It Doesn't Add Up: The Broken Promises of Lifetime Health Benefits, Medicare, and Accounting Rule FAS 106 Do Not Equal Satisfactory Medical Coverage for Retirees

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"[Retirees] are going to face some tough choices, tough choices about health care versus food, health care versus heat, health care versus rent. They are choices that we ought not to impose on people that have helped to build this into the greatest country in the entire world."1

Pity Harry and Louise, the fictional characters who appeared in television advertisements used by opponents of health care reform.2 Just last year the Supreme Court held that Harry's former employer could terminate his promised lifetime medical benefits.3 Now Harry and Louise cannot afford health insurance and Medicare coverage is not enough.

What caused Harry's former employer to terminate his health benefits? Certainly, rising health care costs contributed to the decision to terminate these benefits, but they have been escalating for years.4 The critical factor probably was a recently introduced accounting rule, Financial Accounting Standard 106 ("FAS 106"), requiring most companies to account for future payments for health benefits for retirees on the companies' current financial statements.5 Representative William J. Hughes, former

3. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223, 1226 (1995) (holding that an employer may terminate retiree benefits where the company reserves the right to amend or terminate the plan).
Chairman of the House Select Committee on Aging, stated that although "spiraling health care costs have been prompting companies to scale back the amount of retiree health benefits for over a decade, the new accounting rule under FAS 106 has made the problem more severe." 6

Implementation of FAS 106 forced companies, many for the first time, to calculate the cost of providing health benefits for retired employees. 7 One forecaster calculated this amount to be one trillion dollars for all of corporate America. 8 Many companies reacted to this problem by reducing or terminating the health benefits paid to retired employees. 9 In turn, many retirees sued for reinstatement of their benefits, only to find that their health benefit plans can be terminated at any time at the whim of the company sponsoring the plan or agreement. 10

This Comment argues for national health care reform to reduce the cost of medical care and insurance because the reaction of employers to FAS 106, coupled with recent case law allowing an employer to terminate promised lifetime health benefits, are causing many retirees to go without health insurance. This Comment begins by exploring the background of accounting rule FAS 106 and what it was designed to do. It then explains why this rule is prompting companies to terminate their health benefit plans. This Comment next focuses on retirees' legal responses to this termination. It examines the case law in this area, showing the alternative theories of recovery put forth and how they mostly have been rejected, leaving the retirees with no legal recourse. Finally, it demonstrates that how the combined effect leaves an ever increasing number of retirees' unable to afford health care or insurance, and reliant on government systems that already are endangered. This Comment concludes that national health care reform must take place by the end of the decade or society will not be equipped to handle the increasing number of citizens who are: unable to pay for health insurance; faced with a financially unsound

8. Musa Al-Darayseh, The $1,000,000,000,000 Dilemma; Accounting for Postretirement Benefits Under FASB Statement 106: Financial Accounting Board, 7 NAT'L PUB. ACCT., Nov. 1992, at 22.
Medicare system; and in desperate need of health care that they cannot afford.

I. Financial Accounting Standard 106

A. Understanding How FAS 106 Works

To understand the impact of FAS 106, some background regarding the interaction between accounting and business entities, especially corporations, is useful. Accounting is "an information system that measures, processes, and communicates financial information about an identifiable economic entity." Accounting is a tool used to capture and present financial information in a format that is understandable and universal. This universality presents itself in the form of rules or guidelines for accounting commonly known as generally accepted accounting principles ("GAAP").

The major influences on GAAP are the Statements of Accounting Standards issued by the Financial Accounting Standards Board ("FASB"). Once a standard has been issued, deviations usually are not allowed. These standards become part of GAAP and must be followed. The Securities and Exchange Commission requires most public corporations to use GAAP in their financial statements.

12. Id. at 1-4. The importance of accounting's universal application is that users of the financial information will be able to make comparisons between economic entities. For example, one could easily compare the financial statements of Ford to General Motors because the statements have been prepared using the same set of guidelines.
13. Id. at 10. GAAP is mainly influenced by five organizations: the American Institute of Certified Public Accountants ("AICPA"), the Financial Accounting Standards Board ("FASB"), the Securities and Exchange Commission ("SEC"), the Internal Revenue Service ("IRS"), and the Government Accounting Standards Board ("GASB"). Id. Accounting is a self-regulating field and GAAP is promulgated now mainly by the FASB. Id. at 11. Although the SEC does not make accounting rules it is a major influence on them. Id.
14. Id. FASB is a professional association that, in conjunction with the AICPA, self-regulates the accounting practice. Id.
15. Id.
16. Id. at 10. Deviations from GAAP are allowed only when such deviation reflects the true financial picture better than the standard method. Id.
types of corporations must use GAAP as well.  

The FASB issued FAS 106 in December 1990. The FASB began studying the accounting for postemployment benefits in 1979. It recognized that as the "prevalence and magnitude of employers' promises to provide those [postretirement] benefits . . . increased, there . . . was increased concern about the failure of financial reporting to identify the financial effects of those promises." Prior to the issuance of FAS 106, the FASB sent out a draft copy for comment from the various users of financial information. Fewer corporations welcomed this change, as adoption would cause a reduction in income reported on its financial statements. Indeed, many corporations tried to prevent it from taking effect. However, these efforts were unsuccessful, and corporations now must report postretirement benefits on their financial statements in accordance with FAS 106.

Before FAS 106, employers would report or account for postretirement benefits on a pay-as-you-go basis. FAS 106 requires that employers report postretirement benefits on an accrual basis. The effect of such reporting will cause a significant reduction in current income for most corporations. Employers with 500 or more employees were required to

18. While many corporations use GAAP for the purpose of simplicity, it may be required by the IRS, loan covenants, shareholder demands, or minority interests. NEEDLES, Jr., supra note 11, at 11-33.
19. See FAS 106, supra note 5.
20. Id.
21. Id.
22. Id. at § 517.
25. FAS 106, supra note 5, at § 2. Pay-as-you-go, or cash basis, means that as the company spends money it deducts the expenditure from income. For example, if a company had net income (before paying health insurance for retirees) of $100,000 and it spent $10,000 on retiree health insurance, the effect would be to reduce net income to $90,000 and the company is out $10,000 in cash. This method is contrasted with the accrual basis in which a company with net income (before paying health insurance for retirees) of $100,000, recognizes the fact it must pay the insurance company $10,000 in the future, accrues for this future payment in part by deducting it from net income (which is now $90,000), but still has the $10,000 in cash. See also NEEDLES, Jr., supra note 11, at 104-05 (defining cash basis of accounting as accounting for revenues and expenses as they are received or paid and accrual basis accounting as accounting for revenues when earned and expenses when incurred).
27. Custis, supra note 23, at 23.
use FAS 106 in their financial reporting in 1993,\textsuperscript{28} while employers with fewer than 500 employees began use of FAS 106 in their financial reports in 1995.\textsuperscript{29}

The application of FAS 106 is complicated. An employer must calculate the present value of an employee's postretirement benefits. The employer must subtract this figure from the employer's current income.\textsuperscript{30} The calculation of an employee's postretirement benefits is done with the help of an actuary who takes into account an employee's expected lifetime, retirement date, and benefit costs.\textsuperscript{31} Postretirement benefits are calculated for current and retired employees, and must be subtracted from the employer's income in the year the employer adopts FAS 106.\textsuperscript{32} This amount is not actually paid, however, but it is shown as a liability on a company's balance sheet, reduced by the amount actually paid that year in postretirement benefits.\textsuperscript{33}

An example will clarify the difference between the FAS 106 accounting method and the pay-as-you-go basis.\textsuperscript{34} Suppose that Harry is sixty-five and has an expected life of seventy-three. His company pays his health insurance premium and has promised to do so for the remainder of his lifetime. His health insurance premium is $4,000 per year. Thus, under the pay-as-you-go method, Harry's company has a $4,000 annual expense for his health insurance.\textsuperscript{35}

In each year that Harry's employer provides this health insurance, it reports a $4,000 expense for health insurance in its current year financial

\textsuperscript{28} FAS 106, supra note 5, at § 108.

\textsuperscript{29} Id.

\textsuperscript{30} Murray S. Akresh, supra note 7, at 36-37.

\textsuperscript{31} FAS 106, supra note 5, at § 397.

\textsuperscript{32} A company's income is reflected in its Income Statement, which is "a financial statement that summarizes the amount of revenues earned and expenses incurred during the accounting period." NEEDLES, JR., supra note 11, at 27. There are three basic financial statements: the Income Statement, the Balance Sheet, and the Statement of Cash Flows. Id. at 24-27. The Balance Sheet shows the financial position of a company as of a certain date, presenting a company's assets and claims against those assets, or liabilities. Id. at 27. The Statement of Cash Flows shows the inflow and outflow of cash during an accounting period. Id. at 28.

\textsuperscript{33} See Custis, supra note 23, at 24.

\textsuperscript{34} This example is meant for demonstrative purposes only. It ignores many of the finer points of the accounting rule, inclusion of which are not necessary. See FAS 106, supra note 5, at § 20 (FAS 106 requires actuarial present value calculation based on expected amount and timing of future benefits while considering a host of other factors.).

\textsuperscript{35} This example ignores the effects of inflation and rising health care costs as required by FAS 106. See FAS 106, supra note 5, at § 20 ("Measurement . . . [requires] consideration [of] the expected future cost of providing benefits.").
statements. Under FAS 106, Harry's employer must calculate the entire amount it would spend for his health insurance over his expected remaining lifetime and report this amount as an expense in the year the employer adopts FAS 106. Assuming Harry's expected remaining life is eight years, his total estimated retirement health insurance expense is $4,000 x 8, or $32,000. Thus, Harry's company must reduce income by an additional $28,000 (which represents the total estimated health insurance costs of $32,000 less the current year actual cost of $4,000), which imposes a more significant financial impact on the employer's income.

B. The Effects of FAS 106 on Employers and Employees

The ultimate result of FAS 106 is that most companies must reduce income by significant amounts. One commentator predicted that this amount would be close to one trillion dollars for all of corporate America. Indeed, General Motors' FAS 106 expense was $20.8 billion in 1992.

FAS 106 similarly affects mid-size and smaller companies. In a study conducted by Coopers and Lybrand, an accounting and consulting firm, all employers faced significantly higher health insurance expenses under FAS 106 than under pay-as-you-go. The impact of these expenses is demonstrated by comparing an employer's health insurance expenses with and without FAS 106.

36. For the purposes of simplicity, this calculation ignores the time value of money which would need to be taken into account under FAS 106. See FAS 106, supra note 5, at § 20 (requiring present value calculation).

37. To demonstrate the effects of this calculation on financial statements, assume that Harry is the single employee of a hypothetical employer, ABC, Inc. Example 1 shows the Income Statement of ABC without the effect of FAS 106. Example 2 shows how ABC's Income Statement is affected by FAS 106. Example 3 shows ABC's Balance Sheet without the effect of FAS 106. Finally, Example 4 shows ABC's Balance sheet as affected by FAS 106. The main differences are highlighted in each example. Note that because Harry has a current health insurance cost of $4,000, this makes the total health insurance cost of FAS 106 equal to $32,000 ($4,000 current cost plus the $28,000 FAS 106 cost).

38. CFO's Views on Impact of FASB 106, supra note 23, at ¶ 26,293. In terms of actual dollars spent on health care costs, nothing is changed. The cash flow of a company will not be affected by FAS 106. Its impact will be felt mainly because employers must now estimate the future costs of providing health care which is turning out to be a significant expense. See Government Accounting Office, Retiree Health Plans: Health Benefits Not Secure Under Employer-Based System 5 (1993).

39. Al-Darayseh, supra note 8, at 22.


41. Akresh et al., supra note 7, at 36.

42. Id.
under FAS 106 to health insurance expenses under pay-as-you-go.\textsuperscript{43} The least-affected employer's health insurance expense was two times greater under FAS 106; the most-affected employer's health insurance expense was forty-three times greater.\textsuperscript{44}

FAS 106 has forced many employers to reexamine their retiree health care benefits.\textsuperscript{45} Although FAS 106 applies to all postretirement benefits, it is concerned mainly with health care benefits as these are the most expensive.\textsuperscript{46} Reporting requirements have placed an actuarial measurement of future costs of employer provided postretirement health care directly on its balance sheet.\textsuperscript{47} Management could no longer avoid facing the nightmare of growing expenses;\textsuperscript{48} the response, as expected, has been to cut costs. The only way to cut costs is to reduce or terminate health care benefits paid to retirees, and this is exactly what has happened.\textsuperscript{49}

There are several ways management has shifted retirees' health care costs from the employer to the retiree.\textsuperscript{50} The primary way has been to increase retirees' share of the premium paid for health insurance.\textsuperscript{51} Limits are set at the amount of care the employer will provide, with the re-

\textsuperscript{43} Id. at 37.

\textsuperscript{44} Id. This multiple is mostly a reflection of the maturity of the company. A company with an equal number of current employees as retirees has a lower multiple, while a company with significantly greater ratio of current employees to retirees has a higher multiple. Id.

\textsuperscript{45} See Government Accounting Office, supra note 38, at 2-3 (describing how employers reacted to FAS 106 as well as predictions for future reaction to FAS 106); See also Clarissa B. Edelson & David W. Kesner, Responding to FAS 106, 10 Me. B. J., 90, 90 (1995) (describing FAS 106 as a "seismic shock in its impact on annual reports of employers who provide post retirement health benefits for employees"); Akresh et al., supra note 7, at 36.

\textsuperscript{46} See Edelson & Kesner, supra note 45, at 90-91.

\textsuperscript{47} See Custis, supra note 23, at 24.

\textsuperscript{48} See Government Accounting Office, supra note 38 (employer shifting health care costs to participants in response to rapidly rising health care costs); see also Court Approves Class Action Against McDonnell Douglas Corp., 20 Pens. Rep. (BNA) 862, 863 (Apr. 19, 1993), available in LEXIS, Nexis Library, BNA file. According to John F. McDonnell, chief executive officer of McDonnell Douglas, the termination of retiree health benefits was necessary to avoid "what could have been a heavy blow to our bottom line." Id.

\textsuperscript{49} Id.

\textsuperscript{50} See Government Accounting Office, supra note 38, at 4.

\textsuperscript{51} See William J. Falk & Kenneth S. Berkowitz, Retiree Costs Eyed as Reform Stalls, Nat'l Underwriter, Prop. & Casualty/Risk & Bens. Mgmt. Ed., Nov. 14, 1994, (Supplement) at 22 (stating that 47% of companies surveyed in 1993 reported amending their health plans to require more current retiree contributions and 65% reported increasing the level of future retiree contributions).
tiree responsible for the excess. Other employers have simply terminated the health care benefit plans currently paying for retirees' health care benefits.

By the end of 1994, almost half of the companies in the United States had modified retiree health benefits because of FAS 106. Many of those that have not modified retiree health benefits are still contemplating changes on spending for such benefits. Commentators predict that more companies will modify retiree health benefits based on the recent actions of many employers. Most susceptible to change are those companies that elected to amortize the effects of FAS 106. Because the amortization period is over twenty years, the effects of FAS 106 on financial statements is not as great as immediate recognition. As the costs build over time, however, more companies will realize that providing health care for retirees is no longer affordable, in that their health insurance expense will increase to an amount no longer affordable.

The effect of FAS 106 can be noted in several recent cases involving the termination of retiree health benefits. McDonnell Douglas Corporation cited FAS 106 as the reason for termination of health benefits of more than 8,000 non-union retirees. A spokesman for the International Union of Electronic Workers said that Philip Lighting Division's decision to modify health insurance coverage for retirees under age sixty-five was

52. Id.
53. Id.
55. Id.
56. Id.
57. Id. at 2270. Of all companies adopting FAS 106 in 1993, over half chose amortization rather than immediate recognition of the associated expenses. FAS 106 offers two methods for employers to implement its changes: a one-time total adjustment expense or a 20 year amortization period. Id. Amortization is an accounting mechanism that spreads out a major expense over a definite period of time. Black's Law Dictionary 83 (6th ed. 1990).
58. See Firms Changing Benefits in Response to FAS 106, supra note 54, at 2270.
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precipitated by FAS 106. Similarly, Unisys Corporation decided to phase out retiree health benefits paid by the company when it determined its FAS 106 liability to be $170 million.

Many retirees have responded to the termination of their health benefits by seeking redress in the legal system. Until the ruling and opinion of the United States Supreme Court in Curtiss-Wright v. Schoonejongen, the success of any given retiree depended, in part, on which of the eleven United States Courts of Appeal heard their case. However, Curtiss-Wright has essentially closed the door to a legal remedy. Prior case law is helpful in understanding the debilitating effect of Curtiss-Wright on retiree health benefit termination lawsuits.

II. Case Law Regarding Termination of Health Benefits of Employees and Retirees

A. Prior Law

Welfare benefit plans, including those covering retirees, became regulated by federal law with the enactment of the Employee Retirement Income Security Act ("ERISA") in 1974. This legislation specifically


63. Id. at 443.

64. 115 S. Ct. 1223 (1995).


66. However, when a company commits a "bad act," a legal remedy still exists for the harmed retirees. See, e.g., Varity Corp. v. Howe, 116 S. Ct. 1065, 1068 (1996) (allowing equitable relief for retirees where the company intentionally had misled them about the financial condition of their benefits upon transfer to a new subsidiary).

67. A welfare benefit plan is used to describe an employer plan that provides benefits to employees and retirees other than a pension. JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 508 (2d ed. 1995).

preempts any state law claims. Although many of ERISA's provisions are highly detailed, Congress did not intend to regulate every conceivable issue related to welfare benefit plans, and provided that courts could create a federal common law with regard to certain rights and obligations under ERISA.

For a short period of the time following the passage of ERISA, the federal circuits appeared to be creating a common law rule vesting benefits in employees at retirement. Some courts determined that vesting was a contractual right. Other courts allowed estoppel arguments to prevail. This direction of the courts reached its high point in UAW v. Yard-Man, Inc., though not going so far as to create a common law right of vesting. Although recent cases have put forth many grounds of recovery, the majority of decisions favoring retirees have rested on contract theory and the intent of the parties.

1. Theories of Recovery

As companies terminated health and welfare benefit plans, retirees fought back in court, espousing a number of legal theories. Retirees argued that termination violated ERISA because their benefit vested and

71. See Langbein & Wolk, supra note 67, at 532-34 (discussing implied vesting of welfare benefits).
73. See infra notes 103-04, 110-13.
74. 716 F.2d 1476 (6th Cir. 1983) (finding an inference of retiree vesting in welfare plan).
75. See William T. Payne, Lawsuits Challenging Termination or Modification of Retiree Welfare Benefits: A Plaintiff's Perspective, 10 Lab. Law. 91 (1994).
76. See, e.g., In re Unisys Corp. Retiree Medical Benefit “ERISA” Litigation, 58 F.3d 896, 899 (3d Cir. 1995) (plaintiffs argued for recovery based on violation of ERISA, breach of contract, breach of fiduciary duty of plan administrator, and equitable estoppel (“Unisys II”).
could not be taken away. Alternatively, retirees relied on estoppel, breach of fiduciary duty, and breach of contract arguments. Breach of contract action is easier to maintain where there exists an actual employment contract, such as a collective bargaining agreement.\textsuperscript{78} Thus, this theory is better suited to unionized employees or retirees who were unionized employees.\textsuperscript{79}

\textit{a. Violation of ERISA}

Because ERISA regulates employee welfare plans, many plaintiffs have asserted that termination or modification of their benefits violates ERISA.\textsuperscript{80} This argument was based on a theory that the health benefits were vested in the employee.\textsuperscript{81} While ERISA does not provide for vesting of welfare benefits, as opposed to pension benefits, many circuit courts attempted to create such a right during the decade following the passage of the ERISA legislation.\textsuperscript{82} The more recent and widespread circuit court holdings today recognize that ERISA does not allow for auto-

\textsuperscript{78} Without a written employment contract, plaintiffs must first prove that there was an express or implied employment contract before arguing that such a contract was breached.

\textsuperscript{79} Unionized employees are employed under a collective bargaining agreement or contract.

\textsuperscript{80} See Alday v. Container Corp. of America, 906 F.2d 660, 663 (11th Cir. 1990) (plaintiff alleged employer modification of health plan was a violation of ERISA); John Morrell & Co. v. United Food and Commercial Workers Int'l Union, 37 F.3d 1302, 1303 (8th Cir. 1994) (union argued that the declaratory judgment sought by the company to unilaterally modify or terminate benefits violated ERISA); Local Union No. 150-A v. Dubuque Packing Co., 756 F.2d 66, 67 (8th Cir. 1985) (class action brought by union representing retirees alleging breach of ERISA for employer to terminate their health benefits); Moore v. Metro. Life Ins. Co., 856 F.2d 488, 491 (2d Cir. 1988) (retirees argued violation of ERISA for former employer to modify their health benefits); Murphy v. Keystone Steel & Wire Co., 61 F.3d 560, 563 (7th Cir. 1995) (plaintiffs argued company's unilateral changes to welfare benefits plan violated ERISA); Smith v. ABS Indus., Inc., 890 F.2d 841 (6th Cir. 1989) (plaintiffs alleged termination of health and welfare benefits violated ERISA); Alexander v. Primerica Holdings, Inc., 819 F. Supp. 1296, 1298 (D.N.J. 1993) (retired employees claimed company modification of their welfare benefits plan violated ERISA); Eardman v. Bethlehem Steel Corp. Emp. Welfare Benefit Plans, 607 F. Supp. 196, 198 (W.D.N.Y. 1984) (class action alleging violation of ERISA for modifying retiree welfare benefit plan).

\textsuperscript{81} Vesting describes the process by which an employee acquires rights to certain employer provided benefits. \textsc{Black's Law Dictionary} 1563 (6th ed. 1990).

matic vesting of welfare benefits.\textsuperscript{83}

\textbf{b. Breach of Contract}

In the past, and in some more recent cases, plaintiffs have been most successful in bringing breach of contract actions.\textsuperscript{84} When the health plan or collective bargaining agreement failed to clearly designate health insurance as a vested benefit,\textsuperscript{85} courts looked to the intent of the parties to ascertain whether employees possessed vested rights in the welfare plans.\textsuperscript{86} If vesting occurs under a breach of contract theory, it must do so at retirement.\textsuperscript{87} Courts have not agreed, however, on whether extrinsic evidence may be used to establish intent of the parties.\textsuperscript{88} Generally the

\textsuperscript{83} See Moore, 856 F.2d at 488; John Morrell & Co., 37 F.3d at 1303 ("vesting is not mandatory for 'employee welfare benefit plans'"); Unisys II, 58 F.3d 896, 901 (3d Cir. 1995) ("ERISA does not require automatic vesting of welfare benefit plans"); Vasseur v. Halliburton Co., 950 F.2d 1002, 1006 (5th Cir. 1992) (ERISA "does not require that welfare plans' benefits 'vest' or that an employer maintain them at a particular level.").

\textsuperscript{84} See, e.g., Local Union No. 150-A v. Dubuque, 756 F.2d 66, 70 (8th Cir. 1985) (retirees successful in breach of contract action against former employer for terminating their welfare benefits); Keffer v. H. K. Porter Co. Inc., 872 F.2d 60, 61-62 (4th Cir. 1989) (breach of contract action successful where company intended to provide welfare benefits to retirees); Yard-Man, 716 F.2d at 1478 (retirees successful in requiring specific performance of employer obligation to provide health insurance benefits beyond the term of the collective bargaining agreement).

\textsuperscript{85} "Language in the plan" could mean in the Summary Plan Description, the plan, or the contract, depending on the court. See Bower v. Bunker Hill Co., 725 F.2d 1221, 1225 (9th Cir. 1984) (court looks to language in the SPD if no express language is in the labor contract); Edwards v. State Farm Mut. Auto. Ins. Co., 851 F.2d 134, 136 (6th Cir. 1988) (language in SPD governs when the SPD conflicts with the statements in the underlying plan document); see also Aiken v. Policy Management Sys. Corp., 13 F.3d 138, 140 (4th Cir. 1993) ("representations in a SPD control over inconsistent provisions in an official plan document"); Hansen v. Continental Ins. Co., 940 F.2d 971, 982 (5th Cir. 1991) (SPD governs conflicts between it and the plan document).


\textsuperscript{87} In enacting ERISA, Congress specifically exempted welfare benefit plans from vesting requirements. See 29 U.S.C. §§ 1051, 1053. The employer is under no legal obligation to provide vested welfare benefits. Thus, the question of whether the vesting actually occurs under breach of contract is determined by examining the contract (actual or implied) in existence at the time of retirement.

\textsuperscript{88} See Armistead v. Vernitron Corp., 944 F.2d 1287, 1295 (6th Cir. 1991) (allowing the use of extrinsic evidence in determining the intent of parties as to a plan as set out in the collective bargaining agreement); Cinelli v. Security Pac. Corp., 61 F.3d 1437, 1444 (9th Cir. 1995) (Without ambiguity, "extrinsic evidence may not be used to alter the written terms of the plan."); Gordon v. Barnes Pumps, Inc., 999 F.2d 133, 137 (6th Cir. 1993) ("[W]ritten
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burden has been on the plaintiff to establish intent by a preponderance of the evidence standard.\(^9\)

The most influential judicial precedent for breach of contract action for the termination of retiree health benefits is seen in *UAW v. Yard-Man, Inc.*\(^9\) In *Yard-Man* there was a collective bargaining agreement, or contract, between Yard-Man, Inc. ("Yard-Man") and the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America ("UAW"), that represented both current and retired employees.\(^9\) In the controlling contract, Yard-Man promised retirees that upon reaching age sixty-five, the "[c]ompany will provide insurance benefits equal to the active group benefits . . . for the former employee and his spouse."\(^9\) A year before the expiration of the contract, Yard-Man notified its retirees that it would no longer purchase health insurance for them when the contract expired.\(^9\) The United States Court of Appeals for the Sixth Circuit examined the language of the contract to determine the intent of Yard-Man as to whether the health insurance was promised for the lifetime of the retirees.\(^9\) The Sixth Circuit determined that although the key provision providing for lifetime insurance was ambiguous,\(^9\) when viewed in the context of the whole agreement, it indicated that the intent of Yard-Man was to provide lifetime health insurance.\(^9\) Thus, ambiguous language is to be resolved by determining the intent of the parties through extrinsic evidence.\(^9\)

Further, the court decided in what came to be known as the "Yard-Man

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terms of a plan may not be modified or superseded by oral assurances or other extrinsic evidence."); *Moore*, 856 F.2d at 492 (ERISA bars use of extrinsic evidence where welfare plan language is unambiguous.); *In re New Valley Corp.*, 89 F.3d 143, 149 (3d Cir. 1996) (holding that extrinsic evidence must be considered to determine whether an ambiguity exists in a plan); see generally *Payne*, supra note 75, at 102.

89. *See Unisys II*, 58 F.3d 896, 902 (3d Cir. 1995); *see also* *Howe v. Varity Corp.*, 896 F.2d 1107, 1109 (8th Cir. 1990).


91. *Yard-Man*, 716 F.2d at 1478.

92. Id. at 1480.

93. Id.

94. Id. at 1479.

95. The key provision of the contract stated: "When the former employee has attained the age of 65 years then: (1) The Company will provide insurance benefits equal to the active group benefits . . . for the former employee and his spouse." *Id.* at 1480.

96. *Id.* at 1480-81.

97. *See* *Payne*, supra note 75, at 102-04 (providing a more detailed analysis of case and holding).
"inference" that there was a preference for finding a vested benefit. Part of this inference hinged on the idea that health benefits are a "status benefit" conferred upon reaching retiree status, and as such, cannot be revoked unless a person's status as a retiree changes. The Yard-Man inference, however, is no longer valid. The Sixth Circuit rejected this inference in *International Union, United Auto Workers v. Cadillac Malleable Iron Company, Inc.*

Not all courts have resolved ambiguities in retirees' favor. Some have ruled in favor of employers whose plans contained reservation clauses, which reserve the employer's right to modify or amend a plan. One court has interpreted employer silence in the employer's favor.

c. Equitable Estoppel

Many plaintiffs have relied on equitable estoppel because it appears to be a strong argument. Ordinarily, estoppel requires material misrep-

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98. *Yard-Man*, 716 F.2d at 1482; *see also* *Golden*, 73 F.3d at 655 (holding that while *Yard-Man* has not been overruled, the *Yard-Man* inference is no longer valid); *Eardman v. Bethlehem Steel Corp. Emp. Welfare Benefit Plans*, 607 F. Supp. 196, 214 (W.D.N.Y. 1984) (quoting *Yard-Man* that retiree benefits are status benefits that continue as long as the person remains a retiree); *Mioni v. Bessemer Cement Co.*, 123 L.R.R.M. (BNA) 2492, 2495 (W.D. Pa. 1985) (citing *Yard-Man* holding of inference of intent to continue benefits to retirees as long as they remained retirees).


100. 728 F.2d 807, 808 (6th Cir. 1984) ("there is no legal presumption based on the status of retired employees"); *see also* *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 656 (6th Cir. 1996) (noting that while it considers *Yard-Man* to be good law, there is no inference of vesting for retirees). *But see* *Smith v. ABS Industries, Inc.*, 890 F.2d 841, 846 (6th Cir. 1989) (relying in part on the *Yard-Man* inference in holding for retirees).

101. *See* *John Morrell & Co. v. United Food and Commercial Workers Int'l Union*, 37 F.3d 1302, 1303; *Howe*, 896 F.2d at 1109-10. Interestingly, courts today will not look to extrinsic evidence if the plan documents contain a reservation clause reserving at least the right to modify or amend the plan. *Musto v. American Gen. Corp.*, 861 F.2d 897, 906-07 (6th Cir. 1988); *cf. Smith*, 898 F.2d at 845; *Local Union 150-A v. Dubuque Packing Co.*, 756 F.2d 66, 69 (8th Cir. 1985); *Keffer v. H.K. Porter Co.*, Inc., 872 F.2d 60, 64 (4th Cir. 1989).

102. *Senn v. United Dominion Indus., Inc.*, 951 F.2d 806, 816 (7th Cir. 1992) ("Mere silence... concerning the vestment of welfare benefits fails to give rise to an ambiguity."); *Jensen v. Sipco, Inc.*, 38 F.3d 945, 952 (8th Cir. 1994), *cert. denied, ___ U.S. ___, 115 S. Ct. 1428 (while "clear and unambiguous statements in the SPD are binding, the same is not true of silence").

103. *See* *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, 1419-20 (6th Cir. 1985) (plaintiffs alleged employer was estopped from terminating their benefits because of assurances regarding the sale of the employer); *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1290 (6th Cir. 1991) (affirming district court ruling that employer was estopped from terminating retiree health and life insurance benefits); *Sprague v. General Motors Corp.*, 857 F. Supp. 1182, 1185-89 (E.D. Mich. 1994) (retirees alleged General Motors is estopped from reducing promised lifetime health care benefits).
sentation and detrimental reliance. For retirees, the estoppel argument stems from oral and written promises different than that contained in either the plan's constitution, or the Summary Plan Description ("SPD"). Thus, retirees have argued that an employer is estopped from terminating health benefits because of oral or written promises to the contrary. Although this appears to be a strong claim, courts have ruled otherwise. In fact, the majority of circuit courts confronted with this theory do not recognize an equitable estoppel claim under ERISA.

While most courts have not recognized estoppel claims under ERISA, some courts allowed such claims to continue. In Edwards v. State Farm Mutual Automobile Insurance Company, the court held that if there was misrepresentation in an SPD, proof of reliance on the misrepresentation would be unnecessary. The United States Court of Appeals for the Eleventh Circuit has also found an estoppel argument valid when faced with interpreting ambiguous language in a plan.

The United States Circuit Court for the Sixth Circuit stated that the principles of estoppel may apply to the termination of retiree health and welfare benefit plans. Specifically, five elements must be shown for

105. Id. at 1188-89. A SPD contains, among other information, the plan's requirements for eligibility for participation and benefits. 29 U.S.C. § 1022(b) (1994).
106. Melbinger & Culver, supra note 65, at 151.
107. Id. at 151. Estoppel is not cognizable in the ordinary sense because of the language in 29 U.S.C. § 1102 requiring a plan to be maintained pursuant to a written instrument. Thus, any oral modifications to the plan are explicitly not allowed by law to modify the plan. See Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1165 n.10. (3d Cir. 1990) (discussing availability of estoppel in ERISA cases).
108. Id. (noting that two circuit courts “have decisively rejected” equitable estoppel claims under ERISA).
109. See Alday v. Container Corp. of America, 906 F.2d 660, 666 (11th Cir. 1990) (“no federal common law right to promissory estoppel under ERISA”); Black v. TIC Inv. Corp., 900 F.2d 112, 115 (7th Cir. 1990); Jensen v. Sipco, Inc., 38 F.3d 945, 953 (8th Cir. 1994); Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 491 (2d Cir. 1988) (“ERISA itself positively precludes informal written modifications of employee benefit plans of the kind necessary for plaintiffs' estoppel theory to succeed.”). But see Amato v. Western Union Int'l, Inc., 773 F.2d 1402, 1419 (allowing a third party beneficiary/equitable estoppel claim).
110. Armistead v. Vernitron Corp., 944 F.2d 1287, 1298-1300 (6th Cir. 1991); Hozier, 908 F.2d at 1165 n.10 (3d Cir. 1990).
111. 851 F.2d 134 (6th Cir. 1988).
112. Id. at 137.
114. See Armistead, 944 F.2d at 1300; Sprague v. General Motors Corp., 92 F.3d 1425, 1440-43 (6th Cir. 1996).
retirees to prevail on an equitable estoppel claim. However, the fifth element, detrimental reliance, cannot be established where plan documents contain an unambiguous reservation of the right to amend the plan. In that case there can be no "justifiable reliance." It is not reasonable to rely on employer promises or representations where the participant knows the "conditional nature of such [health and welfare] benefits."

**d. Fiduciary Duty**

All persons exercising control over a welfare benefit plan have a fiduciary duty to administer it "in accordance with its terms." Some retirees have sought recovery based on breach of fiduciary duty upon amendment to a welfare benefit plan that modified or terminated their health benefits. They have not been successful where the plan clearly informs participants that the employer reserves the right to amend, modify, or discontinue the plan.

Retirees have also been unsuccessful in claims for breach of fiduciary duty even where the plan contained no reservation clause. In *Adams v. Avondale*, the court maintained that in the context of a welfare benefit plan, an employer acts in a fiduciary capacity only when "managing any assets of the plan and administering the plan in accordance with its terms," as opposed to establishing, amending, or terminating a plan. It did agree that Avondale, Inc. had failed to comply with the ERISA requirement that every plan should provide a procedure for amending the

115. *See Sprague*, 92 F.3d at 1440-41 (citing Swinney v. General Motors Corp., 46 F.3d 512, 522-23 (6th Cir. 1995)) (citing *Armistead*, 944 F.2d at 1298). The elements are: (1) conduct or language amounting to a representation of material fact; (2) awareness of the true facts by the party to be estopped; (3) an intention on the part of the party to be estopped that the representation be acted on, or conduct toward the party asserting the estoppel such that the latter has a right to believe that the former's conduct be so intended; (4) unawareness of the true facts by the party asserting the estoppel; and (5) detrimental and justifiable reliance by the party asserting estoppel on the representation.

116. *Id.* at 515.

117. *Id.*

118. *Id.* (citing *Unisys II*, 58 F.3d 896, 908 (3d Cir. 1995)).


123. *Id.* at 949.
The Sixth Circuit, however, did not believe that failure to comply with the ERISA requirement would make the plan unamendable. A recent case allowing a breach of fiduciary duty claim is In re Unisys Corp. Retiree Medical Benefits “ERISA” Litigation. In Unisys, the SPD informed participants that retiree medical benefits were for life. The SPD also contained a reservation clause stating that the company “retained the right to terminate the plans ‘at any time’ for ‘any reason.’” Further, persuasive evidence demonstrated that “[t]he message that medical benefits would last for life was confirmed repeatedly and systematically throughout the . . . organization, by all levels of management, in writing and verbally.” Equally as important, evidence was introduced indicating the highest levels of management recognized that employees believed their medical benefits were forever and could not be taken from them.

Thus, the court recognized that an ERISA fiduciary “may not ‘affirmatively mislead’ plan participants,” and further determined that equitable relief is available to retirees if a breach of fiduciary duty is proven. This argument was affirmed by the United States Supreme Court in Varity Corporation v. Howe. The Court held that when a company intentionally misleads beneficiaries about the future of their benefits, the company is acting as a fiduciary. Limiting the impact of its holding, the Court stressed that a company does not act as a fiduciary “simply because it makes statements about its expected financial condition or because ‘an ordinary business decision turn[ed] out to have an adverse impact on the plan.’”

124. Id.
125. Id.
126. 57 F.3d 1255 (3d Cir. 1995) (“Unisys I”).
127. Id. at 1257.
128. Id.
129. Id. at 1260.
130. Id. at 1257.
131. Id.
133. Id. at 1074.
134. Id. (quoting the dissent) (citation omitted). But see Sprague v. General Motors Corp., 92 F.3d 1425, 1442-43. While acknowledging the recent decision in Howe, the court adopted the holding in Unisys I, 57 F.3d 1255 (3d Cir. 1995), that a company has a fiduciary duty “not to misinform employees through material misrepresentations and incomplete, inconsistent or contradictory disclosures.” Sprague, 92 F.3d at 1443 (citing Unisys I, 57 F.3d at 1264). This is a lesser evidentiary standard than intentional misrepresentation.
B. Current Law

The recent Supreme Court decision in Curtiss-Wright Corp. v. Schoonejongen\textsuperscript{135} effectively modified many of the previous case holdings, if not explicitly, then implicitly. The decision provides that plain language reserving the right to amend or terminate the plan overrules any other language in the plan that suggests that benefits are to be provided for the lifetime of the employee.\textsuperscript{136} This case is a paradigm for analysis because the holding, while not foreclosing legal remedies available to retirees, makes an employer's decision to terminate retiree health benefits easier.\textsuperscript{137}

1. Facts of Curtiss-Wright

The Curtiss-Wright Corporation ("Curtiss-Wright") performed a variety of defense-related work which was spread out among its several industrial plants.\textsuperscript{138} As the company began to lose business, it started shutting down plants.\textsuperscript{139} Additionally, the company terminated all welfare benefits for the employees, past and present, who worked at the closed plants.\textsuperscript{140} The retirees from one such plant, located in Wood-Ridge, New Jersey, reacted to the termination of their welfare benefits by bringing suit against Curtiss-Wright.\textsuperscript{141} The retirees alleged that the termination violated ERISA regulations in that the benefits were vested.\textsuperscript{142}

Curtiss-Wright began providing health benefits in 1966 through the purchase of health insurance.\textsuperscript{143} It continued to provide health benefits in this manner until 1976 when it established a welfare benefit plan in ac-

\textsuperscript{135} 115 S. Ct. 1223 (1995).
\textsuperscript{136} Id. at 1226.
\textsuperscript{137} See, e.g., Belanger v. Wyman-Gordon Co., 888 F. Supp. 9 (D. Mass. 1995). Eighteen employees were offered early retirement. Id. at 10. Among the incentives offered to induce early retirement was a survivor income plan. Id. at 11. This was a life insurance plan that would be described as a welfare benefit plan under ERISA. Id. After a short time Wyman-Gordon decided it could no longer afford to continue the plan and terminated it. Id. In denying the plaintiff's ERISA claims, the court relied on its earlier holding in Curtiss-Wright, that employers "are generally free under ERISA, for any reason at any time, to adopt, modify or terminate welfare plans." Id. at 12. Note that for ERISA purposes, health plans are treated the same as welfare plans. See 29 U.S.C. § 1002 (1994) (definition of welfare plan encompasses health plan).
\textsuperscript{138} Curtiss-Wright Corp., 18 F.3d at 1036.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
Communication of the health benefits available before the plan’s implementation in 1976 was sparse. Only two booklets were sent to retirees stating that benefits would terminate upon death or “if the Group Policy terminates.” Additionally, the retirees received a letter in 1973 informing them that their health benefits would terminate on death or “the date the class of persons of which the retiree is a member ceases to be covered by the program.” This letter also contained a clause reserving the right of Curtiss-Wright to revoke or modify the health benefits.

The welfare plan established by Curtiss-Wright had a written constitution that contained a clause reserving the right of the company to modify or amend the plan at any time. In accordance with ERISA requirements, the company sent Summary Annual Reports (“SARs”) of the welfare plan to retirees. These SARs, however, did not contain any reservation language until 1979. Although disputed as being sent to retirees, Curtiss-Wright also prepared SPDs in accordance with ERISA requirements. These SPDs informed recipients that their health insurance would cease upon termination of the underlying group policy. The SPDs specifically informed retirees that their coverage would terminate if “the class of persons of which the retiree is a member ceases to be covered by the Program.”

In 1982, Curtiss-Wright began adding the following language to all communication regarding the welfare benefit plan: “Although the company fully expects to continue this benefit, you should be aware that unlike your retirement benefit which is a vested benefit, the retirement health care coverage is not a guaranteed benefit and therefore is subject to change or termination.” In 1983, the SPD contained new language.

144. *Id.* at 1037.
145. *Id.* at 1036. This is not surprising, given that until ERISA was enacted in 1974, there was little in the way of legal requirements imposed upon health or welfare plans. *Langbein & Wolk,* supra note 67, at 507-09.
146. *Curtiss-Wright,* 18 F.3d at 1036.
147. *Id.* at 1037.
148. *Id.* No court has interpreted ERISA to require SPD or similar documents to reference specifically amendment rights or procedures. *Wise,* 986 F.2d at 934.
149. *Curtiss-Wright,* 18 F.3d at 1037.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
stating that coverage under its plan would cease for retirees and their dependents upon termination of business operations of the facility from which they retired.\textsuperscript{156} Later in 1983, Curtiss-Wright announced the closing of the Wood-Ridge plant and the subsequent termination of health benefits for all employees, current or retired, that worked at the Wood-Ridge plant.\textsuperscript{157} Despite the written communications to the contrary, many retirees alleged that they were told their retiree health benefits would continue for life.\textsuperscript{158} This was disputed by Curtiss-Wright, and suit was filed against the company on behalf of the Wood-Ridge plant retirees for breach of contract and ERISA violations.\textsuperscript{159}

2. History of the Case

The district court litigation continued for six years.\textsuperscript{160} Following a bench trial, the court held that Curtiss-Wright reserved the right to amend its plan.\textsuperscript{161} The new language in the SPD in 1983 was held to be an amendment to the plan, but because the plan did not specify the procedure for an amendment to the plan, the new language was invalid.\textsuperscript{162} The court also held that the plaintiffs had no vested right in the plan.\textsuperscript{163} Thus, the plaintiffs won, even though they had no vested right, because the plan could not be amended to change their rights.\textsuperscript{164}

Because of the absence of an amendment procedure, the United States Court of Appeals for the Third Circuit upheld the district court ruling.\textsuperscript{165} Although the plan constitution allowed for amendment by the "company," the Third Circuit held that this did not meet the requirements of 29 U.S.C. §1102(b), which states that a plan shall identify persons who have authority to amend the plan.\textsuperscript{166}

\textsuperscript{156} Id.
\textsuperscript{157} Id. at 1037-38.
\textsuperscript{158} Id. at 1038.
\textsuperscript{159} Id.
\textsuperscript{161} Curtiss-Wright, 18 F.3d at 1038.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} Id. at 1040, 1042.
\textsuperscript{166} Id. at 1042.
3. Supreme Court Analysis

On certiorari, the United States Supreme Court considered whether "the standard provision in many employer-provided benefit plans stating that 'the Company reserves the right at any time to amend the plan' sets forth an amendment procedure that satisfies [ERISA 29 U.S.C.] § 402(b)(3)." The Supreme Court, in an opinion by Justice O'Connor, held that such language is sufficient. The Court found that employer-provided welfare benefits are not an entitlement under ERISA. Additionally, the Court adopted the holding in Adams v. Avondale Industrial, Inc., that "a company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan."

Absent from the Court's analysis was the fact that, at some level, the company promised its retirees lifetime health benefits. This absence is meaningful in that until it finds otherwise, lower court holdings finding promises of lifetime health benefits generally are overruled by any reservation clause in a welfare benefit plan. The case was remanded back to the district court to determine if the plan was amended by an authorized person of "the Company."

This is a clear indication that ERISA does not bar an employer's ability to terminate the health benefits of its employees. A company, however, must do so in a permissible manner. ERISA requires two procedures: one for amending the plan, and one for identifying the persons who have authority to amend the plan. ERISA defines "persons" to include corporations. Thus, a procedure identifying the company as the "person" who has authority to amend the plan is sufficient for ERISA purposes.

In holding that the reservation clause in Curtiss-Wright's welfare plan met the requirements of ERISA, the Court made it clear that the barest of procedures would be sufficient. Recognizing that Curtiss-Wright's

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167. Curtiss-Wright, 115 S. Ct. at 1226.
168. Id.
169. Id. at 1228.
170. 905 F.2d 943, 947 (6th Cir. 1990).
171. Curtiss-Wright, 115 S. Ct., at 1228 (citing Adams v. Avondale, 905 F.2d 943, 947 (6th Cir. 1990)).
172. Id. at 1231. An appropriate question of corporate law principles. Id.
173. Id. at 1228.
175. 29 U.S.C. § 1002(9).
176. Curtiss-Wright, 115 S. Ct. at 1228.
177. Id. at 1229.
welfare plan was the "simplest of plans," the Curtiss-Wright opinion suggests that more elaborate plans could have more complicated amending procedures. Even more elaborate plans, however, would not require a higher level of detail for amendment procedures. Thus, the barest of procedures for amending the most elaborate welfare plan will suffice under ERISA.

Clearly, the Supreme Court is taking a very liberal reading of this area of law, finding specificity where one could argue none exists. In Curtiss-Wright, this is shown by the use of principles of trust and corporate law to show that "the company," in the context of the welfare plan, can be defined with specificity.

The end result of Curtiss-Wright is that employers having the barest of amendment procedures will have carte-blanche when it comes time to reducing costs by terminating retiree health benefits. Until Curtiss-Wright was decided, the Supreme Court was reluctant to issue a ruling regarding these retiree terminations. This decision may indirectly encourage companies to terminate retiree health benefits knowing that the Supreme Court has, at least implicitly, approved such decisions.

This decision has impacted, and will continue to impact, a broad number of health and welfare plans. The reservation clause contained

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178. Id. Curtiss-Wright's welfare plan was a single-employer plan administered and funded solely by Curtiss-Wright. Id. Complicated welfare plans include those that are funded by multiple employers or provide different levels of benefits to different classes of employees perhaps funded by the purchase of insurance. See Michael J. Canan & William D. Mitchell, Employee Fringe and Welfare Benefit Plans §§ 8.1-8.3, 10.5 (1996) (describing multiple employer welfare benefit plans and different types of health plans).

179. Id. (holding that ERISA § 402(b)(3) [29 U.S.C. § 1102(b)(3)] is ultimately indifferent to the level of detail in an amendment procedure).

180. Id.

181. See Payne, supra note 75, at 118-19.

182. See, e.g., Ackerman v. Warnaco, Inc., 55 F.3d 117, 119, 122 (3d Cir. 1995) (stating that in light of the Court's holding in Curtiss-Wright, this court concludes that "designating the 'management' as the entity with authority to alter the plan satisfies the requirements of sec. 402(b)(3) [of ERISA]." Section 402(b)(3) of ERISA requires a plan to identify who has authority to amend the plan. See 29 U.S.C. § 1102(b)(3); Golden v. Kelsey-Hayes Co., 73 F.3d 648, 654-55 (6th Cir. 1996) (defendant argued unsuccessfully that the Curtiss-Wright decision, when read along with three other Supreme Court cases, modify the holding of Yard-Man); Hennessy v. FDIC, 58 F.3d 908, 922 (3d Cir. 1995) (based on decision in Curtiss-Wright, court upholds grant of summary judgment for company); Murphy v. Keystone Steel & Wire Co., 61 F.3d 560, 564, 569 (7th Cir. 1995) (noting that Curtiss-Wright did not answer the question of whether a violation of 29 U.S.C. § 1102(b)(3) renders a plan unamendable); Sprague v. General Motors Corp., 92 F.3d 1425, 1433-34 (6th Cir. 1996) (citing Curtiss-Wright for authority that plan sponsors are free "for any reason at any time
in Curtiss-Wright's welfare plan is considered a standard reservation clause. Many plans contain similar language. Employers whose plans did contain similar language may have been waiting for the Supreme Court's ruling before taking adverse action against retiree health benefits.

Currently, there are still some avenues of recovery that may be available to retirees in certain situations. Retirees can still prove that their health benefits were contracted for and thus vested. Despite the holding in Curtiss-Wright, the door is not closed on estoppel and fiduciary duty arguments. Most estoppel arguments, however, are won by retirees benefitted by a collective bargaining agreement. Reliance on fiduciary duty theory would appear to be a weak argument, given the adoption of the holding in Avondale by the Court in Curtiss-Wright, and the recent decision in Varity Corp. v. Howe.

Perhaps even more damaging to an estoppel claim is the combination of the Curtiss-Wright holding, allowing the barest of amendment proce-

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183. See Curtiss-Wright, 115 S. Ct at 1227 (“On appeal, Curtiss-Wright primarily argued that the plan documents did contain an amendment procedure, namely, the standard reservation clause contained in the plan constitution.”).

184. See Elizabeth A. Kundin & Deborah Walker, Current Developments in Employee Benefits; Part 2, 26 TAX ADVISER 738, 746 (1995) (“Many ERISA plans include the same amendment procedure language as was included in the Curtiss-Wright Plan.”).

185. Id. (Curtiss-Wright case was watched closely).

186. See generally Melbinger & Culver, supra note 65; Payne, supra note 75.

187. See Golden, 73 F.3d at 653-54 (holding that Curtiss-Wright does not overrule Yard-Man in that lifetime health benefits for retirees can be vested if contracted for). In Golden the court stated, “Yard-Man does not shift the burden of proof to the employer, nor does it require specific anti-vesting language before a court can find that the parties did not intend benefits to vest.” Id. at 656.

188. Id.

189. Mainly because estoppel is a viable claim under § 301 of the Labor Management Relations Act. Payne, supra note 75, at 112.

190. Curtiss-Wright v. Schoonejongen, 115 S. Ct. 1223, 1228 (1995). “[A] company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan.” Id. (citing Adams v. Avondale Indus., Inc., 905 F.2d 943, 947 (9th Cir. 1990)). Because the question of fiduciary duty was not before the court, this language is dicta but indicates how the question would probably be answered if it were presented to the court.

191. 116 S. Ct. 1065 (1996). In this recent case the Court held that intentionally misleading plan participants about the financial security of the company backing the plan is a breach of fiduciary duty and as such, is actionable for individual relief. Id. at 1074-75. The Court did not answer the question of “whether ERISA fiduciaries have any fiduciary duty to disclose truthful information on their own initiative, or in response to employee inquiries.” Id. at 1075.
dures to suffice under ERISA requirements, and the Sixth Circuit’s ruling that an unambiguous reservation of the right to amend will foreclose an estoppel remedy.\textsuperscript{192} Thus, no matter how simplistic the reservation of right to amend the plan is, as long as it is unambiguous, the retirees will lose on an estoppel claim.

III. ATTEMPT AT LEGISLATION

In 1993, Senator Harris Wofford introduced a bill to prohibit employers from terminating retiree health benefits if the retirees have sued over the company’s obligations to retirees.\textsuperscript{193} While the legislation ultimately was unsuccessful, it did seek to put the burden on employers to prove “in cases where health plan language is ambiguous—that termination or reduction of benefits is allowed.”\textsuperscript{194} The legislation, which would amend ERISA, was prompted by both FAS 106 and the recent court cases following termination of retiree health care benefits.\textsuperscript{195}

Similar legislation was introduced again in 1995 in the Senate by Senator Daschle and by Representative Johnson in House of Representatives.\textsuperscript{196} Comparable to the bill by Senator Wofford, the new legislation would enjoin employers from terminating retiree health benefits if any action by the retirees was pending.\textsuperscript{197} The legislation would also significantly alter case law in favor of retirees.\textsuperscript{198} Like its predecessor, the legislation was not enacted into law.

IV. A BRIEF LOOK AT THE FUTURE OF HEALTH CARE FOR RETIREES

Health care in the United States is based on a mixture of action by government and private organizations.\textsuperscript{199} The primary action taken is to

\textsuperscript{192} See Sprague v. General Motors Corp., 92 F.3d 1425, 1441 (6th Cir. 1996) (“Individuals who retired under documents containing an unambiguous reservation of the right to amend will lose on their estoppel claims because there could be no justifiable reliance in those cases.”).


\textsuperscript{194} Id.

\textsuperscript{195} Id. In particular, Unisys, a corporation in Sen. Wofford’s home state of Pennsylvania, terminated the health benefits for about 25,000 retirees and dependents. Id.


\textsuperscript{197} Id. at § 2.

\textsuperscript{198} Id.

The price of private health insurance increased at a rapid pace during the late 1980's and early 1990's. The cost today far exceeds what many households can afford. The problem becomes even greater for those whose income is fixed, like that of many retirees. For them, health insurance takes up a substantial amount of yearly income. Many must resort to using up saved assets until depleted.

At age sixty-five, a retiree is eligible for Medicare, a government-sponsored insurance program. Medicare has two parts: Part A, which pays for hospitalization, and Part B, which pays for doctor bills. While Medicare provides some health security for senior citizens, there is much that it does not cover. Even this program is in jeopardy, as the recent report to Congress on the status of Medicare points out: The portion of Medicare that pays for hospitalization is due to collapse in seven years. The Board of Trustees of Social Security and Medicare, comprised of five members including the Secretaries of Treasury, Health and Human Services, and Labor, urge "that the Medicare program is not sustainable in its present form."

The average retiree over sixty-five is faced with an uncertain future. However, he has a short-term solution in Medicare. There is an even greater problem for those retirees who are under sixty-five and thus do not qualify for Medicare. Termination of employer provided health benefits can cause serious financial consequences for the early retiree.

Retirement before the age of sixty-five is increasing every day in the

200. See Langbein & Wolk, supra note 67, at 510. In 1989, 76% of the nonelderly population was covered by health insurance. Id. Note that Medicare, a form of government health insurance, covers those over 65. Id.


203. Id.

204. Id.


206. Id. at 65-68.

207. Id. (noting that Medicare does not cover extended hospital visits (greater than 150 days) and does not pay for particular services greater than "approved changes").


209. Id. at 57-58.

United States. Several factors have caused this increase. First and foremost, the demand for labor has slackened as a result of the downturn in the economy of the country. When corporations are forced to downsize, many workers are given the option of early retirement. As an incentive for early retirement, many companies increase an employee's pension, pay him a lump sum bonus, or even promise him lifetime health benefits.

V. Conclusion

In his concurring opinion in *Senn v. United Dominion Industries*, Judge Will stressed the need for health care reform:

This case is not an isolated example and is one of the reasons for the growing demand that some form of national health plan be adopted so that retirees and other persons will be able to afford and secure the medical services they need. Given the fact that retirees require progressively more medical treatment as they age and that there will continue to be more of them, it is particularly important that some comprehensive long-term plan other than the present diminishing Medicare program be adopted for their protection.

As more of the work force moves into retirement, companies shoulder bigger retiree expenses. The recent introduction of FAS 106 has prompted many companies to take a long, hard look at the cost of paying these expenses, mainly comprised of health care. The result is that companies are eliminating medical benefits for retirees, even when these benefits were promised for the lifetime of the employee. The blame is not to be cast on FAS 106. In truth, it is only pointing to a potential problem area that many companies have been ignoring. A bankrupt company can no more pay for health care for retirees than the retirees themselves.

FAS 106 will continue to prompt companies to reduce or eliminate health benefits for retirees. The court system will not force these compa-

212. Id. at 88.
213. Id.
215. 951 F.2d 806, 818 (7th Cir. 1992) (holding that the employer legally reserved right to terminate health benefits and thus was not obligated to continue them).
216. *Senn*, 951 F.2d at 818.
nies to pay for promised benefits to retirees. This forces retirees to rely on Medicare and their own assets. Medicare is not a perfect alternative and is not available to those retirees under the age of sixty-five. As more workers enter into retirement, Medicare will be stressed to the breaking point. The need for some type of national health care plan becomes greater with each passing day.

Gregory J. Ossi, CPA
Example 1

ABC, Inc.
Income Statement
For the Year Ending 12/31/91

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<tr>
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<th>Amount</th>
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</thead>
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</tr>
<tr>
<td>Cost of Goods Sold</td>
<td>$ 60,000.00</td>
</tr>
<tr>
<td>Gross Income</td>
<td>$ 65,000.00</td>
</tr>
<tr>
<td><strong>Expenses</strong></td>
<td></td>
</tr>
<tr>
<td>Wages</td>
<td>30,000.00</td>
</tr>
<tr>
<td>Utilities</td>
<td>2,000.00</td>
</tr>
<tr>
<td>Supplies</td>
<td>1,000.00</td>
</tr>
<tr>
<td>Health Insurance</td>
<td>4,000.00</td>
</tr>
<tr>
<td>Interest</td>
<td>1,000.00</td>
</tr>
<tr>
<td>Taxes</td>
<td>2,500.00</td>
</tr>
<tr>
<td><strong>Net Income/(Loss)</strong></td>
<td>$ 40,500.00 $ (24,500.00)</td>
</tr>
</tbody>
</table>
Example 2

ABC, Inc.
Income Statement
For the Year Ending 12/31/91

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Revenues</strong></td>
<td>$ 125,000.00</td>
</tr>
<tr>
<td><strong>Cost of Goods Sold</strong></td>
<td>60,000.00</td>
</tr>
<tr>
<td><strong>Gross Income</strong></td>
<td>65,000.00</td>
</tr>
</tbody>
</table>

**Expenses**

<table>
<thead>
<tr>
<th>Category</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wages</td>
<td>30,000.00</td>
</tr>
<tr>
<td>Utilities</td>
<td>2,000.00</td>
</tr>
<tr>
<td>Supplies</td>
<td>1,000.00</td>
</tr>
<tr>
<td>Health Insurance</td>
<td>32,000.00</td>
</tr>
<tr>
<td>Interest</td>
<td>1,000.00</td>
</tr>
<tr>
<td>Taxes</td>
<td>2,500.00</td>
</tr>
</tbody>
</table>

**Net Income/(Loss)**

<table>
<thead>
<tr>
<th>Amount</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>68,500.00</td>
<td>$ (3,500.00)</td>
</tr>
</tbody>
</table>
### Example 3

**ABC, Inc.**  
**Balance Sheet**  
**12/31/91**

<table>
<thead>
<tr>
<th>Assets</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Cash</td>
<td>$100,000.00</td>
</tr>
<tr>
<td>Accounts Receivable</td>
<td>100,000.00</td>
</tr>
<tr>
<td>Property, Plant and Equipment</td>
<td>100,000.00</td>
</tr>
</tbody>
</table>

**Total Assets**  
$300,000.00

<table>
<thead>
<tr>
<th>Liabilities and Owners' Equity</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Accounts Payable</td>
<td>$10,000.00</td>
</tr>
<tr>
<td>Accumulated Post Retirement Liability</td>
<td>0.00</td>
</tr>
<tr>
<td>Long-term Debt</td>
<td>100,000.00</td>
</tr>
<tr>
<td>Common Stock</td>
<td>50,000.00</td>
</tr>
<tr>
<td>Retained Earnings</td>
<td></td>
</tr>
<tr>
<td>Previous Earnings</td>
<td>115,500.00</td>
</tr>
<tr>
<td>Current Earnings</td>
<td>24,500.00</td>
</tr>
</tbody>
</table>

**Total Liabilities and Owners' Equity**  
$300,000.00
### Example 4

**ABC, Inc.**

**Balance Sheet**

**12/31/91**

<table>
<thead>
<tr>
<th>Assets</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Cash</td>
<td>$100,000.00</td>
</tr>
<tr>
<td>Accounts Receivable</td>
<td>100,000.00</td>
</tr>
<tr>
<td>Property, Plant and Equipment</td>
<td>100,000.00</td>
</tr>
<tr>
<td><strong>Total Assets</strong></td>
<td><strong>$300,000.00</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Liabilities and Owners' Equity</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Accounts Payable</td>
<td>$10,000.00</td>
</tr>
<tr>
<td>Accumulated Post Retirement Liability</td>
<td>28,000.00</td>
</tr>
<tr>
<td>Long-term Debt</td>
<td>100,000.00</td>
</tr>
<tr>
<td>Common Stock</td>
<td>50,000.00</td>
</tr>
<tr>
<td>Retained Earnings</td>
<td></td>
</tr>
<tr>
<td>Previous Earnings</td>
<td>115,500.00</td>
</tr>
<tr>
<td>Current Earnings</td>
<td>(3,500.00)</td>
</tr>
<tr>
<td><strong>Total Liabilities and Owners' Equity</strong></td>
<td><strong>$300,000.00</strong></td>
</tr>
</tbody>
</table>