Vesting Retirement Benefits: Revisiting Yard-Man and its Unacknowledged Presumption

What started out as a potential inference became an omnipresent presumption and now appears to have become a clear-statement rule. Unless a company can point to explicit language in the relevant agreement stating that "retiree benefits" terminate at a particular date or do not vest, the benefits seem to vest as a matter of law. What we continually disclaim presuming we continually seem to presume. – Judge Jeffrey Sutton[1]

What a drag it is getting old. – Mick Jagger[2]

I. Introduction

While retirement seems like the time to relax and unwind after years of slaving over your job, coasting off to the vacation spot with your nest egg and gold watch is becoming less of a given and more of a luxury. Playing that lazy round of golf might have to wait, as today many workers feel the financial need to either remain at a job several years longer than they ever expected, or seek entirely different work in retirement, thus postponing the relaxation that retirement was supposed to offer. One of the reasons for this sad reality is the increasing lack of health care provided to employees by their employers. A study by the Department of Labor found that only 34% of retirees over age 55 were covered by employer-sponsored health care plans in 1994, a decrease of 10% from 1988.[3] Other reports indicate that that number has decreased yet again since the early 1990s.[4] Much of this decrease in providing of retirement health coverage is due to the precarious financial status of our nation. The United States has been mired in its worst economic crisis of the past 60 years,[5] and employers are trying to make financial decisions that will increase profits, even at the expense of those who have worked to build the company to its current status.

The nation as a whole is getting older, as "baby boomers"[6] are aging and moving towards retirement.[7] As those individuals eventually retire, employers likely face a tremendous burden of paying retirement and health benefits to all of them. According to the Census Bureau, between the years 2005 and 2025, the number of people 55 to 64 will increase by 36.4%, and those aged 65 and older will increase by 73.1%, while those between the ages of 25 and 54 will only increase by only 3.8%.[8] Those 65 and older will make up nearly 19% of the population, and many of them will be retired, or heading towards retirement.[9] Along with the increase in retirement-aged individuals, the life expectancy of Americans has steadily increased and now stands at more than 78 years.[10] This increase means that Americans are spending more time living in those retirement years, and thus costing more for employers who pay for health benefits.

As a result, many employers are keeping older employees in lesser capacities in an attempt to avoid losing tremendous numbers of workers to retirement,[11] and to avoid paying all of those workers retirement benefits once the workers are gone.[12] So far, some major companies have actually taken steps as to eliminate altogether the distribution of health benefits to retirees.[13] This type of occurrence can strike fear into the minds of those who are hoping to count on their employer benefits once they retire.

II. Collective Bargaining Agreements and the Vesting of Retirement Benefits

Amidst the financial struggles and employee and retiree compensation, one issue that has long split federal circuits, and still does today, is what to do with retirement benefits at the end of a collective bargaining agreement. Particularly, courts have diverged over whether retirement benefits become vested for a lifetime upon the expiration of the collective bargaining agreement

(CBA) when the agreement is silent or ambiguous on how to handle those benefits. Most of the courts that have looked at the issue base their decisions on their agreement or disagreement with the 1983 Sixth Circuit decision *Int'l Union, UAW v. Yard-Man, Inc.*[14]

The courts that follow *Yard-Man* choose to interpret the collective bargaining agreement in a contract-style method, examining whether the intent of the parties, based on language and context of the agreement, was to have the retirement benefits vest beyond the expiration of the agreement.[15] Alternately, a majority of courts have held that once the collective bargaining agreement ends, there should be a presumption against the vesting of the benefits.[16] This note will address the circuit split, particularly the most recent cases on the subject, and argue that the presumption against vesting is not desirable. The note will also explore a third method, a presumption *towards* the vesting of retirement benefits when a collective bargaining agreement expires. No circuits claim to directly subscribe to this method, but this note will argue that the Sixth Circuit, despite its consistent claims to the contrary, actually does apply a presumption towards the vesting of retirement benefits, and that this is the correct approach.[17]

III. Background

The rewarding of retirement benefits can be a highly sensitive matter for retirees and their former employer. If a unionized group of workers reach a collective bargaining agreement, that agreement usually remains in effect for a determined period of time.[18] When that period ends, the agreement expires and a new accord must be negotiated and agreed upon between the two parties.[19] When a collective bargaining agreement ends, often the current employees' rights under that agreement expire immediately or shortly thereafter.[20] A question has arisen in many circuits as to whether the rights and benefits of the retirees, which were also negotiated under

that agreement, vest for the retirees' lifetime or whether they expire as well.[21] There has been much debate over the topic.

According to the National Labor Relations Act[22], a collective bargaining agreement is an agreement for the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.[23]

The Employee Retirement Income Security Act (ERISA)[24], which was passed in 1974 is a federal law geared towards protecting retirees by setting "minimum standards for most voluntarily established pension and health plans in private industry to provide protection for individuals in these plans."[25] Aside from retirement benefits provided by an employer, there are other types of support for workers who are retired or unemployed, such as Social Security and COBRA,[26] however, those programs will not be the focus of this note.

IV. Methods for Resolving Retirement Benefits at the Expiration of a CBA

A. The Yard-Man Inference and the Contractual Approach

The landmark case, *Int'l Union, UAW v. Yard-Man, Inc.*,[27] is a Sixth Circuit decision that affirmed the district court holding that an employer, Yard-Man, breached its collective bargaining agreement when it terminated the health and life insurance benefits of its unionized retirees.[28] The circuit court held that those benefits of the retirees had vested upon the expiration of their agreement.[29] As the contract in the CBA did not specifically spell out what should be done with the retirement benefits at the end of the agreement, the court used a contractual interpretation approach to reach its conclusion.[30] The approach that the *Yard-Man* court used to determine whether the benefits should vest has made *Yard-Man* a starting point for many courts

when making judgments in the same situation; some have referenced the opinion positively, while others have decried the methods used in that case, instead choosing to take an alternate approach.[31]

In *Yard-Man*, a 1974 collective bargaining agreement was reached between the United Automobile, Aerospace and Agricultural Implement Workers (UAW) and the employer, Yard-Man. The agreement covered employees at a plant in Jackson, Michigan.[32] It was set to expire in 1977, but the Jackson plant closed down only a year into the agreement, in 1975.[33] Yard-Man informed the retirees from the plant that once the collective bargaining agreement expired, health and life insurance benefits of the active employees would expire, and the retirees' benefits would terminate as well.[34] The retirees eventually filed a lawsuit seeking specific performance of Yard-Man to pay the health and life insurance benefits beyond the CBA, and the District Court found that Yard-Man breached its contractual obligations in canceling the insurance and benefit plans of the Jackson retirees upon the collective bargaining agreement's expiration.[35]

The Court of Appeals of the Sixth Circuit affirmed the District Court decision that Yard-Man violated the agreement by stopping payment of retiree health benefits.[36] The court held that the intent of the parties should be used to decide whether retiree insurance benefits vest and continue once the CBA expires.[37] *Yard-Man* also held that in determining whether the parties' intent was to vest, courts should look at the explicit language of the collective bargaining agreement and the context which gave rise to its inclusion.[38] Also, those provisions should be construed with the entire document and the parties' purposes in mind.[39] The court stated that terms of an agreement must be interpreted in a way that renders none of them "nugatory" and in a way that avoids "illusory promises."[40] The court importantly noted that the contractual interpretation is applied, as long as that interpretation is consistent with federal labor policies.[41]

In *Yard-Man*, the relevant sections of the parties' collective bargaining agreement provided that for former employees aged 65 or older, "the company will provide insurance benefits equal to the active group benefit . . . for the former employee and his spouse."[42] The court held that if the agreement is ambiguous or silent regarding how to interpret the intent of the parties, then the court must look at other portions of the agreement as determining factors.[43] In *Yard-Man*, the court stated that the language of the contract was indeed ambiguous.[44] It was determined that the wording could be construed to simply say that the retirees get the same benefits that the employees receive.[45] However, it also might be construed to say that retirees get the same benefits as the employees for the same duration as those employees.[46] Due to this ambiguity, other portions of the agreement were to be examined.[47]

Part of the *Yard-Man* decision which has been very controversial, and has been responsible for much of the circuit split, is the wording of the opinion that states 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. Thus when the parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree.[48]

One reason the *Yard-Man* court gave for finding that the retirement benefits should exist beyond the termination of the collective bargaining agreement was the presence of specific durational limitations in other parts of the agreement.[49] Within the agreement, several other portions were subject to specific limitations on duration, while no such specific durational limitation was present for the distribution of retiree benefits.[50] The court saw this as evidence that the parties intended to maintain the retiree benefits beyond the expiration of the agreement.[51] The Court also held that a finding of intent to create everlasting rights to insurance benefits for retirees, minus explicit language in the agreement, is not inconsistent with federal labor law.[52]

In determining that the benefits of the retired workers vested, the court noted that it seemed impractical to base the existence of benefits for retirees on the possibility that active workers might or might not be laid off.[53] In emphasizing this point, the court referenced the Supreme Court case, *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*[54] In *Pittsburgh Plate Glass*, the Supreme Court determined that when an individual is already retired, his retirement benefits are a permissive, not mandatory, subject of bargaining.[55] Because of that fact, the court in *Yard-Man* noted that it is not likely that "such benefits, which are typically understood as a form of delayed compensation or reward for past services, would be left to the contingencies of future negotiations."[56]

After *Yard-Man*, numerous cases followed and held in favor of the retirees in similar situations, based on the *Yard-Man* inference.[57] Amongst them was a Sixth Circuit decision *Weimer v. Kurz-Kasch, Inc*,[58] in which the court held that the benefits denied to retirees at the expiration of their collective bargaining agreement should have been considered vested based on the intent of the parties.[59]

While some over the years have read the *Yard-Man* inference to provide a presumption in favor of vesting for retirees, many recent cases have argued that the *Yard-Man* inference is not a presumption, and should simply be used as a determination of whether parties showed intent to vest.[60] In *Golden v. Kelsey-Hayes Co.*,[61] the court noted that the inference is designed to "simply guide courts faced with the task of discerning the intent of the parties from vague or ambiguous CBAs."[62] In a 2006 case, *Yolton v. El Paso Tenn. Pipeline Co.*,[63] the Sixth Circuit court addressed how it believed that *Yard-Man* inference should be construed.[64] The court noted in its *Yolton* opinion, that the parties (as well as some of the previous opinions of the Sixth Circuit) seemed to be misinterpreting the term "inference" used in *Yard-Man* to mean a legal

presumption towards the vesting of the benefits of the retirees.[65] Circuit Judge Boyce F. Martin Jr.[66] spoke of how numerous employers had been dismayed over the presumption of vesting they assume was provided in *Yard-Man*.[67] Martin said that "this Court has never inferred an intent to vest benefits in the absence of either explicit or extrinsic evidence indicating such an event."[68] *Yolton* explained that *Yard-Man*'s instruction is for the courts to "apply ordinary principles of contract interpretation."[69]

Finally, the *Yolton* court pointed to federal retirement law ERISA[70] which provides that there are two types of employee benefits.[71] One type, pension plans, is subject to mandatory participation and vesting according to ERISA's rules.[72] The other type, welfare benefits, is not subject to the same mandatory participation and vesting requirements.[73] Under ERISA, health insurance benefits for retirees fall into the category of welfare benefits.[74] As such, *Yolton* held that retiree health insurance benefits were not mandatorily vested under ERISA.[75] As previously seen in *Pittsburgh Glass* though, something that is not a mandatory subject of bargaining can still be permissively bargained for.[76]

Even within the circuits that support the *Yard-Man* inference, the validity of the law has been challenged many times, but those courts continue to uphold its validity, spurning those efforts to reverse *Yard-Man*.[77] For example, the Sixth Circuit has seen several cases that presented such challenges in situations where the *Yard-Man* inference was then determined to be inapplicable. Some argued that *Sprague v. General Motors*,[78] appeared to overrule the *Yard-Man* decision.[79] In *Sprague*, employees complained of being denied lifetime retiree health care benefits.[80] The employer's benefits booklets did mention lifetime coverage for retirees, however the plan also gave General Motors the right to reserve the right to amend or terminate the plan.[81] The court held that the unambiguous right of the employer to amend the plan made it clear that

the retiree benefits did not vest.[82] However, *Sprague* featured a distinct factor which distinguishes itself from the law established in *Yard-Man*.[83] *Yard-Man* and the cases that have followed it dealt with two-party contracts, while *Sprague* dealt with a plan unilaterally implemented and thus controlled by General Motors.[84]

In 2009, the vesting of retiree benefits became an issue again in the Sixth Circuit, with *Winnett v. Caterpillar, Inc.*[85] In *Winnett*, a collective bargaining agreement was reached in 1988 between the union and the employer, Caterpillar.[86] The agreement expired in 1991, and a new collective bargaining agreement was not reached until 1998.[87] Caterpillar unilaterally implemented caps on the amount it would pay for retiree health coverage for employees who retired after January 1, 1992.[88] Between 1992 and 1998, several employees retired and brought claims that their no-cost retiree medical benefits were vested based on the 1988 agreement, and that the caps added unilaterally in 1992 should not apply to them.[89] The court notes that the retirees bringing the suit were still active employees when the 1988 agreement expired.[90] Based on the intent of the parties, the court determined that under the 1988 agreement, retirement benefits vested when a worker was retired, not when a worker became *eligible* for retirement.[91] Similar to its inapplicability in the *Sprague* case, the court held that the *Yard-Man* inference did not apply in *Winnett*, because *Winnett* dealt with employees who were still active, as opposed to actual retirees.[92] Though distinguishing itself specifically for purposes of the case, the court again failed to overturn the long-running holding of the circuit.[93] *Yard-Man* remains good law.[94]

Although reading *Yard-Man* to say that the inference is not a presumption of vesting retiree benefits[95] creates a more arduous process for retirees to argue for the vesting of their benefits, courts have found this goal attainable for retirees. In 2008, *Noe v. PolyOne Corp.*,[96] another Sixth Circuit decision, revisited the topic of whether the parties in a collective bargaining

agreement intended for the benefits of retirees to vest upon expiration of the agreement.[97] In basic terms, the plaintiffs were retirees who felt that the Employee Benefits Agreements (EBAs) that provided them with no obligation to pay for health insurance premiums, reimbursement for Medicare and $1 prescriptions, were vested and would last for life.[98] Soon, the employer, PolyOne, implemented a Flexible Benefit Program, also known as a flex program, which altered the benefits of employees and soon required the retirees to pay higher prescription prices, contribute to insurance premiums and pay for Medicare.[99] The court determined that the retiree benefits were intended to vest, and thus vacated the district court's award of summary judgment in favor of the defendant employer.[100]

The court's decision included several important reasons for determining that the parties intended to vest the retirees' benefits.[101] First of all, the court looked at the language which gave no indication that the intention was to not vest.[102] Second, the court noted that the durational provisions were of a general nature, and thus do not bar a finding that there was intention to vest[103] If a durational provision is general, then that durational provision should be perceived to applying a duration length to the agreement overall, and not specific parts of the agreement.[104] The *Noe* court recalls that "[a]bsent specific durational language referring to retiree benefits themselves, courts have held that the general durational language says nothing about those retiree benefits."[105] So, a provision that deals with the agreement, but not mentioning the specific retirement benefits discussed, is considered only a general durational provision, and thus not specific enough to have any impact on duration of the retirement benefits.[106] Plus, if specific durational language is mentioned, but only in regards to other specific parts of the agreement and not regarding retiree benefits, there is further evidence that there might be intent to vest.[107] If

there were intent to preclude vesting of benefits, the benefits section might include durational language similar to the limiting durational language of those other sections.[108]

A third thing that the *Noe* court held was that the agreement expressly tied the eligibility of retiree health benefits with that of pension eligibility.[109] Since pensions are determined to be mandatorily vested,[110] it should be presumed that if retirement health benefits are linked to the pensions, then the retirement benefits would also be treated in the same fashion.[111] Fourth, the court said that the method argued by the defendant (a presumption against the vesting of retirement benefits), would make some of the agreement's promises illusory.[112]

Few other courts have supported *Yard-Man* as strongly as the Sixth Circuit. The Fourth, Eleventh and First Circuits have all accepted *Yard-Man*, but some observers claim that they are fully aligned with the Sixth Circuit decision,[113] while others claim that those circuits accept *Yard-Man* only in bolstering fashion for other findings, not as the main thrust of its decisions.[114]

B. Presumption Against Vesting

Most circuit courts have held that at the expiration of a collective bargaining agreement which is silent on the issue of the vesting of retirement benefits, there should be a presumption against the vesting of retirement benefits for life.[115] Those circuits do not subscribe to the *Yard-Man* inference. In *Bidlack v. Wheelabrator Corp.*, [116] Seventh Circuit Judge Richard Posner implemented such a presumption against the vesting of benefits, but only in those situations where the collective bargaining agreement was silent on the vesting of retirement benefits.[117] Posner wrote that in negotiating a written contract with a definite expiration date, there is an implication of limited liability for the parties, and looking outside of the CBA, to presume the vesting of rights, would deprive the participants of the protections that the contract provides.[118]

In *Rossetto v. Pabst Brewing Co.*,[119] the Seventh Circuit again held firmly in favor of a presumption against lifetime retirement benefits. In *Rossetto*, a group of retired machinist workers (and their spouses) received retirement benefits under a collective bargaining agreement.[120] Once the agreement ended and the brewery closed, the plaintiffs argued that their retirement benefits should continue on rather than expiring.[121] In *Rossetto*, the Seventh Circuit court broke down a four part rule for how it would determine whether or not retirement benefits should be vested upon the expiration of collective bargaining agreements:

> 1. If a collective bargaining agreement is completely silent on the duration of health benefits, the entitlement to them expires with the agreement, as a matter of law (that is, without going beyond the pleadings), unless the plaintiff can show by objective evidence that the agreement is latently ambiguous, that is, that anyone knowledgeable about the real-world context of the agreement would realize that it might not mean what it says. This is the *Bidlack* presumption and its latent-ambiguity rebuttal.
>
> 2. If the agreement makes clear that the entitlement expires with the agreement, as by including such a phrase as "during the term of this agreement," then, once again, the plaintiff loses as a matter of law unless he can show a latent ambiguity by means of objective evidence. This is a general rule of contract law, independent of but consistent with *Bidlack.*
>
> 3. If there is language in the agreement to suggest a grant of lifetime benefits, and the suggestion is not negated by the agreement read as a whole, the plaintiff is entitled to a trial. Of course, if the agreement expressly grants such benefits, the plaintiff is entitled, not to a trial, but to a judgment in his favor. We are speaking of a case in which merely suggestive language creates a patent ambiguity.
>
> 4. If the plaintiff is entitled to a trial by reason of either a patent or a latent ambiguity, the normal rules of evidence will govern the trial, and so the parties will not be limited at trial to presenting *objective* evidence of meaning.[122]

The *Rossetto* court determined that the language of the collective bargaining agreement was indeed latently ambiguous, and thus remanded the case back to the lower court.[123] Per the first part of the four-part test, if the plaintiffs sought the possibility of having their benefits vest, they had to rebut the presumption against vesting of benefits at termination of the collective

bargaining agreement.[124] They succeeded in rebutting this presumption. [125] If they had not done so, their rights would have terminated at that point.[126]

The Fifth Circuit is amongst the other circuits that have held that there is a presumption that retirement benefits do not vest when a collective bargaining agreement ends.[127] In *Nichols v. Alcatel USA, Inc.*,[128] the court held that if ambiguity exists in the terms of the contract, only then may the court look at outside evidence to determine the intent of the parties in the agreement.[129] There was no such ambiguity in this case, according to the court, and the benefits were deemed unvested.[130] The *Nichols* court also re-iterated what the Fifth Circuit had said before – that it does not follow the *Yard-Man* inference.[131] The Third Circuit has also held against the vesting of retirement benefits. In *Int'l Union v. Skinner Engine Co.*,[132] the circuit court rejected *Yard-Man*, holding that it "cannot agree with *Yard-Man* and its progeny that there exists a presumption of lifetime benefits in the context of employee welfare benefits."[133] The court goes on to argue that "the *Yard-Man* inference may be contrary to Congress' intent in choosing specifically not to provide for the vesting of employee welfare benefits."[134]

V. Third Method of Addressing Retiree Benefits upon the Expiration of a CBA, and Argument Supporting that Method

Although several courts have decided against the *Yard-Man* inference which originated in the Sixth Circuit, and has been followed by a number of other circuits,[135] a retiree-friendly approach is more appropriate. When a collective bargaining agreement expires, and the agreement is silent or ambiguous on the issue of whether retiree benefits vest upon the agreement's expiration, the proper method for dealing with the legal struggle is a presumption in favor of vesting retirement benefits.

A. Arguments Supporting Presumption in Favor of Retirement Vesting

A majority of courts have rejected the *Yard-Man* inference completely, and presume that retirement benefits do not vest unless explicit language orders it; the Sixth Circuit, which nobly favors *Yard-Man*, has interpreted that the inference is not a presumption towards the vesting of retiree benefits.[136] However, a presumption *towards* the retirees is a valid and necessary method of handling agreements that are ambiguous on the matter of vesting retiree benefits. While the Sixth Circuit court has arrived at appropriate results of vesting in many of the cases it has heard regarding whether retirement benefits vest at the end of a CBA, the court's reasoning is faulty, as it fails to correctly interpret the fact that in the way it reaches those conclusions of vesting of retirement benefits, the court is actually applying a presumption towards vesting of those benefits.[137]

If language of an agreement specifically states that benefits will not be vested, then the benefits are intended to not vest. However, when there is silence or ambiguity in the language on the topic, a legal presumption against the vesting of retiree benefits, which other circuits practice,[138] is advantageous to employer but potentially degrading to the individual who has spent his career working for that employer. There are several reasons why the retiree's benefits should vest, including legal precedent, retirees' desire to control their own fate, public policy towards the retired workers and their expectations and reliance on benefits, and avoiding a slippery slope towards the diminishing of all benefits.

1. *Precedent for a Presumption towards Vesting*

Some circuit courts have supported the *Yard-Man* inference, but have read it only to require an interpretation of the collective bargaining agreement to determine if it shows the parties' intentions to have retirement benefits vest upon the expiration of the agreement.[139] No courts explicitly claim to read the *Yard-Man* inference as a presumption towards vesting of retirement benefits, but some courts' actions speak differently than their words. Principally, the Sixth Circuit has consistently affirmed *Yard-Man* since its origin, but it claims that there is no presumption towards vesting.[140] This and other courts that have used the *Yard-Man* approach of interpreting the parties' intent, have found a smart and thorough way of viewing the *Yard-Man* inference – much more humanitarian than a presumption against vesting. But, when the Sixth Circuit has applied its style of interpreting the parties' intent in these cases, it actually *has* consistently applied a presumption towards vesting, and should continue to do so.

While opining against the vesting of retiree benefits in the case,[141] Judge Jeffrey Sutton's dissenting opinion in *Noe*[142] included a substantial argument about the way that the Sixth Circuit has actually treated the *Yard-Man* inference.[143] As did the majority in *Rossetto*[144] and the concurrence in *Bidlack*,[145] Sutton's dissent in *Noe* describes some defined options for dealing with the retirement benefits and expiring CBAs, each of which are addressed at length throughout this note.[146] First, courts can create a presumption against vesting.[147] Sutton opined that this method is appropriate because it is a significant, and perhaps unusual, decision for a company to make an unchangeable promise to pay health-care benefits for life when the agreement is for such an abbreviated time.[148] Another approach Sutton brings up to deal with the inference is to not adopt any presumption at all. He feels that this method is beneficial because the absence of a presumption will lead to proper traditional contract interpretation and a lack of interference with proper interpretation.[149] The third option Sutton presents for the court is to

adopt a presumption in favor of the vesting of retiree benefits.[150] Among the positives Sutton lists for this approach is the fact that it aids those retirees who lose their benefits and are often not able to return to work in an effort to receive benefits.[151] Although Sutton does not favor this method, it is the most compassionate alternative towards those who have put in years of hard labor and laid the groundwork for the current employees.

Most importantly, in his dissent, Judge Sutton points to the fact that although in recent cases, the Sixth Circuit has disclaimed that any presumption towards the vesting of healthcare benefits for retirees exists in the *Yard-Man* inference,[152] the Sixth Circuit actually has treated the inference as a presumption.[153] While Sutton's end result, an opinion against a vesting presumption, is incorrect, his claim that the Sixth Circuit's behavior has often indicated an unspoken presumption is exactly right.[154] Sutton notes that due to the decision record of the Sixth Circuit when dealing with retirement benefits at CBA expiration situations, numerous observers and courts have recognized the Sixth Circuit's treatment of the inference as a presumption.[155] Sutton makes a tremendous statement about the definitive nature that the Sixth Circuit seems to have moved towards in applying the Yard-Man inference:

> What started out as a potential inference became an omnipresent presumption and now appears to have become a clear-statement rule. Unless a company can point to explicit language in the relevant agreement stating that "retiree benefits" terminate at a particular date or do not vest, the benefits seem to vest as a matter of law. What we continually disclaim presuming we continually seem to presume.[156]

Despite the fact that the Sixth Circuit has deliberately elected not to recognize a presumption, the Circuit consistently applies a presumption to these cases.[157] This is the approach that should be adopted by other circuits as well. The crucial element in finding a rebuttable presumption towards vesting in these cases is the aforementioned issue of durational

clauses.[158] Based on those Sixth Circuit decisions, the presumption in favor of vesting of retirement benefits at expiration of a CBA may be rebutted only by language that specifically goes against the vesting.[159] Much of the substantiation for existence of this presumption comes from the language the court itself has used regarding durational limitations.[160] The Sixth Circuit court has claimed that the *Yard-Man* inference does not shift the burden to the employer to show that there was no intent to vest,[161] but the court stated in its *Yolton* opinion that "absent specific durational language referring to retiree benefits themselves, courts have held that the general durational language says nothing about those retiree benefits."[162] This language clearly indicates that the court will not find an intention to preclude vesting *unless there is durational language that specifically mentions the non-vesting of retirement benefits*. This means that a presumption exists that the benefits do vest. In several cases, the court has read the *Yard-Man* language about durations to mean that the general duration clauses of the agreements were designed for the agreements as a whole, and not designed to also create a specific duration for retiree benefits provided in the agreement.[163]

For example, in its *Maurer* opinion, the Sixth Circuit court noted that although the collective bargaining agreement in the case was to terminate after three years, that termination did not extend to the benefits provided under the agreement.[164] Even the majority in *Noe*, which combats the dissent's claim that the Sixth Circuit has applied the *Yard-Man* inference as a presumption,[165] still shows itself to be cognizant of the overwhelming tendency the circuit has had towards the vesting of retirement benefits at the expiration of collective bargaining agreements.[166] The majority notes that "of the eleven most pertinent Sixth Circuit cases addressing whether retiree health benefits have vested, this court found evidence of vesting in ten."[167] Recognizing this presumption towards vesting in the Sixth Circuit opinions provides

powerful legal precedent in support of benefits vesting in future cases (at least within that circuit).

Aside from circuit court cases, other courts have also opposed presumptions against vesting of contractual elements in cases where explicit terms do not exist. In *Litton Fin Printing v. NLRB*,[168] the United States Supreme Court held that an arbitration clause continued after the agreement's termination in order to apply the clause to disputes that arose under the contract.[169] The Supreme Court noted that rights survive termination of an agreement if explicit terms say so, but also that vested benefits can also exist despite a lack of explicit terms.[170]

One important thing to note is the sway that Judge Sutton might have on the landscape of the issue of retirement benefits at the expiration of a CBA. Judge Sutton has been an influential judge in regards to labor and employment issues, as he provided a well documented concurring opinion in Michigan Family Resources Inc. v. SEIU Local 517M.[171] In that opinion, Sutton favored the limiting of judicial review of labor arbitration decisions to arbitrable disputes where the arbitrator exercised bias, a conflict of interest, or an effort to dispense his own brand of industrial justice.[172] Sutton's 2008 dissent in *Noe* might have some influence on the other judges who take notice of the presumption in the application of the *Yard-Man* inference. As the circuits are split on the issue, one would imagine that the Supreme Court would eventually hear eventually weigh in on the topic, particularly if substantial circuit court judges are drawing attention to the conflict that still exists.

2. *Retirees' Desire to Control Their Own Fate*

With the U.S. economy struggling mightily in recent years,[173] employers and active employees both are in positions to look out for themselves. When a long-time employee

negotiates retiree benefits as part of a collective bargaining agreement, he would likely want to have those benefits for his entire retirement, not for just three years. But when a young employee is left to negotiate the rights and benefits of an already retired worker, there might not be much advantage for him to advance the interests of those who came before him.[174] As *Yard-Man* explained, retirees would certainly not want to leave their fate up to the negotiating power of current and future employees.[175] *Pittsburgh Plate Glass* addresses the matter of leaving the negotiations for retirees' benefits to active workers, by noting that the active employees do not have tremendous incentive to negotiate for the benefits of retirees, especially if they know that someday their retiree benefits are going to be negotiated by then-active employees.[176] The Supreme Court in *Pittsburgh Plate Glass* stated that "benefits that active workers may reap by including retired employees under the same health insurance contract are speculative and insubstantial at best."[177]

A smart union representative might try to establish some sort of firm retirement (post-employment) benefits while the employees are still active, because when a worker is still active, the retirement benefits established are a mandatory subject of bargaining.[178] Once the workers are retired, the rights become permissive (no longer mandatory), and the employer can alter or eliminate the rights and benefits of the already retired employees without being compelled to bargain for that ability.[179] A union is permitted to choose current compensation over future retirement benefits for its employees, but once the retirement benefits are vested in a person, the union may no longer bargain those benefits away.[180] So, a union representative likely wants clear language of vesting in the agreement; but if that language is not present, *Yard-Man* decision indicates that retirees would surely want to have the benefits last beyond the end of the agreement, rather than be open to elimination.[181] As discussed above, ERISA does not require

welfare benefits (including health insurance benefits) to vest as it does for pension benefits.[182] However, despite ERISA not requiring that health insurance benefits vest, ERISA does not say that the benefits *may* not vest.[183] So, benefits can vest and still meet federal ERISA law.[184]

Another reason that the employees would likely want retirement benefits to continue beyond the expiration of a collective bargaining agreement is the fact that often a union does not claim to represent the employees once they are retired.[185] If that is the case, then the union is not in the position of needing to fight any longer for benefits for those workers who are retired, thus leaving the retirees out to dry.[186] In speaking to the Charlotte Observer, the late Gene Upshaw, Pro Football Hall of Famer and former union president for the National Football League Players Association, said of retired NFL players, "The bottom line is, I don't work for them. They don't hire me and they can't fire me. They can complain about me all day long. They can have their opinion. But the active players have the vote. That's who pays my salary."

There is also not much incentive for the employer to help retirees or potential retirees. Health care costs have climbed to very high levels,[187] and as a result, the typical employer seeks to avoid dealing with the high rates.[188] Employers that do not want to eliminate retirement benefits look to increase retiree contributions or perhaps offer less liberal retiree health benefits to active employees.[189] As mentioned above, if active employees know that their benefits are at risk, it might be beneficial for them to push for smaller benefits for retirees and larger immediate compensation for themselves. Other active employees might simply be apathetic about the retirees and not care about what type of coverage they are getting, or what type of coverage they themselves will receive when it is time for them to retire. While it might be noble for an active employee to give up some of his earnings to benefit those who came before him, sometimes it is a rarity.[190]

3. *Public Policy Towards Retired Workers and their Expectations/Reliance*

There is a public policy argument that people want retirees to be taken care of and not have to struggle for medical and financial security after a lifetime of work.[191] One concern about the reduction or termination of benefits at the end of a collective bargaining agreement is the fact that retired employees are old and often can no longer work for themselves. The elderly are commonly not in the position to look for new jobs or to fight for what they feel is a proper award of benefits.[192] Nor are employers anxious to hire the aged. Many workers feel the need to work longer for a long-time employer to avoid the risk of dealing with the loss of retirement benefits once their careers are over.[193] Many people do not know how to go about preparing for retirement, so employer-sponsored health plans are great aids to those individuals through their older years. One study shows 42% of those people 55 and over have not given "a lot of thought" to how to manage their money in retirement so they do not outlive their savings.[194] Even more alarming is that due to the expectations workers put into the health care that is provided for them, 60% of people 55 or older have not given "a lot of thought" to how to pay for long-term care in a nursing home or health care costs not covered by Medicare.[195]

Many employees heavily rely on employer-provided benefits for their retirement and have expectations that once they retire, the work that they have done for years will lead to benefits for the duration of their retirement. Judge Richard Cudahy in his concurring opinion to the *Bidlack* case noted that years ago, both employers and employees seemed to be of the belief that benefits were designed to last a lifetime and that it was economics that led employers to start reconsidering that position, first in reductions, and eventually in limitations.[196] Cudahy opined

that a presumption in favor of the vesting of retirement benefits is appropriate for a collective bargaining agreement that contains ambiguity on how to handle those benefits.[197] Cudahy said,

> Before about 1980, I seriously doubt that it occurred to many employers to grant retiree health benefits on anything less than a lifetime basis. The overwhelmingly prevalent trend of labor contracts was to continue or improve retiree benefits from contract to contract. It was only in the eighties, with spiraling medical costs, heightened foreign competition, epidemic corporate takeovers and the declining bargaining power of labor, that thought was first given to reducing retiree benefits from contract to contract or even (though this seems more implausible) to eliminating such benefits entirely. I think that, at least before the eighties were in full swing, prevailing conditions suggested a presumption among unions and management alike that retiree health benefits vested unless there was agreement to the contrary.[198]

Cudahy also wrote that sometimes parties have expectations that are so fundamental that negotiating about those expectations is unnecessary.[199] He notes that in not specifically addressing particular issues, "sometimes silence says more than words."[200] Retirees often will rely on the benefits that were provided in their collective bargaining agreement. The expectation that comes with that can leave them desperately in need if those benefits are negotiated away with no recourse for the retiree that is being deprived.

Finally, a presumption towards vesting provides some legitimate honesty to long-term employees who have spent their lives working for a single company. In *Yard-Man*, the Sixth Circuit court maintained that a CBA's terms must be interpreted to avoid illusory promises.[201] *Yard-Man* offered to cover retirement insurance when retirees reached 65, but as retirees were allowed to retire at 55, the retirees would have to pay for the insurance until that point.[202] The court noted that if those insurance benefits "were terminated at the end of the collective bargaining agreement's three-year term, this promise is completely illusory for many early

retirees under age 62."[203] This lack of delivering upon the beliefs and expectations of its workers epitomizes the drawbacks to the denial of vesting in these situations.

4. *Avoiding the Slippery Slope*

Another problem with the termination of retirement benefits at the end of a collective bargaining agreement is the very real risk of a slippery slope. The denial of vested retirement benefits at the expiration of a CBA can open the door to more denials and deprivations for retired workers. When a company knows that its jurisdiction provides for a presumption against vesting, the presumption can potentially lead to gradual attempts by the employer to push for increasing leverage against the retirees. A decision by a court that allows the limitation or extermination of benefits at the end of a collective bargaining agreement can lead to an employer trying to limit benefits in broader situations, or trying to eliminate them altogether – something many employers have already attempted.[204] The less the retirees receive, the easier it is to take from them in the future. Baby boomers are reaching retirement age and will soon be flooding the retirement system.[205] American employers will have to make decisions about how, or whether, to provide benefits for the influx of retirees, and limiting or eliminating benefits altogether are growing possibilities.[206] When a company like General Motors can cut health benefits for retirees, it can open the door for countless other companies to enhance their cost-cutting measures to the detriment of those who have dedicated their lives to the companies.[207] One GM employee said, "In 34 years with General Motors, I had many opportunities to go in other directions that were much more lucrative, but the promise of health care and pension for life was something that I had to consider."[208] Retirees have falsely been led to believe that they have

earned some security and protection in their later years, but now they are forced to fear for what else can be taken away from them.

VI. Conclusion

When people retire, they want, and often expect, benefits that will last for the lifetime of their retirement! This seems to be a thing of the past, as older workers and retirees face tough roads ahead. Employers' greed and negligence towards retirees is partially responsible, but employers cannot solely be blamed for the lack of support for retirees; current employees[209] and the government play a hand as well.[210] The difficult economic landscape of the past several years leaves everyone in the working world in an unpredictable lurch, but everyone points the finger at everyone else.[211] Unfortunately, retirees are easy targets when cuts have to be made because if they are often out of sight, and out of mind, with little clout.

As the *Yard-Man* opinion said, retirement benefits are status benefits.[212] People retire for life. It is hard to imagine that many of them would sign up for particular retirement benefits if those benefits were only designed to last three years, but that is what many courts have held.[213] When collective bargaining agreements end, and the language is ambiguous or silent as to whether retiree health benefits under the agreement vest, the courts have traditionally recognized either a presumption against vesting, or a contract-style interpretation of the agreement to determine the intent of the parties on the issue. A third method should be adopted in those situations – a presumption in favor of the vesting of retirement benefits.

The *Yard-Man* decision 35 years ago, and those cases that have followed, have held on to humanity and awarded aging workers with the respect that they have earned. Although the Sixth Circuit has refused to claim that it is rightfully applying a presumption in favor of the vesting

retirement benefits, it should continue what it is doing, because it is indeed creating a presumption in favor of vesting for retirees.[214]

[1] Noe v. PolyOne Corp., 520 F.3d 548, 564 (6th Cir. Ky. 2008) (Sutton, J., dissenting) (describing a presumption that the Sixth Circuit seems to employ towards the vesting of retirement benefits at the expiration of collective bargaining agreement, despite its claims that it does not apply such a presumption).
[2] Mick Jagger and Keith Richards, *Mother's Little Helper*, in AFTERMATH (Decca Records, 1966).
[3] MARK A. ROTHSTEIN AND LANCE LIEBMAN, EMPLOYMENT LAW: CASES AND MATERIALS, 1239 (Foundation Press, Sixth Edition, 2007) (citing U.S. DEP'T OF LABOR, RETIREMENT BENEFITS OF AMERICAN WORKERS, 27, 29 (2006).
[4] William Payne and Pamina Ewing, *Union-Negotiated Lifetime Retiree Health Benefits: Promise or Illusion*, 9 MARQEA 319, 319 (2008) (citing EMPLOYERS' ACCOUNTING FOR POSTRETIREMENT BENEFITS OTHER THAN PERSONS, FIN. ACCOUNTING STANDARD NO. 106 (Fin. Accounting Standards Bd., Dec. 1990).
[5] Laura Meckler and Jonathan Weisman, *Obama to Call for a New Era of Responsibility – Huge Crowds Gather as First African-American President Takes Office; Aides Expect Steps on Iraq War, Bank Policy This Week*, THE WALL STREET JOURNAL, January 20, 2009 at A1 (noting that the United States is suffering its "worst economic crisis since the Great Depression").
[6] Patrick Purcell, CRS REPORT FOR CONGRESS: OLDER WORKERS: EMPLOYMENT AND RETIREMENT TRENDS, 2 (Congressional Research Service 2006), *available at* http://aging.senate.gov/crs/pension34.pdf (defining "baby boomers" as those individuals born between 1946 and 1964).
[7] Purcell, *supra* note 6, at 2 (noting that the demographics of the United States will change when the "baby boomers" reach retirement age).
[8] Purcell, *supra* note 6, at 2 (giving statistics showing the drastic changes in the percentage of older Americans in the coming years, in comparison to the younger generation).
[9] Purcell, *supra* note 6, at 2 (showing evidence of the aging of America's Population).
[10] David Brown, *Life Expectancy Hits Record High in United States*, WASHINGTON POST, June 12, 2008, at A4 ("Life expectancy is the calculation of how long a newborn could expect to live if the mortality rates at birth prevailed for a lifetime").
[11] Purcell, *supra* note 6, at 2 ("The age-distribution of those 25 to 64 years old already is undergoing a substantial shift toward a greater number of older individuals and a relative scarcity of young people entering the labor force.").
[12] Purcell *supra* note 6, at 13 (indicating that many employers are having their older employees work part-time or part-year schedules, to avoid having them retire).
[13] Nick Bunkley, *Some White Collar G.M. Retirees Scramble as Health Care is Cut Off*, NEW YORK TIMES, November 10, 2008, at B1 (describing how General Motors decided to cut the health benefits of many of its workers, in order to save $1.5 billion at a time when the corporation is struggling mightily).
[14] 716 F.2d 1476 (6th Cir. 1983).
[15] *See infra* Part IV.A
[16] *See infra* Part IV.B
[17] Noe v. PolyOne Corp., 520 F.3d 548, 564 (6th Cir. Ky. 2008) (Sutton, J., dissenting) (describing a presumption that some courts seem to unwillingly employ towards the vesting of retirement benefits).

[18] Bidlack v. Wheelabrator Corp., 993 F.2d 603, 607 (7th Cir. Ind. 1993) (referring to a collective bargaining agreement as "invariably three years"; *see Yard-Man*, 716 F.2d at 1478 (noting that the agreement began in 1974 and was to end in 1977).
[19] See National Labor Relations Act 29 U.S.C. 151, § 9.
[20] *Yard-Man*, 716 F.2d at 1481.
[21] *See id.*
[22] National Labor Relations Act, 29 U.S.C. 151
[23] *See* National Labor Relations Act 29 U.S.C. 151, § 8(d).
[24] *See* UNITED STATES DEP'T OF LABOR, RETIREMENT PLANS, BENEFITS AND SAVINGS, *See* 29 U.S.C.S. 1001, www.dol.gov/dol/topic/retirement/erisa.htm (last visited April 24, 2009).
[25] *See* UNITED STATES DEP'T OF LABOR, RETIREMENT PLANS, BENEFITS AND SAVINGS, *See* 29 U.S.C.S. 1001, www.dol.gov/dol/topic/retirement/erisa.htm (last visited April 24, 2009).
[26] David L. Gregory, *COBRA: Congress Provides Partial Protection Against Employer Termination of Retiree Health Insurance*, 24 SAN DIEGO L. REV. 77 at 83-84 (describing the history and significance of the Consolidated Omnibus Budget Reconciliation Act (COBRA) plan for former workers); Brian J. Harrigan, *Erosion of Retiree Health Benefits: Impact on Health Status of Near-Elderly*, 8 GEO. PUBLIC POL'Y REV. 85, 88-90 (noting the presence of COBRA as an option for aging retirees).
[27] 716 F.2d 1476 (6th Cir. 1983).
[28] *See id.* at 1478.
[29] *See id.*
[30] *See Yard-Man*, 716 F.2d at 1478; *See also* Gregory, *supra* note 26, at 78.
[31] *See infra* Part IV.B
[32] *See Yard-Man*, 716 F.2d at 1478.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *See id.* at 1479.
[38] *See Yard-Man*, 716 F.2d at 1479.
[39] *See id.* at 1479-80.
[40] *See id.* at 1480 (emphasizing the damaging nature of illusory or inconsistent promises).
[41] *See id.* at 1480 ([T]he 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.").
[42] *See id.* at 1480.
[43] *See id.* at 1480 (noting that if there is ambiguity, then the court can "look to other words and phrases in the collective bargaining agreement for guidance.").
[44] *See Yard-Man*, 716 F.2d at 1480.
[45] *See id.* If interpreted this way, the benefits, while they existed, were to be the same for the retirees as for the active employees. *See id.*
[46] *See id.* at 1480. If interpreted this way, the benefits would be the same for retirees and active employees, and the benefits would last only as long as those of the active employees. *See id.* The court has determined that if the language of the agreement is clear and unambiguous, then

extrinsic evidence is not allowed to enter for purposes of examining intent. *See* Yolton v. El Paso Tenn. Pipeline Co., 435 F.3d 571, 591 (6th Cir. 2006).
[47] *See Int'l Union, UAW v. Yard-Man, Inc,* 716 F.2d 1476, 1480 (6th Cir. 1983).
[48] *See id.* at 1482.
[49] *See id.* at 1482.
[50] *See id.* at 1481-82. For example, the agreement stated that savings and pension plan programs would only continue until the end of the collective bargaining agreement, at which point they would expire. Nothing of this nature existed for the health and insurance benefits. *See id.* at 1482. In determining whether other evidence points to a vesting of retirement benefits in this case, the court also determined that limiting health insurance for a retiree's family upon the retiree's death only to the expiration of the CBA is an exception to the anticipated continuation of retiree benefits beyond the life of the CBA. *See id.* at 1481.
[51] *See id.* at 1481-82.
[52] *See Yard-Man*, 716 F.2d at 1482.
[53] *See id.* at 1481 (noting how the tenuous nature of employee status seems too unreliable for the retirees to base the existence of their benefits).
[54] 404 U.S. 157 (1971) (hereinafter *Pittsburgh Plate Glass*).
[55] *See Pittsburgh Plate Glass*, 404 U.S. at 181-82; *see also Yard-Man*, 716 F.2d at 1482.
[56] *See Yard-Man*, 716 F.2d at 1482 ("If [employees] forego wages now in expectation of retiree benefits, they would want assurance that once they retire they will continue to receive such benefits regardless of the bargain reached in subsequent agreements."
[57] *See* United Auto Workers v. Cadillac Malleable Iron Co., 728 F.2d 807 (6th Cir. 1984) (hereinafter *Cadillac*). The court in *Cadillac* affirmed the Sixth Circuit's *Yard-Man* method. *See id*. at 809; *See also* Gregory, *supra* note 26, at 91 ("Thus, although the court of appeals rejected any lifetime presumption, its heavy and express reliance on *Yard-Man* strongly indicated a judicial disposition to construe retiree benefits grounded in collective bargaining agreements in a fashion most beneficial to the retirees.").
[58] 773 F.2d 669 (6th Cir. 1985).
[59] *See Weimer*, 773 F.2d at 676; *See also* Nathanael Berneking, *Don't Mow Over the Yard-Man Inference: Guarding Against Improper Modification of Welfare Benefits Provided in a Collective Bargaining Agreement* 45 ST. LOUIS L.J. 261, 273 ("Thus the court continued Yard-Man's trend of considering the existence of retiree benefits in light of other factors").
[60] *See* Payne & Ewing, *supra* note 4, at 331.
[61] 73 F.3d 648 (6th Cir. 1996).
[62] *See id.* at 656. (noting that *Yard-Man* did not shift the burden from the plaintiff showing there was was a presumption of vesting to the defendant showing that there was no presumption to vest) *See id.* at 656.
[63] 435 F.3d 571 (6th Cir. 2006).
[64] *See id.* at 580.
[65] *See id.* at 580.
[66] *See id.* at 574.
[67] *See id.* at 579-80.
[68] *See Yolton*, 435 F.3d at 580 (clarifying the nature of reading the opinion in *Yard-Man* which is not as straight-forward in favor of the vesting of retiree benefits as some people have understood it).

[69] *See id.* at 580.
[70] ERISA is the Employee Retirement Income Security Act of 1974. *See* 29 U.S.C.S. 1001; *See also* UNITED STATES DEP'T OF LABOR, RETIREMENT PLANS, BENEFITS AND SAVINGS, www.dol.gov/dol/topic/retirement/erisa.htm (last visited April 24, 2009).
[71] *See Yolton* 435 F.3d at 578; Noe v. PolyOne Corp., 520 F.3d 548, 552 (6th Cir. Ky. 2008).
[72] *See Yolton* 435 F.3d at 578, fn 4; 29 U.S.C. 1002(2)(a); 29 U.S.C. 1002(1).
[73] *See Yolton* 435 F.3d at 578, fn 4; U.S.C. 1051.
[74] *See Yolton* 435 F.3d at 578; U.S.C. 1002(1).
[75] *See Yolton* 435 F.3d at 578.
[76] See notes 53-56 and accompanying text.
[77] *See* Maurer v. Joy Techs., Inc., 212 F.3d 907 (6th Cir. Ohio 2000) (holding that the benefits of retirees vested upon expiration of their collective bargaining agreement).
[78] 133 F.3d 388 (6th Cir. 1998).
[79] *See Sprague* 133 F.3d at 393-94.
[80] *See id.* at 392-94.
[81] *See id.* at 393-94; *see also* Alicia Mazurek, *Class Certifications to Modify Retiree Healthcare Benefits Met the Requirements of Federal Rule of Civil Procedure 23 of Fair, Reasonable and Adequate*, 86 U. DET. MERCY L. REV. 39 at 41-42.
[82] *See Sprague* 133 F.3d at 404; *see also* Mazurek, *supra* note 81, at 41-42.
[83] *See* Int'l Union v. BVR Liquidating, Inc, 190 F.3d 768, 773 (6th Cir. 1999) (clarifying that the holding in Sprague only applied to situations where the employer imposed a unilateral agreement on its employees, which would allow it to amend or terminate the benefits).
[84] *See Maurer*, 212 F.3d at 918-19.
[85] 553 F.3d 1000 (6th Cir. Tenn. 2009).
[86] *See id.* at 1003.
[87] *See id.* at 1002.
[88] *See id.* at 1003.
[89] *See id.* at 1008.
[90] *See Winnett*, 553 F.3d at 1008.
[91] *See id.* at 1012.
[92] *See id.* at 1011.
[93] *See id.* at 1003.
[94] See BVR Liquidating, 190 F.3d at 773.
[95] *See infra* Part IV.B.
[96] 520 F.3d 548 (6th Cir. Ky. 2008).
[97] *See id.* at 550-51.
[98] *See id.* at 551.
[99] *See id.* at 551.
[100] *See id.* at 551.
[101] *See Noe*, 520 F.3d at 553.
[102] *See id.* at 553.
[103] *See id.* at 553.
[104] *See Yolton* 435 F.3d at 581.
[105] *See* Noe 520 F.3d at 554 (citing *Yolton* 435 F.3d at 581); *see also Yard-Man*, 716 F.2d at 1482.

[106] *See* Noe 520 F.3d at 554; *see also Yard-Man*, 716 F.2d at 1482.
[107] *See* Noe 520 F.3d at 553; *see also Yard-Man*, 716 F.2d at 1481-82.
[108] *See* Noe 520 F.3d at 553.
[109] *See* Noe 520 F.3d at 553 (explaining that a tie between the eligibility of benefits and pensions is something the court has "repeatedly held evinces an intent to vest").
[110] *See supra* notes 70-76 and accompanying text.
[111] *See Noe* 520 F.3d at 553.
[112] *See Noe* 520 F.3d at 553 (admitting that illurosy promises in an agreement can "result in violation of our precedent"); *see also Yard-Man*, 716 F.2d at 1481-82.
[113] *See* Payne & Ewing, *supra* note 4, at 332-33 (arguing that Eleventh and Fourth circuits have fully embraced the Yard-Man decision of the Sixth Circuit through cases such as United Steelworkers of Am. v. Connors Steel Co., 855 F.2d 1499, 1501 (11th Cir. 1988), and Keffer v. H. K. Porter Co., Inc., 872 F.2d 60, 64 (4th Cir. 1989)).
[114] *See* Douglas Sondgeroth, *High Hopes: Why Courts Should Fulfill Expectations of Lifetime Retiree Health Benefits in Ambiguous Collective Bargaining Agreements*, 42 B.C. L. REV 1215, 1237-38 (arguing that the Eleventh and Fourth Circuits have found other reasons for retirement benefits to vest, and use *Yard-Man* to "buttress" those findings).
[115] *See infra* notes 117-35 and accompanying text.
[116] 993 F.2d 603 (7th Cir. Ind. 1993).
[117] *See Bidlack*, 993 F.2d at 608; *see* Sondgeroth, *supra* note 114, at 1240.
[118] *See Bidlack*, 993 F.2d at 608 (holding that there should be a presumption against the vesting of retirement benefits at the end of a collective bargaining agreement, but that this presumption could be rebutted by the retiree if he can prove that the contract is ambiguous); s*ee* Sondgeroth, *supra* note 114, at 1239-40.
[119] 217 F.3d 539 (7th Cir. Wis. 2000).
[120] *See Rossetto*, 217 F.3d at 542.
[121] *See id.* at 542.
[122] *See id.* at 547.
[123] *See id.* at 545-46.
[124] *See Rossetto*, 217 F.3d at 545-46.
[125] *See id.* at 545-46.
[126] *See id.* at 545-46.
[127] Nichols v. Alcatel USA, Inc., 532 F.3d 364, 379 (5th Cir. Tex. 2008).
[128] 532 F.3d 364, 379 (5th Cir. Tex. 2008).
[129] *See id.* at 377.
[130] *See id.* at 378.
[131] *See id.* at 378. The court holds that the plaintiff's reliance on the Sixth Circuit's opinion in Cole v. ArvinMeritor, Inc., 516 F. Supp. 2d 850 (E.D. Mich. 2005), was thus misplaced, as the Cole case "relies on the inference that retiree benefits vest unless there is language in the CBA to the contrary." *See Nichols*, 532 F.3d at 378.
[132] 188 F.3d 130 (3d Cir. 1999).
[133] *See id.* at 141.
[134] *See id.* at 140.
[135] *See supra* notes 114-15 and accompanying text.
[136] *See supra* Part IV.A.

[137] *See infra* notes 140-209 and accompanying text.
[138] *See supra* Part IV.B.
[139] See Noe v. PolyOne Corp., 520 F.3d 548 (6th Cir. Ky. 2008); s*ee also* Maurer v. Joy Techs., Inc., 212 F.3d 907 (6th Cir. Ohio 2000).
[140] *See supra* notes 60-76 and the accompanying text.
[141] *See Noe*, 520 F.3d at 564. The majority had decided in favor of applying the *Yard-Man* inference, which resulted in a vesting of the retiree plaintiffs' benefits. *See id.* at 551.
[142] *See* Noe v. PolyOne Corp., 520 F.3d 548, 564 (6th Cir. Ky. 2008) (Sutton, J., dissenting).
[143] *See* Noe v. PolyOne Corp., 520 F.3d 548, 567 (6th Cir. Ky. 2008) (Sutton, J., dissenting).
[144] See Rossetto v. Pabst Brewing Co., 217 F.3d 539, 547 (7th Cir. Wis. 2000) (describing the methods to deal with the vesting benefits issue in different circumstances)
[145] Bidlack v. Wheelabrator Corp., 993 F.2d 603, 613 (7th Cir. Ind. 1993) (J., Cudahy, concurring); *See infra* notes 197-201 and accompanying text.
[146] *See Noe*, 520 F.3d at 568 (Sutton, J., dissenting).
[147] *See Noe*, 520 F.3d at 568 (Sutton, J., dissenting); Int'l Union v. Skinner Engine Co.188 F.3d at 139; *Bidlack*, 993 F.2d at 606-07 (J., Cudahy, concurring) (discussing the unchangeable nature of vested rights vs. the brief nature of a CBA).
[148] *See Noe*, 520 F.3d at 568 (Sutton, J., dissenting).
[149] *See Noe*, 520 F.3d at 568 (Sutton, J., dissenting).
[150] *See Noe*, 520 F.3d at 568 (Sutton, J., dissenting). Sutton states that no circuit has yet taken this position but he also claimed in his dissent that the Sixth Circuit has been applying just such a presumption in recent cases. *See id.*
[151] *See Noe*, 520 F.3d at 568 (Sutton, J., dissenting).Many of these retirees are not able to require their union to negotiate new benefits for them either. *See id.*
[152] *See Noe*, 520 F.3d at 567 (Sutton, J., dissenting). Sutton points to the majority's claim that *Yard-Man* does not create a legal presumption of interminable retiree benefits and that *Yard-Man* creates an inference "only if the context and other available evidence indicate an intent to vest." *See id.* at 552 (quoting Yolton v. El Paso Tenn. Pipeline Co., 435 F.3d 571, 579 (6th Cir. 2006))
[153] *See Noe*, 520 F.3d at 567 (Sutton, J., dissenting). Sutton notes that the Circuit claims not to presume, but does anyway *See id.* at 568 (Sutton, J., dissenting).
[154] *See id.* at 567 (Sutton, J., dissenting).
[155] *See id.* at 567-68 (Sutton, J., dissenting). (pointing to the language from several courts including the Seventh Circuit, the Third Circuit, the Second Circuit as well as writings like Roger Siske's WHAT'S NEW IN EMPLOYEE BENEFITS (stating "The Sixth Circuit presumes vesting and requires a clear statement of termination to prove otherwise")).
[156] *See Noe*, 520 F.3d at 568 (Sutton, J., dissenting).
[157] *See Noe*, 520 F.3d at 568 (Sutton, J., dissenting).
[158] *See Noe*, 520 F.3d at 567 (Sutton, J., dissenting).
[159] *See id.*
[160] Yolton v. El Paso Tenn. Pipeline Co., 435 F.3d 571, 581 (6th Cir. 2006).
[161] See Yolton, 435 F.3d at 580; *see also* Golden v. Kelsey-Hayes Co., at 73 F.3d 648, 656 (6th Cir. 1996).
[162] *See Noe*, 520 F.3d at 554 (citing *Yolton*, 435 F. 3d at 581).
[163] *See* Maurer v. Joy Techs., Inc., 212 F.3d 907, 917-18 (6th Cir. Ohio 2000).
[164] *See id.*

[165] *See id.* at 563-64.
[166] *See Noe*, 520 F.3d at 564, n 5 (giving evidence that the Sixth Circuit has been finding a presumption towards vesting of retirement benefits).
[167] *See Noe*, 520 F.3d at 564, n 5 (stating that regarding the vesting of retiree health benefits, the court has found evidence of vesting in over 90% of the biggest cases on the issue).
[168] 501 U.S. 190 (1991).
[169] *See id.* at 196-98; see also Bidlack v. Wheelabrator Corp., 993 F.2d 603, 612, fn. 2 (7th Cir. Ind. 1993) (J., Cudahy, concurring).
[170] *See Litton*, 501 U.S. at 196-98; *see also Bidlack*, 993 F.2d 603, 612, fn. 2 (J., Cudahy, concurring).
[171] 438 F.3d 653 (6th Cir. 2006)
[172] *See id.*
[173] Laura Meckler and Jonathan Weisman, *Obama to Call for a New Era of Responsibility – Huge Crowds Gather as First African-American President Takes Office; Aides Expect Steps on Iraq War, Bank Policy This Week*, THE WALL STREET JOURNAL, January 20, 2009 at A1 (noting that the United States is suffering its "worst economic crisis since the Great Depression").
[174] Yolton v. El Paso Tenn. Pipeline Co., 435 F.3d 571, 581 (6th Cir. 2006) ("Retirees who have left their bargaining unit, and can no longer rely on their union to maintain their benefits, are not likely to leave their benefits alterable based on the changing whims and relative bargaining power of their former union and employer.").
[175] *See Int'l Union, UAW v. Yard-Man, Inc,* 716 F.2d 1476, 1482 (6th Cir. 1983).
[176] *See Allied Chemical Workers v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 181 (1971) ("By advancing pensioners' interests now, active employees, therefore have no assurance that they will be the beneficiaries of similar representation when they retire. The insurance against future contingencies that they may buy in negotiating benefits for retirees is thus a hazardous and therefore, improbable investment.").
[177] *See id.* at 180. (showing that bargaining in favor of the already-retired workers may not be in the best interest of the active employees who are negotiating the agreement).
[178] *See id.* at 159-60.
[179] *See Yard-Man*, 716 F.2d at 1484. It is a permissive subject of bargaining however, so the employer may negotiate over the retiree benefits if the parties so choose. *See id.*
[180] *See id.* at 1482, fn. 8.
[181] *See id.* at 1481-83.
[182] See notes 70-76 and accompanying text.
[183] See Maurer v. Joy Techs., Inc., 212 F.3d 907, 917 (6th Cir. Ohio 2000); *see also* Golden v. Kelsey-Hayes Co., 73 F.3d 648, 655 (6th Cir. 1996).
[184] See Maurer, 212 F.3d at 917; Golden 73 F.3d at 655.
[185] William Rhoden, *After Peace, Can Upshaw Fight for NFL Players Past or Present?* NY TIMES, Page 3D (February 2, 2006).
[186] *See id.*
[187] Mark Rothstein and Lance Liebman EMPLOYMENT LAW: CASES AND MATERIALS, (Foundation Press, Sixth Edition, 2007), at 1239.
[188] Mark Rothstein and Lance Liebman EMPLOYMENT LAW: CASES AND MATERIALS, (Foundation Press, Sixth Edition, 2007), at 1239.
[189] Rothstein & Liebman at 1239.

[190] An example of active employees apathy towards the retirees of their business occurred recently in the National Football League. Aging retired players of the league have voiced their concern over the lack of pension and health benefits the union, the National Football League Players' Association has provided to them. Ron Kroichick, *Pensions in Pro Sports: An Age-Old Issue for All the Big Leagues*, SAN FRANCISCO CHRONICLE, March 18, 2007 at C1. Some of them are damaged physically or mentally due to the toll the game took on them, and many struggle to make ends meet. *See id.* Some active players, like Matt Birk of the Baltimore Ravens (then of the Minnesota Vikings), have made efforts to persuade his NFL colleagues to contribute to the cause of helping retirees, but has had mixed results. *See* Mike Lopresti, *NFL Players Ignore Birk's Plea, Chance to Aid Their Brethren*, USA TODAY, February 2, 2009, *available at* www.usatoday.com/sports/columnist/lopresti/2009-02-02-nfl-gridiron-greats_N.htm. Birk attempted to make a financial collection from fellow active players, some of whom are multi-millionaires, to aid the retirees, but Birk received only a smattering of support from the players. *See Id.*

[191] *See* Gregory, *supra* note 26, at 99-100.

[192] *See* Harrigan, *supra* note 22 at 86.

[193] *See id.* at 85-86.

[194] This study also finds that 66% of people of all ages have not given "a lot of thought to how to manager their money in retirement so they do not outlive their savings. *See* Ruth Helman and Variny Paladino, *Will Americans Ever Become Savers? The 14th Retirement Confidence Survey, 2004*, EMPLOYEE BENEFIT RESEARCH INSTITUTE, No. 268, page 10 (April 2004).

[195] *See id.*

[196] Bidlack v. Wheelabrator Corp., 993 F.2d 603, 613 (7th Cir. Ind. 1993) (J., Cudahy, concurring).

[197] *See id.*; *see also* Sondgeroth, *supra* note 114, at 1234.

[198] *See Bidlack*, 993 F.2d at 613 (J., Cudahy, concurring).

[199] *See Bidlack*, 993 F.2d at 613 (J., Cudahy, concurring) (citing Arthur Corbin, CORBIN ON CONTRACTS § 570 (Colin K. Kaufman ed., Supp. 1984).

[200] *See id.*

[201] *See Int'l Union, UAW v. Yard-Man, Inc,* 716 F.2d 1476, 1479 (6th Cir. 1983).

[202] *See id.* at 1481.

[203] *See id.*

[204] *See* Rothstein & Liebman, *supra* note 3, at 1239. Even the words "lifetime benefits" do not mean anything in certain courts. *See* Vallone v. CNA Fin. Corp. 375 F.3d 623 (7th Cir. 2004), which notes that "the problem for the plaintiffs is that 'lifetime' may be construed as 'good for life unless revoked or modified.' *See id.* at 633. The court found summary judgment in favor of the defendant company, when a collective bargaining agreement that called for "lifetime benefits" for its employees was subject to elimination of those "lifetime" benefits if the company wanted to alter it. *See id.* at 634. The court did not find the existence of both a reservation rights clause and a promise of "lifetime benefits" to be enough of an ambiguity to defeat the presumption that the Seventh Circuit holds against the vesting of benefits. *See id.* at 634. This decision, while contractually sound, makes things much tougher for the retirees who took early retirement, believing that they were signing up for lifetime benefits. *See id.* at 642; see Jennifer Claire Sprague, *How Secure are Your Lifetime Benefits?*, 30 S. ILL. U. L. 195, 217-18 (2005). The court in *Vallone* even noted how the wording of the contract might have been difficult. *See*

Vallone, 375 F.3d at 642 ("This story does not have a happy ending. What this case comes down to, in the end, is the distinction between 'lifetime' and 'vested' welfare benefits – a legal distinction that understandably escaped many of Continental's employees who elected to take early retirement under the[agreement]") *See id,*

[205] *See supra* notes 6-13 and accompanying text (discussing baby-boomers).

[206] *See supra* notes 11-13 (explaining how General Motors' decisions are hurting retirees).

[207] *See supra* notes 11-13.

[208] Nick Bunkley, *Some White Collar G.M. Retirees Scramble as Health Care is Cut Off*, NEW YORK TIMES, November 10, 2008, at B1.

[209] *See supra* notes 173-190 and accompanying text.

[210] For example, the Pension Benefit Guaranty Corporation only guarantees $4,500 per month in 2009. *See* http://www.pbgc.gov/workers-retirees/benefits-information/content/page789.html#2009. While that it is better than nothing, it does not do much to halt the financial worries and concerns for aging retiring employees. *See id.*

[211] Catherine Fisk, *Lochner Redux: The Renaissance of Laissez-Faire Contract in the Federal Common Law of Employee Benefits*, 56 OHIO ST. L.J. 153, 166 ("Given that employee expectations of continued health coverage are being disappointed . . . Congress may have expected the courts to fashion protections," but "because Congress did not create protections, the courts have seemed to assume that employees were to be left unprotected.").

[212] *See Int'l Union, UAW v. Yard-Man, Inc,* 716 F.2d 1476, 1482 (6th Cir. 1983).

[213] *See supra* Part IV.B

[214] *See supra* Part V.