BRINGING BACK THE YARD-MAN INFERENCE

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I. INTRODUCTION

In recent years, the cost of health care for retirees has increased at an alarming rate. Contributing factors include the facts that Americans are changing jobs more frequently than before, and that they are now retiring before age sixty-five—the age at which they are eligible for Medicare. Pursuant to employee benefit plans, employers have been forced to shoulder much of this increase in healthcare costs.

Fairly recent estimates place the national liability for retiree health benefits at a truly staggering amount—between four hundred million and two trillion.1 Naturally, companies that had agreed to pay these costs in a previous era no longer wanted to pick up the tab. And when they began terminating company welfare plans, a wave of employee-initiated litigation ensued. The results were decidedly pro-employer in their rigid reliance on plan documents even in the face of overwhelming evidence that employers had represented that benefits were vested, or had failed to correct employees' false assumptions that benefits were vested. This comment examines this pro-employer sentiment in the federal courts and recommends a reintroduction of the Yard-Man inference—the presumption that benefits vest upon retirement—in order to counteract it.


II. THE BACKDROP TO THE RECENT WAVE OF RETIREE BENEFIT PLAN TERMINATIONS AND LITIGATION.

A. Financial Accounting Standards Board (FASB) Rule 106\(^2\) Served as Impetus and Pretext for Companies to Terminate Their Retiree Welfare Benefit Plans.

The promulgation of FASB Rule 106 in the early 1990's brought matters to a head. Essentially, this rule mandated a shift from a cash method of accounting for retiree welfare benefits to an accrual method. The rule significantly and adversely affected corporate financial statements.

In short, the rule’s result is that any future obligation to pay retiree welfare benefits for active employees must be recognized in current financial statements. This requirement significantly reduces current income for most corporations that employ more than five hundred people and that have retiree welfare plans.\(^3\) For instance, Ford Motor Co. reported a 7.5 billion dollar charge against current income in 1992.\(^4\) Similarly, General Motors had to charge 20.8 billion in 1992 in order to comply with the rule.\(^5\) Some estimate that this reduction of current income for corporate America equals approximately 1.5 trillion dollars.\(^6\)

In the wake of these staggering paper losses, and the very real increases in the cost of welfare benefits, many companies modified the scope of their benefit plans. Other companies simply terminated their welfare plans. In response to these modifications and terminations, a spate of lawsuits arose.\(^7\) The courts hearing these cases have consistently sided with the employers.\(^8\) These courts have repudiated the Yard-Man inference, evidenced a strong distrust for evidence extrinsic to the written plan documents, and used ERISA’s preemption of state law as an excuse to essentially ignore traditional contract claims, such as estoppel. In short, these recent decisions have systematically tipped the scales in favor of corporate America. Even in cases where employers make consistent

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2. Id.
3. Id.
4. Id. at 432.
5. Id.
representations that welfare benefits are vested, retirees will probably not prevail under the current treatment of such claims by courts.

B. **ERISA Requirements**

When Congress enacted the Employee Retirement Income Security Act\(^9\) (hereinafter “ERISA”) in 1974, the protection of pension benefits took center stage.\(^10\) Welfare benefits were more of an afterthought, because, at the time, employees usually retired at age sixty-five, and employers accounted for any benefits they agreed to pay according to the cash method.\(^11\)

With regard to pensions, ERISA provides detailed and rigorous vesting, funding and informational requirements. However, ERISA does not subject welfare plans to such a comprehensive regime. Nevertheless, in establishing a welfare benefit plan, the employer must act pursuant to a written instrument (a “plan”) and must provide the participants and their beneficiaries with summary plan descriptions (“SPDs”). These summary plan documents are required by statute to specify the circumstances that will result in disqualification, ineligibility, denial, or loss of benefits.\(^12\) In contrast to pensions, there are no vesting and funding requirements for welfare benefit plans under ERISA. As such, there is no automatic vesting of welfare benefit plans as there is with pension plans.

Automatic vesting\(^13\) was rejected because the costs of such plans are subject to fluctuation and unpredictable variables.\(^14\) So, employers do retain the right to modify or terminate welfare benefit plans.\(^15\) But they can contract to allow for vesting of these rights. Thus, employers can agree to make the benefits irrevocable.

In analyzing whether an employer has done so, courts employ a traditional contract framework.\(^16\) In other words, if the governing plan

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10. Pension benefits are regular cash payments made by an employer after the retirement of an employee.
11. Welfare benefits are salary benefits in addition to pension benefits that an employer provides to, or for the benefit of, the employee. Examples include health insurance and life insurance.
13. Automatic vesting means that if an employer sets up a benefits plan, the employer must pay out those benefits without changing or modifying them when an employee meets the conditions of the plan.
14. Rossbacher et al., supra note 8, at 311.
15. See generally Curtis Wright Corp. v. Schoonejongen, 514 U.S. 73, 86 (1993) (holding that the reservation clause in the employer provided employee benefit plan was sufficient notice for amending the plan).
documents unambiguously reserve the right to amend or terminate the plan, then any claim by disgruntled employees who were divested of their benefits will be denied. On the other hand, if the plan unambiguously grants lifetime benefits, then the employer cannot modify the plan. If the governing plan documents are deemed ambiguous, then a court will examine extrinsic evidence in order to glean the intent of the parties.

III. CONTRARY TO ITS PURPOSE, ERISA HAS LEFT RETIREES WORSE-OFF THAN THEY WERE UNDER OLD STATE LAW REGIMES

A. Judicial Approaches to Welfare Benefits Before ERISA

Early pre-ERISA decisions held that benefit plans were not enforceable because employees did not give consideration for the benefits and, as such, were mere "gratuities." An example of this early judicial hostility towards employee claims for vested benefits can be found in Menke v. Thompson. Though Menke concerned a pension plan, it is nonetheless instructive of the early judicial treatment of benefits programs because of the overriding similarity between the two types of plans.

At the time of Menke's retirement from the Missouri Railroad Company, his employer had a pension plan in place which provided that every employee who had worked for the company for twenty-five continuous years would receive pension benefits. However, no employee was eligible for the pension if he or she had voluntarily left the service of the company, even if it was only for one day. Because he had gone on strike in 1922, which had interrupted his twenty-five years of continuous service, the board of pensions denied Menke pension benefits.

In his complaint, Menke contended that his foreman had made an oral promise to him that upon his return from the strike, he would be returned to full seniority as if he had never gone on strike. In light of this promise, the special master found that the pension plan constituted a unilateral

17. Because welfare benefits do not automatically vest, employers frequently include reservation of rights clauses in benefits plans in order to make clear that they can modify or cease paying for benefits at will. However, these clauses are often ambiguous, especially when viewed in relation to extra-plan indications that the employer intended the benefits to vest at retirement.
19. 140 F.2d 786, 791-92 (8th Cir. 1944) (holding that a deceased employee's executrix had no right to collect a pension).
20. Id. at 787.
21. Id.
22. Id. at 788.
23. Id. at 789.
contract, which was binding upon the company once the employee had complied with the conditions of the plan.\textsuperscript{24}

The district court, though, rejected the findings of the special master. It concluded that, as a matter of law, the pension plan was a “unilateral voluntary undertaking by the railroad company” and that the company could decide for itself who met the plan’s eligibility requirements, which the employer was free to set.\textsuperscript{25} The Eighth Circuit agreed in essence with the district court. It held that the pension plan was entirely voluntary and its benefits were essentially gratuities.\textsuperscript{26}

In support of the proposition that the plan was a gratuity, the Eighth Circuit noted that the plan did not depend on employee financial contributions. Thus, the company bore the whole burden and could “condition its bounty in such a manner as it saw fit.”\textsuperscript{27} Additionally, no statute in force required the company to take on such a burden.\textsuperscript{28} Incidentally, the court ruled that even if the pension was a contract or an offer, Menke had not complied with the terms of the offer. No acceptance existed meaning that the employer was not bound to pay.\textsuperscript{29}

In the years leading up to the enactment of ERISA, however courts began to reject the notion that retiree welfare benefits and pension plans were unenforceable because they were mere gratuities. Instead, courts came to view these plans as binding on the employer, based on unilateral contract theories.\textsuperscript{30} The case of Upholsterers International Union of North America v. American Pad & Textile Co. embodied this new line of reasoning.\textsuperscript{31}

In American Pad & Textile Co., the union sued the American Pad & Textile Company for damages related to a violation of the terms of a previously existing labor-management contract. The contract contained language that “any employee with 15 years or more of continuous service . . . at the time of retirement and having attained the age of 65 years, the Company will continue to cover such eligible retired employees with $2,000 life insurance.”\textsuperscript{32} In fact, the Company had paid the premiums on life insurance policies even in the years before the agreement in

\begin{itemize}
\item \textsuperscript{24} \textit{Id.}
\item \textsuperscript{25} \textit{Id.} at 790.
\item \textsuperscript{26} \textit{Id.}
\item \textsuperscript{27} \textit{Id.}
\item \textsuperscript{28} \textit{Id.}
\item \textsuperscript{29} \textit{Id.}
\item \textsuperscript{30} Rose City Trans. Co. v. Portland, 533 P.2d 339, 342 (Ore. 1975). The court held that an employer would be held liable for a benefits program if a three-part standard was met. The first prong was that the employer must adopt a plan to provide retirement benefits. The second requirement was that the employee must have been aware of the plan. The third prong was that the employee must meet the plan’s eligibility requirements. \textit{Id.}
\item \textsuperscript{31} 372 F.2d 427, 428 (6th Cir. 1967).
\item \textsuperscript{32} \textit{Id.} at 427.
\end{itemize}
question.\textsuperscript{33}

In 1962, the company closed its Ohio plant and relocated to a new plant in Louisiana. Despite the “will continue” language in the collective bargaining agreement, American Pad & Textile Co. informed its retired employees that it had decided to cease paying the premiums on the life insurance policies.\textsuperscript{34} At trial, the company contended that the words “will continue” should be read in conjunction with the words “for the term of this contract.”\textsuperscript{35} The retirees disagreed.

The Sixth Circuit held that the word “continue” in the key provision was ambiguous.\textsuperscript{36} The court went on to say that the fact that the provision in question did not contain limiting language, while a second provision relating to other benefits did, lent credibility to the union’s interpretation.\textsuperscript{37} More significantly, the court held that, in view of the company’s practice of paying the life insurance premium which was formalized in the agreement with the union, the clause was “an employee benefit provision which vests when the employee service called for is fully performed.”\textsuperscript{38} In other words, this employee benefit provision was a unilateral contract. For these reasons, the Sixth Circuit upheld summary judgment for the retirees.\textsuperscript{39}

In the wake of American Pad & Textile Co., courts began to look upon welfare benefits as a means of deferred compensation.\textsuperscript{40} Courts found the relative bargaining strengths of the parties so unequal that they often refused to give effect to arguably ambiguous reservation clauses.\textsuperscript{41} In short, employees were better protected under the old state law regimes that existed before the enactment of ERISA.

B. The Judicial Treatment of Welfare Benefit Plans After ERISA has Made Retirees Worse Off

For the sake of uniformity, ERISA preempts all prior existing state law on the subject of retiree welfare benefits.\textsuperscript{42} However, Congress intended federal courts to develop a federal common law to fill in gaps

\begin{itemize}
  \item \textsuperscript{33} Id. at 428.
  \item \textsuperscript{34} Id. at 427.
  \item \textsuperscript{35} Id. at 428.
  \item \textsuperscript{36} Id.
  \item \textsuperscript{37} Id.
  \item \textsuperscript{38} Id.
  \item \textsuperscript{39} Id. at 429.
  \item \textsuperscript{40} Payne, supra note 18, at 95.
  \item \textsuperscript{41} Id. See also Evo v. Jomac, Inc., 289 A.2d 551, 557 (N.J. 1972) (interpreting a clause in the statute to protect an employee from forfeiture of accumulations); Stopford v. Boonton Molding Co., 265 A.2d 657, 668 (N.J. 1970) (upholding a judgment against an employer stating that an employee cannot collect a lump sum payment).
  \item \textsuperscript{42} 29 U.S.C. §1144(a)(2001).
\end{itemize}
caused by this preemption. In carrying out this charge, nothing apparently prevents courts from turning to the preempted state common law for guidance. With few exceptions, however, the federal courts have not done so.

For instance, old common law claims for fraud and estoppel have found no analogue in the federal system. Plan interpretation techniques demonstrate reluctance to resort to extrinsic evidence. Exacerbating the problem is the fact that most circuits have all but abandoned or rejected the Yard-Man inference. In sum, retirees are worse-off now than they were before the enactment of ERISA. This is extremely troubling since ERISA was intended to do the opposite.

IV. THE YARD-MAN INFERENCE

In 1974, Yard-Man Inc. and the union of United Automobile, Aerospace and Agricultural Implement Workers of America Union ("UAW") entered into a three-year collective bargaining agreement that provided for retiree welfare benefits. Yard-Man's plant, though, closed approximately one year later. In 1977, the company notified former employees that their existing health and life insurance benefits would cease when the collective bargaining agreement expired. In finding for the retirees, the Sixth Circuit recognized that, because the welfare benefits did not automatically vest under ERISA, the issue became the parties' intent. So, the court focused its inquiry on the collective bargaining agreement (hereinafter "CBA"). In examining the agreement, the court relied on the basic principles of contractual interpretation to discern the intent of the parties as to whether the benefits were irrevocable.

The court introduced the highly controversial concept that retiree benefits are status benefits that carry with them an inference that they continue so long as the requisite status is maintained. Thus, when examining the agreement to determine if it is ambiguous—which, in turn, determines the need for extrinsic evidence—there is an inference that the parties likely intended those benefits to continue for life. This is known as the Yard-Man inference.

The court specifically stated that this inference by itself would not by

43. 120 CONG. REC. 29,942 (1974).
46. Id.
47. Id. at 1479.
48. Id.
49. Id. at 1482.
50. Id.
itself establish an intent to create vested benefits.\(^5\) Rather, the court explained that the inference would serve as contextual evidence of the parties' intent in making the agreement.\(^5\)

The *Yard-Man* inference has two logical underpinnings.\(^5\) First, it takes the modern pre-ERISA view of welfare benefit contract interpretation into account. For example, to determine intent, courts look at extrinsic evidence from the outset rather than resorting to such evidence only in the case of ambiguity. Second, retiree welfare benefits are a permissive subject of bargaining, meaning that employers do not have to negotiate with unions on this issue. As such, it behooves unions to take care of the issue once and for all while it is on the table.

Presently, the Fourth, Sixth, and Eleventh Circuits accept the *Yard-Man* inference.\(^5\) But, in light of the *Sprague* decision discussed below, it is somewhat questionable whether the inference is still viable in the Sixth Circuit.\(^5\) The Third, Fifth, and Eighth Circuits have explicitly rejected the *Yard-Man* inference, concluding that such an inference impermissibly shifts the burden to employers.\(^5\) However, this is not the case.

The inference is only evidence to be used in interpreting a contract and, by itself, is not sufficient to carry the day. The *Yard-Man* court made this exceedingly clear.\(^5\) Unfortunately, in the period after *Yard-Man*, some courts did apply the inference much too broadly. A good example of this broad application is seen in *Policy v. Powell Pressed Steel Co.*\(^5\)

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51. Id.
52. Id. The *Yard-Man* court, in explaining the role of inference, stated that "as part of the context from which the collective bargaining agreement arose, the nature of such benefits simply provides another inference of intent." Id.
53. Payne, supra note 18, at 103.
54. Sacher & Payne, supra note 16, at 484.; see Keffer v. H.K. Porter Co., 872 F.2d 60, 64 (4th Cir. 1989) (quoting *Yard-Man* as part of its holding); United Steelworkers v. Connors Steel Co., 855 F.2d 1499, 1515 (11th Cir. 1988) (citing *Yard-Man* to support the finding that the language of the agreement at issue was unambiguous); *Yard-Man*, 716 F.2d at 149 (opining that the collective bargaining process cannot be bypassed to modify vested pension benefits).
55. Sprague v. Gen. Motors Corp., 133 F.3d 388, 406 (6th Cir. 1998) (holding that benefits were not vested despite summary plan documents that asserted both that employees would be entitled to free health insurance throughout retirement and that the terms of the current plan were subject to change).
56. UAW v. Skinner Engine Co., 188 F.3d 130, 139-41 (3d Cir. 1999) (rejecting the *Yard-Man* inference and embracing the Eighth Circuit's criticism of the inference); United Paperworkers Int'l Union v. Champion Int'l Corp., 908 F.2d 1252, 1261 n.12 (5th Cir. 1990) (finding merit in the Eighth Circuit's criticism of *Yard-Man*); Anderson v. Alpha Portland Indus., 836 F.2d 1512, 1517 (8th Cir. 1988) (disagreeing with *Yard-Man* to the extent that it recognizes an inference of an intent to vest).
57. *Yard-Man*, 716 F.2d at 1482 (stating that the consideration of certain factors "simply provides another inference of intent. Standing alone, this factor would be insufficient to find an intent to create interminable benefits").
58. 770 F.2d 609, 612 (6th Cir. 1985) (holding that the CBA at issue granted lifetime
Powell arose in the context of a collective bargaining agreement. The defendant, Powell Steel Co., contended that it retained the right to cancel employee health insurance coverage because the obligation to provide such coverage ended with the expiration of the collective bargaining agreement. The Powell court disagreed and held that the contract in question unambiguously conferred lifetime benefits on the retirees due to language in the pension and insurance agreements. Relying on Yard-Man and the fact that a union may not bargain away retiree benefits which have already vested in particular individuals, the Powell court stated that "normally retiree benefits are vested." The Yard-Man inference, of course, stood for no such thing. Rather, the inference is merely one thing for a court to consider when analyzing contracts or plan documents for ambiguity.

In any event, to many courts and commentators alike, Yard-Man came to stand for this sort of excess which helped lead to its current disfavor. This development comes at a time when some courts decisions imply that the termination of retiree health benefits is an unfortunate but acceptable sacrifice for the economic health of America’s corporations.

V. PLAN INTERPRETATION UNDER ERISA

Federal courts have placed an overwhelming emphasis on formal written plan documents in cases regarding the termination of retiree welfare benefit programs. Accordingly, both oral and written extra-plan communications have diminished tremendously in importance. Extrinsic evidence is rarely used to augment or change an agreement. More importantly, it is also seldom used to determine whether an ambiguity exists in a plan document that appears plain on its face.

This approach has become a sword in the hand of employers, who can frequently promise that employee benefits will last for life and not face liability as long as they place a carefully worded reservation of rights provision in the formal plan documents. Such an approach runs contrary to

health benefits to certain retirees).

59. Id. at 610.
60. Id. at 614.
61. Id. at 613.
62. Rossbacher et al., supra note 8, at 347.
64. See, e.g., Nachwalter v. Christie, 805 F.2d 956, 960 (11th Cir. 1986) (disallowing oral modifications of a written agreement).
65. See Sulentic, supra note 63, at 5; see also Priority Solutions, Inc. v. Cigna, 1999 WL 1057202, at *4 (S.D.N.Y. Nov. 8, 1999) (stating that Cigna was not free to disregard the plain meaning of the plan).
both the congressional intent in the enactment of ERISA and pre-ERISA state common law constructs.

A. ERISA Plans are Analyzed Under the Rubric of Contract Law

ERISA broadly preempts state law in the area of pension and welfare benefits. Nonetheless, most courts have recognized that these welfare and pension plans should be analyzed under contract and trust law.\(^\text{66}\) As such, a brief examination of the two competing approaches to contract analysis and the role of extrinsic evidence within these paradigms is in order.

Skepticism of and extreme reluctance to resort to extrinsic evidence characterizes the formalistic approach espoused by Williston. In dealing with whether a contract is integrated clauses and basic contract interpretation, the Williston approach concerns itself first and foremost with the ‘four corners’ of the document in question.\(^\text{67}\) In contrast, the Corbinian or modern approach, propounds that extrinsic evidence is necessary for the analysis and interpretation of the integration issue and the overall contract.\(^\text{68}\) In other words, under this modern approach courts will consider extrinsic evidence even if the meaning of the written plan or contract is plain on its face. In light of ERISA’s contractual nature, the tension between the modern and traditional paradigms plays an important role in ERISA plan litigation.

1. Federal Courts Now Strictly Adhere to the Principle That the Plan Rules

Section 402 of ERISA requires that all employee benefit plans be reduced to writing.\(^\text{69}\) As Alison Sulentic argues, many courts have used this rule to protect employers from promises that were never formally made a part of the plan document, but carry much more weight with the employees.\(^\text{70}\) She states, “ERISA’s mandate of a written plan document

\(^{66}\) See, e.g., Brewer v. Protexall, Inc., 50 F.3d 453, 457 (7th Cir. 1995) (stating that health benefit plans governed by ERISA should be interpreted by federal common law rules of contract interpretation); Burnham v. Guardian Life Ins. Co. of Am., 873 F.2d 486, 489 (1st Cir. 1989) (stating that ERISA-regulated group life insurance policies must be interpreted under principles of federal substantive law, including the common sense canons of contract interpretation).

\(^{67}\) See, e.g., John D. Calamari & Joseph M. Perillo, A Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation, 42 Ind. L.J. 333, 338 (1967) (stating that when a writing appears complete on its face, it is deemed to be a total integration).


\(^{70}\) Sulentic, supra note 63, at 38 n.191.
has come to justify the assertion that the written plan embodies the entire plan.” 71 This proposition is fraught with internal inconsistencies.

First, employees rarely, if ever, get to meaningfully participate in the drafting of the plan documents. Furthermore, such plans do not always contain all the promises made in the context of the benefit plan. Moreover, the actual utility of the written plan is somewhat limited because many plan participants are not able to adequately understand the benefits outlined in the formal plan document even if they were to read it. 72

More importantly, the written plan document rule is a part of the statute’s fiduciary provisions. 73 It is more properly understood as a provision to protect employees by forcing the employer to reduce the plan to writing so that all the key promises and benefits are in one place. 74

Courts have long held that an ERISA plan can exist without any formal plan document. In Dillingham, for instance, the Eleventh Circuit announced that an ERISA plan exists if “from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits.” 75 This test demonstrates that the absence of a written plan “indicates a failure to adhere to fiduciary standards,” not the absence of a plan altogether. 76 Despite the Dillingham test, “courts have assumed that the requirement of a written plan document signifies the exclusion of parol evidence in a manner that goes far beyond the manner in which commentators such as Corbin prescribe for the common law.” 77

For instance, the Third Circuit, in In re New Valley Corp., 89 F.3d 143, 149 (3d Cir. 1996), said that section 402 operates like any other common law integration clause and bars the introduction of parol evidence to vary or contradict the written terms. In short, courts have interpreted section 402 as a strict, statutorily-imposed merger clause that excludes the consideration of extrinsic evidence to vary or augment the terms of the plan, even in the face of numerous extra plan communications on the part of the employer. 78

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71. Id. at 39.
73. The obligation to reduce the plan to writing appears in the provisions that set forth fiduciary obligations under ERISA. See also Sulentic, supra note 65, at 40 n.205 (stating that the written plan document rule is part of ERISA’s fiduciary provisions).
74. Sulentic, supra note 65, at 40 n.206 (stating ERISA’s fiduciary provisions are designed to force employers to maintain a plan document).
75. Donovan v. Dillingham, 688 F.2d 1367, 1373 (11th Cir. 1982).
76. Sulentic, supra note 63, at 44-45 n.233 (citing Dillingham, 688 F.2d at 1372).
77. Id. at 47 n.244.
78. Id. at 46-48 nn. 243-250 (noting that some courts have gone far beyond what Corbin prescribes for common law exclusion of parol evidence to interpret the rule as a statutorily imposed integration clause).
2. Plan (Contract) Interpretation Under ERISA

It is fairly well settled that courts turn to extrinsic evidence to interpret the terms of even an integrated contract only when those terms are ambiguous, or the terms are susceptible to more than one reasonable interpretation. However, the controversial question remains as to how one should determine whether a term or provision is ambiguous. The formalistic versus modern debate as to the role of extrinsic evidence also affects plan interpretation under ERISA.

For all the benefits that the 'four-corners' or formalistic approach may offer, problems with this approach abound. For instance, the 'four-corners' approach invites the interference of the judges' own subjective experiences. Arguably it would be far better to rely upon extrinsic evidence that relates directly to the agreement itself rather than the extrinsic evidence of a judge's own personal experiences as to what a contract term means. To this end, the modern approach argues that a term cannot be deemed unambiguous without first considering the context of the agreement. Nevertheless, in recent years judges have been reluctant to consider extrinsic evidence in contract interpretation, particularly for ERISA plan interpretation. Some courts have gone so far as to hold that vesting of welfare benefits cannot occur if the express language of the plan does not provide for it.

Despite the concerns regarding the use of extrinsic evidence in assessing ambiguity, a written plan document that accurately describes the entire agreement faces no threat from parol evidence. In any event, this judicial hostility to extrinsic evidence, even in light of express promises of lifetime benefits, makes the Yard-Man inference even more necessary.

It would function as an additional consideration for judges in making the initial determination of ambiguity—not sufficient to carry the day, but a counterweight to the current approach.

80. See, e.g., Mellon Bank v. Aetna Bus. Credit, Inc., 619 F.2d 1001, 1011 (3d Cir. 1980) (stating that "under a 'four corners' approach a judge sits in chambers and determines from his point of view whether the written words before him are ambiguous").
81. Sulentic, supra note 63, at 60 (stating, "even when the extrinsic evidence strongly suggests that the plan document is ambiguous, there is a deep-rooted reluctance to acknowledge an ambiguity that is not patently obvious on the face of the document").
82. See, e.g., Sprague v. Gen. Motors Corp., 133 F.3d 388, 400 (6th Cir. 1998) (stating that the intent to vest must be found in the plan documents and must be stated in clear and express language).
83. Sulentic, supra note 63, at 63.
VI. RECENT CASES HAVE EMBRACED PRINCIPLES THAT MAKE IT MUCH HARDER FOR THE RETIREES' CLAIMS TO SUCCEED

A. Sprague

Chief among pro-employer cases is Sprague v. General Motors Corp. In 1985, General Motors ("GM") became fully self-insured. Its welfare benefit plan contained language stating that GM reserved the right to modify or terminate the benefits. However, GM issued a number of summary plan descriptions ("SPDs"), which contained lifetime language such as "at no cost to them . . . for their lifetimes." Many of these SPDs did not contain language reserving the right to modify or terminate the benefits. Additionally, plant officials made numerous oral and written assurances to the early retirees that their benefits would last for the remainder of their lives. Analyzing this fact pattern, the court began with the premise that because ERISA specifically exempts welfare plans from the vesting requirements of pension plans, an employer's commitment to vest should "not be inferred lightly." In its analysis, the Sixth Circuit ignored its own Yard-Man precedent, severely limited the viability of equitable estoppel, and significantly departed from generally accepted principles of welfare benefit plan interpretation under ERISA.

1. The Contract/ Vesting Question

Prior to Sprague, in Edwards v. State Farm Mutual Automobile Insurance Co., the Sixth Circuit had held that the statements in SPDs are binding, and if they conflict with those in the plan itself, then the SPD shall govern. The court in Sprague considerably narrowed this holding by explaining that Edwards did not apply to silence. Because the SPD is by definition a summary, the Sprague court concluded that there is no conflict with the plan if a SPD with lifetime language does not contain reservation

84. Sprague, 133 F.3d at 406.
85. Id. at 393-94.
86. Id. at 400.
87. Id. at 395.
88. Id. at 400.
90. Sprague, 133 F.3d at 401.
language. This holding particularly hurts retirees and also runs contrary to the statutory purpose of the SPDs.

SPDs are supposed to describe the circumstances that will result in termination of benefits. Surely, a reservation of rights is a circumstance resulting in termination. Moreover, most circuits have also held that SPDs should take precedent over the plan. Courts defer to SPDs because they are supposed to be written in such a way that the average plan participant can understand them, whereas the plan itself is often incomprehensible to the average participant.

The Sprague court also held that there is no ambiguity in a situation in which the SPD tells participants both that the terms of the current plan entitle them to free health insurance throughout retirement and that the terms of the current plan are subject to change. Rather the court dismissed this seemingly contradictory SPD as a “qualified promise.” Therefore, the court did not look at the extrinsic evidence, including the many promises that the benefits were for life.

The Seventh, Eighth, and Eleventh Circuits all rejected the Sixth Circuit’s approach. Even the circuits that have found similar provisions unambiguously in favor of non-vesting have declined to adopt an absolute rule against vesting in such circumstances.

Nonetheless, the Sixth Circuit’s approach in Sprague might still be acceptable if the court had allowed the retirees to bring claims to address

91. Id. at 400.
93. Rossbacher et al., supra note 8, at 314. See, e.g., Parker v. BankAmerica Corp., 50 F.3d 757, 763 (9th Cir. 1995) (stating that if there is a conflict between the provisions of a summary policy and the policy itself, the terms in the summary control).
94. Payne, supra note 18, at 110; See also 29 U.S.C. § 1022(a) (2001).
95. Sprague, 133 F.3d at 401.
96. Id.
97. See, e.g., Barker v. Ceridian Corp., 122 F.3d 628, 635 (8th Cir. 1997) (holding that a plan that both promised lifetime benefits and reserved the right to terminate benefits was ambiguous); Diehl v. Twin Disc, Inc., 102 F.3d 301, 306 (7th Cir. 1996) (holding that employees have vested rights when plan documents both asserted that rights were vested, and in separate documents, reserved the right to terminate benefits); Stewart v. K.H.D. Deutz of America, Corp., 980 F.2d 698, 703-04 (11th Cir. 1993) (stating that because both clauses could not be given full effect and the agreement did not state which should be qualified, the terms of the agreement were ambiguous); Sacher & Payne, supra note 16, at 485.
98. See Chiles v. Ceridian Corp., 95 F.3d 1505, 1512 (10th Cir. 1996) (holding that a general reservation of rights clause unambiguously controls a promise of continued health care benefits to retirees); In re Unisys Corp. Retiree Med. Benefit “ERISA” Litig., 58 F.3d 896, 904 n.11 (3d Cir. 1995) (stating that a reservation of rights will always prevail over a promise of benefits and noting that, due to the abundance of ERISA plans and the differing benefits these plans provide, each case is fact specific and the court must make its determination of the benefits provided based on the language of the particular plan it has been called upon to review); Sacher & Payne, supra note 16, at 485.
the many representations of lifetime benefits that the company made, and its failure to correct the impression of employees that the benefits were for life. However, the Sprague court essentially closed the door to estoppel claims and to claim for breach of fiduciary duty under ERISA section 404(a)(1), the theoretical credibility of which the Supreme Court upheld in Varity Corp. v. Howe.99

2. Breach of Fiduciary Duty

The court in Sprague held that, although GM may have been acting as a fiduciary when it stated that the plans would be paid for life, they did not deliberately mislead employees, which the court considered an integral part of a breach of fiduciary duty claim.100 In other words, when GM said the benefits were for life, the corporation intended to pay the benefits for life. Furthermore, according to the court, ERISA did not require GM to include the reservation of termination rights in the SPDs.101

Apparently, the court decided that employers do not wear their fiduciary hats when they modify a plan, but only face fiduciary liability under ERISA for making misrepresentations that are deliberately misleading. As such, a breach of fiduciary duty claim will not succeed in federal court unless the employer deliberately tried to hurt the employees. This requirement that plaintiffs prove intent to harm is a very high bar for employees who have lost their benefits.

3. Equitable Estoppel

While most courts do not recognize a claim of estoppel in ERISA plan litigation,102 the Sprague court validated the possibility of the claim. But what the court gave with one hand, it took away with the other. The court held that there cannot be estoppel when the relied-on representation runs counter to the unambiguous terms of the plan.103 Of course, the Sprague court also held that lifetime language and reservation clauses in the same document do not create ambiguity, nor is there an ambiguity if an SPD contains lifetime language and no reservation of rights.

In light of this holding, it is hard to imagine a situation in which plan documents would appear so ambiguous as to permit a viable estoppel claim. Indeed, under Sprague’s estoppel standard, retirees could only bring

100. Sprague, 133 F.3d at 405.
101. Id. at 406.
102. Rossi, supra note 7, at 248.
103. Sprague, 133 F.3d at 404.
a viable claim when they could prevail under the contract or vested right theory anyway (i.e. when the contract is ambiguous and favorable extrinsic evidence is admissible).

4. The *Yard-Man* Inference

Lastly, the court in *Sprague* did not mention the *Yard-Man* inference, a doctrine that the Sixth Circuit actually developed. This omission might stem from the fact that the inference was developed in the context of the collective bargaining agreements and the Labor Management Relations Act, whereas *Sprague* was a non-union case. However, circuit courts that have accepted the inference have not made a distinction between union and non-union employees in this matter. The *Sprague* court certainly did not explicitly make such a distinction.

Much of the reasoning behind the development of the *Yard-Man* inference is equally valid in the non-union, ERISA-governed context. Congress did not intend ERISA to make employees worse-off than they were before its enactment. Additionally, salaried employees are equally, if not more, powerless than union employees when bargaining for ERISA-type benefits. More importantly, prior to ERISA, state courts were much more disposed to find in favor of retirees than they are now. State courts accepted both estoppel and fraud claims and took the modern view of contract interpretation. Given the *Sprague* court's rejection of these principles, the reinstitution of the *Yard-Man* inference becomes even more important to effect the true goal of ERISA.

B. *Skinner Engine Co.*

*UAW v. Skinner Engine Co.* also reflects the increasing judicial hostility to retirees, who have lost their welfare benefits. I examine the contract claim, breach of fiduciary duty claim, and equitable estoppel claim in turn.

1. Contract Claim

In the wake of FASB Statement No. 106, the Skinner Engine Co. eliminated or modified retiree health benefits at the expiration of its 1993

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106. See generally Payne, *supra* note 18 (stating that courts generally accept the estoppel principles when the plaintiff shows that the defendant made a material misrepresentation upon which the plaintiffs reasonably relied to their detriment).
107. 188 F.3d 130 (3d Cir. 1999).
collective bargaining agreement ("CBA") with the UAW. As a preliminary matter, the court rejected the Yard-Man inference and began its analysis with the familiar but controversial premise that because ERISA does not provide for the automatic vesting of welfare plans, intent to vest "must not be inferred lightly" and must be stated in clear and express language.

The CBAs did have language to the effect that the benefits would "continue" and "shall remain." However, the court ruled that these terms did not constitute clear and express language in favor of vesting. The court also rejected the union’s argument that the phrases were, at the very least, ambiguous and should at least survive summary judgment.

In rejecting this contention, the court first noted that "reference must be made to the contract language, the meanings suggested by counsel, and the extrinsic evidence offered in support of each interpretation." The court concluded that it was not reasonable to interpret the phrases as conferring lifetime, vested benefits. Accordingly, no ambiguity existed.

The court believed that the phrases merely related back to prior agreements. So, in the case of benefits carried over, the new agreement stated "will continue" or "shall remain." In case of new benefits, the agreements stated that they "will be obtained, will provide" or "will be instituted." Moreover, while the agreements almost invariably mentioned vesting with regard to pension benefits, they never mentioned it with regard to welfare benefits.

Finally, the court rejected the testimony of various union members and of a former Skinner executive that the welfare benefits were understood during negotiations as vested and thus irrevocable. The court rejected this testimony with the somewhat cryptic statement that, while courts should resort to extrinsic evidence to determine if a contract is ambiguous, it may not be used to create an ambiguity where none exists.

However, the court examined and accepted other extrinsic evidence, like the fact that Skinner continued to provide benefits to employees.

108. Id. at 136.
109. Id. at 139.
110. Id.
111. Id. at 141.
112. Id. at 142.
113. Id. at 144.
114. Id. at 142.
115. Id.
116. Id.
117. Id. at 143.
118. Id.
119. Id. at 137-38.
120. Id. at 144-45.
121. Id. at 145.
retirees during strikes. Additionally, the court used expired CBA’s in order to determine that the phrases represented merely a limited promise to continue the benefits in the current CBA. Moreover, the court recognized that the trier of fact may not merely consider “whether the language is clear from its point of view.” Further, the court stated that the appellant’s conclusion had legitimacy only if viewed in a vacuum (i.e. divorced from its context). In short, the court actually did use considerable extrinsic evidence to determine that the plan did not vest rights.

One finds it hard to explain why the court deemed these instances of extrinsic evidence worthwhile, but found that the highly probative testimony of an executive merely created an ambiguity “where none exists” rejecting it as based on the “notion of moral responsibility.” Nevertheless, this distinction becomes much clearer when viewed in the context of the recent judicial activism for employers evidenced in *Sprague.*

2. Breach of Fiduciary Duty

The *Skinner* court also rejected the retirees’ breach of fiduciary duty claim under section 404(a)(1) of ERISA. Taking a page out of *Sprague,* the court said that there was no “competent evidence which suggests that the company made any affirmative misrepresentations” or deliberately misled the retirees. Additionally, the court held that there existed no duty on the company’s part to correct a false assumption on the part of the employees if it did not create the misunderstanding and did not remain silent when questioned about its benefits.

3. Equitable Estoppel

The *Skinner* court also rejected an equitable estoppel claim under ERISA. The court’s reasoning again mirrored that of *Sprague.* The court held that there cannot be reasonable reliance when there is an unambiguous reservation of rights in the plan documents. The trial court found such a reservation in the SPD. Nevertheless, both parties conceded that these SPD’s were never provided to plan beneficiaries. As such, these SPD’s did not constitute a part of the governing plan documents. Nonetheless, the court refused to reverse the trial court’s granting of

122. *Id.* at 144.
123. *Id.* at 142.
124. *Id.* at 143.
125. *Id.* at 146.
126. *Id.* at 150.
127. *Id.*
128. *Id.* at 151.
129. *Id.* at 150-51.
summary judgment because the retirees did not show evidence of detrimental reliance.130

VII. THE YARD-MAN INference SHOULD BE RE-INSTITUTed OR INTRODUCED TO COUNTERACT THE RECENT ANTI-RETIREE JUDICIAL ACTIVISM.

The best solution to the judicial activism evident in Skinner and Sprague is the introduction or re-institution of the Yard-Man inference. This is particularly true in the Sixth Circuit and other circuits that have taken the hard-line stance against retirees that if the contract or plan does not unambiguously vest rights, then the retiree does not have recourse.

The inference does not, as some courts and commentators have described, shift the burden to the defendants (the employers). Rather, the inference determines whether plan documents are ambiguous, and, therefore, whether to allow the introduction of favorable extrinsic evidence to discern intent.

This inference does have the potential to be abused. Presently, however, federal courts are consistently abusing the ERISA preemption of state law. The inference would function as a way to keep this activism in check. At the very least, having the Yard-Man inference in mind when reviewing plan documents will assist trial courts to keep ERISA’s pro-employee intent in mind.131 In light of the judicial hostility to employees, it is likely that this could only be accomplished through statutory means.

VIII. CONCLUSION

Beginning in 1992, companies discovered a timely pretext to justify the elimination of company-funded retiree welfare benefit programs. The cases discussed above, as well others, demonstrate “an overriding judicial determination that retiree health care is wildly expensive, threatening the solvency of corporate America.”132

Protecting the solvency of corporate America was not Congress’s intent in enacting ERISA. ERISA’s preemption of state law that favored retirees did not aim to make the retirees worse-off or to change the relative burdens on them vis-a-vis their former employers. Indeed, the Supreme Court said as much in Firestone Tire and Rubber. On the contrary, ERISA was enacted to bring uniformity and to make sure that employers reduced their plans to writing so that employees could reasonably avail themselves

130. Id. at 151-52.
131. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 114 (1989) (stating that ERISA was enacted to “protect the interests of employees”).
132. Rossbacher et al., supra note 8, at 308.
of the terms of the plan.

Cases like *Skinner* and *Sprague* demonstrate just how far the courts have diverged from Congress's intent. Estoppel and breach of fiduciary duty claims are essentially dead letters even in cases in which the employer has made extra-plan misrepresentations or has refrained from correcting false assumptions. Courts have also been consistently unwilling to find either that the contract unambiguously vests or is at least so ambiguous as to allow extrinsic evidence that very often favors the retirees. In light of these judicial tendencies, the *Yard-Man* inference becomes a necessary tool for retirees.