participants and beneficiaries to police the manner in which the trust funds are administered.<sup>31</sup> If a decision to terminate or reduce insurance benefits is made to benefit the employer or anyone else who is neither a participant nor a beneficiary, such a decision might be held to violate this section.

### A. Contract Principles

Courts have applied contract theories to determine whether an employer intended to create lifetime retirement benefits or something less. In general, courts treated retirement benefits as nonforfeitable, lifetime benefits in the absence of compelling evidence to the contrary.<sup>32</sup> For reasons not difficult to discern, courts were reluctant to allow termination of benefits. The most obvious reason was that medical insurance was and still is a necessity for everyone. Most people who have insurance are covered through their employment.<sup>33</sup> Further, few could afford to buy comprehensive individual policies, especially retirees on fixed incomes.<sup>34</sup> While the Medicare program<sup>35</sup> is of some assistance, retirees are not eligible for it until they reach age sixty-five, and the program does not cover all medical expenses.<sup>36</sup>

In addition, courts were concerned that permitting termination

30. LMRA § 302(c)(5), 29 U.S.C. § 186(c)(5) (1982), authorizes an employer to pay money or other things of value into a trust for the sole purpose of providing certain specified benefits to eligible employees and their families and dependents. Such a trust must be established pursuant to a written agreement between employer and employees and the trust must be administered by a joint board of trustees on which employer and employees are equally represented. "Taft-Hartley trusts" are found generally in multiemployer bargaining units where several employers and one or more unions establish a trust fund. See *infra* notes 69-89 and accompanying text.

31. 29 U.S.C. § 186(c)(5) (1982). See *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981).

32. See, e.g., *Upholsterers' Int'l Union v. American Pad & Textile Co.*, 372 F.2d 427 (6th Cir. 1967) (contract language construed strictly against the employer); *Schofield v. Zion's Coop. Mercantile Inst.*, 85 Utah 281, 39 P.2d 342 (1934). See also *Magee v. San Francisco Bar Pilots Benevolent & Protective Ass'n*, 88 Cal. App. 2d 278, 198 P.2d 933 (1948).

33. See generally Paul & Elkin, *Principles of Plan Design*, in *EMPLOYEE BENEFITS HANDBOOK* § 2.03 (rev. ed. 1987).

34. The cost of an individual policy can reach up to several hundred dollars a month for a person over the age of 50. Interview with William Payne, Assistant General Counsel, United Steelworkers of America, Pittsburgh, Pa. (Oct. 15, 1985).

35. The Medicare program, codified at 42 U.S.C. §§ 1395-1396 (1982), began in 1965 and provides medical benefits for individuals over the age of 65.

36. *EMPLOYEE BENEFIT RESEARCH INSTITUTE, FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS* 4, 18, 133 (2d ed. 1985); J. KRAUSKOPF, *ADVOCACY FOR THE AGING* § 21.1 (1983).

Many employees are allowed to retire before age 65. In some industries such as the automobile and steel industries, employees can retire after 30 years of service. Interview with William Payne,



would allow the employer to have the advantages of promising benefits without ever having to deliver what was promised. The employer provided retirement benefits either because the union gave up other wage demands in return, or because it wished to encourage salaried employees to stay with the company until retirement.<sup>37</sup> Courts reasoned that the employer should not be able to promise the benefits, receive continued service and loyalty from employees and then withdraw the benefits after they retire.<sup>38</sup>

Courts addressed these concerns by means of two overlapping theories—the deferred compensation theory, which was applied to union retirees, and the unilateral contract theory, which was applied to nonunion

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Assistant General Counsel, United Steelworkers of America, Pittsburgh, Pa. (Oct. 15, 1985). See generally *Retirees Out in the Cold*, *supra* note 7, at 105.

Most of the retiree insurance cases date from the mid-1960's after the Medicare program was created. In fact, most insurance policies for retirees eligible for Medicare only pay for what Medicare does not cover. See POST-RETIREMENT MEDICAL BENEFITS SURVEY, *supra* note 5, at 4. See also Barnes & Mishkind, *supra* note 4, at 584.

37. See *Hoefel v. Atlas Tack Corp.*, 581 F.2d 1 (1st Cir. 1978), *cert. denied*, 440 U.S. 913 (1979); *In re Erie Lackawanna Ry.*, 548 F.2d 621 (6th Cir. 1977); *Sheehy v. Seilon, Inc.*, 10 Ohio St. 2d 242, 227 N.E.2d 229 (1967); *Cantor v. Berkshire Life Ins. Co.*, 171 Ohio St. 405, 171 N.E.2d 518 (1960); *Mamorsky & Zimmerman*, *supra* note 4, at 294.

38. See *Sheehy v. Seilon, Inc.*, 10 Ohio St. 2d 242, 227 N.E.2d 229 (1967). This view was expressed most eloquently in a nonunion case, *Musto v. American Gen. Corp.*, 615 F. Supp. 1483 (M.D. Tenn. 1985):

Once an employee has rendered his years of service to the employer, his "sweat equity," and has taken retirement, the employee furnishes little to the employer that generates revenue; hence, the employer may perceive little risk in reducing the level of benefits previously promised. Since an active employee generates revenues beyond his wage and costs of overhead, he possesses the economic leverage to bargain for benefits. Freedom of the employee to leave—and with him the profits he generates, imposes a check on the employer's temptation to trim costs by reducing employee benefits. The employer who amends the company vacation policy reducing annual vacation days from two weeks to two days will experience a mass exodus of his labor pool. But, the employer who doubles the medical insurance premiums for his retirees will receive the increased monthly checks from all those who can afford it and cannot find an adequate substitute source of protection. The retirees have no economic leverage, hence no bargaining position to check modifications of benefits made solely in the interest of their former employer. To permit the enforcement of termination/modification clauses without a showing of good cause has the effect of reducing the status of hard earned welfare plan benefits to mere gratuities. Accurate financial forecasting or retirement planning is impossible because continuation of the benefits is subject to the discretion of an employer. The exercise of such discretion without a "for cause" standard cuts against Congress' intent to safeguard these retirement benefits.

*Id.* at 1496-97 (citations omitted).

Union retirees are not necessarily protected by the collective bargaining process, since although employers are required to bargain over fringe benefits for active employees, see *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949), employers are not required to negotiate benefits for retirees. *Allied Chem. Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). See Comment, *Non-Contributory Pensions as Subjects of Compulsory Collective Bargaining*, 13 DET. L.J. 20 (1949). As a result, it is likely that the parties intended to create lifetime benefits. *UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1482 (6th Cir. 1983). See also *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 613 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1202 (1986); *Weimer v. Kurzkasch, Inc.*, 773 F.2d 669, 672-73 (6th Cir. 1985). For a detailed discussion, see *infra* notes 130-34 and accompanying text.

employees.<sup>39</sup> The two theories often produced similar results—upholding benefits.<sup>40</sup> In the case of salaried employees, courts found that retirees had lifetime benefits even when the language of the benefit document was ambiguous or seemed to permit termination. Unlike employees covered by collectively bargained plans, salaried employees often have little to say about the structure of their benefit plans.

### 1. *Deferred Compensation Theory*

The deferred compensation theory is simple. Employees work for retirement benefits during the time of their active employment and receive a lower salary or wage in order to receive pensions and other benefits after retirement.<sup>41</sup> Allowing termination or reduction of these benefits would mean that employees would lose what they have earned.<sup>42</sup> Unless there were clear indications that benefits could be terminated or reduced, courts were not likely to find that the employee would lose these benefits. Once the employee completed the required service and retired,

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39. See *infra* notes 41-68 and accompanying text. The unilateral contract theory cannot be applied to union retirees because collective bargaining agreements are bilateral not unilateral contracts. See Rabkin, *supra* note 4, at 677.

40. See, e.g., *In re Erie Lackawanna Ry.*, 548 F.2d 621 (6th Cir. 1977) (unilateral contract formed when employees retired and benefits vested); *Upholsterers' Int'l Union v. American Pad & Textile Co.*, 372 F.2d 427 (6th Cir. 1967) (retiree insurance benefits vested when employees retired).

41. See *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949), where the Seventh Circuit held that retirement plans were wages as contemplated by the NLRA and, therefore, a mandatory subject of bargaining. In collectively bargained plans, the union gives up present wages or other forms of compensation in return for retirement benefits.

In *Hunter v. Sparling*, 87 Cal. App. 2d 711, 197 P.2d 807 (1948), in a nonunion context, the court explained the long-standing rule of law in California that pensions were deferred compensation: "He is not fully compensated upon receiving his salary payments because, in addition, he has earned certain pension benefits, the payment of which is to be made at a future date." *Id.* at 713, 197 P.2d at 814. See also *Allied Chem. Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 176 n.17 (1971).

42. See *Hoefel v. Atlas Tack Corp.*, 581 F.2d 1, 5 (1st Cir. 1978), *cert. denied*, 440 U.S. 913 (1979); *American Pad*, 372 F.2d at 428; *Ehrle v. Bank Bldg. & Equip. Corp.*, 530 S.W.2d 482 (Mo. Ct. App. 1975); *Cantor v. Berkshire Life Ins. Co.*, 171 Ohio St. 405, 171 N.E.2d 518 (1960); *Schofield v. Zion's Coop. Mercantile Inst.*, 85 Utah 281, 39 P.2d 342 (1934); *Tilbert v. Eagle Lock Co.*, 116 Conn. 357, 165 A. 205 (1933).

This perspective was explained most eloquently in an arbitration decision, *Roxbury Carpet*, 73-2 Lab. Arb. Awards (CCH) ¶ 8521, at 4938 (1973), where Prof. Clyde Summers found that union retirees had lifetime insurance benefits:

[There is a] common understanding . . . that when a man has worked over a period of time to earn certain rights, he ought not be deprived of those rights by events beyond his control in the absence of clear contractual language requiring that result. When an employer has received the full value of his employees' services, he ought to provide the full value of the expected benefits. The common understanding is that, in the absence of a clearly expressed intent to the contrary, compensation for services rendered in industrial employment is not to depend on contingencies, that men do not labor for chances on a roulette wheel and employers do not expect to pay wages with lottery tickets. Collective agreements and contracts of employment will be read as incorporating this common understanding.

the retirement benefits "vested."<sup>43</sup>

As would be expected, courts were rather one-sided about interpreting the language of collective bargaining agreements and other documents—they usually favored the retiree.<sup>44</sup> Indeed, examining the cases, it is not easy to identify what language or circumstances would be sufficient to allow reduction or termination of benefits.<sup>45</sup> One way courts have justified this approach is by citing the time-honored maxim that "the law abhors a forfeiture."<sup>46</sup> Unless the parties' language clearly and unambiguously indicates an intention to permit termination or reduction of benefits, a court will not so order—silence is not enough.<sup>47</sup>

Just how clear or unambiguous does the language have to be? In some cases, courts strained to find the contract language ambiguous and therefore insufficient.<sup>48</sup> For example, in the leading case *American Pad*, the collective bargaining agreement contained a standard clause which

43. *American Pad*, 372 F.2d at 428. See also *Schneider v. Electric Auto-Lite Co.*, 456 F.2d 366 (6th Cir. 1972); *Smith v. Kingsport Press, Inc.*, 366 F.2d 416 (6th Cir. 1966).

Although courts use the deferred compensation theory to discuss union retirement benefits, courts obviously recognize that retirement benefits are also deferred compensation for nonunion employees. See, e.g., *Sheehy v. Seilon, Inc.*, 10 Ohio St. 2d 242, 227 N.E.2d 229 (1967); *Cantor v. Berkshire Life Ins. Co.*, 171 Ohio St. 405, 171 N.E.2d 518 (1960); *Schofield v. Zion's Coop. Mercantile Inst.*, 85 Utah 281, 39 P.2d 342 (1934).

44. See, e.g., *American Pad*, 372 F.2d at 427 (general durational clause insufficient to make benefits conditional).

45. Compare *American Pad*, 372 F.2d at 427-28 (language created lifetime benefits) with *United Rubber Workers v. Lee Nat'l Corp.*, 323 F. Supp. 1181, 1187-88 (S.D.N.Y. 1971) (insurance lasted only for the duration of the collective bargaining agreement). See *infra* notes 48-61 and accompanying text.

46. See *Hoefel*, 581 F.2d at 6; *In re Erie Lackawanna Ry.*, 548 F.2d 621, 626 (6th Cir. 1977); *Neuffer v. Bakery Workers Int'l Union*, 307 F.2d 671, 674-75 (D.C. Cir. 1962); *Cantor*, 171 Ohio St. at 405, 171 N.E.2d at 518. See also A. CORBIN, CORBIN ON CONTRACTS § 748 (1952) (citation omitted):

When it is said that courts do not favor forfeitures, the meaning is that they do not like to see a party to a contract getting something for nothing. It is for the same reason that they refuse to enforce an express provision for the payment of a penalty. Therefore, the courts do not greatly favor express conditions precedent where the condition is itself no part of the subject-matter of exchange by the parties and where giving effect to the condition will result in one of the parties enjoying benefits under the contract without giving the agreed equivalent in exchange therefor. The courts do not hold such express conditions to be contrary to public policy, however; they are not yet ready to limit our much prized freedom of contract so greatly. Nevertheless, they are very ready to put an interpretation on a contract so as to avoid such a harsh condition; and they are very ready to dispense with the necessity of such a condition by holding that it can be waived without consideration, and that it can be excused and made entirely unnecessary by supervening facts making its performance impracticable.

47. See *supra* note 46. See also *Rehmar v. Smith*, 555 F.2d 1362, 1368-69 (9th Cir. 1977).

48. In *In re Erie Lackawanna Ry.*, 548 F.2d 621 (6th Cir. 1977), the court held that the employer may not deprive retirees of vested rights under an insurance plan, even pursuant to a reserved power to terminate the plan, absent good and sufficient cause for forfeiture. A contract of insurance should be construed most liberally in favor of the insured, forfeitures by construction or implication should be avoided and it must be deemed to be a term of the contract that a party is not disabled from performance by insolvency or bankruptcy. Therefore, the plan was construed as legally enforceable notwithstanding the employer's bankruptcy. See also *Schofield v. Zion's Coop. Mercantile Inst.*, 85 Utah 281, 39 P.2d 342 (1934) (provisions reserving to the employer the right to modify the

limited the insurance plan for active employees to the duration of the collective bargaining agreement.<sup>49</sup> However, the court found that the clause was insufficient to establish that retiree insurance benefits lasted only for the duration of the collective bargaining agreement because another paragraph of the agreement covering retiree insurance stated that the company "will continue to cover such eligible retired employees with \$2,000 life insurance."<sup>50</sup> There was no indication that the life insurance benefits were to last only as long as the other provisions of the agreement.<sup>51</sup> If the union and the employer intended to create benefits that lasted only for the life of the agreement, the court reasoned, they would have included language to this effect in the paragraph covering retirement benefits.<sup>52</sup> The ambiguity was resolved in favor of the retirees; the benefits vested when they retired.<sup>53</sup>

Where the parties' language clearly indicated that the benefits were to expire with the agreement, courts enforced that language.<sup>54</sup> In *United Rubber Workers v. Lee National Corp.*,<sup>55</sup> the welfare agreement covering retiree insurance stated that retiree life insurance "would be continued in the amount of \$2,250."<sup>56</sup> However, another section specifically provided that the employer would only have to maintain the benefit programs for the duration of the agreement.<sup>57</sup> Accordingly, the court held that the parties did not intend to create benefits beyond the duration of the collective bargaining agreement, and the company could lawfully terminate these benefits after the agreement expired.<sup>58</sup>

Discerning what language will suffice to establish the right to terminate is difficult. It is obviously a factual issue but negotiations for collective bargaining agreements rarely yield language or bargaining history

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plan and denying to any officer or employee a claim to a pension construed as applying only to current employees and not to retirees).

49. 372 F.2d at 428.

50. *Id.* at 427 (emphasis added).

51. *Id.* at 428.

52. *Id.* at 428 n.3. There was no bargaining history in this case which sheds any light on whether the parties intended to create lifetime benefits.

53. *Id.* at 428.

54. *Turner v. Local 302, Int'l Bhd. of Teamsters*, 604 F.2d 1219 (9th Cir. 1979) (facts of the case occurred prior to full effect of ERISA); *United Rubber Workers v. Lee Nat'l Corp.*, 323 F. Supp. 1181 (S.D.N.Y. 1971).

55. 323 F. Supp. 1181, 1187-88 (S.D.N.Y. 1971).

56. *Id.* at 1187 (emphasis added).

57. *Id.* Article III of the agreement stated that "the company shall be relieved of any Employee . . . other than to maintain such [insurance] contracts or contracts in force for the duration of this Agreement." This clause is far more specific than the general durational clause in *Upholsterers' Int'l Union v. American Pad & Textile Co.*, 372 F.2d 427, 428 (6th Cir. 1967).

58. 323 F. Supp. at 1187-88. The court also allowed termination even though the company continued those benefits after the agreement expired. Continuation of benefits has been held to establish that benefits were designed to exist beyond the duration of the collective bargaining agreement. *See infra* notes 143-49 and accompanying text.

which can establish the parties' intent with any certainty. Indeed, uncertainty is built into the process, resulting in contracts which contain vague or ambiguous language. This occurs when the parties cannot agree on a position, when they are willing to allow a third party to decide the issue later, or when they simply did not think ahead.<sup>59</sup>

When retiree insurance plans were initially negotiated, few parties were aware of the costs these plans would ultimately present or the possibility that the plant or factory might close.<sup>60</sup> Even if the employer representatives and union officials who negotiated the agreement are available to testify, their testimony is not likely to shed much light on their original intention.<sup>61</sup> The presumptions courts use are, therefore, critical to resolving this issue. If courts proceed on the assumption that benefits, as deferred compensation, are vested at retirement, it would be difficult for the employer to show otherwise.

## 2. *Unilateral Contract Theory*

In scrutinizing retirement benefits for salaried, nonunion retirees, courts frequently used a second theory—the unilateral contract theory. The employer makes an offer for a unilateral contract when it establishes retirement benefits and communicates the existence of these benefits to its employees.<sup>62</sup> The employee then accepts the offer by working for the period required by the plan. Once the employee has performed the required service, a contract is formed and the benefits become vested or nonforfeitable. However, unlike the deferred compensation cases, specific and clear language which allows the employer to terminate or reduce benefits may not be sufficient.<sup>63</sup>

Proceeding under the theory of unilateral contract, courts hesitated

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59. See F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 342-45 (4th ed. 1985); P. PRASOW & E. PETERS, *ARBITRATION AND COLLECTIVE BARGAINING: CONFLICT RESOLUTION IN LABOR RELATIONS* 44-59 (1970).

60. MARTIN SEGAL NEWSLETTER, *supra* note 10.

61. They may not remember what the parties intended or they may have opposing views on what the language was supposed to mean.

62. *Hoefel v. Atlas Tack Corp.*, 581 F.2d 1 (1st Cir. 1978), *cert. denied*, 440 U.S. 913 (1979); *Hunter v. Sparling*, 87 Cal. App. 2d 711, 722, 197 P.2d 807, 814 (1948); *Sheehy v. Seilon, Inc.*, 10 Ohio St. 2d 242, 243, 227 N.E.2d 229, 230 (1967) (*per curiam*) (reaffirming *Cantor*); *Cantor v. Berkshire Life Ins. Co.*, 171 Ohio St. 405, 408-09, 171 N.E.2d 518, 522 (1960); *McHorse v. Portland Gen. Elec. Co.*, 268 Or. 323, 331, 521 P.2d 315, 318-19 (1974); *Schofield v. Zion's Coop. Mercantile Inst.*, 85 Utah 281, 288, 39 P.2d 342, 344 (1934); *F.E. Gilbert v. Norfolk & W. Ry.*, 114 W. Va. 344, 347-48, 171 S.E. 814, 816-17 (1933). *But cf.* *Bromberg v. United Cigar-Whelan Stores Corp.*, 125 N.Y.L.J. 687, 19 Lab. Arb. Awards (CCH) ¶ 66203 (N.Y. Sup. Ct. 1951) (Although plan offered by employer may give rise to contractual obligations when accepted by employees' service, the contract may be illusory, and thus unenforceable, if employer reserves the right to modify the provisions of the plan unilaterally.).

63. *Hoefel v. Atlas Tack Corp.*, 581 F.2d 1, 6 (1st Cir. 1978), *cert. denied*, 440 U.S. 913 (1979).

to enforce termination language even when it appeared to be clear.<sup>64</sup> In *Cantor v. Berkshire Life Insurance Co.*,<sup>65</sup> a termination clause provided that the employer could cancel pension benefits at any time and for any reason. Even so, the court found that the benefits were vested and the employee could not be deprived of benefits after retirement.<sup>66</sup> Similarly, the Sixth Circuit in *In re Erie Lackawanna Ry.*<sup>67</sup> refused to enforce a clause which reserved the right of the employer to terminate life insurance for retired employees. One way to distinguish these cases from ones involving collective bargaining agreements is that nonunion or salaried employees rarely negotiate the terms of their benefit plans. Courts are apt to scrutinize these benefits plans carefully because of the possibility of overreaching and abuse.<sup>68</sup>

### B. Section 302(c)(5) Trusts<sup>69</sup>

Although there are few cases, termination or reduction of retiree insurance might create a cause of action for retirees under section 302 of the LMRA<sup>70</sup> if these benefits are provided by Taft-Hartley or jointly administered trust funds.<sup>71</sup> To avoid union corruption and misallocation of benefits funds, section 302 prohibits employers from making payments to union representatives unless the employer and the union establish a jointly administered trust fund that meets the requirements of section 302(c)(5).<sup>72</sup>

Section 302(c)(5) requires that the union and the employer establish

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64. *Sheehy v. Seilon, Inc.*, 10 Ohio St. 2d 242, 227 N.E.2d 229 (1967) (per curiam) (reaffirming *Cantor*); *Cantor v. Berkshire Life Ins. Co.*, 171 Ohio St. 405, 410, 171 N.E.2d 518, 522 (1960).

65. 171 Ohio St. 405, 171 N.E.2d 518 (1960).

66. *Id.* at 408-09, 171 N.E.2d at 522.

67. 548 F.2d 621, 625-27 (6th Cir. 1977).

68. For a discussion of the difference between union and nonunion retirees, see *infra* notes 176-215.

69. LMRA § 302, 29 U.S.C. § 186 (1982).

70. *Id.* at (c)(5).

71. Taft-Hartley trusts are normally found in multiemployer bargaining units because this structure is the most practical way to provide welfare and pension benefits for employees who work for a number of employers during their work life. See OFFICE OF PENSION AND WELFARE BENEFIT PROGRAMS, U.S. DEPT OF LABOR, THE FUNDING STATUS OF MULTIEMPLOYER PENSION PLANS AND IMPLICATIONS FOR COLLECTIVE BARGAINING 4, 8 (1985); R. MARSHALL, THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980: A REPORT TO THE COUNCIL OF MULTIEMPLOYER PENSION SECURITY 2-3 (1985). In single employer plans, it is far more common for the employer to manage and control the welfare and pension funds alone. Although the union does not administer the benefit plans in employer controlled plans, it may act in an advisory capacity. N.A. LEVIN, GUIDELINES FOR FIDUCIARIES OF TAFT-HARTLEY TRUSTS: AN ERISA MANUAL 2 (1980).

72. 29 U.S.C. § 186(c)(5) (1982); Comment, *The Arbitrary and Capricious Standard Under ERISA: Its Origins and Application*, 23 DUQ. L. REV. 1033 (1985) [hereinafter *The Arbitrary and Capricious Standard*].

a trust fund independent of either party.<sup>73</sup> Payments must be made in accordance with a written agreement, and the trust must be governed by written plan documents.<sup>74</sup> In addition, the trust must be administered by an equal number of union and employer representatives. In the event of a deadlock, the court will appoint an impartial umpire to break the tie.<sup>75</sup> Finally, payments must be held in trust for the sole and exclusive benefit of employees and their dependents.<sup>76</sup>

From the "sole and exclusive benefit" language derived from traditional trust law and found in section 302(c)(5), a majority of federal courts applied an "arbitrary and capricious" standard to review trustees' actions.<sup>77</sup> In doing so, courts were creating federal common law even though the section did not expressly authorize courts to do so.<sup>78</sup>

In developing a series of strict fiduciary standards governing trustees' behavior, the federal judiciary created the "structural violation" doctrine to assert jurisdiction:

This analysis begins with the premise that a provision of a plan which has the effect of denying beneficiaries their right to benefits under the plan, with no reasonable purpose for so doing, is not established "for the sole and exclusive benefit of the employees". . . . Once an initial determination is made that the plan as structured has such an effect, the court then had jurisdiction to review the trustees' actions in denying benefits, utilizing the arbitrary and capricious standard. It thus became a relatively simple matter for a plaintiff to obtain federal jurisdiction over his claim of wrongful denial of benefits by asserting only that he was a participant

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73. *The Arbitrary and Capricious Standard*, *supra* note 72, at 1037; D. MCGINN, JOINT TRUST PENSION PLANS 5-7 (1978).

74. *The Arbitrary and Capricious Standard*, *supra* note 72, at 1037; D. MCGINN, *supra* note 73, at 5.

75. *The Arbitrary and Capricious Standard*, *supra* note 72, at 1037.

76. *Id.*; D. MCGINN, *supra* note 73, at 5. See also N.A. LEVIN, *supra* note 71, at 3.

77. There is no general definition of the arbitrary and capricious standard. As applied to review of trustees' actions, courts have articulated a number of factors:

[W]e . . . view as probative of the good faith of a trustee or administrator the following factors: (1) internal consistency of a plan under the interpretation given by the administrators or trustees; (2) any relevant regulations formulated by the appropriate administrative agencies, here the IRS and the Department of Labor; and (3) factual background of the determination by a plan and inferences of lack of good faith, if any.

*Dennard v. Richards Group, Inc.*, 681 F.2d 306, 314 (5th Cir. 1982); see also *Music v. Western Conference of Teamsters Pension Trust Fund*, 712 F.2d 413, 418-19 (9th Cir. 1983), *on remand from* 459 U.S. 810 (1982), *vacating* 660 F.2d 400 (1981); *Maggard v. O'Connell*, 671 F.2d 568, 570-71 (D.C. Cir. 1982); *Rosen v. Hotel & Restaurant Employees Union*, 637 F.2d 592, 596-97 (3d Cir. 1981), *cert. denied*, 454 U.S. 898 (1981); *Rehmar v. Smith*, 555 F.2d 1362, 1371 (9th Cir. 1977); *Carr v. Hotel & Restaurant Employees Pension Fund*, 585 F. Supp. 949, 952 (E.D. Pa. 1984); *The Arbitrary and Capricious Standard*, *supra* note 72, at 1047-48.

Courts have incorporated the arbitrary and capricious standard from § 302(c)(5) to review individual claims for benefits under ERISA's fiduciary duties section, § 404, 29 U.S.C. § 1104 (1982). See *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 333 (3d Cir. 1984). See *infra* note 259.

78. *The Arbitrary and Capricious Standard*, *supra* note 72, at 1037-41.

in the plan and was denied benefits, these assertions being sufficient to make out a prima facie case of "structural defect" in the plan.<sup>79</sup>

It is not difficult to see how retirees could assert that retiree insurance reductions or terminations constituted denial of benefits sufficient to meet the structural violation standard of section 302. For example, in *Turner v. Local 302, International Brotherhood of Teamsters*,<sup>80</sup> retirees challenged reductions in medical benefits instituted by the trustees of the fund.<sup>81</sup> Because of financial problems with the retiree benefit program, the parties to the collective bargaining agreement amended the agreement to reduce funding and to allow the fund to reduce retiree medical benefits accordingly.<sup>82</sup> Retirees argued that their insurance benefits were vested under the collective bargaining agreement and could not be reduced without their consent. They also contended that they could sue the union because it controlled the trust fund and had agreed to the plan reductions.<sup>83</sup> Retirees argued that because the union dominated the trust fund, the trust fund no longer operated for the "sole and exclusive benefit" of the retirees, in violation of section 302(c)(5) which requires the trust to be independent of the union and the employer.<sup>84</sup> The Ninth Circuit found the changes in the retiree medical plan requiring retirees to make monthly payments or lose benefits constituted a "structural" change in the plan, subject to judicial review.<sup>85</sup> However, the court found that the reductions were not arbitrary and capricious under section 302(c)(5) because there was no evidence that the union dominated the trust fund, because the changes were made to protect the long-term viability of the fund, and because trust assets were not used to benefit anyone other than the employees.<sup>86</sup> The trustees could reduce or terminate benefits; retiree insurance benefits were not vested or nonforfeitable.<sup>87</sup>

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79. *Id.* at 1039-40.

80. 604 F.2d 1219 (9th Cir. 1979). *Turner* was decided under § 302(c)(5) because the dispute arose prior to the effective date of the fiduciary provisions of ERISA. See ERISA § 414, 29 U.S.C. § 1114 (1982) (effective date Jan. 1, 1975). *Turner* was also decided prior to the Supreme Court's decision in *United Mine Workers Health & Retirement Fund v. Robinson*, 455 U.S. 562 (1982) (federal courts have no authority to overturn plan provisions established in collective bargaining absent illegality). Whether *Turner* would have been decided differently after *Robinson* is dubious. Circuit courts have interpreted *Robinson* to limit review of plan administration only where trustees exercise no discretion under the collective bargaining agreement. See, e.g., *Hurn v. Retirement Fund Trust of the Plumbing, Heating & Piping Indus.*, 703 F.2d 386, 389 n.2 (9th Cir. 1983).

81. *Turner*, 604 F.2d at 1219.

82. *Id.* at 1223.

83. *Id.* at 1227.

84. *Id.* at 1224.

85. *Id.* at 1227.

86. *Id.* at 1227-28. The trust had an equal number of union and management trustees as required by § 302(c)(5). The benefit changes were approved by union and management trustees. *Id.*

87. In *Turner*, there were no allegations of bribes or misuse of funds. *Id.* at 1228. The retirees also brought an action under § 301 arguing the benefit reductions eliminated vested rights in the medical benefits. The court determined that retirees did not have vested benefits. *Id.* at 1224-25. ERISA's distinction between health and welfare benefits and pension benefits played a large role in



Although the retirees were unsuccessful, *Turner* did indicate that there may have been violations of section 302 if these benefits had vested or if the trust funds had been diverted to someone other than employees.<sup>88</sup> As will be indicated later, ERISA's fiduciary standards are more stringent than those of section 302 and could prove to be far more useful to retirees.<sup>89</sup> One important difference is that ERISA's fiduciary standards apply to all benefit plans, not just to Taft-Hartley trust funds.

## II

### RETIREE INSURANCE AFTER ERISA

Since the passage of ERISA in 1974, there has been a significant increase in the number of retiree insurance cases.<sup>90</sup> As noted earlier, the economic downturn in recent years has severely affected major manufacturing industries such as steel and automobiles.<sup>91</sup> In the steel industry, employment has declined from 509,000 employees in 1973 to 296,000 employees in 1984.<sup>92</sup> In the American automobile industry, employment has declined twenty-five percent to 570,000 employees from its peak in 1978.<sup>93</sup> Employees in these industries often have extensive fringe benefits including retiree insurance benefits, the result of strong unions and aggressive bargaining.<sup>94</sup> As with most employee benefits, employers have tried to reduce labor costs by reducing or terminating retiree insurance plans.<sup>95</sup> In situations where factories or plants are closed and there are no active employees, the employer may simply terminate all benefits with

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the court's decision. Because ERISA does not require vesting standards for welfare benefits, and because the collective bargaining agreement contained no language implying that health and welfare benefits vest at retirement, the court held that welfare benefits do not vest in the same way as pensions. For a detailed discussion of the effect of ERISA on retiree insurance cases, see *infra* Part II and note 126.

88. *The Arbitrary and Capricious Standard*, *supra* note 72, at 1038 n.17.

89. *Id.* at 1037 n.14. See *infra* notes 246-306 and accompanying text.

90. See cases cited *supra*, note 3.

91. See S. BOWLES, D. GORDON & T. WEISSKOPF, *BEYOND THE WASTELAND* 17-178 (1984); J. RIFKIN & R. BARBER, *THE NORTH WILL RISE AGAIN* 15-82 (1978). Most of the retiree insurance cases arose in the Midwest or Northeast in the older manufacturing industries. See Anderson & Manning, *Big Steel's Big Chill*, *Newsweek*, Jan. 9, 1984, at 69; *Can Detroit Cope This Time?*, *BUS. WK.*, Apr. 22, 1985, at 78-81, 84, 88; *Even If Steel Gets Import Relief Its Anxieties Won't Go Away*, *BUS. WK.*, June 25, 1984, at 29-30; Hicks, *Big Steel is Getting Smaller*, *N.Y. Times*, July 31, 1986, at 25, col. 1 and at 28, cols. 1-4; Beazley & Russell, *Steel Union Is Balking at Further Givebacks*, *Wall St. J.*, July 29, 1986, at 1, col. 6, and at 12, cols. 1-3; Serrin, *The Shattered Steelworkers*, *N.Y. Times*, July 29, 1986, at 25, cols. 2-4, and at 31, cols. 1-6; see also *supra* note 3 (cases cited).

92. *Three Industries That Want Help*, *Time*, Oct. 7, 1985, at 32; see also A. DENZAU, *AMERICAN STEEL: RESPONDING TO FOREIGN COMPETITION* 1-3 (1985); Serrin, *supra* note 91, at 25, cols. 2-4, and at 31, cols. 1-6.

93. *Can Detroit Cope This Time?*, *BUS. WK.*, Apr. 22, 1985, at 80.

94. See Wayne, *Steel's Pension-Funding Woes*, *N.Y. Times*, July 30, 1986, at 25, cols. 2-4, and at 29, cols. 1-6.

95. *Retirees Out in the Cold*, *supra* note 7, at 105-06; *Making Retirees Share*, *supra* note 4, at 50.

as little fanfare as possible. In the case of nonunion retirees, the employer might simply notify all concerned that the benefits will end. In the case of union retirees, the employer may time the terminations to coincide with expiration of the collective bargaining agreement.<sup>96</sup>

Even when an industry is not threatened with extinction, the rising costs of health and welfare benefits, especially medical benefits, have proved onerous. Medical benefits are even more expensive for older workers because older workers are the "highest consumers of health care services."<sup>97</sup> To contain medical costs, employers are restructuring medical benefit plans.<sup>98</sup> As the population continues to age, retiree health benefits will continue to be a major expenditure in the future.<sup>99</sup>

As indicated, the impact of ERISA on retiree insurance plan reductions or terminations is uncertain because retiree insurance was not a major issue at the time the act was debated and enacted.<sup>100</sup> Congress passed ERISA in 1974 to prevent pension plan failures; health and welfare benefits were secondary concerns.<sup>101</sup>

The basic statutory scheme of ERISA distinguishes between pension and welfare benefit plans.<sup>102</sup> Title I contains the "labor law provisions"

96. See, e.g., *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669, 670 (6th Cir. 1985); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 611 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1202 (1986); *District 29, UMW v. Royal Coal Co.*, 768 F.2d 588, 589 (4th Cir. 1985); *UFCW Local 150A v. Dubuque Packing Co.*, 756 F.2d 66, 67 (8th Cir. 1985); *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1225 (9th Cir. 1985); *UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1478 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *Piech v. Midvale-Heppenstall Co.*, 594 F. Supp. 290, 292 (E.D. Pa. 1984), *aff'd mem.*, 770 F.2d 1074 (3d Cir. 1985); *Bomhold v. Pabst Brewing Co.*, 5 Empl. Ben. Cas. (BNA) 2315, 2317 (C.D. Ill. 1984); *UAW v. New Castle Foundry, Inc.*, 4 Empl. Ben. Cas. (BNA) 2455, 2456 (S.D. Ind. 1983); *United Steelworkers v. Midvale Heppenstahl Co.*, 94 Lab. Cas. ¶ 13,528 (W.D. Pa. 1981). See also *Who'll Pay?*, *supra* note 8, at 72; *Retirees Out in the Cold*, *supra* note 7, at 105-06.

97. POST-RETIREMENT MEDICAL BENEFITS SURVEY, *supra* note 5, at 1-2. As the population continues to age, this problem may grow worse.

98. "Cost containment" is a term used to describe efforts to reduce the cost of medical benefits. Cost containment measures do not always require that the retiree loses medical benefits. Some changes are simply designed to reduce unnecessary medical expenses. Changes might mean switching to a health maintenance organization or an approved list of providers. Such a plan would still provide the same level of benefits and employees would not necessarily have to pay more for medical care, although the changes may limit choice or require extra procedures. However, some cost containment measures such as those that require copayments or eliminate coverage do shift the cost to the participants and have provoked litigation by retirees. See *infra* Part II; see generally Sieverts, *Health Cost Containment Strategies*, in *EMPLOYEE BENEFITS HANDBOOK* §§ 36.00-36.20 (rev. ed. 1987).

99. POST-RETIREMENT MEDICAL BENEFITS SURVEY, *supra* note 5, at 1-2.

100. *Hansen v. White Farm Equip. Co.*, 5 Empl. Ben. Cas. (BNA) 2131, 2136-38 & n.15 (N.D. Ohio 1984), *rev'd on other grounds*, 788 F.2d 1186 (6th Cir. 1986) (citing *A-T-O, Inc. v. Pension Benefit Guar. Corp.*, 634 F.2d 1013, 1021 (6th Cir. 1980) (congressional desire to protect pension benefits balanced against cost imposition of other regulatory requirements). See also *supra* notes 12-14 and accompanying text.

101. See J. SHERMAN, *PENSION PLANNING AND DEFERRED COMPENSATION* § 1.01, at 1-4 (1985).

102. Although welfare and pension plans are both employee benefit plans under ERISA § 3(3), 29 U.S.C. § 1002(3) (1982), ERISA does distinguish between them. ERISA §§ 3(1), 3(2)(A), 29

on vesting, funding, reporting and disclosure, fiduciary responsibilities, and the administration and enforcement provisions.<sup>103</sup> Title II contains the amendments to the Internal Revenue Code outlining the minimum vesting and funding requirements needed for plans to qualify for tax-exempt treatment under the Internal Revenue Code.<sup>104</sup> Title III establishes the administrative and enforcement responsibilities of the Internal Revenue Service and the Department of Labor.<sup>105</sup> Title IV governs pension plan termination and insurance for certain types of pension plans.<sup>106</sup> Welfare benefit plans are not required to meet ERISA's stringent participation, vesting and funding standards.<sup>107</sup> They are, however, subject to ERISA's reporting and disclosure provisions and fiduciary standards.<sup>108</sup>

As indicated, ERISA is not the only federal statute affecting retiree insurance plans.<sup>109</sup> For collectively bargained plans, section 301 and section 302 of the LMRA coexist with ERISA.<sup>110</sup> Therefore, union retirees can continue to bring cases under sections 301 and 302<sup>111</sup> as well as section 502 of ERISA, the principal section providing participants and beneficiaries with a cause of action.<sup>112</sup> On the other hand, nonunion retirees

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U.S.C. §§ 1002(1), 1002(2)(A) (1982). Unlike pension plans, welfare benefit plans are specifically exempted from ERISA's participation, vesting and funding requirements. ERISA §§ 201, 301, 29 U.S.C. §§ 1051, 1081 (1982). *Hansen v. White Farm Equip. Co.*, 5 Empl. Ben. Cas. (BNA) 2131, 2137 (N.D. Ohio 1984), *rev'd on other grounds*, 788 F.2d 1186, 1191 (6th Cir. 1986). Furthermore, a Treasury Department regulation also specifies that the term "accrued benefits" applies only to pension plans and not to "ancillary benefits" such as medical and life insurance benefits. 26 C.F.R. § 1.41(a)-7(a)(ii) (1986); *see also* ERISA § 3(19) (term "nonforfeitable" only applies to pension plan). Accrued benefits cannot be reduced or eliminated by plan amendment. 29 U.S.C. § 1054(a) (1982).

103. Title I of ERISA, 29 U.S.C. §§ 1001-1145 (1982 & Supp. III 1985).

104. Title II of ERISA, Pub. L. No. 93-406, 88 Stat. 898-994, codified in scattered sections of 5, 26 & 31 U.S.C. (1982 & Supp. III 1985).

105. Title III of ERISA, 29 U.S.C. §§ 1201-1242 (1982).

106. Title IV of ERISA, 29 U.S.C. §§ 1301-1461 (1982 & Supp. III 1985).

107. *Hansen*, 5 Empl. Ben. Cas. at 2137, *rev'd on other grounds*, 788 F.2d 1186, 1191 (6th Cir. 1986). ERISA §§ 101-111, 401-414, Pub. L. No. 93-406, 88 Stat. 840-52, codified at 29 U.S.C. §§ 1021-1031, 1101-1114, and in scattered sections of 18 U.S.C. (1982). *See also* 29 U.S.C. §§ 1003(a), 1051(1), 1081(a)(1) (1982).

108. ERISA §§ 102-104, 404, 29 U.S.C. §§ 1022-1024, 1104 (1982). *See infra* notes 219-309 and accompanying text.

109. *See supra* notes 25-31.

110. 29 U.S.C. §§ 185-186 (1982).

111. *Id.*

112. ERISA § 502(a), 29 U.S.C. § 1132 (1982). While retirees and dependents of retirees can bring an action under § 502, courts are divided over whether unions and other parties not listed in the statute have standing to bring an action under that section. The courts which hold that the union lacks standing have found so because § 502 only mentions participants, beneficiaries, or fiduciaries and not unions. Unions may, however, join retirees as individual plaintiffs. *See Pressroom Unions-Printers League Income Sec. Fund v. Continental Assur. Co.*, 700 F.2d 889, 822 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983); *Tuvia Convalescent Center, Inc. v. National Union of Hosp. Employees*, 717 F.2d 726 (2d Cir. 1983); *Stone & Webster Eng'g Corp. v. Ilesley*, 690 F.2d 323, 326 (2d Cir. 1982), *aff'd sub nom. Arcudi v. Stone & Webster Eng'g Corp.*, 463 U.S. 1220 (1983); *Crown Cork & Seal Co. v. Teamsters Pension Fund*, 549 F. Supp. 307 (E.D. Pa. 1982), *aff'd*, 720 F.2d 661 (3d Cir. 1983); *Grand Union Co. v. Food Employers/UFCW Pension Fund*, 6 Empl. Ben. Cas.

have a cause of action only under ERISA because ERISA expressly preempts all state law which "relates to employee benefit plans."<sup>113</sup>

Because of the different statutory bases, two general lines of retiree insurance cases have emerged. Courts have generally decided challenges to reductions and terminations of collectively bargained plans under section 301.<sup>114</sup> Most section 301 cases have continued to follow the analysis in the pre-ERISA case law.<sup>115</sup> All decisions concerning nonunion plans have been made under ERISA.<sup>116</sup> The retiree insurance cases decided under ERISA are more complex and varied than the section 301 cases. Some cases apply the same analysis as the section 301 cases while others incorporate pre-ERISA state law into federal law.<sup>117</sup> This section will examine whether the analysis ought to be the same as that for retiree insurance cases brought under section 301 and whether incorporating pre-ERISA state law is compatible with the structure and purpose of ERISA.<sup>118</sup>

Apart from the issue of vesting, if plan participants and beneficiaries are not informed that their benefits can be reduced or terminated, or if those changes are made for inappropriate reasons, there may be additional claims under ERISA. ERISA imposes detailed disclosure and reporting requirements on plans for the benefit of participants and beneficiaries<sup>119</sup> and stringent fiduciary standards for those engaged in the management and control of benefit plans.<sup>120</sup> The last two parts of this section will examine the impact of these provisions on retiree insurance plans.

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(BNA) 2531, 2534-36 (D.D.C. 1985) (employer lacks standing); District 65, UAW v. Harper & Row, Publishers, Inc., 576 F. Supp. 1468, 1476 (S.D.N.Y. 1983); R.M. Bowler Contract Hauling Co. v. Central States Southeast and Southwest Areas Pension Fund, 547 F. Supp. 783 (S.D. Ill. 1982); Wong v. Bacon, 445 F. Supp. 1177 (N.D. Cal. 1977).

The opposing line of cases rejected a literal reading of § 502 and instead focused on whether the party was "within the zone of interests to be protected or regulated by the statute . . . in question." Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970) (cited in Walker v. Jaffe, 5 Empl. Ben. Cas. (BNA) 2736, 2739-41 (W.D. Tex. 1983)). In the collective bargaining setting, it is the union which bargains for the fringe benefits covered by ERISA. The union should, therefore, be able to sue to protect these benefits for its members under the Act. See Walker, 5 Empl. Ben. Cas. at 2739-41. See also Fentron Indus. Inc. v. National Shopmen Pension Fund, 674 F.2d 1300, 1305 (9th Cir. 1982); International Ass'n of Bridge Iron Workers, Local 111 v. Douglas, 646 F.2d 1211 (7th Cir. 1981); Air Line Pilots Ass'n v. Northwest Airlines, Inc., 627 F.2d 272, 277 (D.C. Cir. 1980); Trustees of Western Teamsters Pension Fund v. D & J Inv. Co., 5 Empl. Ben. Cas. (BNA) 1481, 1482 (W.D. Wash. 1984).

113. ERISA § 514, 29 U.S.C. § 1144 (1982).

114. See *infra* notes 121-53 and accompanying text.

115. See *supra* cases cited in note 23.

116. See *infra* notes 154-215 and accompanying text.

117. See *infra* notes 154-60 and accompanying text.

118. See *infra* notes 154-215 and accompanying text.

119. For a discussion of ERISA's reporting and disclosure requirements, see *infra* notes 216-45 and accompanying text.

120. For a discussion of ERISA's fiduciary duties, see *infra* notes 246-306.

### A. Vesting Under ERISA

#### 1. Collectively Bargained Plans

After passage of ERISA, federal courts continued to clarify and in some cases strengthen earlier doctrines designed to protect the expectations of retired employees.<sup>121</sup> The leading case, *UAW v. Yard-Man, Inc.*,<sup>122</sup> went further than pre-ERISA cases and characterized retirement benefits as "status benefits" which carry an inference "that they continue so long as the prerequisite status is maintained."<sup>123</sup> The UAW brought the section 301 action when the company terminated life and health insurance benefits for retirees after the collective bargaining agreement expired and two years after the plant closed.<sup>124</sup> The court held that as long as the employee remained retired, he or she would continue to receive the benefits; the collective bargaining agreement need not contain an explicit statement that benefits vest at retirement.<sup>125</sup> This inference of lifetime benefits may, of course, be rebutted by the employer if language in the agreement explicitly indicates that the benefits last no longer than the duration of the agreement.<sup>126</sup> Absent such a showing, the retiree will

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121. See *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669 (6th Cir. 1985); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1202 (1986); *District 29, UMW v. Royal Coal Co.*, 768 F.2d 588 (4th Cir. 1985); *UFCW Local 150A v. Dubuque Packing Co.*, 756 F.2d 66 (8th Cir. 1985); *District 17, UMW v. Allied Corp.*, 735 F.2d 121 (4th Cir. 1984), *rev'd*, 765 F.2d 412 (en banc), *cert. denied*, 105 S. Ct. 3527 (1985); *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325 (3d Cir. 1984); *UAW v. Cadillac Malleable Iron Co.*, 3 Empl. Ben. Cas. (BNA) 1369 (W.D. Mich. 1982), *aff'd*, 728 F.2d 807 (6th Cir. 1984); *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984); *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *Turner v. Local 302, Int'l Bhd. of Teamsters*, 604 F.2d 1219 (9th Cir. 1979); *UAW v. White Farm Equip. Co.*, 5 Empl. Ben. Cas. (BNA) 2449 (D. Minn. 1984); *Piech v. Midvale Heppenstall Co.*, 594 F. Supp. 290 (E.D. Pa. 1984), *aff'd mem.*, 770 F.2d 1074 (3d Cir. 1985); *Bomhold v. Pabst Brewing Co.*, 5 Empl. Ben. Cas. (BNA) 2315 (C.D. Ill. 1984); *UAW v. New Castle Foundry, Inc.*, 4 Empl. Ben. Cas. (BNA) 2455 (S.D. Ind. 1983); *UAW v. Roblin Indus.*, 561 F. Supp. 288 (W.D. Mich. 1983); *Metal Polishers Local 11 v. Kurz-Kasch, Inc.*, 538 F. Supp. 368 (S.D. Ohio 1982); *United Steelworkers v. Midvale Heppenstahl Co.*, 94 Lab. Cas. (CCH) ¶ 13,528 (W.D. Pa. 1981).

122. 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984).

123. *Id.* at 1482.

124. *Id.* at 1478.

125. *Id.*

126. *Id.* Cases that have held that retirees did not have vested insurance benefits start from a different premise than from the "status benefit" approach. These cases do not apply an inference that retiree benefits are intended to last beyond the duration of the collective bargaining agreement. Stressing the difference between pension and welfare benefits under ERISA, they require explicit language indicating the parties intended to create lifetime benefits. No such intention will be implied if that language is not present. *Turner v. Local 302, Int'l Bhd. of Teamsters*, 604 F.2d 1219 (9th Cir. 1979); *UAW v. Roblin Indus.*, 561 F. Supp. 288 (W.D. Mich. 1983); *UAW v. New Castle Foundry, Inc.*, 4 Empl. Ben. Cas. (BNA) 2455, 2456-57 (S.D. Ind. 1983); *Metal Polishers Local 11 v. Kurz-Kasch, Inc.*, 538 F. Supp. 368 (S.D. Ohio 1982). *Metal Polishers* and *Roblin* have little precedent value because they are district court decisions in the Sixth Circuit which were decided before *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984). In addition, *Turner* was distinguished on the facts by a later Ninth Circuit case, *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984). Furthermore, *Turner*, *Metal Polishers* and *Roblin* can be reconciled with

prevail.

*Yard-Man* presented two rationales for the status benefit approach. The first rationale is the same as that of pre-ERISA cases<sup>127</sup>—retirement benefits, including retiree insurance, are deferred compensation for past services.<sup>128</sup> Active employees give up wages in order to receive these benefits after retirement; it is unlikely that they would forgo wages for retiree benefits if there were no assurance they would receive them when they retired.<sup>129</sup>

The second rationale concerns the status of retired workers in the collective bargaining process. Unlike active employees, retired workers have little protection.<sup>130</sup> In *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*,<sup>131</sup> the Supreme Court held that retirees are not employees under the National Labor Relations Act nor are they members of the bargaining unit. Therefore, benefits for retired workers are permissive rather than mandatory subjects of collective bargaining. Neither the union nor the employer is required to bargain over benefits for retirees although they can and often choose to do so.<sup>132</sup> Given this reality, it is likely that retiree insurance benefits were intended to be lifetime benefits because active employees would not want to give up wages for benefits that could be bargained away in future negotiations after they retire.<sup>133</sup>

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the status benefit approach, because in those cases there was no language in the agreements or brochures nor any other extrinsic evidence that indicated retiree benefits were lifetime benefits. *Turner*, 604 F.2d at 1221-28; *Metal Polishers*, 538 F.2d at 546; *Roblin*, 561 F. Supp. at 370.

127. See *supra* notes 41-43 and accompanying text.

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

129. *Id.*

130. *Id.* at 1482, 1484-87. Retirees are an easier target for cost-cutting than active employees because cutting their benefits will not necessarily damage the morale of active employees, as retirees are not present in the workplace. National Senior Citizen Law Center, *Reducing Retirees' Health Benefits: The Courts Develop a Remedy*, 18 CLEARINGHOUSE REV. 1399 (1985).

131. 404 U.S. 157 (1971).

132. *Id.* The principal rationale for holding that retirees are not employees or members of the bargaining unit is that there is insufficient community of interest between retired and active employees because retirees are not present in the workplace. *Id.* at 171-75. The Supreme Court also rejected the National Labor Relations Board's argument that benefits for retirees "vitally affected" the employment terms and conditions of active employees. The relationship between bargaining for retirees and active employees was considered too "speculative" a basis to require mandatory bargaining. *Id.* at 176-82.

The status of retiree benefits is different when the employer has filed for bankruptcy. A recent case, *In re Century Brass Prods., Inc.*, 795 F.2d 265, 274-76 (2d Cir. 1986), holds that retiree benefits are a mandatory subject of bargaining under 11 U.S.C.A. § 1113 (West Supp. 1986) of the Bankruptcy Code because retiree benefits vitally affect active employees in the reorganization process. However, because of a conflict of interest between active and retired employees, the union may not be the appropriate representative for retirees in bankruptcy proceedings. In the event the bankruptcy court finds such a conflict of interest, then the bankruptcy judge must appoint a separate representative for retirees. *Id.* at 275-76. Therefore, within the bankruptcy proceeding, retirees may not have the benefit of union representation even though retiree insurance benefits are mandatory subjects of bargaining.

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

In the event that the union and employer bargain away vested benefits or if the employer unilaterally terminates the benefits, the only recourse for retirees is to bring an action under section 301.<sup>134</sup>

To apply the status benefit approach, courts look first at the collective bargaining agreement and then to other, extrinsic evidence. *Yard-Man* presented a detailed analysis of a collective bargaining agreement.

In *Yard-Man*, a number of provisions in the collective bargaining agreement were taken as indicating the parties intended to create lifetime medical and life insurance benefits for retirees.<sup>135</sup> The insurance clause stated that "the company will provide insurance benefits" for retired employees and their spouses. The clause was ambiguous because it was uncertain whether it was meant to stand alone or was to be read in conjunction with the general durational clause in the collective bargaining agreement.<sup>136</sup> However, termination language was found in provisions governing benefits for active employees and in other parts of the agreement, but not in the clause governing retiree insurance.<sup>137</sup> The court reasoned that the parties presumably would have included a termination clause for retiree insurance benefits if they intended these benefits to terminate in the same way.<sup>138</sup>

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134. *Pittsburgh Plate Glass*, 404 U.S. at 157. The Supreme Court indicated that the union and the employees cannot, however, bargain away vested retirement rights. *Id.* at 181 n.20. In *Pittsburgh Plate Glass*, the employer unilaterally changed the retiree medical benefit program after the passage of Medicare in 1965. The union filed an unfair labor practice charge. The Board held that the company violated §§ 8(a)(5), 8(d), 29 U.S.C. §§ 158(a)(5), 158(d) (1982), by refusing to bargain over the changes. The Supreme Court held that the employers did not violate § 8(a)(5) because insurance benefits for retirees were not mandatory subjects of bargaining. However, the Supreme Court held that unilateral changes in retiree benefits would violate § 301 if the benefits were vested. *Pittsburgh Plate Glass*, 404 U.S. at 160-63, 181 n.20.

The other important implication of *Pittsburgh Plate Glass* is that because retirees, unlike active employees, are not part of the bargaining unit, they need not exhaust the grievance procedures under the collective bargaining agreement. *Anderson v. Alpha Portland Indus.*, 752 F.2d 1293 (8th Cir. 1985). If the union chooses to bring an action on behalf of retirees under § 301, the union may have to arbitrate if the arbitration clause covers this kind of grievance. There are cases where the union chose to represent retirees and the employer had to arbitrate these claims. *See id.* at 1296; *United Steelworkers v. Cantron, Inc.*, 580 F.2d 77, 80-81 (3d Cir. 1978); *Textile Workers Local 129 v. Columbia Mills*, 471 F. Supp. 527, 530-31 (N.D.N.Y. 1978).

ERISA requires that pension and welfare plans have a claims procedure so that participants and beneficiaries can appeal the denial of benefit claims. *See* ERISA § 503, 29 U.S.C. § 1133 (1982). If such a procedure exists, normally the claimant would have to exhaust these procedures before bringing an action in court. Comment, *Private Enforcement of ERISA*, 47 U. CIN. L. REV. 272, 278-80 (1978). However, the claims procedures only decide what benefits participants and beneficiaries are entitled to receive under the terms of an existing benefit plan. These procedures cannot decide if the employer or trust plan can terminate or reduce the insurance plan. Therefore retirees challenging plan modifications and terminations do not have to exhaust the claims procedures under ERISA.

135. 716 F.2d 1476, 1481-82 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984).

136. *Id.* at 1480.

137. *Id.* at 1481. This language refers to termination of benefits for active employees who are laid off.

138. *Id.*

Further, although the collective bargaining agreement did limit the duration of benefits for the retiree's spouse and dependent children after the retiree's death to that of the collective bargaining agreement, no limiting language of this sort was included in the description of the retiree health and welfare benefits.<sup>139</sup> Also the agreement allowed employees to retire at fifty-five and maintain their insurance. However, the employee would be required to pay for the cost of the insurance until age sixty-five, when the company would thereafter pay the cost. If retiree insurance terminated at the expiration of the collective bargaining agreement, the provision requiring payment of benefits at age sixty-five would be meaningless.<sup>140</sup>

Finally, the court held that the general duration clause, found in all collective bargaining agreements, was insufficient to establish that retiree insurance benefits lasted only for the term of the agreement.<sup>141</sup> The inference of "status benefits" together with the other evidence outweighed the implication that all provisions of the agreement, including retiree insurance benefits, expired after the time specified in the general duration clause.<sup>142</sup>

When the language of the collective bargaining agreement does not yield a clear-cut resolution on the issue of lifetime benefits, courts must look to extrinsic evidence indicating how the parties treated these benefits. This evidence may include the payment of benefits after the expiration of the collective bargaining agreement, statements made by company officials to retirees about the duration of the benefits, and the characterization of the benefits in the summary plan description ("SPD") or other correspondence sent to employees and retirees. For example, in *UAW v. Cadillac Malleable Iron Co.*<sup>143</sup> and *Bower v. Bunker Hill Co.*,<sup>144</sup> the companies continued retiree insurance benefits during strikes.<sup>145</sup> In both cases, the courts reasoned that had the parties intended retiree insurance benefits to last only for the duration of the collective bargaining agreement, the company would not have continued to pay benefits during a strike. Similarly, personnel officers met with each employee who was about to retire. During these interviews, no distinction was made between pension and other retirement benefits. Employees were told that

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139. *Id.* The employer also continued retiree insurance benefits after the plant closed. The court interpreted this behavior as indicating that the employer did not believe that the benefits expired with the collective bargaining agreement.

140. *Id.*

141. *Id.* at 1482-83.

142. *Id.* at 1483.

143. 728 F.2d 807 (6th Cir. 1984), *affirming* 3 Empl. Ben. Cas. (BNA) 1369 (W.D. Mich. 1982).

144. 725 F.2d 1221 (9th Cir. 1984).

145. *Cadillac Malleable*, 728 F.2d at 808-09; *Bower*, 725 F.2d at 1225.



their benefits were for life.<sup>146</sup> In *Cadillac Malleable*, letters sent from the company to retirees announcing improvements in retiree insurance benefits also suggested that the insurance benefits were lifetime benefits.<sup>147</sup> In *Bower*, the employee booklet or summary plan description contained several provisions which gave retirees the impression that they had lifetime benefits.<sup>148</sup>

*Yard-Man*, *Cadillac Malleable*, and *Bower* stand for the proposition that when the language of the agreement is ambiguous and when the company's statements and actions indicate that it did not consider the benefits to be limited to the duration of the collective bargaining agreement, then courts will treat the benefits as lifetime benefits. This is a reasonable result; in the absence of clear language indicating that benefits last only for the duration of the collective bargaining agreement, retirees are likely to believe they have lifetime benefits and will plan accordingly.<sup>149</sup> At the same time, employers who do not intend to provide lifetime benefits may achieve that effect by including limiting language in the collective bargaining agreement.<sup>150</sup> As with the pre-ERISA cases, it is not clear what language would be sufficient; most cases that have analyzed the question have found provisions in the agreement either ambiguous<sup>151</sup> or explicit in establishing that retirees had lifetime benefits.<sup>152</sup> Consequently employers who fail to insist on explicit limiting language may be faced with extensive liability that they may or may not expect.<sup>153</sup>

## 2. Nonunion Plans

Considerable uncertainty exists over the proper approach to determining whether employers can terminate retiree insurance provided to nonunion retirees. Three general approaches have been applied at the district court level. The district court in *Hansen v. White Farm Equip-*

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146. *Cadillac Malleable*, 728 F.2d at 809. These exit interviews are described in the district court opinion. *Cadillac Malleable*, 3 Empl. Ben. Cas. at 1373. See also *Bower*, 725 F.2d at 1224-25.

147. See *Cadillac Malleable*, 3 Empl. Ben. Cas. at 1375, 728 F.2d at 809.

148. 725 F.2d at 1224. For a detailed discussion of ERISA's disclosure and reporting requirements, see *infra* notes 216-45 and accompanying text.

149. For a discussion of consequences of loss of insurance for retirees, see *supra* note 12.

150. *Yard-Man*, 716 F.2d at 1482; see also *Bower*, 725 F.2d at 1223.

151. *UFCW Local 150A v. Dubuque Packing Co.*, 756 F.2d 66, 69-70 (8th Cir. 1985); *Yard-Man*, 716 F.2d at 1480; *Piech v. Midvale-Heppenstall Co.*, 594 F. Supp. 290, 296 (E.D. Pa. 1984), *aff'd mem.*, 770 F.2d 1074 (3d Cir. 1985). But see *District 29, UMW v. Royal Coal Co.*, 768 F.2d 588, 592 (4th Cir. 1985) (employer's obligation to provide retiree medical benefits did not extend beyond duration of collective bargaining agreement).

152. *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669, 676 (6th Cir. 1985); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 616 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1202 (1986).

153. As a result, employers are now attempting to clarify and limit their obligations at least as to future requirements. See *Barnes & Mishkind*, *supra* note 4, at 585, 590-93, 611; *Fillion*, *supra* note 4, at § 6.03; *Retirees Out in the Cold*, *supra* note 7, at 105-06; *Making Retirees Share*, *supra* note 4, at 50.

*ment Co.*<sup>154</sup> took the most protective stance when it held that even a clear and unambiguous termination was per se unenforceable under ERISA. *Musto v. American General Corp.*<sup>155</sup> took a middle position by enforcing a termination clause only because the clause allowed termination in the event of severe financial distress. *Eardman v. Bethlehem Steel Corp.*<sup>156</sup> simply incorporated the status benefit approach of *Yard-Man* enforcing clear and unambiguous termination clauses. These cases provide authority for nonunion retired employees to bring actions challenging terminations and reductions of retiree insurance under theories which produce results similar to those brought under section 301. The nonunion cases have caused the most consternation among employers because they may not be able to reduce or terminate retiree insurance benefits even if they include unambiguous termination clauses.<sup>157</sup> The issue is whether ERISA should make it more difficult to reduce or terminate benefits than would be the case under section 301. The answer, in part, depends on whether a stricter approach is necessary to protect retirees.

It is unclear whether the analyses in the district court opinions in *Hansen* and *Musto* remain valid after the Sixth Circuit's opinion in *Hansen v. White Farm Equipment Co.*<sup>158</sup> In this decision, the appeals court reversed the district court and held that federal common law did not prohibit the termination of retiree insurance benefits where the termination clause is clear and unambiguous.<sup>159</sup> The Sixth Circuit remanded the case to determine if the language in the brochures permitted termination after the employees retired. The court disapproved of the per se approach used by the district court and instead adopted the status benefit approach.<sup>160</sup> The opinion also casts doubt on the financial distress approach employed by *Musto*. Because it is unclear whether other circuits will adopt the Sixth Circuit's reasoning, all three approaches are discussed below.

Despite their differences, all three cases recognize that retiree insurance can vest under ERISA.<sup>161</sup> While the ERISA cause of action is important for unionized retirees, for nonunion retirees it is essential. ERISA's broad preemption provision in section 514 prohibits any action

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154. 5 Empl. Ben. Cas. (BNA) 2130, 2142-43 (N.D. Ohio 1984), *rev'd*, 788 F.2d 1186, 1192-93 (6th Cir. 1986).

155. 615 F. Supp. 1483, 1500-01 (M.D. Tenn. 1985).

156. 607 F. Supp. 196, 214-15 (W.D.N.Y. 1984).

157. Barnes & Mishkind, *supra* note 4, at 592; Mamorsky & Zimmerman, *supra* note 4, at 295.

158. 788 F.2d 1186 (6th Cir. 1986).

159. *Id.* at 1192-93.

160. *Id.* at 1193-94.

161. Section 502 of ERISA, 29 U.S.C. § 1132 (1982), allows federal courts to incorporate select state law principles as a matter of federal common law. See *Hansen*, 5 Empl. Ben. Cas. at 2140-41, 788 F.2d at 1190, 1192 (reversing on other grounds); *Musto*, 615 F. Supp. at 1497-1500; *Eardman*, 607 F. Supp. at 214-15.

under state law,<sup>162</sup> nonunion retirees can bring an action only under ERISA. If the interpretation of ERISA were to foreclose that option, then nonunion retirees would have no means of redress.

Because ERISA precludes a state contract action, the major issue confronting the courts was whether Congress intended federal courts to create federal common law under ERISA. Congress clearly stated that employee benefit plan regulation was "exclusively a federal concern."<sup>163</sup> As indicated earlier, ERISA distinguishes between pension and welfare benefit plans. ERISA "exempt[s] employee welfare benefit plans from [the] stringent participation, vesting, and funding standards."<sup>164</sup> According to the legislative history, Congress was concerned that applying vesting and funding requirements to welfare benefits would increase costs and administrative complexity.<sup>165</sup> By refusing to *require* vesting and funding, did Congress intend to preclude the courts from fashioning federal common law allowing retirees to have vested rights to their benefits?<sup>166</sup>

Employers have argued that ERISA never intended the vesting provisions to apply to welfare benefit plans and that courts should not disturb the delicate balance between employee rights and employer obligations by holding that welfare benefits can vest under federal common law.<sup>167</sup> It is true that ERISA does not require employers to provide any employee benefits. When employers do provide benefits, the benefits are already subject to extensive regulation. Employers may therefore argue that courts should not impose additional requirements where Congress has not chosen to do so.<sup>168</sup>

Although ERISA distinguishes between pension and welfare benefit

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162. ERISA § 514(a), 29 U.S.C. § 1144(a) (1982).

163. There is no explicit provision in ERISA which prohibits vesting of retiree insurance. Legislative history indicates that Congress intended courts to fashion a federal common law of employee benefits. The Conference Report stated that actions under ERISA "are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947." H.R. REP. NO. 1280, 93d Cong., 2d Sess. 327, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5107 (Conference Report). Federal courts have long fashioned federal common law under § 301. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); Shaw v. Delta Airlines Inc., 463 U.S. 85 (1983); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981). *See also* Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208, 1215 (8th Cir.), *cert. denied*, 454 U.S. 1084 (1981). *See also infra* note 171.

164. *Hansen*, 5 Empl. Ben. Cas. at 2137, 788 F.2d at 1192 (reversing on other grounds); *see supra* note 18.

165. H.R. REP. NO. 807, 93d Cong., 2d Sess. 60, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4670, 4726 (Conference Report); *Hansen*, 5 Empl. Ben. Cas. at 2138, 2142-43, 788 F.2d at 1192 (reversing on other grounds).

166. *Hansen*, 5 Empl. Ben. Cas. at 2137-38, 788 F.2d at 1192 (reversing on other grounds).

167. *Barnes & Mishkind*, *supra* note 4, at 592-93; *but see Hansen*, 5 Empl. Ben. Cas. at 2137-38, 788 F.2d at 1191-92 (reversing on other grounds) (failure to require vesting and funding of welfare benefits not an indication Congress intended to prohibit vesting if parties choose to do so).

168. *See generally Barnes & Mishkind*, *supra* note 4, at 592.

plans, *Hansen* was correct in indicating that Congress' failure to require vesting and funding of welfare benefit plans does not indicate that Congress endorsed the "unfettered unilateral termination of such plans."<sup>169</sup> Nor did failure to require vesting for welfare benefits indicate that courts could not fashion federal common law.<sup>170</sup> In fact, fashioning federal common law to allow vesting of retiree welfare benefits is consistent with the basic purpose of ERISA to promote and protect employee benefits.<sup>171</sup> An employer can certainly create lifetime benefits and if these are created, employees can enforce their rights to these benefits. ERISA provides the minimum requirements; employers can provide more than is mandated under the statute. But employers cannot promise such benefits and then preclude enforcement.<sup>172</sup>

Given that ERISA permits the vesting of retiree insurance, what approach should courts use to decide whether the parties intended to create lifetime benefits? Should employers be able to incorporate effective termination clauses in the plan documents and in employee brochures? District courts in *Hansen* and *Musto* incorporated the unilateral contract theory from pre-ERISA state law<sup>173</sup> to argue that benefits vested at retirement even if plan documents indicate that the employer can reduce or terminate the plan. *Eardman*<sup>174</sup> and the Sixth Circuit opinion in *Hansen*<sup>175</sup> follow the status benefit approach of *Yard-Man*.<sup>176</sup> Despite the protective stance these cases take, a number of issues remain

169. 5 Empl. Ben. Cas. at 2138 (citation omitted), *rev'd on other grounds*, 788 F.2d at 1192 (quoting from the district court opinion); see also H.R. REP. NO. 807, 93d Cong., 2d Sess. 53-54, 58, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4670, 4719-20, 4726.

170. 5 Empl. Ben. Cas. at 2138-39, 788 F.2d at 1190-93 (reversing on other grounds).

171. See 120 CONG. REC. 29942 (1974) (remarks of Sen. Javits) (emphasis added):

In view of Federal preemption, State laws compelling disclosure from private welfare or pension plans, imposing fiduciary requirements on such plans, imposing criminal penalties on failure to contribute to plans—unless a criminal statute of general application—establishing state termination insurance programs, et cetera, will be superseded. *It is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.*

*See, e.g.,* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (LMRA § 301 intended to generate development of body of federal substantive common law); see also H.R. REP. NO. 1280, 93d Cong., 2d Sess. 327, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5107 (Conference Report) (actions under ERISA to be regarded as arising under the laws of the United States).

172. While *Hansen* does not discuss this, another argument which supports the ability of courts to create federal common law is the general grant of jurisdiction in § 502(a)(1)(B) of ERISA which allows participants or beneficiaries to recover benefits or clarify their rights to future benefits. 29 U.S.C. § 1132(a)(1)(B) (1982). If the employer provides lifetime benefits, then this section permits participants and beneficiaries to enforce these benefits even if ERISA does not require lifetime benefits. See *Murphy v. Heppenstall Co.*, 635 F.2d 233, 238-39 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982).

173. *Hansen*, 5 Empl. Ben. Cas. at 2141-43, *rev'd*, 788 F.2d at 1192 (district court's reliance on this pre-ERISA state case law "misplaced"); *Musto*, 615 F. Supp. at 1497.

174. 607 F. Supp. at 214-15.

175. 788 F.2d at 1193.

176. *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984).

open. Should union and nonunion retirees be treated differently under ERISA? What analysis applies when union retirees sue under ERISA as well as under section 301? Should an explicit termination clause be valid under section 301 but not under section 502 of ERISA? An examination of the case law suggests some answers.

In *Hansen*, retirees brought a class action seeking retroactive reinstatement of health and welfare benefits terminated by White Farm.<sup>177</sup> White Farm terminated the benefits shortly after the company was sold by its parent company, White Motor. White Motor had filed for bankruptcy under chapter 11. The bankruptcy court granted summary judgment against the retirees, holding that the language in the insurance booklets established the employer's right to terminate the benefits and holding that ERISA did not prohibit the exercise of that clause against retirees.<sup>178</sup> The district court found that termination of the benefits violated federal common law under ERISA.<sup>179</sup>

Unlike the cases decided under section 301, the employer did include termination language in employee brochures.<sup>180</sup> The key clause stated that "the Company does reserve the right to change the Plans, and, if necessary, discontinue them."<sup>181</sup> In refusing to enforce the termination language, the district court relied on pre-ERISA state contract law.<sup>182</sup> Under the unilateral contract doctrine described earlier, the promise of retiree welfare benefits by the employer constitutes an offer accepted by the employee once he or she has completed performance by working until retirement.<sup>183</sup> After retirement, an enforceable contract exists. Thus, the benefits cannot be terminated even if the employer expressly reserved the right to end them.<sup>184</sup>

The district court appeared to retreat from this stark holding, finding that the termination language in the 1970 and 1978 booklets was ambiguous.<sup>185</sup> The Sixth Circuit, however, understood the district court as holding that a termination clause of any description was not enforcea-

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177. *Hansen*, 5 Empl. Ben. Cas. at 2133.

178. *Id.* at 2133-35.

179. *Id.* at 2143, 2145.

180. *Id.* at 2143-45. See *supra* notes 121-53 and accompanying text.

181. *Hansen*, 5 Empl. Ben. Cas. at 2133.

182. *Id.* at 2141-43. Apart from the language in the 1978 Booklet, the 1970 Booklet also did not contain an unambiguous termination clause. The Booklets were the only insurance documents available. There were no plan documents presented in evidence in the bankruptcy court. *Id.* at 2144, 788 F.2d at 1188.

183. See *supra* notes 62-68 and accompanying text.

184. *Hansen*, 5 Empl. Ben. Cas. at 2141-42 (citing *Cantor v. Berkshire Life Ins. Co.*, 171 Ohio St. 405, 171 N.E.2d 518 (1960)); see also *Hoefel v. Atlas Tack Corp.*, 581 F.2d 1, 4 (1st Cir. 1978), cert. denied, 440 U.S. 913 (1979); *In re Erie Lackawanna Ry.*, 548 F.2d 621 (6th Cir. 1977); *Sheehy v. Seilon, Inc.*, 10 Ohio St. 2d 242, 227 N.E.2d 229 (1967); *Cantor v. Berkshire Life Ins. Co.*, 171 Ohio St. 405, 171 N.E.2d 518 (1960).

185. *Hansen*, 5 Empl. Ben. Cas. at 2145.

ble after the employee retired. After rejecting this analysis, the Sixth Circuit, instead, incorporated the status benefit approach of *Yard-Man* discussed earlier.<sup>186</sup>

In *Musto*, the district court paralleled much of the *Hansen* district court treatment of pre-ERISA state contract law but did not find the termination/modification clause "unenforceable and void as a matter of public policy."<sup>187</sup> Retirees brought a class action challenging reductions in the medical insurance plan by National Life and Accident Insurance Company's successor, American General Corporation. American General had reduced the lifetime maximum and required payment of large deductibles and premiums.<sup>188</sup> The employer had included termination/modification clauses in the master plan documents, in certificates of insurance issued to each retiree and in the summary booklets provided retirees every few years.<sup>189</sup> The key language in the booklets allowed the employer to reduce or terminate benefits if "it becomes necessary."<sup>190</sup> The court determined this barred American General's reduction of benefits unless the company showed that "some unforeseen contingency . . . threatens the financial base of the entire corporation."<sup>191</sup> The company was unable to make this showing. It was not sufficient that the cost of medical benefits outweighed any premiums paid by retirees.<sup>192</sup> The promise of medical insurance was not a gratuity; employees were told that they would have these benefits if they remained with the employer until retirement. The employer established retirement benefits in order to attract and maintain productive employees. Therefore, having fully performed at the time of retirement, the employee was entitled to receive the benefits he or she had earned.<sup>193</sup>

*Musto* indicates that a termination/modification clause could be enforceable under ERISA but only if the clause is explicit and does not give the employer the right to change the plan for any reason or at any time. The basic purpose of ERISA was to "safeguard employees' retirement income from unforeseeable, arbitrary and capricious reductions or modifications by former employers and others."<sup>194</sup> Allowing uninhibited en-

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186. 788 F.2d at 1190-94.

187. 615 F. Supp. 1483, 1500 (M.D. Tenn. 1985).

188. *Id.* at 1486-91.

189. *Id.* at 1488.

190. *Id.*

191. *Id.* at 1500.

192. *Id.*

193. *Id.* at 1487-88, 1490.

194. *Id.* at 1494; H.R. REP. NO. 533, 93d Cong., 1st Sess. 5-6, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4639, 4643-45.

In *Musto*, the court also held that the employer did not comply with ERISA's disclosure requirements. 615 F. Supp. at 1500. For a discussion of ERISA's disclosure requirements, see *infra* notes 216-45 and accompanying text.

forcement of any termination/modification clause would not comport with this purpose.

*Eardman* takes the more conservative, status benefit approach of the section 301 cases.<sup>195</sup> Bethlehem Steel informed retired employees that it was reducing medical benefits in the wake of a plant closure by requiring premiums, deductibles, precertification for certain types of inpatient care, and lifetime limitations or "caps" on the amount paid to employees and their dependents.<sup>196</sup> After closely scrutinizing plan documents and the summary plan description, extrinsic testimony and other documents, the court concluded that Bethlehem had not "retained the right to reduce or to terminate the medical or life insurance benefits programs. . . ."<sup>197</sup> The court was especially persuaded by statements made by Bethlehem's agents to employees at exit interviews, plant shutdown lectures and in brochures given to employees over the years.<sup>198</sup> *Eardman* does not go as far as *Hansen* in stating that a clear and explicit reduction or termination clause would not be enforced. *Eardman* simply holds that the language was ambiguous especially when other company actions created the clear impression that retired employees would have lifetime benefits.<sup>199</sup> Unlike *Musto*, *Eardman* does not say what kind of termination or reduction clause would be enforceable. Like *Yard-Man*, *Eardman* indicates that a termination clause might be valid if it is explicit and if employees are not given any contrary indications in booklets or by other statements made by the employer.<sup>200</sup>

The major difficulty with the district court analysis in *Hansen* is that employers can not be certain whether a reduction or termination clause is valid no matter how carefully it is drawn or how clearly it is communicated to nonunion employees.<sup>201</sup> Because ERISA does not require employers to provide any benefits to employees, the purposes of the Act are not promoted by prohibiting any reduction or termination.<sup>202</sup> In addition, it might not be wise to preclude enforcement of any such clause because employers might be reluctant to offer retiree welfare plans if they cannot reduce or terminate them under any circumstances.

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195. 607 F. Supp. 196 (W.D.N.Y. 1984).

196. *Id.* at 198.

197. *Id.* at 209.

198. *Id.* at 199-207. Although Bethlehem did not actually terminate or reduce life insurance benefits, the court included references to life insurance as evidence of how Bethlehem regarded medical benefits. *Id.* at 211.

199. *Id.* at 214-15.

200. *Id.*; see also *Yard-Man*, 716 F.2d at 1482.

201. There is no issue as to whether the employer can terminate or reduce retiree insurance for active employees. Even the cases most favorable to retirees indicate that vesting only occurs when the employee has retired. This means that active employees with many years of service and those close to retirement can lose their benefits. Vesting schedules inevitably involve some arbitrariness. There are always equitable problems with people who have almost enough service to qualify.

202. *Hansen*, 788 F.2d at 1192-94.

However, the analysis in *Musto* indicates that it is possible to protect legitimate expectations of retired employees while permitting some flexibility for employers. A termination clause would be enforceable if the clause restricted terminations or reductions to situations where the financial stability of the company was at stake.<sup>203</sup> This approach could be called the "financial distress" doctrine. An employer would not be able to terminate a plan or reduce benefits for any reason or at any time; it would have to show that continued payments threatened the financial stability of the company.

How serious and imminent must this threat be? The court in *Musto* did not have to address this question because the employer's earnings indicated that the company was in no difficulty.<sup>204</sup> *Musto* suggests, though, that the employer need not be insolvent. It is unclear what point short of insolvency would be sufficient, however.<sup>205</sup> Whatever standard of financial distress is used, though, the employer should have the burden of demonstrating that it is entitled to avoid its promise to provide retiree insurance.

The financial distress approach could be more difficult for an employer to satisfy than the status benefit approach of *Yard-Man* because *Yard-Man* would enforce an explicit clause if it is unambiguous and if the employer treats the benefits as conditional. While the financial distress approach in *Musto* may not survive the Sixth Circuit's opinion in *Hansen*, this approach is more in keeping with the purposes of ERISA.<sup>206</sup> Because the fundamental purpose of ERISA is to safeguard retirement benefits, retiree insurance benefits surely deserve the highest degree of

203. *Musto*, 615 F. Supp. at 1500.

204. *Id.*

205. The most appropriate definition of insolvency is contained in the Bankruptcy Code § 101(29), 11 U.S.C. § 101(29) (Supp. III 1985):

(29) "insolvent" means—

(A) with reference to an entity other than a partnership, financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of—

(i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and

(ii) property that may be exempted from property of the estate under section 522 of this title; and

(B) with reference to a partnership, financial condition such that the sum of such partnership's debts is greater than the aggregate of, at a fair valuation—

(i) all of such partnership's property, exclusive of property of the kind specified in subparagraph (A)(i) of this paragraph; and

(ii) the sum of the excess of the value of each general partner's nonpartnership property, exclusive of property of the kind specified in subparagraph (A) of this paragraph, over such partner's nonpartnership debts;

See 2 COLLIER ON BANKRUPTCY ¶ 101.26 (15th ed. 1985).

206. See *Hansen*, 788 F.2d at 1191-93. Although the analysis of *Musto* probably does not survive, the result in that case would likely be the same. The clause only allowed termination in the event of financial hardship, and the status benefit approach would likely restrict termination to that situation.



protection. While ERISA permits pension plans to be terminated, the Act also requires pension benefits to be funded and "accrued benefits" protected.<sup>207</sup> Because retiree insurance benefits are not funded and retirees do not accrue benefits in the same way as pensions, careful scrutiny of insurance plan terminations or reductions becomes vital.

If ERISA provides a stricter standard than the section 301 cases, courts must decide how to analyze retiree insurance benefits for union retirees who can bring an action under both statutes. First of all, should union and nonunion retirees be treated differently under ERISA? Nothing in ERISA distinguishes between union and nonunion plans. ERISA's provisions apply to both.

There are few policy reasons to make such a distinction. One distinction between union and nonunion employees is that there is rarely any bargaining between the employer and nonunion or salaried employees. Collective bargaining agreements are, at least in theory, a product of arm's-length bargaining between the employer and the union.<sup>208</sup> For nonunion employees, employers can insert strong modification and termination clauses without any consultation with employees. Thus, nonunion employees have little or no bargaining power. As indicated earlier, courts may be reluctant to enforce modification and termination clauses in nonunion plans because these benefit plans have characteristics of adhesion contracts.<sup>209</sup>

The difficulty with this argument is that it overlooks the fact that both union and nonunion retirees have little control over the actions of their employer after retirement. As indicated, union retirees have very little ability to affect the collective bargaining process since they are not members of the bargaining unit or employees within the National Labor Relations Act. The employer does not have to negotiate over benefits for retirees.<sup>210</sup> Similarly, the employer often provides retirement benefits for salaried employees in order to attract and retain reliable, productive employees. Once an employee retires, the employer has little economic reason to maintain benefits for retirees.<sup>211</sup> In any case, the protective analysis of the termination clause by the court in *Musto* should provide more than enough safety for nonunion retirees even if they had little or no bargaining power during their work life.

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207. See *supra* note 102.

208. NLRA § 1, 29 U.S.C. § 151 (1982) (collective bargaining promotes commerce "by restoring equality of bargaining power between employers and employees"); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 282-85 (1978); Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1407-09 (1958); J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 111-14 (1983); see also *Rehmar v. Smith*, 555 F.2d 1362, 1368-69 (9th Cir. 1977).

209. See *supra* notes 62-68 and accompanying text.

210. See *supra* notes 130-34.

211. See *supra* note 38.

The analysis in *Musto* would have to be altered slightly if applied to collectively bargained plans because collective bargaining agreements are bilateral not unilateral contracts. However, the financial distress approach in *Musto* is not dependent on the unilateral contract theory. Termination clauses in collective bargaining agreements can be subject to the same scrutiny. The purposes of ERISA would not be served if retiree insurance plans could be terminated at the discretion of employers or at the expiration of collective bargaining agreements.

Adopting the *Musto* approach would also mean that union retirees might prevail under ERISA even though they could lose under section 301. If the collective bargaining agreement clearly indicates that retiree insurance benefits last for the duration of the agreement only and the employer communicates this limitation to its employees, then the status benefit approach would mean that retirees do not have lifetime benefits.<sup>212</sup> On the other hand, the financial distress approach of *Musto* would not permit termination of the benefits unless continuation of the benefits threatened the stability of the company.

The Sixth Circuit's opinion in *Hansen* avoids this result by applying the same analysis under section 301 as under ERISA.<sup>213</sup> It would not be anomalous, however, for ERISA to impose a more stringent standard than section 301. As indicated, ERISA imposes a number of requirements on employee benefit plans; there are no requirements under section 301.<sup>214</sup> Section 301 gives retirees the right to sue only if the collective bargaining agreement gives them lifetime benefits. Section 301 does not prescribe the content of the agreement.

ERISA, on the other hand, clearly does. If ERISA requires retiree insurance benefits to be treated as lifetime benefits, then the union and the employer ultimately will have to change the agreement to take this into account. These changes are no different, in principle, from changes required following the passage of ERISA. All collectively bargained plans had to be modified to comply with the requirements under the Act.<sup>215</sup> ERISA can and should require protection for all retirees.

### B. Reporting and Disclosure Requirements

Prior to the passage of ERISA, plan participants and beneficiaries were often unaware of the terms and conditions of their benefit plans.<sup>216</sup> Disclosure to participants was commonly nonexistent or misleading. Some plan booklets highlighted the positive provisions without mention-

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212. *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984).

213. 788 F.2d at 1193.

214. See *supra* notes 100-08, and accompanying text.

215. See generally Fillion & Trebilcock, *The Duty to Bargain Under ERISA*, 17 WM. & MARY L. REV. 251 (1975).

216. See *infra* note 217 and accompanying text.

ing or drawing attention to the negative features of the plans, specifically the conditions under which employees might lose some or all of their benefits. In other instances, these conditions were not written in language that an average person could understand. Employees often expected benefits at retirement only to find out that they failed to fulfill requirements of which they were unaware. ERISA's legislative history indicates great concern about the lack of complete disclosure on the part of employers about the details of the benefit plan.

It is grossly unfair to hold an employee accountable for acts which disqualify him from benefits, if he had no knowledge of these acts, or if these conditions were stated in a misleading or incomprehensible manner in plan booklets. Subcommittee findings were abundant in establishing that an average plan participant, even where he has been furnished an explanation of his plan's provisions, often cannot comprehend them because of the technicalities and complexities of the language used.<sup>217</sup>

To increase knowledge about benefit plans, ERISA requires plan administrators to disclose to participants and beneficiaries the terms of each benefit plan in a summary plan description. Section 102 of ERISA requires the summary plan description to be "written in a manner calculated to be understood by the average plan participant, . . . sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan."<sup>218</sup>

The summary plan description ("SPD") must explain the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits . . ." <sup>219</sup> Regulations issued by the Department of Labor require SPDs to include information about termination. If it does not contain this information, then the SPD is not in compliance with ERISA.<sup>220</sup>

In regard to retiree insurance plans, the summary plan description

217. H.R. REP. NO. 533, 93d Cong., 1st Sess. 8, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4639, 4646.

218. ERISA § 102(a)(1), 29 U.S.C. § 1022(a)(1) (1982).

219. ERISA § 102(b), 29 U.S.C. § 1022(b) (1982).

220. Regulations issued by the Department of Labor require that the SPD contain:

(1) . . . a statement clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture or suspension of any benefits [sic] that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits . . .

29 C.F.R. § 2520.102-3(1)(f) (1985).

Department of Labor Technical Release No. 84-1 (issued May 14, 1984) interprets ERISA § 102 to mean that plan termination is a circumstance which may result in a denial or loss of benefits. Therefore, the SPD "must include information concerning the provisions of the plan which relate to the termination of the plan." 11 PENS. REP. (BNA) 653 (1984). An SPD which does not include this information would not be "in compliance" with summary plan description requirements of ERISA. *Id.*

See ERISA §§ 103-105, 29 U.S.C. §§ 1023-1025 (1982) for other provisions governing disclosure to participants and beneficiaries under ERISA.

must clearly state when and if retiree welfare benefits can be modified or terminated.<sup>221</sup> The courts have interpreted failure to include such a provision in the SPD in two general ways. First, failure to include that provision is often taken to indicate that the parties never intended retiree insurance benefits to be terminable.<sup>222</sup> Second, even if other plan documents reserved the right to modify or terminate retiree insurance plans, the employer may be estopped from imposing this condition.<sup>223</sup> In either case, failure to include a clear termination clause could preclude the plan from denying benefits.<sup>224</sup>

As indicated above, in several cases courts carefully examined the language in the SPDs given to participants and beneficiaries.<sup>225</sup> The attention focused on the SPD is consistent with one of the purposes of enacting ERISA—to protect retirement benefits for employees. If the employer does not include something as crucial as the possibility that the benefits could be reduced or terminated, then that omission is a powerful indication that retiree insurance benefits were intended as lifetime benefits. While this omission is not necessarily viewed as dispositive, it is given significant weight.<sup>226</sup>

For example, in *Bower v. Bunker Hill Co.*,<sup>227</sup> the summary plan description contained only one eligibility requirement: the employee must be receiving pension benefits from the employer. No mention was made of any circumstances under which retirees could lose their benefits.

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221. See *Musto*, 615 F. Supp. at 1500.

222. In the retiree insurance cases where language in the SPD was at issue, SPDs contained ambiguous termination clauses. See, e.g., *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1224 (9th Cir. 1984); *Musto v. American Gen. Corp.*, 615 F. Supp. 1483 (M.D. Tenn. 1985); *Mioni v. Bessemer Cement Co.*, No. 82-2378, at 10-15 (W.D. Pa. Oct. 10, 1986); *Hansen v. White Farm Equip. Co.*, 5 Empl. Ben. Cas. (BNA) 2130, 2144-45 (N.D. Ohio 1984), *rev'd on other grounds*, 788 F.2d 1186, 1193 (6th Cir. 1986); *Eardman v. Bethlehem Steel Corp.*, 607 F. Supp. 196 (W.D.N.Y. 1984).

223. For a discussion of equitable estoppel see *infra* notes 234-45 and accompanying text.

224. See *infra* notes 121-53 and accompanying text. As indicated earlier, a court may refuse to enforce even an explicit, unambiguous clause under ERISA. See *supra* notes 154-215 and accompanying text.

Language in the SPD seems to be more important in nonunion retiree cases because the SPD may be the only plan document available. See, e.g., *Eardman v. Bethlehem Steel Corp.*, 607 F. Supp. 196, 207-09 (W.D.N.Y. 1984) (employee booklets or SPDs were the plan documents); *Hansen v. White Farm Equip. Co.*, 5 Empl. Ben. Cas. (BNA) 2130, 2134, 2144-45 (N.D. Ohio 1984), *rev'd on other grounds*, 788 F.2d 1186, 1188 (6th Cir. 1986) (only plan documents found were the SPDs). In the union retiree cases, courts normally examine the SPD when the language in the collective bargaining agreement is ambiguous. See, e.g., *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984). See *infra* discussion in notes 227-33 and accompanying text.

225. See *UFCW Local 150A v. Dubuque Packing Co.*, 756 F.2d 66, 69 (8th Cir. 1985); *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 331 (3d Cir. 1984); *Musto v. American Gen. Corp.*, 615 F. Supp. 1483 (M.D. Tenn. 1985); *Hansen v. White Farm Equip. Co.*, 5 Empl. Ben. Cas. (BNA) 2130, 2144-45 (N.D. Ohio 1984), *rev'd*, 788 F.2d 1186, 1188-89 (6th Cir. 1986). See *supra* cases cited in note 222. See also *supra* notes 142-48, 154-200 and accompanying text.

226. See *supra* notes 143-48 and accompanying text.

227. 725 F.2d at 1224.

However, the SPD did contain a disclaimer clause, in small print, on the last page which stated that the booklet was "an illustration of benefits—not a contract."<sup>228</sup> Employees were advised to see the copy of the contract in the personnel office.<sup>229</sup> The district court discounted the statements indicating that retirees had lifetime benefits because the disclaimer clause would put any reasonable person on notice that the booklet did not create contractual rights.<sup>230</sup>

The Ninth Circuit found this disclaimer inadequate because it was printed in smaller type than other clauses and "set off from the main body of the text."<sup>231</sup> The disclaimer should not be effective where the language in the collective bargaining agreement or other plan documents did not indicate that benefits lasted only for the duration of the collective bargaining agreement, where the employer told employees that they had lifetime benefits, and where the employer continued to pay benefits during a strike.<sup>232</sup> In reversing a summary judgment for the employer, the court did consider the language in the SPD as one indication of whether the parties intended to create lifetime benefits.<sup>233</sup>

In another line of cases, courts have used an equitable estoppel theory to prevent the plan from relying on exclusions or other conditions which were omitted from the summary plan description.<sup>234</sup> For exam-

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228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* at 1224-25. ERISA regulations require that "limitations, reductions, or restrictions of plan benefits shall be described or summarized in a manner not less prominent than the style, captions, printing type, and prominence used to describe or summarize plan benefits." *Id.* at 1224 (citing 29 C.F.R. § 2520.102-2(b) (1985)). The disclaimer in *Bower* did not conform to this regulation. *Id.* It was likely that an employee could miss it entirely. Also, there is a major issue as to whether a disclaimer that potentially results in reduction or termination should even be effective. There might be a role for such a clause because it may be very difficult for plan sponsors and administrators to include every important feature of the benefit plan in the booklet. However, if a disclaimer is to be effective, it must be prominently displayed and it must be in a language an ordinary person can understand.

233. *Id.* at 1225. Because the issue on appeal was whether the summary judgment against plaintiffs was appropriate, the court did not decide whether the insurance benefits were vested.

234. *Zittrouer v. Uarco Inc. Group Benefit Plan*, 582 F. Supp. 1471 (N.D. Ga. 1984); *Hillis v. Waukesha Title Co.*, 576 F. Supp. 1103 (E.D. Wis. 1983); *Terones v. Pacific States Steel Corp.*, 526 F. Supp. 1350 (N.D. Cal. 1981); *Winston v. Hotel and Restaurant Employees Welfare Fund*, 110 Ill. App. 3d 163, 441 N.E.2d 1217 (1982).

One line of cases decided primarily under § 302 of the LMRA, 29 U.S.C. § 186 (1982), refused to apply the estoppel doctrine to pension plans where plan requirements described in employee brochures differed from requirements in other plan documents. *See, e.g., Haeberle v. Board of Trustees of Buffalo Carpenters*, 624 F.2d 1132, 1139-40 (2d Cir. 1980); *Reiherzer v. Shannon*, 581 F.2d 1266, 1267 n.1 (7th Cir. 1978); *Phillips v. Kennedy*, 542 F.2d 52, 55 n.8 (8th Cir. 1976); *Thurber v. Western Conference of Teamsters Pension Plan*, 542 F.2d 1106, 1108-09 (9th Cir. 1976). Courts were concerned that requiring plans to pay pensions to those who are not eligible to receive them might jeopardize the fiscal soundness of pension funds. *Phillips*, 542 F.2d at 55 n.8. Because retiree insurance plans are generally not funded, this rationale does not apply to retiree insurance cases. Given the strong emphasis in ERISA on disclosure to participants and beneficiaries, the equitable

ple, in *Zittrouer v. Uarco Inc. Group Benefit Plan*,<sup>235</sup> the spouse of a former employee sued the plan after Uarco denied her claim for extended care benefits. The plan provided certain medical benefits to the spouses of deceased employees but provided that extended-care benefits were payable only to covered individuals who were confined to an extended care facility prior to their seventieth birthday.<sup>236</sup> The plaintiff was seventy-nine when she entered the nursing home. Although the full plan document contained this restriction, it was not included in the summary plan description.<sup>237</sup> The SPD did, however, contain a disclaimer clause which stated that the booklet "describes the highlights of the plan."<sup>238</sup> The district court found that the disclaimer was ineffective because it contravened statutory disclosure requirements. Because Uarco did not include the restriction in the booklet, it was "estopped" from enforcing that restriction.<sup>239</sup>

Use of the estoppel doctrine furthers ERISA's purpose of protecting the expectations of participants and beneficiaries. It is not difficult for employers to include such crucial information in the SPD. A participant and a beneficiary would assume that the SPD would contain this sort of exclusion or restriction.<sup>240</sup> Under an estoppel theory, a court could refuse to enforce a restriction or exclusion allowed by other plan documents if it is not included in the SPD.<sup>241</sup>

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estoppel doctrine ought to be available in the appropriate case. It is not difficult to comply with ERISA's disclosure requirements, and participants and beneficiaries ought to be able to rely on the SPD and other information furnished by the employer or the trust plan.

235. 582 F. Supp. 1471 (N.D. Ga. 1984).

236. *Id.* at 1474. An extended care facility is a nursing home.

237. *Id.*

238. *Id.* at 1475.

239. *Id.* The court denied defendant's motion for summary judgment. The opinion does not decide whether the estoppel issue ought to prevail under the facts of the case. *Id.*

240. *Id.*

241. In a few retiree insurance cases, retirees argued that the employer should be "estopped" from terminating or reducing benefits. *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 617 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1202 (1986); *District 17, UMW v. Allied Corp.*, 735 F.2d 121, 129-30 (4th Cir. 1984), *rev'd*, 765 F.2d 412 (en banc), *cert. denied*, 105 S. Ct. 3527 (1985); *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 331 (3d Cir. 1984). Of these, only *Struble* involved provisions of an SPD, but the Third Circuit rejected the estoppel theory because the provisions of the SPD supported the employers' argument that retiree medical benefits lasted only for the duration of the collective bargaining agreement. Therefore, retirees could not reasonably have believed that the employers promised lifetime benefits. *Id.* at 331.

In the other cases, retirees argued that the employer should be estopped from terminating benefits because of statements or other actions which indicated that retirees had lifetime benefits. In these cases, the court either refused to apply the estoppel doctrine or did not address the issue. Although the employer told retirees that they had lifetime benefits in *Powell Pressed Steel*, the court did not address the estoppel issue because it found that the collective bargaining agreement provided lifetime benefits. 770 F.2d at 617. In *Allied Corp.*, retirees argued that statements made by management employees and payments made 16 months beyond the expiration of the collective bargaining agreement should prevent the employer from terminating the health plan. 735 F.2d at 129-30. The court found that the employer had not made statements which indicated that it was obligated to provide

While the estoppel theory could sometimes create extensive liability for an employer if it leads to providing retirees with lifetime benefits not originally contemplated, this result is consistent with the policies behind the disclosure requirements and the Department of Labor's interpretation of them.<sup>242</sup> Employees should be able to rely on the information in the SPD, certainly with respect to matters as crucial as reduction or termination of benefits.<sup>243</sup> If the employer mistakenly omits the clause, the employee should not be the party who bears the cost of that mistake.

The analysis of the SPD as an indication of the intent of the parties and the application of the estoppel doctrine are consistent with the law's general tendency to disfavor forfeitures unless the conditions that trigger them are "clear and express."<sup>244</sup> As indicated in the discussion of pre-ERISA case law, state and federal courts do not allow retirees to lose retirement benefits unless plan documents contain explicit and unambiguous language specifying that the benefits can be reduced or terminated.<sup>245</sup> If retiree insurance benefits are not lifetime benefits, then active and retired employees must be given clear notice of the contingent nature of their benefits.

### C. ERISA's Fiduciary Standards and Retiree Benefit Termination

This section will examine whether and under what circumstances a decision to terminate or reduce retiree insurance benefits violates ERISA's strict fiduciary standards.<sup>246</sup> If a plan reduction or termination does violate the fiduciary standards, there can be additional liability for those categorized as fiduciaries under ERISA. To explore the question of whether plan reduction or termination violates ERISA's fiduciary standards, this section will first examine the definition of "fiduciary" and the stringent standards incorporated in the Act. Next, it will discuss the organization of welfare benefit plans and the types of fiduciary problems

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lifetime benefits nor did continuation of benefits provide any basis for an estoppel theory. *Id.* The court did find that the United Mine Workers 1974 Benefit Plan and Trust was required by the terms of the collective bargaining agreement to provide these retirees with lifetime health benefits. *Id.* at 134. On appeal, the Fourth Circuit reversed this decision, finding that the employer, not the Mine Workers Trust, was obligated to provide lifetime benefits for retirees and that the employer had breached the collective bargaining agreement by failing to require its successor to provide these benefits as required. 765 F.2d 412 (1985) (en banc) (not addressing the estoppel issue).

242. See *supra* notes 217-20 and accompanying text.

243. Inadequate or incomplete disclosure to participants and beneficiaries can also violate ERISA's fiduciary standards. See, e.g., *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984), *cert. denied*, 106 S. Ct. 183 (1985) (employer's concealment of severance allowance policy violated both ERISA's reporting and disclosure requirements and fiduciary standards). For a detailed discussion of ERISA fiduciary standards, see *infra* notes 246-306 and accompanying text.

244. See *supra* discussion of pre-ERISA case law at notes 44-61 and accompanying text.

245. *Blau*, 748 F.2d at 1348. See also *Neuffer v. Bakery Workers Int'l Union*, 307 F.2d 671, 674 (D.C. Cir. 1962) (Burger, J., dissenting).

246. ERISA §§ 401-414, 29 U.S.C. §§ 1101-1114 (1982).

associated with different plan structures. The last part will examine the differing views on whether welfare plan termination violates ERISA's fiduciary standards.

ERISA contains a very broad definition of "fiduciary."<sup>247</sup> A fiduciary is anyone who "exercises any discretionary authority" or control over plan assets, anyone who "renders investment advice for a fee," and anyone who has "discretionary authority in the administration" of a benefit plan.<sup>248</sup> The key language is "discretionary control or authority."<sup>249</sup> Whether a person is considered a fiduciary depends not on the title but on the functions he or she performs.<sup>250</sup>

In order to understand who is a fiduciary, it is necessary to examine welfare benefit plan organization. As indicated earlier, there are two general types of benefit plan organization for unionized employees: a) employer controlled plans and b) Taft-Hartley trusts.<sup>251</sup> All nonunion plans and most union benefit plans are employer controlled.

As mentioned above, Taft-Hartley trusts are independent of the employer and the union.<sup>252</sup> The trust is administered by an equal number of union and management trustees.<sup>253</sup> The trustees are obviously fiduciaries because they have discretionary authority and control plan administration, organization and assets. Although there may be others who would be considered fiduciaries, such as plan administrators and investment advisors, the trustees have the principal responsibility for actions of the trust.<sup>254</sup>

The division of authority and control in employer controlled plans is more complicated. Normally, the benefit plans are administered by corporate officers. There is usually no separate entity which is independent of the employer. As with the Taft-Hartley trusts, ERISA allows those who control benefit plans to wear "two hats."<sup>255</sup> The employer as the "sponsor" of the plan<sup>256</sup> is a fiduciary because it manages and controls

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247. ERISA § 3(21)(A), 29 U.S.C. § 1001(21)(A) (1982).

248. *Id.*

249. *Id.*; Leigh v. Engle, 727 F.2d 113, 133 (7th Cir. 1984); H.R. REP. NO. 1280, 93d Cong., 2d Sess. 323, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5103 (Conference Report).

250. Leigh, 727 F.2d at 133-35; Brandt v. Grounds, 687 F.2d 895 (7th Cir. 1982). See 29 C.F.R. § 2509.75 (FR-16A) (1985).

251. See *supra* notes 69-89 and accompanying text.

252. These are usually found in multiemployer bargaining units although a single employer bargaining unit can have a Taft-Hartley trust. See *supra* notes 69-89 and accompanying text.

253. The union trustees are usually union officials. Management representatives are normally selected by the employers in the bargaining unit. Conversation with Karin Feldman, Assistant General Counsel, United Steelworkers of America, Pittsburgh, Pa. (May 19, 1986).

254. See *supra* notes 69-76 and accompanying text.

255. ERISA § 408(c)(3), 29 U.S.C. § 1108(c)(3) (1982); NLRB v. Amax Coal Co., 453 U.S. 322, 333 n.16 (1981); Amato v. Western Union Int'l, Inc., 5 Empl. Ben. Cas. (BNA) 2718, 2722 (S.D.N.Y. 1984); Board of Trustees, Container Mechanics Welfare/Pension Fund v. Universal Enters., Inc., 5 Empl. Ben. Cas. (BNA) 1143, 1157-58 (S.D. Ga. 1983).

256. A plan sponsor is defined as:



the plan. However, there are times when the employer is allowed to pursue its interests as an employer. Distinguishing between the employer as fiduciary and the employer as employer is sometimes difficult to do just as it is difficult on occasion to distinguish union and management as trustees of a Taft-Hartley plan and as collective bargaining agents of their respective parties.<sup>257</sup> Drawing the line between them can become crucial when plan termination is at issue. When an employer terminates or reduces retiree insurance plans, the normal reason for the decision is reduction of costs. The trustees of a Taft-Hartley trust generally reduce or terminate retiree insurance plans because the union and the employer have changed the collective bargaining agreement.

When a party is a fiduciary, ERISA imposes stringent standards for fair dealing, standards that are more stringent than what existed under prior state trust law or section 302.<sup>258</sup> Unlike the fiduciary standards of section 302, those of ERISA govern all pension and welfare benefit plans, not just jointly administered trust plans.<sup>259</sup>

ERISA's fiduciary duties are contained in section 404(a):

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(B) (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

ERISA § 3(16)(B), 29 U.S.C. § 1002(16)(B) (1982).

257. See, e.g., *UMW v. Robinson*, 455 U.S. 562 (1982); *Donovan v. Bierwirth*, 680 F.2d 263 (2d Cir. 1982), *cert. denied*, 459 U.S. 1069 (1982).

258. While ERISA's fiduciary duties have their origins in state trust law, Congress intended ERISA's fiduciary duties to be more comprehensive and stricter than the common law of trusts. *Donovan v. Mazzola*, 716 F.2d 1226, 1231-32 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); *Sinai Hosp. v. National Benefit Fund for Hosp. Workers*, 697 F.2d 562, 565 (4th Cir. 1982); H.R. REP. NO. 1280, 93d Cong., 2d Sess. 302, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5083. Hutchinson & Ondrasik, *Fiduciary Responsibility Under the Employee Retirement Income Security Act*, in *THE HANDBOOK OF EMPLOYEE BENEFITS* 737, 742-54 (J. Rosenbloom ed. 1984).

259. H.R. REP. NO. 1280, 93d Cong., 2d Sess. 296, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5076. See also *supra* notes 87-88 and accompanying text. Although ERISA § 404(a), 29 U.S.C. § 1104(a) (1982), is more comprehensive than § 302(c)(5), 29 U.S.C. § 186(c)(5) (1982), § 302(c)(5) still co-exists with ERISA § 404 and has influenced fiduciary case law under ERISA. First of all, courts derived the arbitrary and capricious standard to review alleged fiduciary violations in benefit claims from § 302. See, e.g., *District 17, UMW v. Allied Corp.*, 735 F.2d 121, 133 (4th Cir. 1984), *rev'd on other grounds*, 765 F.2d 412 (en banc), *cert. denied*, 105 S. Ct. 3527 (1985); *Fine v. Semet*, 699 F.2d 1091, 1093 (11th Cir. 1983); *Elser v. International Ass'n of Machinists Nat'l Pension Fund*, 684 F.2d 648, 654 (9th Cir. 1982), *cert. denied*, 464 U.S. 813 (1983); *Peckham v. Board of Trustees, Int'l Bhd. of Painters & Allied Trades Union*, 653 F.2d 424, 426 (10th Cir. 1981), *rev'd on other grounds*, 455 U.S. 562 (1982); *Rosen v. Hotel & Restaurant Employees Union*, 637 F.2d 592, 596 & n.5 (3d Cir.), *cert. denied*, 454 U.S. 898 (1981); *Pierce v. NECA-IBEW Welfare Trust Fund*, 488 F. Supp. 559, 564 (E.D. Tenn. 1978), *aff'd*, 620 F.2d 589, 591 (6th Cir.) (per curiam), *cert. denied*, 449 U.S. 1015 (1980); *Bayles v. Central States Pension Fund*, 602 F.2d 97, 99 (5th Cir. 1979); *Reiherzer v. Shannon*, 581 F.2d 1266, 1272 (7th Cir. 1978); *Rueda v. Seafarers Int'l Union*, 576 F.2d 939, 942 (1st Cir. 1978); *Bueneman v. Central States Pension Fund*, 572 F.2d 1208, 1209 & n.3 (8th Cir. 1978); *Riley v. Marine Eng'rs Beneficial Ass'n Pension Trust*

... a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and

- (A) for the exclusive purpose of:
  - (i) providing benefits to participants and their beneficiaries; and
  - (ii) defraying reasonable expenses of administering the plan;
- (B) with care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
- (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
- (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV.<sup>260</sup>

If a fiduciary violates these duties, then a participant or beneficiary may bring an action under section 502, in addition to a claim for benefits under that section.<sup>261</sup> In employer controlled plans, fiduciary liability depends on (1) whether the employer is a fiduciary when it decides to terminate a retiree insurance plan and, if so, (2) whether that decision violates ERISA's fiduciary standards. There is a division of authority over these questions. Because the decision to terminate is made to reduce expenses, the retirees could claim that the decision was not made "solely in the interests of the participants and beneficiaries."<sup>262</sup> In addition, if the benefits were vested or intended as lifetime benefits, retirees might also be able to argue that termination or reduction was not made in accordance with plan documents and instruments and thus violated ERISA's fiduciary duties.<sup>263</sup>

Although there are few cases which address whether retiree insurance benefit terminations violate ERISA's fiduciary duties,<sup>264</sup> there are

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Fund, 570 F.2d 406, 413 (2d Cir. 1977); *The Arbitrary and Capricious Standard*, *supra* note 72, at 1041 & n.23.

Whatever difficulty existed in bringing actions for fiduciary violations under § 302(c)(5), ERISA § 404(a) obviously clearly contemplates such actions. See *supra* notes 78-79 and accompanying text. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 332-33 (1981). In fact, courts that have allowed fiduciary actions under § 302(c)(5) have often treated the § 302 and § 404 actions as if there were no difference between them. See, e.g., *Harm v. Bay Area Pipe Trades Pension Plan Trust Fund*, 701 F.2d 1301, 1305 (9th Cir. 1983).

Apart from the arbitrary and capricious standard, § 302(c)(5) still governs the structure of jointly administered trust funds and provides a remedy in the event of a deadlock. See *supra* notes 69-76 and accompanying text.

260. 29 U.S.C. § 1104 (1982). See also ERISA § 405, 29 U.S.C. § 1105 (1982) (liability for breach by co-fiduciary); § 406, 29 U.S.C. § 1106 (1982) (prohibited transactions); § 409, 29 U.S.C. § 1109 (1982) (remedies for breach of fiduciary duty).

261. ERISA § 502(a), 29 U.S.C. § 1132(a) (1982).

262. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) (1982).

263. *Id.* § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) (1982).

264. *District 17, UMW v. Allied Corp.*, 735 F.2d 121, 130 (4th Cir. 1984), *rev'd*, 765 F.2d 412

some pension plan termination cases which discuss this issue.<sup>265</sup> There are three general positions which can be derived from the pension and retiree insurance termination cases. The first states that plan termination does not violate the fiduciary duties because ERISA allows employers to terminate both pension and welfare benefit plans. The reason for the termination is irrelevant.<sup>266</sup> The second position is that plan termination may violate ERISA's fiduciary duties if the retiree insurance benefits are vested. If the benefits are not lifetime benefits, then the termination or reduction of these benefits does not violate fiduciary standards even if the termination was made to benefit the employer rather than the participants or beneficiaries. The final position, adopted by only one court, would find a fiduciary violation even if the benefits are not vested if the plan is terminated and the surplus assets are returned to the employer.<sup>267</sup>

The first position states that welfare benefit plan termination does not violate ERISA's fiduciary duties because plan termination, like plan creation, is not a fiduciary function under ERISA. A significant body of case law supports this position.<sup>268</sup> ERISA does not require employers to provide pension or any other benefits to employees. The decision to provide such benefits is a business decision. Under ERISA's voluntary scheme, the employer is also permitted to terminate these benefits. Like the decision to create benefits, the decision to terminate is a business decision although ERISA does provide fairly comprehensive regulation of pension plan termination.<sup>269</sup> Most of the pension cases that regard pension terminations as business decisions concern actions by employers to terminate pension plans in order to recover the surplus assets.<sup>270</sup> Because ERISA allows employers to terminate pension plans and recover

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(en banc), *cert. denied*, 105 S. Ct. 3527 (1985); *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 735 F.2d 325 (3d Cir. 1984); *Musto*, 615 F. Supp. at 1501-03.

265. *See infra* notes 268-71.

266. *Id.*

267. *Struble*, 735 F.2d at 331-36.

268. *See Flight Officers, Inc. v. United Airlines*, 756 F.2d 1262 (7th Cir. 1985); *Sutton v. Weirton Steel Div. of Nat'l Steel Corp.*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 2387 (1984); *Amato v. Western Union Int'l, Inc.*, 5 Empl. Ben. Cas. (BNA) 2718 (S.D.N.Y. 1984); *District 65, UAW v. Harper & Row, Publishers, Inc.*, 576 F. Supp. 1468, 1477-78 (S.D.N.Y. 1983).

269. *See* Title IV of ERISA, 29 U.S.C. §§ 1301-1461 (1982 & Supp. III 1985) which regulates pension plan terminations. This view is also taken by the Department of Labor. *See* testimony of Alan D. Lebowitz, Acting Director, U.S. Dep't of Labor Office of Pension and Welfare Benefit Programs, before the Select Committee on Aging of the House of Representatives, 98th Cong., 1st Sess. 98-99, 107, *reprinted in* Comm. Pub. No. 438 (Sept. 28, 1983).

270. Due to recent increases in the stock market, many pension plan investments have yielded much higher returns than expected. As a result, many defined benefits plans have more than enough funds to cover vested, accrued benefits. To gain access to this source of funds, some employers have terminated their pension plans, allocated the accrued benefits and recovered the surplus funds. The recovery of pension plan assets has been a controversial practice. *See, e.g.*, 12 PENS. REP. (BNA) 894, 988, 1059, 1269, 1317, 1411 (1985); 13 PENS. REP. (BNA) 851 (1986). ERISA § 4044, 29 U.S.C. § 1344 (1982), allows recapture of surplus assets as long as there are sufficient assets to cover all liabilities to participants and beneficiaries and plan documents permit recapture of funds, and, as

surplus assets if the plan documents permit it, most of the cases have found that the decision to terminate the pension plan did not violate ERISA's fiduciary duties even though the decision was made to improve the financial position of the employer.<sup>271</sup>

It is not clear how to apply this position to retiree insurance plan terminations. None of the retiree insurance cases which address the issue of fiduciary liability categorically state that plan termination is strictly a business decision.<sup>272</sup> ERISA places few restrictions on welfare benefit plan changes or terminations. However, as indicated earlier, the employer or employer and union can contractually bind themselves not to terminate or reduce welfare benefits.<sup>273</sup> As indicated, ERISA simply provides minimum standards for disclosure and fiduciary liability; an employer is not prohibited from providing more than the Act requires.<sup>274</sup> Once the employer exceeds the minimum standards by agreeing to provide the employees with lifetime insurance benefits, the employer can not terminate these benefits. While these benefits are clearly enforceable under section 502 of ERISA, there is some question whether there is fiduciary liability for attempting to abrogate this commitment.

The second position states that termination of retiree insurance benefits can violate two of ERISA's fiduciary duties. First, the "exclusive benefit rule"<sup>275</sup> requires that decisions by a fiduciary be made "solely in the interest of participants" and for the "exclusive purpose of . . . providing benefits." In employer controlled plans, the decision to terminate retiree insurance benefits is designed to reduce costs and increase the employer's cash flow. Obviously, the employer saves money if it does not have to pay these benefits.<sup>276</sup> Although the union is not likely to agree to termination and therefore terminations are less likely to occur in Taft-Hartley trusts than in employer controlled plans,<sup>277</sup> the decision to terminate the plan may benefit employers because they would no longer

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long as the recapture of funds does not violate any other law. *District 65, UAW v. Harper & Row, Publishers, Inc.*, 576 F. Supp. 1468, 1478 (S.D.N.Y. 1983).

271. *Washington-Baltimore Guild v. Washington Star Co.*, 555 F. Supp. 257 (D.D.C. 1983); *District 65, UAW v. Harper & Row, Publishers, Inc.*, 576 F. Supp. 1468 (S.D.N.Y. 1983). *But cf. Del Grosso v. Spang*, 769 F.2d 928 (3d Cir. 1985) (employer violated fiduciary duties when it amended plan documents to permit reversion of surplus assets).

272. *See infra* note 283.

273. *See supra* notes 168-72 and accompanying text.

274. *See supra* notes 163-72 and accompanying text.

275. ERISA § 404(a), 29 U.S.C. § 1104(a) (1982).

276. *See infra* notes 300-06 and accompanying text.

277. The union trustees are likely to be reluctant to reduce or terminate benefits to retirees because such a move would be unpopular with the union membership. *See generally* Fillion, *supra* note 4, at § 6.03. Any decision requires the votes of union trustees to pass.

The other reason that terminations are less likely to occur is that the funds cannot inure to the benefit of any employer because whatever savings occur remain with the trust fund. *See* Brief *Amicus Curiae for the United Steelworkers of America AFL-CIO:CLC* at 11-15, *Massachusetts Mut. Life Ins. Co. v. Russell*, 105 S. Ct. 3085 (1985).

have to contribute and because any surplus remaining in the plan might be returned to the employer.<sup>278</sup>

Financial difficulties can create divided loyalties for employers who manage benefit plans. Although ERISA allows employers and others with potentially conflicting interests to administer and manage benefit plans,<sup>279</sup> these parties are required to act "solely in the interests of participants and beneficiaries" when they act as fiduciaries.<sup>280</sup> If the employer is experiencing financial difficulties or if there are other pressures to reduce costs, then the employer may not be able to make decisions according to the required fiduciary standards. As some cases indicate, the designated fiduciaries of the employer should then resign and the employer should appoint an independent party as trustee. This action, of course, rarely happens.<sup>281</sup>

Second, the decision to terminate or even reduce the benefits can violate the fiduciary duty to follow plan documents. For example, in *Musto*, the court held that the plan documents indicated that retirees had lifetime benefits.<sup>282</sup> Therefore, the successor employer's decision to reduce these benefits was not in accordance with the plan documents.<sup>283</sup>

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278. See *infra* notes 289-300 and accompanying text (discussion of *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325 (3d Cir. 1984)).

279. See *supra* notes 255-60 and accompanying text.

280. ERISA § 404; 29 U.S.C. § 1104 (1982); see also *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981).

281. ERISA §§ 409, 502, 29 U.S.C. §§ 1109, 1132 (1982), authorize the court to appoint an independent administrator if it is necessary to protect the benefit plan. See *Del Grosso v. Spang*, 769 F.2d 928, 937-38 (3d Cir. 1985); *Leigh v. Engle*, 727 F.2d 113, 125 (7th Cir. 1984); *Donovan v. Bierwirth*, 680 F.2d 263, 271-72 (2d Cir. 1982).

282. 615 F. Supp. 1483, 1501-03 (M.D. Tenn. 1985).

283. *Id.* See also *District 17, UMW v. Allied Corp.*, 735 F.2d 121, 130 (4th Cir. 1984), *rev'd*, 765 F.2d 412 (en banc), *cert. denied*, 105 S. Ct. 3527 (1985).

In *Musto*, 615 F. Supp. at 1488, the employer did include a termination/modification clause in the summary plan description, but the clause stated that the company would terminate the plan only if it was necessary. *Id.* The court interpreted the clause to mean that the company could not terminate or reduce benefits unless there was "some unforeseen contingency that threatens the financial base of the entire corporation." *Id.* at 1500. The company's financial records did not indicate that its financial health would be jeopardized if the retiree insurance benefits continued. *Id.* See *supra* notes 187-94 and accompanying text for a detailed discussion of this case. Reduction of benefits, therefore, was not in accordance with plan documents. *Musto*, 615 F. Supp. at 1501-03.

The court also found that plan changes which terminated a retiree's medical insurance if the retiree was covered by other insurance was "arbitrary and capricious." *Id.* at 1503-04. American General would be required to act "solely in the interests of participants and beneficiaries," ERISA § 404, 29 U.S.C. § 1104 (1982). Termination of coverage did not benefit retirees in any way. In fact, the provision discouraged retirees from securing additional or other insurance for fear of losing the company's benefits. *Musto*, 615 F. Supp. at 1503-04.

In *Allied Corp.*, the court found that the employer did not violate its fiduciary duties because the collective bargaining agreement and other plan documents allowed the employer to terminate the plan after the expiration of the agreement. 735 F.2d at 130. The implication is that the employer, as a fiduciary, could have violated its fiduciary duty to follow plan documents if the plan documents provided lifetime benefits for retirees. Although the Fourth Circuit reversed this decision on other grounds, it never addressed the fiduciary issue. 765 F.2d at 472 (en banc).

As discussed earlier, the case law indicates that the plan documents must contain language which clearly states that these benefits are not lifetime benefits or the court is likely to treat them as such.<sup>284</sup> The employer should be familiar with these cases. Any decision to terminate or reduce benefits can avoid violating fiduciary duties only if the plan documents indicate that the benefits are not vested. Plan documents would have little meaning if a fiduciary could ignore them.

The principal difficulty with the position that termination violates ERISA's duty of loyalty is that all terminations benefit the employer in the sense that the employer will no longer have to pay for the benefits. Yet, ERISA clearly contemplates that both pension and welfare benefits can be terminated or reduced.<sup>285</sup> However, it is possible that the employer or trust plan can restrict its right to terminate or reduce benefits. If the employer created lifetime retiree benefits, then there are restrictions on termination or reduction of welfare plans. When an employer or trust contemplates termination of such a plan, there is a risk of violating the requirement that a fiduciary follow the plan documents.<sup>286</sup> While it is clear that collective bargaining agents are not fiduciaries, the party who implements the agreement violates the law.<sup>287</sup> If the fiduciary is unable or unwilling to resist termination or reduction, it is usually because of divided loyalty to the employer on the one hand and to the participants and beneficiaries on the other. Therefore, an independent trustee should be appointed to run the plan.<sup>288</sup>

There is one case which goes further than this position. In *Struble v.*

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284. See *supra* Part II, §§ A, B.

285. Although pensions can be terminated, accrued pension benefits cannot be reduced. See ERISA § 204, 29 U.S.C. § 1054 (1982); I.R.C. § 411, 26 U.S.C. § 411 (1982 & Supp. III 1985). Accrued benefit means an "annual benefit" beginning at the normal retirement for a defined benefit pension plan and the balance of an individual's account in the case of a defined contribution pension plan. ERISA § 3(23), 29 U.S.C. § 1002(23) (1982). ERISA defines a defined benefit pension plan as a plan which "provides a benefit derived from employer contributions other than an individual account plan." ERISA § 3(35), 29 U.S.C. § 1002(35) (1982). The employer agrees to provide the employee with a particular benefit at retirement—for example, \$500 per month. By contrast, a defined contribution plan establishes an individual account for each employee. The pension benefit will be based solely on the amount of money in that account. ERISA § 3(34), 29 U.S.C. § 1002(34) (1982). Because welfare benefits are usually not funded and do not accrue as do pension benefits, there is no such requirement in ERISA for welfare plans.

286. See *Musto*, 615 F. Supp. at 1501-03. See *supra* note 283.

287. See *Robinson*, 455 U.S. at 573-74. This is an unlikely scenario because the trustees are normally the same parties who negotiated the collective bargaining agreement. What is more likely to happen is that the trustees will take off their "fiduciary" hat, become union and management representatives, and renegotiate the agreement. Sometimes, the trustees will simply leave the room and become negotiators in the hall. Interview with Karin Feldman, Assistant General Counsel, United Steelworkers of America, Pittsburgh, Pa. (Nov. 30, 1985).

288. ERISA authorizes removal of fiduciaries when they violate their fiduciary duties. *Massachusetts Mut. Life Ins. Co. v. Russell*, 105 S. Ct. 3085, 3093 (1985); *Del Grosso v. Spang*, 769 F.2d 928, 937-38 (3d Cir. 1985); *Donovan v. Mazzola*, 716 F.2d 1226, 1238 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); *Donovan v. Bierwirth*, 680 F.2d 263, 276 (2d Cir. 1982).

*New Jersey Brewery Employees' Welfare Trust Fund*,<sup>289</sup> the Third Circuit overturned a summary judgment and allowed the retirees to assert their claim that employer trustees violated their fiduciary duties by voting to terminate and give the surplus in the retiree welfare plan to employers in the bargaining unit.<sup>290</sup> The court indicated that this action could violate ERISA's fiduciary standards even though the welfare benefits were not vested and could be terminated when the collective bargaining agreement expired.<sup>291</sup>

*Struble* concerned a Taft-Hartley trust which required employers to contribute a certain amount per hour per employee. The collective bargaining agreement provided that the employer would not have to participate in the trust fund if it ceased to make contributions and that the employer's workers would not be entitled to benefits any longer.<sup>292</sup> In 1976, the collective bargaining agreement specified that employers did not have to make any further contributions to the trust fund, and the trust fund was to be terminated. Retirees sued claiming that their insurance benefits were vested and that the decision to refund the surplus in the welfare fund to the employers violated ERISA's fiduciary duties. The Third Circuit found that the benefits were not vested because the collective bargaining agreement stated that retirees received benefits as provided in the current agreement and the employer did, in fact, cease making contributions after the trust plan was terminated. In addition, the SPD stated that the benefits would terminate when the employer ceased making "contributions toward the insurance."<sup>293</sup>

The situation in *Struble* is very similar to that of the pension plan termination cases where the employer terminated the plan in order to recover the surplus assets.<sup>294</sup> *Struble* rejects the notion that the right to terminate the plan means that the employer (or employers) can always recover the surplus. The major difference between *Struble* and the other cases is that the surplus assets were in a Taft-Hartley trust fund which is independent of the employer.<sup>295</sup> In *Struble*, the retirees sued only the employer trustees on the grounds that they acted in the interest of the employers, not that of the participants and beneficiaries.<sup>296</sup> The union trustees voted against returning the surplus to the employers. Because of a deadlock, an umpire was appointed to make the decision, and the umpire supported the employer trustees.<sup>297</sup>

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289. 732 F.2d 325 (3d Cir. 1984).

290. *Id.* at 331-36.

291. *Id.* at 328-31.

292. *Id.* at 338.

293. *Id.* at 330-31.

294. See *supra* notes 268-71 and accompanying text.

295. For a discussion of Taft-Hartley trusts, see *supra* notes 69-89 and accompanying text.

296. 732 F.2d at 334-35. See also ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) (1982).

297. 732 F.2d at 334-36. As indicated earlier, management and the union each have an equal

This case suggests that termination of a welfare plan and returning surplus assets to the employer violates ERISA's fiduciary standards even though the plan allows reduction or termination of benefits. This case is unlikely to be of much value to retiree insurance terminations unless the plan is part of a Taft-Hartley trust because most employer controlled plans do not have a separate fund for welfare benefits.<sup>298</sup> It is uncertain whether a court would find the employer liable even though the termination reduces expenses. Terminating the plan did not violate fiduciary standards in *Struble* because the plan documents allowed the trust fund to terminate the plan.<sup>299</sup> However, the Third Circuit suggested that returning the surplus to the employer might have violated ERISA's fiduciary standards. It is hard to see how returning the assets is a violation if the plan could be terminated without liability in the first instance, unless the court is taking the position that the surplus should go only to participants and beneficiaries.<sup>300</sup>

Even if the termination or reduction of retiree insurance benefits violates ERISA's fiduciary standards, what does this additional cause of action give to retirees? There are certain remedies available to retirees if there is a breach of fiduciary standards.<sup>301</sup> First of all, the retirees may be able to have an independent administrator appointed to operate the benefit plan if the employer is unable or unwilling to administer the plan in the interest of the participants and beneficiaries as required by section 404.<sup>302</sup> Retirees may want an independent administrator if there is reason to believe that the employer will continue to make decisions adverse to the interests of the retirees. Second, retirees might also be able to require the employer to return or "disgorge" all profits made from terminating or reducing a welfare plan.<sup>303</sup> This remedy is important because it

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number of trustees in a Taft-Hartley trust. In the event of a deadlock, the court will appoint an impartial umpire. ERISA § 302(c)(5), 29 U.S.C. § 186(c)(5) (1982). See *supra* notes 69-89 and accompanying text.

298. Retiree insurance plans are generally not funded. See *infra* note 331.

299. *Struble*, 732 F.2d at 330-31.

300. The court did not decide whether the decision to return the funds violated the fiduciary standard. The Third Circuit simply reversed the lower court's summary judgment. *Id.* at 330-36.

301. ERISA § 409(a), 29 U.S.C. § 1109(a) (1982), provides:

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

See also ERISA § 502, 29 U.S.C. § 1132 (1982).

302. See *supra* note 281.

303. ERISA § 409(a), 29 U.S.C. § 1109(a) (1982), authorizes this remedy. See *supra* note 289. S. REP. NO. 383, 93d Cong., 1st Sess. 105, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4890, 4988. In fact, the disgorgement remedy can be traced to the common law of trusts. "The purpose of this strict rule is to deter breaches by denying fiduciaries any profits from the use of



makes plan termination or reduction more expensive for the employer. It might be attractive to an employer to terminate or reduce retiree insurance benefits because the employer might believe that the worst thing that will happen is that the court will require the reinstatement of benefits and the payment of attorney's fees and costs.<sup>304</sup> In the meantime, the employer does not have to pay the benefits and saves money. Without insurance, retirees are unlikely to use medical services unless there is an emergency. As a result, these bills will not be as high as they would ordinarily be.<sup>305</sup> If the employer had to return the savings to the retirees, the employer would be reluctant to terminate or reduce benefits where the plan documents indicate that these are lifetime benefits.<sup>306</sup>

### III PROPOSAL FOR REFORM

Although the recent case law has been favorable to retirees, considerable uncertainty remains for all parties. Retired employees may believe they have lifetime welfare benefits only to have these benefits terminated or reduced by the employer.<sup>307</sup> Even though retirees may ultimately prevail, they face lengthy and expensive court battles to establish their rights.<sup>308</sup> In the meantime, they may be left without any health insur-

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assets." *Leigh v. Engle*, 727 F.2d 113, 122 & n.17 (7th Cir. 1984). See also *Hutchinson & Ondrasik*, *supra* note 258 at 768-69; *Phillips, Civil Litigation Under the Employee Retirement Income Security Act of 1974*, 49 *Miss. L.J.* 241, 267-68 (1978).

304. Interview with William Payne, Assistant General Counsel, United Steelworkers of America, Pittsburgh, Pa. (Oct. 15, 1985). ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1) (1982), authorizes the court to grant attorney's fees if retirees prevail.

305. Interview with William Payne, Assistant General Counsel, United Steelworkers of America, Pittsburgh, Pa. (Oct. 15, 1985).

306. *Id.* If punitive damages are available for breach of fiduciary duties, then retirees may have an additional remedy in the event that insurance plan terminations or reductions violate ERISA's fiduciary duties.

There is some question whether punitive damages are available to participants and beneficiaries for breach of fiduciary duties. In *Massachusetts Mut. Life Ins. Co. v. Russell*, 105 S. Ct. 3085 (1985), the Supreme Court held that ERISA § 409(a), 29 U.S.C. § 1109(a) (1982), does not provide plan participants and beneficiaries with a cause of action for punitive damages. *Russell*, 105 S. Ct. at 3091-92. Therefore, § 409(a) only authorizes relief for the benefit plan and does not give a "private right of action for compensatory or punitive relief." *Id.* However, the Supreme Court left open a possibility that punitive damages might be available under other provisions of ERISA. *Id.* at 3089 n.5. In a concurring opinion, Justice Brennan emphasized that participants and beneficiaries may have a cause of action for punitive damages under § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1982). *Russell*, 105 S. Ct. at 3094-99 (Brennan, J., concurring; joined by White, Marshall & Blackmun, JJ.).

307. Their dependents may also believe they have benefits. Many plans also cover spouses and dependents of retired employees, but these benefits often terminate at the death of the retiree or in the event that the spouse remarries. See *POST-RETIREMENT MEDICAL BENEFITS SURVEY*, *supra* note 5, at 4-6.

308. ERISA does permit retirees to receive attorney's fees if they win the suit. See ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1) (1982). But if they lose, retirees must bear the costs themselves. Sometimes unions will sue on their behalf, but the union may not choose to do so and even if it does, it may not have standing to sue under ERISA. See *supra* note 112.

ance unless the court issues a preliminary injunction requiring the employer to continue coverage.<sup>309</sup> An additional problem is that some employers might well terminate or reduce coverage to see if they can achieve a settlement for less than the employer's original obligation.

The current uncertainty also creates difficulties for employers. It is unclear what their obligations are toward retired employees. In the collective bargaining setting, as we have seen, courts are likely to enforce clear language indicating that the employer is obliged to provide welfare benefits only for the duration of the collective bargaining agreement.<sup>310</sup> However, courts are strict about how they analyze the language in the agreement and other plan documents. If the language is subject to more than one interpretation and if the employer behaved as though these benefits were lifetime benefits, many courts will find that the language was not clear enough to rebut the inference that retiree insurance benefits are lifetime benefits.<sup>311</sup>

It is uncertain what language would suffice to rebut this inference; whatever the standard is, few collective bargaining agreements are written clearly enough to satisfy it. If the employer wants to change the agreement in negotiations to clarify its obligation to retirees, it may face the dilemma that merely proposing such language could be construed as an admission that retiree welfare benefits are lifetime benefits.<sup>312</sup> If a court does interpret the language modification proposal this way, any new language will apply only to active employees. It would not change the employer's obligation to retirees.

The case law presents even more problems for an employer who provides retiree insurance benefits to salaried employees. As indicated earlier, language permitting termination or reduction of retiree insurance

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309. Some cases have granted preliminary injunctions to restore insurance benefits to retirees during the lawsuit. *See, e.g.,* *Musto v. American Gen. Corp.*, 615 F. Supp. 1483, 1494-1506 (M.D. Tenn. 1985) (preliminary injunction restrains employer from instituting changes in medical plan); *Mamula v. Satralloy, Inc.*, 578 F. Supp. 563, 579-85 (S.D. Ohio 1983) (employer must restore benefits). A preliminary injunction is not always granted even though retirees suffer hardships because of the loss of medical insurance. Retirees must show:

- 1) the likelihood of success on the merits;
- 2) the likelihood of irreparable harm absent such extraordinary relief;
- 3) the impact on the public interest; and
- 4) the possibility of substantial harm to others.

*Musto*, 615 F. Supp. at 1494.

Even if retirees can show that they are likely to succeed on the merits, courts do not always recognize the harm to retirees as sufficient for an injunction. Interview with William Payne, Assistant General Counsel, United Steelworkers of America, Pittsburgh, Pa. (Oct. 15, 1985).

310. *See, e.g.,* *District 29, UAW v. Royal Coal Co.*, 768 F.2d 588, 592 (4th Cir. 1985); *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1223 (9th Cir. 1984).

311. *See supra* notes 143-53 and accompanying text.

312. As indicated earlier, courts pay close attention to bargaining history if such evidence is available. *See supra* notes 58-61, 148-53 and accompanying text.

benefits may not be enforceable against already retired employees.<sup>313</sup> Unless this rule is modified, it may be very difficult for an employer to terminate or reduce the insurance benefits of retired salaried employees. In particular, under *Musto*, the employer could not terminate or reduce a plan unless it faced severe economic distress because of these obligations.<sup>314</sup> If there is no clear language permitting reduction or termination, the employer might be faced with the same dilemma as with collectively bargained plans. Assuming this language would be effective, courts might well interpret promulgation of such language as an admission of liability.

Even though most of the cases favor the retirees, the union may also face a dilemma not unlike that of the employer if the language in the collective bargaining agreement is interpreted by a court to mean that retirees have benefits only during the duration of the agreement. Any proposed change to make it clear that employees have lifetime welfare benefits might be interpreted in court as an admission that the parties initially did not intend to create lifetime benefits. The union would be better leaving the language alone despite any unclarity.<sup>315</sup>

If benefit plans are administered by Taft-Hartley trusts, union officials, as trustees, will have to address this uncertainty. This uncertainty may make it difficult to provide the benefits if employer contributions are insufficient to meet these obligations.<sup>316</sup> Even employer controlled plans may not have money to pay the benefits. Very few retiree medical plans are funded, which means that the employer does not set aside money to pay for the cost of benefits in the future. Even if employers are required to provide lifetime benefits, retirees may not be able to collect the benefits if the employer experiences financial difficulties. At present, most medical benefits are paid on a "pay-as-you-go" basis from the corporate treasury or from a fund consisting of employer contributions.<sup>317</sup> If retirees are to collect their benefits, there must be changes in the way these benefits are funded. As will be indicated, Congress will have to remove obstacles in the Internal Revenue Code before employers will be able to

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313. See *supra* Part II, §§ A, B.

314. *Musto*, 615 F. Supp. at 1500.

315. Sometimes the language in the collective bargaining agreement clearly says that the insurance benefits vest at retirement. See *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669, 676 (6th Cir. 1985); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 616 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1202 (1986).

316. The collective bargaining agreement may fix the employer's contribution to the trust fund. If the amount is insufficient to cover the benefits the trust fund may not be able to require higher contributions from the employers. Therefore, there may be no funds available to pay for the benefits. Conversation with Karin Feldman, Assistant General Counsel, United Steelworkers of America, Pittsburgh, Pa. (June 15, 1985).

317. Few retiree health plans are funded, and there are legal obstacles to funding medical benefits in the tax code. See *infra* notes 331-34 and accompanying text.

prefund retiree insurance benefits.<sup>318</sup>

ERISA must be amended to end the uncertainty over whether the benefits vest at retirement, to create greater uniformity among the federal circuits and to enable employees to plan their expenses more rationally and predictably. First, ERISA should be amended to include a presumption that retiree insurance benefits are lifetime benefits unless there is clear language or other strong evidence which indicates otherwise. Second, ERISA should contain a transitional provision which would allow parties to amend plan documents to clarify the status of retiree insurance benefits, without this amendment's having any effect on the existing rights of retirees, employers or trust plans. For any such amendment to be effective it must be communicated to active and retired employees in a manner calculated to be understood by the average employee. Third, ERISA should require retiree insurance benefits, like pension benefits, to be funded. If predictions of the cost of medical benefits are to be accurate, Congress must consider stabilizing the Medicare program, because any decrease in federal benefits generally raises the costs of providing medical insurance for retirees over the age of sixty-five.<sup>319</sup>

#### A. Vesting of Retiree Insurance

Including a presumption in ERISA would, to some extent, incorporate the analysis of most of the case law. As indicated in the earlier discussion, *UAW v. Yard-Man* established an inference that retiree insurance benefits are "status benefits" that last for the lifetime of the retiree.<sup>320</sup> The employer can rebut this inference if there is explicit, unambiguous language in the agreement and other extrinsic evidence that establishes that the insurance benefits were not intended as lifetime benefits. A court applying the analysis used in *Musto*, however, would enforce a termination clause, but only if it is explicit. It would not allow the employer to terminate for any reason.<sup>321</sup>

Would a presumption add or clarify anything? There are several arguments in favor of incorporating a statutorily mandated presumption in ERISA. First, most of the case law is concentrated in the Sixth Circuit.<sup>322</sup> It is unclear how other circuits will handle this issue. This un-

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318. See *infra* notes 330-34 and accompanying text.

319. Many plans allow employees to retire before the age of 65. See D. MCGINN, *supra* note 73, at 84. In some cases, for example the UAW agreement, employees can retire as early as 48 in the "30 and out" program. See *supra* note 36. If employees can retire that early and if employers provide retiree insurance benefits, employers may have to provide medical insurance benefits for over 15 years before the retiree would be eligible for Medicare. Obviously, Medicare costs are irrelevant for early retirees. See *Retirees Out in the Cold*, *supra* note 7, at 105-06.

320. 716 F.2d at 1482. See POST-RETIREMENT MEDICAL BENEFITS SURVEY, *supra* note 5, at 6-7.

321. *Musto*, 615 F. Supp. at 1500.

322. See *supra* note 3 (cases cited).

certainty itself creates problems for benefit plans. No one can be certain of the status of their retiree health and welfare programs until there is litigation. Uncertainty makes future planning very difficult. One of the reasons for passage of ERISA in 1974 was to create uniformity in employee benefit law. Given the magnitude of the liability at stake, it is important that all parties be able to ascertain their rights and obligations readily. The case law has not produced that degree of certainty.

Another reason to include a presumption is that, in some ways, it more generously protects the expectations of retirees than the status benefit approach of *Yard-Man*.<sup>323</sup> A presumption that retiree insurance is a lifetime benefit, if not rebutted by substantial evidence, would be sufficient to establish that such benefits vest at retirement. While an application of the status benefit approach might produce the same result, the statute would make it certain. It would be clear when benefits vest; parties could plan benefit programs accordingly. The amendment would also be a clear congressional statement that retiree insurance is as important as pension benefits for maintaining a decent retirement standard of living.<sup>324</sup>

The amendment could also aid employers who provide retiree insurance benefits for salaried employees. The amendment would allow employers to include effective termination clauses in certain circumstances. This presumption would allow the employer to include a clause permitting termination or reduction of retiree insurance benefits as long as the employer communicates this to its employees and as long as the clause does not give unlimited power of termination to the employer.<sup>325</sup> The presumption should allow termination or reduction only if the corporation faces financial distress; it would not permit such actions simply because the employer decides that it no longer wants to provide these benefits. As indicated earlier, nonunion and union retirees have little influence on the structure of their benefit plans; it therefore makes sense to limit the circumstances under which benefits can be reduced under ERISA. Both union and nonunion retirees would be protected from changes after retirement.

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323. *Yard-Man*, 716 F.2d at 1476.

324. Congress should consider amending ERISA to require vesting schedules for retiree insurance benefits similar to those required for pension benefits. See ERISA § 203, 29 U.S.C. § 1053 (1982). At the present time, employees are contractually guaranteed retiree medical benefits only if they remain with the employer until retirement. With earlier vesting, employees could have medical benefits even though they change jobs before retirement. For example, Congress could require vesting of some portion or percentage of medical benefits after 10 years. A participant with 10 years of service would be entitled to 50% of medical benefits covered by the plan. The percentage of coverage could increase to 100% after 20 years of service. Many plans already require anywhere from 15 to 20 years of service before the employee is eligible for benefits at retirement. Interview with Karin Feldman, Assistant General Counsel, United Steelworkers of America, Pittsburgh, Pa. (Sept. 25, 1986).

325. See *Musto*, 615 F. Supp. at 1500.

ERISA should also be amended to allow a transition period during which employers and unions could change the plan documents without creating a presumption that the parties intended from the outset to create lifetime benefits. For example, merely proposing language indicating that retiree insurance benefits are not lifetime benefits would not be interpreted as indicating that the employer had earlier created lifetime benefits. At the same time, retirees would not necessarily be disadvantaged. The statute should make it clear that present retirees could retain lifetime benefits. Retirees' rights would depend on the status quo at the time they retired. Allowing employers to propose changes may dissuade them from unilaterally terminating or reducing benefits and forcing the retirees to bring suit to clarify their rights.

Additionally, the proposed amendment to ERISA should require the employer to inform active and retired employees about any changes in retiree insurance benefits. Failure to inform retirees of plan amendment should render these changes unenforceable. As indicated earlier some courts have used an "estoppel theory" to prevent enforcement of conditions or other significant terms which are not clearly explained in the summary plan description.<sup>326</sup> This estoppel principle ought to be included in ERISA to make the disclosure provisions meaningful. Retired and active employees must know, in clear terms, whether and to what extent they will have benefits.

ERISA should also require that retirees and active employees nearing retirement be told about any changes to unvested benefits far enough in advance for them to make other arrangements for insurance coverage. It should be possible to give at least a six month notice to retirees.

### *B. Funding of Retiree Insurance*

Even if courts find that employers are required to provide lifetime benefits for retirees, this finding will do retirees very little good if there is no money to pay for the benefits. Unlike pension benefits, active employees generally pay for the retiree insurance benefits of retired employees because no money was accumulated to pay the benefits when retirees were active employees.<sup>327</sup> The only way to protect retiree insurance benefits is to require that they be funded. As with pension plans, an actuary would have to estimate the future costs of medical insurance and employ-

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326. See *supra* notes 234-45 and accompanying text.

327. This fact does not mean that retiree insurance benefits are not deferred compensation. Even though active employees give up some wages or salary to receive retirement insurance benefits, this money is not saved at that time. In *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 615-16 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1202 (1986), and *UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1482 n.7 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984), the Sixth Circuit rejected the employers' argument that the fact that the benefits were unfunded demonstrated that they did not intend to create lifetime benefits.

ers would have to put aside this amount. If the plan is self-insured, the actuary would have to estimate the future cost of medical claims.<sup>328</sup> Concededly, these predictions could never be perfectly accurate. Nonetheless, projections must be made to fund these benefits.

In order to simplify this process, Congress should consider stabilizing the Medicare program. Every reduction in Medicare benefits greatly affects the cost of medical benefits for those retirees over the age of sixty-five. Many retiree medical plans supplement Medicare benefits for retirees over sixty-five. If the Medicare deductibles increase, the cost of providing benefits increases.<sup>329</sup> Congress should consider what effect reducing Medicare benefits has on retiree insurance benefits.

The most significant obstacle to funding retiree insurance benefits consists of provisions in the Internal Revenue Code designed to raise revenue to reduce the budget deficit. The Deficit Reduction Act of 1984 amended the Internal Revenue Code to impose limits on accumulation of excess, nontaxable funds in welfare plans.<sup>330</sup> If these limitations are also

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328. The actuarial calculations and assumptions for defined benefit pension plans are quite complex. For example, the actuary must consider the benefit promised, the amount likely to be generated by fund investments, and the likelihood that plan participants and beneficiaries will live or stay in their jobs long enough to be eligible to receive the benefits. For a detailed discussion, see Cooper, *Financing Defined Benefit Pension Plans*, in *EMPLOYEE BENEFITS HANDBOOK* §§ 11.00-11.110 (rev. ed. 1987).

The Martin E. Segal Company, a major actuarial firm, identifies two major ways to prefund retiree health benefits: terminal and level funding. With terminal funding, the plan sponsor puts aside a lump sum to pay for the retiree's benefit at the employee's retirement. This amount is calculated by considering the retiree's life expectancy, "the future cost of health care benefits and the interest to be earned on the unused portion of the lump sum set aside." *MARTIN SEGAL NEWSLETTER*, *supra* note 10, at 2. With level funding, the plan sponsor pays for retiree benefits during the employee's work life or in the case of retired employees, over the retiree's lifetime. The amount set aside is calculated using the same factor as with terminal funding. *Id.*

A third method, which is less popular, is to establish a retiree health plan as part of a pension plan. See I.R.C. § 401(h), 26 U.S.C. § 401(h) (1986). The plan sponsor has to put health benefit funds in a separate account to prevent the funds from being used to pay pension benefits. The contributions are calculated as a percentage of total pension benefits paid to ensure that the health benefits are "subordinate to the pension plan's principal aim of providing retirement income." *MARTIN SEGAL NEWSLETTER*, *supra* note 10, at 2-3. At the present time, few retiree plans are funded. See *infra* note 331. Recent changes in the tax code have severely reduced the ability of plan sponsors to prefund retiree insurance plans. See *infra* notes 330-34 and accompanying text.

329. As indicated, many retiree insurance programs for retirees over age 65 are Medicare carve-out or supplement plans. The insurance plan covers whatever Medicare does not cover. If Congress reduces the Medicare program, then the cost of retiree insurance will increase at the same time. See *MARTIN SEGAL NEWSLETTER*, *supra* note 10, at 1-2. See generally *POST-RETIREMENT MEDICAL BENEFITS SURVEY*, *supra* note 5, at 1; *Retirees Out in the Cold*, *supra* note 7, at 105-06.

330. Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, 754, 852-53, 867-68, 872, 875-77, 897, 958 (codified at 26 U.S.C. § 401 (Supp. III 1985)). Essentially the Deficit Reduction Act allows retiree health insurance plans to accumulate reserves for funding retiree benefits but the amount must be accumulated on a level basis over the working lives of employees. See *supra* note 328. Moreover, the computation of these reserves must be made on the assumption that the cost of medical benefits in the future will be the same as current expenses. However, these computations cannot take into account inflation, nor can investment income which exceeds these limits. Otherwise, this income will be taxable. Furthermore, the Act does not allow any deduction for future

placed on the accumulation of funds in retiree benefit plans, it will be difficult to fund retiree insurance plans. To resolve this problem Congress must amend the Internal Revenue Code to permit tax-free accumulation of funds necessary to assure retiree insurance benefits. It makes little sense to require employers to provide lifetime benefits if they are prevented from taking measures to ensure that this is done. At the present time, tax policy is moving in the opposite direction from the court cases. Present policy burdens active employees unfairly because these plans are generally not funded; the costs of these benefits are factored into the calculation of their wage and benefit packages.<sup>331</sup>

In recent Senate hearings on retiree insurance benefits, several employer representatives urged Congress to change the tax law to allow the funding.<sup>332</sup> Employers as well as unions are interested in funding these benefits not only because court decisions have increased liability but also because new accounting standards require companies to put their health insurance liability on their balance sheets. Funding these benefits would provide a satisfactory way to indicate that the company is setting aside funds to pay for this liability as it comes due.<sup>333</sup> It would also enable corporations to accumulate assets the way they do with pension plans.<sup>334</sup>

One criticism of these proposals is that they may assist current retir-

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funding for the plan if it provides medical benefits solely for current retirees. No deductions are allowed for plans which favor key or top-level employees only. STAFF OF SENATE COMM. ON FINANCE, 99TH CONG., 2D SESS., DESCRIPTION OF PRESENT LAW (JCX-15-85), TAX TREATMENT OF EMPLOYER-PROVIDED HEALTH BENEFITS 4-8 (Comm. Print Sept. 6, 1985); *Analysis of the Employee Benefit Provisions of the Deficit Reduction Act of 1984*, 11 PENS. REP. 5-12 (Special Supp. Sept. 3, 1984).

Employers can also prefund retiree medical benefits if the plan is subordinate to retirement pension benefits. The contributions are limited to 25% of total contributions to the retirement plan and this amount must be placed in a separate account which cannot revert to the employer or "be used for any other purpose." *Post Retirement Medical Benefits: Hearing Before the Senate Finance Subcomm. on Savings, Pensions, and Investment Policy*, 99th Cong., 2d Sess. 2 (Sept. 9, 1985) (testimony of Dennis Ross, Deputy Tax Legislative Counsel, Dep't of the Treasury).

331. Few employers fund their insurance programs. According to the Washington Business Group Survey, only five percent of the companies surveyed prefunded their benefits. POST-RETIREMENT MEDICAL BENEFITS SURVEY, *supra* note 5, at 8; see MARTIN SEGAL NEWSLETTER, *supra* note 10, at 3-4.

332. *Post Retirement Medical Benefits: Hearing Before the Senate Finance Subcomm. on Savings, Pensions, and Investment Policy*, 99th Cong., 2d Sess. 1 (Sept. 9, 1985); 12 PENS. REP. (BNA) 1261-62 (1985).

333. 11 PENS. REP. (BNA) 911 (1984); 12 PENS. REP. (BNA) 1261-62 (1985); *Who'll Pay?*, *supra* note 8, at 72; *Retirees Out in the Cold*, *supra* note 7, at 105.

334. See ERISA §§ 301-306, 29 U.S.C §§ 1081-1086 (1982); I.R.C. § 1013, 26 U.S.C. § 1013 (1982).

If ERISA is amended to require funding of retiree insurance plans, Congress may also need to consider creating an insurance pool for retirees in the event that the plan is underfunded and the employer is insolvent. Under ERISA, the Pension Benefit Guaranty Corporation ("PBGC") already guarantees basic retirement pension benefits for participants and beneficiaries if the pension plan is unable to pay these benefits. This termination insurance program is financed by requiring employers to pay premiums or fees for each participant. ERISA §§ 4001-4068, 29 U.S.C §§ 1301-1368 (1986). Employers could be required to contribute premiums for each participant in the retiree insurance



ees at the expense of current workers. The increased liability and rising medical costs have already resulted in terminations and reductions for active employees.<sup>335</sup> Most active employees will not have benefits as generous as those of current retirees, if they have benefits at all. Should these changes be made if they will not benefit current workers later, after they retire? Although these proposals may benefit current retirees more than future retirees, it is still desirable to ensure that at least current retirees receive what they were promised and what they earned. The private sector is not likely to provide medical insurance for all who need it; many employers do not provide pensions, much less retiree insurance benefits.<sup>336</sup> The only way to provide medical coverage for all who need it is to enact comprehensive national health insurance.<sup>337</sup> Because it is un-

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plan to the PBGC which would administer the insurance pool. In this way, the PBGC would have the means to provide coverage to retirees under these circumstances.

335. Rabkin, *supra* note 4, at 687; POST-RETIREMENT MEDICAL BENEFITS SURVEY, *supra* note 5, at 9.

336. See *supra* note 11; see also Consumer Reports, *Will You Ever Collect a Pension?*, 47 CONSUMER REP. 124 (1982) (roughly half of workforce not covered by a pension); *Post Retirement Medical Benefits: Hearing Before the Senate Finance Subcomm. on Savings, Pensions, and Investment Policy*, 99th Cong., 2d Sess. 8 (Sept. 9, 1985) (testimony of Dennis Ross, Deputy Tax Legislation Counsel, Dep't of the Treasury).

337. Proposals for a national health insurance system are not new. For a long time, it has been recognized that many people could not afford health care or health insurance. Health care reformers proposed national health insurance as far back as the early part of this century. D. HIRSHFIELD, *THE LOST REFORM: THE CAMPAIGN FOR COMPULSORY HEALTH INSURANCE IN THE UNITED STATES FROM 1932 TO 1943*, at 1-41 (1970). The first major effort to enact national health insurance occurred during the Depression as part of the New Deal. Despite a determined effort, that effort failed due in large part to opposition by the American Medical Association. *Id.* at 135-65. Several proposals for national health insurance were made in the 1970's. Rep. Ronald Dellums, Sen. Edward Kennedy and others introduced various national insurance plans in Congress, but none were ever passed. Starr, *Transformation in Defeat: The Changing Objectives of National Health Insurance, 1915-1980*, in *COMPULSORY HEALTH INSURANCE* (R. Numbers ed. 1982). See also J. KRIZAY & A. WILSON, *THE PATIENT AS CONSUMER* (1974); S. LAW, *BLUE CROSS: WHAT WENT WRONG 191-95* (2d ed. 1976). Given the hostility of the present administration to new social programs, it is unlikely that Congress will enact any legislation that creates a national health insurance system in the near future. Perhaps if medical benefits for active and retired employees become too expensive for the private sector, there may be a new movement for national health insurance in the future.

Despite the hostility to national health insurance, Congress has taken a small step toward requiring employers to provide medical insurance to retirees. The Consolidated Omnibus Reconciliation Act of 1986, ("COBRA") Pub. L. No. 99-272, 100 Stat. 83, requires employers with 20 or more employees to provide health coverage to terminated employees and dependents for 18 or more months. Retirement is a termination covered under COBRA. Therefore, even retirees who do not have retiree health insurance plans can at least extend their health care coverage up to 18 months, but the cost of insurance plus a small administrative fee must be paid by retirees. COBRA § 10001, 100 Stat. 222-27 (amending 26 U.S.C. §§ 106, 162); § 10002, 100 Stat. 227-32, 29 U.S.C. §§ 1161-1168 (adding §§ 601-608 to Title I of ERISA; amending ERISA § 502, 29 U.S.C. § 1132). See 13 PENS. REP. (BNA) 74-78, 92, 97-98, 1095-96 (1986).

In addition, Congress recently passed two special statutes governing retiree benefits when the employer files for bankruptcy under chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101-1160 (1982 & Supp. III 1985). The first statute requires the trustee in bankruptcy to continue paying retiree health and life insurance benefits until May 25, 1987. This provision was introduced in re-

likely that such a measure will pass in the near future, Congress should, at least, shore up private health insurance benefits for retirees.

### CONCLUSION

Insurance benefits have become almost as important to retirees as pension benefits. Even before passage of ERISA, courts were inclined to find that retiree insurance benefits vested once the employee retired. After ERISA and in the last few years, thousands of retirees have experienced benefit reductions and terminations as medical costs increased and major industries have closed factories and plants. Fortunately, the case law has been just as favorable to retirees as pre-ERISA case law. Even though the case law under ERISA and other federal labor law generally protects the retiree, that is not an invariable result; the mode of analysis varies, resulting in some uncertainty. This Article has argued for a more protective standard under ERISA. Retiree insurance should be presumed a lifetime benefit which vests at retirement unless the employer includes in plan documents and employee handbooks an explicit and unambiguous termination clause indicating otherwise. Even if such a clause is included, it should not be enforced unless it permits reductions or termination only in the event that the company is in severe financial distress. Finally, to ensure that retirees receive their benefits, this Article has also argued that retiree insurance plans be funded in ways similar to those in which pension plans are funded. Otherwise, the right to receive benefits will mean little if there is no money available to pay for them in the future.

The elderly have a difficult enough time making ends meet as it is. Managing without medical insurance is, for many, a crushing burden. The unfairness of that burden is heightened when the retiree had reason to expect that his or her years of effort would provide a dignified and protected retirement. With more than \$2 trillion at stake, the problem of

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sponse to LTV's termination of retiree benefits after it filed for bankruptcy. On Guarantee of Retiree Benefits From Companies in Bankruptcy, Pub. L. No. 99-500 (Oct. 18, 1986). 13 PENS. REP. (BNA) 1874-75 (1986). See also 13 PENS. REP. (BNA) 1329-31, 1772, 1795, 1824 (1986). This statute is intended as a temporary measure to give Congress more time to consider retiree benefit proposals in detail. *Id.* at 1874-75.

The second statute amends COBRA to provide retirees and their spouses with health benefits for a longer period if these benefits are lost because the employer files for bankruptcy. If the employer filed for bankruptcy on or after July 1, 1986, and retirees lose their benefits as a result, the employer must allow retirees to purchase insurance benefits at 102% of the cost to the employer. Retirees can continue coverage until death and surviving spouses can continue coverage up to 36 months after the death of the retired employee. Retirees also retain their benefits after they qualify for Medicare. Omnibus Budget Reconciliation Act of 1986 ("OBRA") § 9501, Pub. L. No. 99-509, 100 Stat. (classification pending) (Oct. 21, 1986) (amending 26 U.S.C. § 162(k) and ERISA § 603, 29 U.S.C. § 1163), 13 PENS. REP. 1866-71 (1986). A more detailed discussion of retiree insurance benefits in bankruptcy is beyond the scope of this Article.

preserving medical benefits for the retired calls for rational, humane treatment. This Article provides a beginning to that critical undertaking.