Many employers offer some type of retiree health care coverage. Employers are concerned over substantial increases in health care costs, which combined with the growing number of retirees, have placed an unanticipated financial burden on employee health care plans. In recent years, early retirement incentive plans have increased the number of retirees who receive such health benefits. Additionally, the population is growing older as the average life expectancy in the United States increases. The situation is exacerbated by the concern over the federal budget deficit: any cut in Medicare increases retiree medical costs. Health care benefits are naturally of paramount importance for elderly retirees. Accordingly, the private sector will have to bear increasing responsibility for health care of the elderly.

As employers modify retiree health care plans to reduce costs or terminate plans as they file bankruptcy or close plants, arguments between employers and employees concerning health care plans have increasingly become the subject of lawsuits and legal commentary. At issue is whether employers have the right to unilaterally terminate or reduce retiree welfare benefits or whether the rights have vested in the retirees.

Welfare benefits are defined under the Employee Retirement Income Security Act of 1974 (ERISA) as including medical, surgical, hospital, sickness, disability, unemployment, and death benefits. Welfare benefits, unlike pension benefits, are not subject to the strict vesting requirements of:

2. Id. See also Musto v. American Gen. Corp., 615 F. Supp. 1483, 1496 (M.D. Tenn. 1985) (four-fold increase in costs over last five years).
3. Van Olson, supra note 1.
4. See also Policy v. Powell Pressed Steel Co., 770 F.2d 609 (6th Cir. 1985) (Company originally agreed to pay fifty percent of the cost of retirees' health benefits supplemental to Medicare. Later agreements increased this to 100 percent).
6. E.g., Musto, 615 F. Supp. at 1483.
7. E.g., In re White Farm Equipment Co., 788 F.2d 1186 (6th Cir. 1986).
9. Id.
10. Supra notes 1 and 5; infra note 25.
12. 29 U.S.C. § 1002(1) (1982 & Supp. 1986). This section defines welfare benefits as medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services.
13. Pension benefits are defined under ERISA as retirement income or deferral of income by employees. 29 U.S.C. § 1002(2) (1986).
ERISA. This gap in federal statutory law has led the courts to formulate their own analysis as to when employers may terminate or reduce the welfare benefits of retirees.

Part I of this comment will examine the applicable statutory law in this area. Part II will examine the developing body of federal case law. Part III will address the underlying policy concerns in conjunction with already established precedent to provide insight into what the law in this area should be.

I. APPLICABLE LAW

Federal Statutory Law

Employee benefit plans in general are the subject of ERISA. ERISA does not require the creation of employee benefit plans, but once an employer or employee organization establishes a benefit plan, the employer or employee organization must comply with ERISA regulations.

Both welfare and pension benefit plans are subject to reporting and disclosure requirements. ERISA also defines the fiduciary responsibilities of the administrator and standard of care to be followed. ERISA pension plans are subject to stringent funding and vesting requirements based on age and length of service. ERISA, however, specifically exempts employee welfare plans from the vesting and funding provisions.

Plaintiffs attempting to enforce welfare benefits under ERISA's fiduciary responsibility provision have met with little success. The only requirement is

---

17 Each participant in the plan must be provided with a summary plan description and summary of any material modifications; these summaries must also be filed with the Secretary of Labor. 29 U.S.C. §§ 1021-22 (1982). See generally A Practical Guide to the New Pension Reform Legislation (S. Glasser ed. 1975).
18 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 the 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.
22 Of course, if a fiduciary failed to administrate the plan according to plan documents, plaintiffs could sue under ERISA's fiduciary provision. The difficulty is in ascertaining whether plan documents give retirees a vested right to the welfare benefits.
That welfare provisions not be arbitrary, capricious or unreasonable on their face or as applied. Thus, health benefits cannot be reduced or eliminated in an arbitrary or unreasonable manner, or for a capricious reason. However, plaintiffs have been denied relief under this standard because defendants may prove, and usually do, that benefit reductions or terminations were the result of financial necessity. One commentator has noted that "because of the great deference courts give to the decisionmaker, it is difficult to prevail under this theory."

Federal Common Law

More important than ERISA's fiduciary provision, at least on the issue of vesting of welfare benefits, is ERISA's preemption provision. As a result of this provision, federal courts are developing a rule of federal common law on the issue of welfare benefits. The courts infer their authority from ERISA's preemption provision, ERISA's legislative history, and the Labor Management Relations Act (LMRA).

ERISA specifically "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." The Supreme Court has stated that "Congress used the words 'relate to' in section [1144] in their broad sense." The courts have reasoned that Congress intended the area to be "an exclusive federal concern" and where statutory law is silent, the federal courts should fashion a federal common law.

---

2Music v. Western Conference of Teamsters, 712 F.2d 413 (9th Cir. 1983).
28788 F.2d at 1191 (“ERISA's broad preemption provision makes it clear that Congress intended to establish employee benefit plan regulation as an exclusive federal concern, with federal law to apply exclusively, even where ERISA itself furnishes no answer.”). See also Adcock, 616 F.Supp. at 415; Musto, 615 F.Supp. at 1497.
29Infra notes 34-36 and accompanying text.
33White Farm, 788 F.2d at 1191.
34One court has seen ERISA as a congressional mandate for a nationally uniform regulatory scheme. Menhorn v. Firestone Tire & Rubber Co., 738 F.2d 1496, 1500 (9th Cir. 1984). The Menhorn court stated that Congress realized that the bare terms . . . of these statutory provisions would not be sufficient to es-
In support of their position the courts often cite the statement of Senator Javits that "it is also intended that a body of federal substantive law will be developed by the courts to deal with issues involving rights under private welfare and pension plans." It has been suggested that "courts have used this statement as carte blanche for developing a common law of welfare benefit plans," while largely ignoring the fact that ERISA's legislative history may also support the contention that Congress did not intend that federal courts develop a common law to fill in ERISA's gaps. Nevertheless, it seems clear that the courts are not overstepping their bounds by developing common law rules to deal with the issue of whether certain retirees have a vested interest in welfare benefit plans.

The same conclusion can be reached under the Labor Management Relations Act (LMRA). Section 301 of the LMRA authorizes federal district court jurisdiction over suits brought by and against labor organizations. This includes suits between employers and labor organizations as well as suits based on contracts between employers and labor organizations. Although retirees are no longer members of the collective bargaining unit, and active workers are not required to negotiate on the behalf of retirees, they are not without protection under the LMRA. The Supreme Court has noted that "under established contract principles, vested retirement rights may not be altered without the pensioner's consent . . . the retiree, moreover, would have a federal remedy under Section 301 of the Labor Management Relations Act for breach of contract if his rights were unilaterally changed." The threshold question is whether the courts have the power to create federal common law when activities arise from and bear heavily upon a federal program, even though there is no federal statute specifically applicable.

Establish a comprehensive regulatory scheme. It accordingly empowered the courts to develop a body of federal common law governing employee benefit plans. The federal common law serves three related ends. First, it supplements the statutory scheme interstitially. Second and more generally, it serves to ramify and develop the standards that the statute sets out in only general terms. Third, Congress viewed ERISA as a grant of authority to the courts to develop principles governing areas of the law regulating employee benefit plans that had previously been the exclusive province of state law.

Id. at 1498-1500. See also Terpinas v. Seafarer's Int'l Union, 722 F.2d 1445, 1447 (9th Cir. 1984); Musto, 615 F.Supp. at 1494; Adcock, 616 F.Supp. at 415; White Farm, 788 F.2d at 1191. Cf. J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 132 (2d ed. 1983) ("Federal courts have the power to create federal common law when activities arise from and bear heavily upon a federal program, even though there is no federal statute specifically applicable.").


*Id.


*Id. at 173.

*Id. at 181 n. 20. See Turner v. Local Union No. 302, Int'l Bhd. of Teamsters, 604 F.2d 1219, 1225 (9th Cir. 1979); Weimer v. Kurz-Kasch, Inc., 773 F.2d 669, 673 (6th Cir. 1985); Powell, 770 F.2d at 609. At least one
remains as to whether the retirees' rights have vested.

A number of the welfare benefit cases have been brought under the LMRA. The Supreme Court has held that federal substantive law is to be applied in LMRA actions. This federal substantive law must be based on the underlying policy of the federal labor laws. Traditional contract rules may be applied as long as the application is consistent with federal labor policy.

Even in suits brought under ERISA, the courts may analogize to LMRA actions to find that substantive federal law should apply. Courts should develop a federal common law applicable under both ERISA and the LMRA in the interests of uniformity and consistency.

Under federal common law, state law is preempted but not ignored. State law may give courts guidance in developing a federal common law. The Supreme Court, in the context of the LMRA, has stated that "Federal interpretation of the federal law will govern, not state law. But state law, if compatible with the purpose of [the LMRA], may be resorted to in order to find the rule that will best effectuate the federal policy. Any state law applied, however, will be absorbed as federal law and will not be a source of private rights."

Under the LMRA and most of ERISA, federal and state courts have concurrent jurisdiction. Although most actions are brought in federal district court, one federal court has noted that state courts are well-suited to decide welfare benefit cases since such actions normally deal with application of general principles of state contract law.

court has noted that under the LMRA the union itself has standing to bring suit on behalf of retirees. Int'l Union (UAW) v. Yard-Man, Inc., 716 F.2d 1476, 1486 (6th Cir. 1983), cert. denied, 465 U.S. 1007 (1984) ("As a signatory to the contract it could bring an action for the third party beneficiary retirees." In addition, the active union employees, as future retirees, have an active interest in enforcing benefit plan provisions.).

"E.g., Yard-Man, 716 F.2d at 1476; Powell, 770 F.2d at 609; Weimer, 773 F.2d at 669; Local Union No. 150-A, United Food and Commercial Workers v. Dubuque Packing Co., 756 F.2d 66 (8th Cir. 1983); Dist. 17, Dist. 29, Local Union 7113, and Local Union 6023, United Mine Workers of Am. v. Allied Corp., 735 F.2d 121 (4th Cir. 1984), cert. denied, 105 S.Ct. 3527 (1985); Int'l Union, (UAW) v. Roblin Indus., 561 F. Supp. 288 (W.D. Mich. 1983).


"Id.

"Id. at 457.

An ERISA Conference Committee Report noted that federal district courts have exclusive jurisdiction over claims of breach of fiduciary duty, but federal and state courts have concurrent jurisdiction over other ERISA claims. "All such actions in Federal or State courts 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. Conf. Rep. No. 120, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. CODE CONG. & AD. NEWS 5177, 5188 (statement of Sen. Williams) (as quoted in Menhorn v. Firestone Tire & Rubber Co., 738 F.2d 1496, 1498 (9th Cir. 1984).

"Supra notes 26-36 and accompanying text.


"Lincoln Mills, 353 U.S. at 457.


"Menhorn, 738 F.2d at 1500 n.2.
II. Case Law Dealing With Vesting of Employees’ Rights to Welfare Benefits

The Sixth Circuit: Yard-Man and White Farm

To date, the Sixth Circuit has been the most active in developing rules in this area. In 1983 the court decided the leading case of *International Union (UAW) v. Yard-Man, Inc.*[^3] The case arose out of a collective bargaining agreement entered into between the UAW and Yard-Man in 1974 which covered the company’s Jackson, Michigan, plant.[^4] The plant closed in 1975. Two years later the company notified retirees that their health and life insurance benefits would terminate at the expiration of the collective bargaining agreement.[^5] In a suit brought by the UAW, the court held that the health and welfare benefits had vested in the retirees and were to continue beyond the life of the collective bargaining agreement.[^6]

The court laid down the following approach to be used in determining whether welfare rights under a collective bargaining agreement have vested:

The court should first look to the explicit language of the collective bargaining agreement for clear manifestations of intent. The intended meaning of even the most explicit language can, of course, only be understood in light of the context which gave rise to its inclusion. The court should also interpret each provision in question as part of the integrated whole. If possible, each provision should be construed consistently with the entire document and the relative positions and purposes of the parties . . . The agreement’s terms must be construed so as to render none nugatory and avoid illusory promises . . . Finally, the court should review the interpretation ultimately derived from its examination of the language, context and other indicia of intent for consistency with federal labor policy[^7] (citations omitted).

The *Yard-Man* court also stated that “retiree benefits are in a sense ‘status’ benefits which, as such, carry with them an inference that they continue so long as the prerequisite status is maintained . . . there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree.”[^8] The court went on to note that retiree welfare benefits are not necessarily interminable and federal labor policy does not

[^4]: *Id. at 1478.
[^5]: *Id. The agreement was to expire June 1, 1977.
[^6]: *Id. at 1481.
[^7]: *Id. at 1479-80. The collective bargaining agreement in *Yard-Man* stated that when the retiree has turned 65, “the Company will provide insurance benefits equal to the active group benefits . . . for the former employee and his spouse.” *Id. at 1480. The court found this language to be ambiguous. Turning then to the language in other parts of the agreement and the context under which the provision arose, the court held that the intent was to give retirees a vested right in the benefits. *Id. at 1481-83.
[^8]: *Id. at 1482.*
presumptively favor vesting of welfare rights when the collective bargaining agreement is silent on the issue. The court found that the nature of the benefits in the context of the collective bargaining process provided an inference that the parties intended the rights to vest. However, the court cautioned that this factor alone was insufficient to establish intent; the controlling factor was the language of the agreement itself.

The Sixth Circuit has recently addressed the issue of vesting of welfare benefit rights in a non-union context. In In re White Farm Equipment Co., White Farm had filed for reorganization under Chapter 11 of the federal Bankruptcy Code. A related company entered an agreement to assume the obligations to White Farm retirees under the non-contributory welfare benefit plan. A short time later retirees were notified that the welfare benefit plan would be discontinued; identical coverage would be available on a fully contributory basis at group rates.

Retirees and spouses of deceased retirees filed for adversary proceedings in the bankruptcy court. Ultimately, the Sixth Circuit court, on appeal from the bankruptcy court and federal district court, held that retiree welfare benefits do not automatically vest at retirement. The parties' intent is determinative as to whether the employer retains the right to modify or terminate the plan. In this particular case, the documentary evidence was found to be ambiguous and the case was remanded for findings as to the parties' intent.

The court agreed with the statement in Yard-Man that the first item the

---

9 Id.
10 Id.
11 This discussion of the "status" nature of retiree benefits has been cited in several cases. Almost all of the cases that cite this passage are in the Sixth Circuit, e.g., Weimer v. Kurz-Kasch, Inc., 773 F.2d 669, 673 (6th Cir. 1985); Policy v. Powell Pressed Steel Co., 770 F.2d 609, 616 (6th Cir. 1985); Int'l Union and Local 784, UAW v. Cadillac Malleable Iron Co., 728 F.2d 807, 809 (6th Cir. 1984); Eardman v. Bethlehem Steel Corp. Employee Welfare Benefit Plans, 607 F.Supp. 196 (D.C. N.Y. 1984).
12 White Farm, 788 F.2d at 1186.
13 Id. at 1188.
14 Id.
15 Id.
16 Id. at 1189.
17 Id. at 1186.
18 Id.
19 Id. The documentary evidence consisted of three summary booklets issued by the company to its employees. Some of the pertinent language in the booklets, which the appellate court found to be ambiguous, included the following:

- Your insurance terminates when you leave our employ, when you are no longer eligible or when the group policy terminates, whichever happens first . . . .
- If your Group Life Insurance terminates because the Group policy is terminated or amended . . . you may also make application to convert your Group Life insurance to an individual Life insurance policy . . . .
- The company fully intends to continue your plans indefinitely. However, the Company does reserve the right to change the plans, and, if necessary, discontinue them. (Emphasis added)

Id. at 1188-89. It could be argued that the finding of the bankruptcy court, that this language unambiguously established the employer's right to modify or terminate the plan, was correct.
court must look to in deciding whether employees have a vested interest in welfare benefit rights is the contract itself. Secondly, the court must "look to federal law to see if any express or implied statutory command or other federal policy mandates a federal common law rule limiting the right of an employer to exercise . . . a reserved right of termination." The court found that no federal statute requires mandatory vesting: ERISA exempts welfare benefits from mandatory vesting. In addition, the court found that there was no clear precedent under state or federal case law on which to base a federal common law rule of mandatory vesting. The court also noted that mandatory vesting of retiree welfare benefits is a matter for the legislature rather than the courts.

In examining the Sixth Circuit view of Yard-Man and White Farm, several rules become apparent. The first is that the governing factor as to vesting of retiree welfare benefits will be the intent of the parties. In determining intent, the courts must first look to the language expressed in the collective bargaining agreement or other relevant documents, such as plan descriptions. Since the courts may liberally construe ambiguities, employers wishing to retain modification and/or termination rights must clearly reserve those rights. Employers must also guard against contradictory language in other parts of the writing. Additionally, the court may ultimately look to factors outside the writings as relevant in determining the parties' intent.

Secondly, the court will not support a judicially created common law rule

9 Id. at 1191.
10 Id.
11 Id. See supra notes 19-20 and accompanying text.
12 Id. at 1192-93. The district court had ruled that welfare benefit rights automatically vest at retirement. Id. at 1192. The appellate court pointed out that the state law cases the lower court had relied on were pre-ERISA and, with one exception, dealt with pension rather than welfare rights. Id.

One case cited by the lower court did deal with welfare benefits: Sheehy v. Seilon, Inc., 10 Ohio St.2d 242, 227 N.E.2d 229 (1967). In Sheehy the Supreme Court of Ohio held that employees who had been induced to continue employment with the company by promises of life and health insurance coverage had a vested right to these benefits upon retirement, notwithstanding a provision in the contract to the contrary. Id. In White Farm the appellate court stated that Sheehy "arose prior to ERISA's effectiveness, however, and we are not bound to follow the Ohio law construed there." White Farm, 788 F.2d at 1192.

14 Yard-Man, 716 F.2d at 1479-80; White Farm, 788 F.2d at 1186.
15 Yard-Man, 716 F.2d at 1479.
16 White Farm, 788 F.2d at 1191.
17 See supra note 69 and accompanying text.
18 Contradictory terms may make the parties' intent ambiguous; additionally, "the collective bargaining agreement's terms must be construed so as to render none nugatory and avoid illusory promises." Yard-Man, 716 F.2d at 1480. See also Van Olson, supra note 1, at 406.
19 Yard-Man, 716 F.2d at 1480. See also Int'l Union and Local 784, UAW v. Cadillac Malleable Iron Co., 728 F.2d 807, 808 (6th Cir. 1984) (court found fact that retiree welfare benefits were paid by the company when no collective bargaining agreement was in effect — during a strike — indicative of the company's intent that the benefits were not tied to the duration of the collective bargaining agreement); Eardman v. Bethlehem Steel Corp. Employee Welfare Benefit Plans, 607 F.Supp. 196 (D.C. N.Y. 1984) (court found a deciding factor to be the fact that employees were told that their benefits would not be changed during exit interviews).
that retiree welfare benefits vest at retirement. The White Farm court very explicitly overruled a lower court decision that had espoused such an automatic vesting rule.81

Finally, the White Farm opinion indicates that the language of Yard-Man concerning the "status" nature of retiree benefits should not be given too much weight. Several writers have commented on Yard-Man’s language and concluded that the Sixth Circuit espouses an alternate view to the contract theory of other courts.82 The lower court decision in White Farm bolstered these writers’ views.83

Interestingly, although White Farm quotes other language from Yard-Man,84 it does not refer to Yard-Man’s analysis of the status nature of retiree benefits. Apparently the status nature of retiree benefits is confined to the collective bargaining context.85 The court was willing then to give plaintiffs the benefit of “an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree.”86

In a later case87 the Sixth Circuit court stated that “normally retiree benefits are vested . . . because retirees, with respect to their benefits, are unprotected in the collective bargaining process. Upon expiration of a collective bargaining agreement, a union owes no duty to bargain for continued non-vested benefits for retirees.”88 This suggests the policy behind the inference given to support plaintiff retirees’ position: the desire to protect retirees who can no longer protect themselves in the collective bargaining process. As retirees in a non-union setting are equally at a bargaining disadvantage, logically there should be no distinction between the two situations. If union retirees are entitled to the inference that their rights are vested, then plaintiffs in a non-union setting, such as those in White Farm, are equally entitled to this inference.

As stated in Yard-Man, the inference that retiree rights are vested is not alone sufficient to establish the intent of the parties.89 This inference does not

81White Farm, 788 F.2d at 1193 (“We have decided that the district court’s ruling, under which the existence and scope of a termination clause in this type of case would be immaterial, is erroneous . . . .”)
82Note, Employee Benefits Law: Securing Employee Welfare Benefits Through ERISA, 61 Notre Dame L. Rev. 551, 561-63 (1986); Shultz & Langan, Current Developments in Employee Benefits, 10 Employee Rel. L.J. 732 (1985); Van Olson, supra note 1, at 405; Reducing Retirees’ Health Benefits: The Courts Develop a Remedy, 18 Clearinghouse Rev. 1399, 1400-01 (1985) (author found the fact that welfare benefits had been referred to as “deferred compensation” and “status benefits” came “very close to suggesting that health benefits are vested entitlements.”)
83Supra note 82.
84White Farm, 788 F.2d at 1192.
85See Yard-Man, 716 F.2d at 1482.
86Id.
88Id. at 672. See also Policy v. Powell Pressed Steel Co., 770 F.2d 609 (6th Cir. 1985). Both Weimer and Policy cite Yard-Man for the proposition that retiree benefit rights are normally vested, although Yard-Man does not explicitly state this. See Weimer, 773 F.2d at 672; Policy, 770 F.2d at 612-13.
89Yard-Man, 716 F.2d at 1482.
rise to the level of a presumption. In *International Union and Local 784, UAW v. Cadillac Malleable Iron Co.*, the court stated that "there is no legal presumption based on the status of employees."

*Cadillac Malleable* cited the status language of *Yard-Man* and noted that the lower court had considered the history of collective bargaining between the union and the company and found that the intent of the parties was that the welfare benefits be paid for life to the retirees. One persuasive fact noted by the court was that the company had paid premiums for life and health insurance of retirees during a strike, when no collective bargaining agreement was in effect.

A federal district court in Tennessee has also considered welfare benefits of retirees. In *Musto v. American General Corp.*, the court focused on the fact that the company's welfare benefit plan was "a major inducement to attract employees. The promise of continued benefits at no cost to the individual after retirement was a material part of the presentation to prospective employees." The court found the company's plan to be at least partly responsible "for retaining a productive and reliable work force."

At the same time the company was promising retirement benefits at no cost to employees, in important documents the company was reserving the right, if necessary, to terminate or modify those benefits. Eventually the company unilaterally modified the plan to require contributions from retirees for continued coverage and plaintiffs brought a class action.

In examining the evidence, the court found that there was conflicting language in the welfare plan descriptions. Following the precept that terms must be construed to avoid nugatory and illusory promises, the court went on

---

9728 F.2d 807 (6th Cir. 1984).
9Id. at 808.
9Id. at 809.
9Id. at 808.
9Id. A Ninth Circuit case also found the fact that the employer made payments during a strike to be persuasive evidence that the parties intended that the rights were to outlast the collective bargaining agreement. *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1225 (9th Cir. 1984).
9Id. at 1487.
9Id.
9Id. at 1488.
9Id. at 1491. One reason for the company's action was the fact that the cost of the medical plan had increased four-fold in five years. *Id.* at 1496.
9Id. at 1499. The court stated that

the termination/modification clause contained in the NLT/NLA summary plan descriptions clearly and expressly reserve the right to amend and terminate the medical insurance benefit plan. At the same time, however, the plan descriptions also promise to continue the plans after the plaintiffs' retiree, without further cost to the retiree. The Court cannot read both provisions together without reaching the conclusion that the provisions conflict and require interpretation of what the parties mutually intended by placing the terms in the agreement.
to consider the fact that the parties no longer had equal bargaining power.101 The retirees had performed their part of the agreement by giving the company years of service; the court reasoned that these retirees were now entitled to the benefits that they had bargained for.102 The insurance coverage in this case was characterized "as a non-monetary form of past employment, deferred income."103

Additionally, the court noted that any modification, according to the reserve clause, must be "necessary."104 The court then laid down a stringent test for when a modification or termination is necessary: the company must show not that the costs of the medical insurance plan far outweigh the insurance premiums paid by retirees, but rather that the contractual promises previously made are now avoidable because of some unforeseen contingency that threatens the financial base of the entire corporation.105

The general tenor of these cases is that retirees have a right to welfare benefits that they had bargained for and relied on. As seen, however, the common law as developed by the courts looks first to the intent of the parties to see whether the retirees' rights have vested.106 Clearly, courts may not fashion a federal common law rule that welfare benefits mandatorily vest at retirement.107

Other Circuits

Very few cases dealing directly with this issue have been reported from other circuits; the Sixth Circuit probably has the most substantially developed

---

101 Id.
102 Id.
103 Id. at 1495. Note that pension rights, which vest under ERISA requirements, are normally characterized as deferred income. Id.
104 Id. at 1500.
105 Id. Compare Int'l Union, UAW v. Roblin Industries, 561 F.Supp. 288 (W.D. Mich. 1983), where the court looked at the fact that insurance rates for the company were based on a group consisting of both active and retired workers. The court stated that if the group were limited to retirees, insurance would be almost unobtainable because of the prohibitively high rates. Id. at 299. The court viewed this "as evidence that retiree benefits were not intended to extend beyond the duration of collective bargaining agreements." Id.
106 Supra notes 57-101 and accompanying text. Compare these views with the ones expressed in Int'l Union, UAW v. Roblin Industries, 561 F.Supp. 288 (W.D. Mich. 1983). In Roblin, the court found the parties' agreement to be ambiguous; in looking to parol evidence, the court held that the parties did not intend the welfare benefits to be guaranteed for life. Id. at 293. The court stated that collective bargaining agreements do not usually create or guarantee the continuance of an employer-employee relationship. Id. at 298. As a result, "the rights conferred under a collective bargaining agreement do not normally survive the discontinuance of a business or the expiration of a bargaining agreement." Id.
107 Id. Even if a substantial body of state case law existed on which to predicate a vesting rule, in light of the fact that ERISA excludes welfare plans from its vesting requirements, the federal courts probably still would be hesitant about requiring that welfare rights mandatorily vest.
case law in this area.

To date, the major Fourth Circuit decision has been *District 17, District 29, Local Union 7113, and Local Union 6023, United Mine Workers of America v. Allied Corp.* In *Allied*, the court found that the clear language of the agreement required payment of health benefits only during the term of the agreement.

The company continued to pay benefits for sixteen months beyond the expiration of the agreement. The court held that the company was not estopped from discontinuing benefits, as any reliance was not reasonable in light of the employees' knowledge of the agreement. The court noted that while pension rights are normally vested, "health and welfare benefits are negotiated periodically and last only the life of the collective bargaining agreement."

This language was derived from the Ninth Circuit case of *Turner v. Local Union No. 302, International Brotherhood of Teamsters*. In *Turner*, the current employees of the company, through their union, ratified a collective bargaining agreement that provided for a decrease in the benefits of a health and welfare trust. Retirees brought suit. The court found that the language of the relevant agreements allowed modification of the level of welfare benefits retirees were to receive.

More recently, in *Bower v. Bunker Hill Co.*, the Ninth Circuit reversed

---


109Id. at 124. The agreement provided that

[Each signatory Employer shall establish an Employee benefit plan to provide, implemented through an insurance carrier(s), health and other non-pension benefits for its Employees covered by this Agreement as well as pensioners under the 1974 Pension Plan and Trust, whose last classified employment was with such Employer. The benefits provided pursuant to such plans shall be guaranteed during the time of this Agreement by each Employer at levels set forth in such plans. (Emphasis added)]

Id. at 124 n. 6. Testimony showed that all benefits were open for negotiation every three years. Id. at 127.

110Id. at 129.

111Id. at 130.

112Id. at 129 (citing Turner v. Local Union No. 302, Int'l Bhd. of Teamsters, 604 F.2d 1219 (9th Cir. 1979)).

113604 F.2d at 1225.

114Id. at 1222. The desired decrease in the benefit plan was caused by financial concern: fewer active employees and more retired employees had resulted in contributions that were insufficient to meet current expenditures for retirees' benefits. Id. at 1223.

115Id. at 1224-25. Ten trustees, five selected by the union and five picked by the companies, administered the health and welfare benefit trust fund. The Trust Agreement provided that these trustees could "increase the benefits available under any of the programs . . . if in [their] judgment there are sufficient sums in the Fund" and could "decrease benefits under any of the programs . . . if in [their] judgment such action is warranted." Id. at 1222.

The court also noted that

The record of the successive collective bargaining agreements shows that appellant's rights to the health and welfare benefits were not vested. They could be terminated at the end of any one of the collective bargaining agreements. None of the documents establishing the health and welfare benefits made any representation as to the length of the period during which these benefits would continue to be paid, other than "throughout the term of this agreement."

Id. at 1225.

116725 F.2d 1221 (9th Cir. 1984).
a lower court that had rendered summary judgment for the defendant company and remanded the case for further findings. In *Bower*, retirees alleged that the company improperly terminated retirement medical insurance when the company ceased operations. The appellate court found that agreements between the company and employees were ambiguous as to the expiration of retiree medical insurance. Language in the plan description suggested that retiree insurance benefits were not limited to the duration of the collective bargaining agreement. The court further noted that there was a factual issue as to whether management had represented the benefits as lifelong to the employees. The fact that the company had continued payments for retiree benefits during a strike was an objective manifestation of the company's intent and probably indicated that the retiree benefits were not tied to the duration of the collective bargaining agreement.

The Ninth Circuit is evidently not going to adopt the Sixth Circuit's reasoning that retirees in a collective bargaining context are entitled to an inference that retiree benefits are vested at retirement. Although the *Bower* opinion cited *Yard-Man*, it did so only superficially. *Bower* focused on the language of the agreement.

Too few cases exist on this point to firmly indicate the Ninth Circuit's opinion. However, the findings of the court in *Bower* indicate that the courts may be moving away from the dogmatic statement in *Turner* that "health and welfare benefits are negotiated periodically and are paid from a fund of employer contributions and last only the life of the collective bargaining agreement." The Eighth Circuit considered this issue in *Local Union No. 150-A, United Food and Commercial Workers v. Dubuque Packing Co.* The company, after a plant closing, notified retirees that their health and welfare benefits would terminate when the collective bargaining agreement expired.

The court found the contract to be ambiguous and admitted parol evidence as to the parties' intent. Although the court noted that the right to

---

117 *Id.* at 1222.
118 *Id.* at 1223.
119 *Id.* at 1224.
120 *Id.*
121 *Id.* at 1225.
122 See *supra* notes 58-60, 82-91 and accompanying text.
123 *Bower*, 725 F.2d at 1223.
124 *Turner*, 604 F.2d at 1225.
125 756 F.2d 66 (8th Cir. 1985).
126 *Id.* at 67.
127 *Id.* at 69. The lower court had found that employees were told they would receive lifetime benefits; the company continued benefits when no collective bargaining agreement was in effect; and the company continued to provide benefits to retirees which were not explicitly included in the latest collective bargaining agreement.
receive welfare benefits arises from the retirees' status as a past employee, the court stated that “the dispute is simply one of contract interpretation.” In this case, the court felt that plaintiff retirees had carried their burden of proof to show that the rights were vested.

III. POLICY CONSIDERATIONS

In many of these cases, the courts examined the policy concerns behind the situation. Federal labor policy is relevant in developing a federal common law. One concern of federal labor statutes and policy is the bargaining power between parties in a collective bargaining situation. It is asserted in Yard-Man that the underlying concept of federal labor law “is an attempt to place the employer and its employees in relatively equal positions of bargaining strength.” The union has used its collective strength to obtain retiree benefits. It is therefore unfair of the employer to subsequently “attempt to regain from the individual retirees what it gave up in the collective bargaining process.”

Other courts have been similarly concerned with the lack of bargaining power by retirees. In one LMRA case the court observed that retired employees have no economic or bargaining power within this system. Their financial security derives from past economic power pragmatically and prudently exercised. Once retirement benefits have been bargained for, earned, and become payable, the employer may not recant on his contractual obligation to pay them. Nor may retirees demand that they be increased. Changing economic facts pertaining to the employer’s business or the general economy occurring after an employee retires cannot enhance or depreciate the value of his prior services or justify periodic post-retirement negotiations.

In Musto v. American General Corp., the court stated that employers should not have unilateral discretion in modifying or terminating welfare benefit plans since retirees have already given years of service to the company and are no longer in a position to bargain with the company. Thus “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

---

128 Id. at 70.
129 Id.
130 See supra notes 50, 71-72 and accompanying text.
131 Yard-Man, 716 F.2d at 1496.
132 Id.
134 615 F.Supp. at 1483.
135 Id. at 1496-97.
to mere gratuities." Similarly, in *Weimer v. Kurz-Kasch, Inc.*, the court stated that because retirees are usually unprotected in the collective bargaining process, retiree benefit rights are normally vested.

Another source of federal labor policy is ERISA and its legislative history. The broad intent of ERISA is to protect employee benefit plans, including safeguarding retirement income from "unforeseeable, arbitrary and capricious reductions or modification by former employers and others." The vesting provisions of ERISA were Congress' response to numerous problems concerning pensions. These problems included misadministration of funds; employees' loss of entire pensions if they left their jobs, voluntarily or otherwise, before retirement; and loss of pensions due to the insolvency of the employer. Congress omitted welfare benefit plans from the vesting requirements of ERISA because of a concern over the cost of the pension plans and ease of administration. ERISA was "a finely tuned balance between protecting pension benefits for employees while limiting the cost to employers."

Another consideration is that vesting of welfare benefits, either under statute or federal common law, would have a chilling effect on employers' willingness to offer such plans. In response to this concern, one court noted that if an employer offers such benefits, the "employer must take a more realistic approach to the promises he makes in seeking to solicit and retain quality employees and not to promise more than he is willing to pay."

In fairness, employees should be able to rely on the promises of employers. The question remains as to whether employers should be required to promise that a certain amount of welfare benefits will vest upon retirement. At least one court has considered the public interest in providing and protect-

---

136 *Id.* at 1497.

137 773 F.2d 669 (6th Cir. 1985).

138 *Id.* at 672.


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

141 See supra notes 19-21 and accompanying text.


143 *Id.*

144 *Id.*

145 *Id.* at 414 (quoting ATO, Inc. v. Pension Benefit Guarantee Corp., 634 F.2d 1013, 1021 (6th Cir. 1980)). *Adcock* also cited the Senate Finance Committee Report which stated that [t]o require the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income. Also, where the employee moves from one employer to another, the ancillary benefits (which are usually on a contingency basis) would often be provided by the new employer, whereas the new employer normally would not provide pension benefits based on service with the old employer. *Adcock*, 616 F.Supp. at 414-15 n. 3. See Note, *Employer Benefits Law: Securing Employee Welfare Benefits Through ERISA*, 61 NOTRE DAME L. REV. 551, 570-71 (1986) (suggesting that Congress balance the above concerns and promulgate vesting schedules for welfare benefits, as it did for pension benefits).

146 *Musto*, 615 F.Supp. at 1500-01.
ing health and welfare benefits of the elderly. The court noted that as between the general public and the employer, the employer should have to honor its promises to retirees and finance the insurance plan, so that "individuals can rely on private support during their retirement years and . . . will not have to rely on public subsidy."

The fact remains that the legislature has not required mandatory vesting of welfare benefits, and the legislature is the proper authority to do so. The courts remain unwilling and unable to fashion a common law mandatory vesting rule. Unless the legislature addresses this issue, the governing factor as to whether welfare rights have vested is the parties' intent, as evidenced by their written agreements and conduct.

FRANCES FIGETAKIS