NOT IF I SUE YOU FIRST: DEFENDANT CLASS ACTIONS

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NOT IF I SUE YOU FIRST

Defendant Class Actions in the Context of Retiree Welfare Benefits

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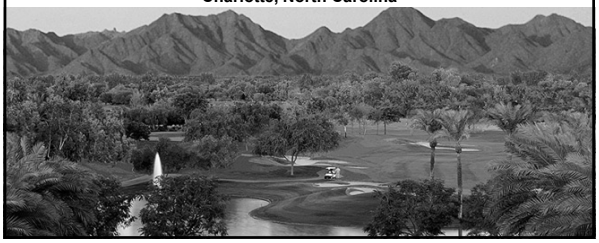


The Defendant Class Action

Rule 23(a) : "One or more members of a class may sue or be sued as representative parties...."

Defendant class actions have been certified when there is a need for a "procedural device that allows one who has a common grievance against a multitude of persons to resolve the . . . dispute by using only a few members of the class. *In re Broadhollow Funding Corp.,* 66 B.R. 1005, 1007 (Bkrtcy EDNY 1986);

The use of a defendant class avoids costly multiple litigation and the danger of inconsistent adjudication of the same issue. *See Califano v. Yamasaki,* 442 U.S. 682, 700 - 01 (1979)

Defendant Class Action Types of Cases

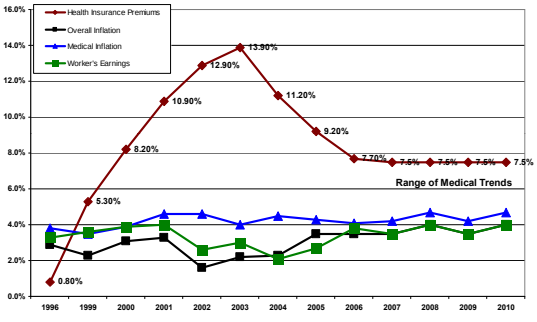
Securities
Antitrust
Patent Infringement
Challenges to Legislation
Environmental
ERISA Welfare Benefits

Retiree Health Care Issue

Retiree health care costs are escalating in sync with national trends

- **People are living longer**
- **Health care costs increase significantly more than inflation**
- **Health care is most expensive for the young and the old**
- **A growing retiree base is being supported by a relatively static employee group**
- **FASB 106**

Healthcare Costs Continue to Outpace Inflation and Wages

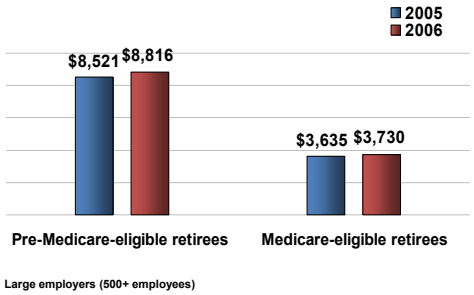


Note: Data on premium increases reflect the cost of health insurance premiums for a family of four

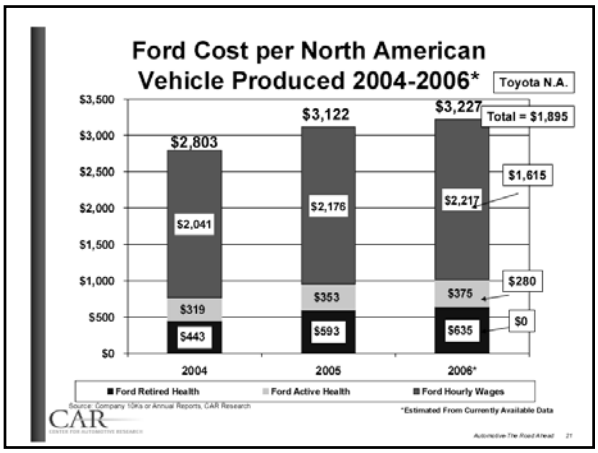
Source: Kaiser/HRET Survey of Employer-Sponsored Health Benefits; 2006

Average health benefit cost per retiree

Based on 2006 respondents providing both 2005 and 2006 cost



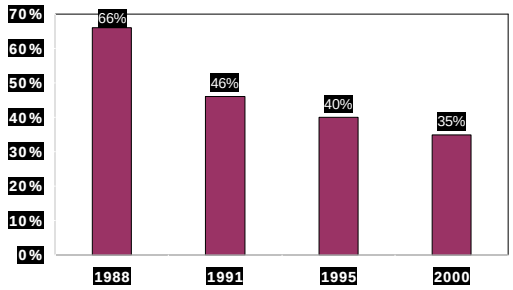
Large employers (500+ employees)



Ratio of Working Age Population (20 to 65) to Retirement Age (over 65)

Ratio of Working Age Population (20 to 65) to Retirement Age (over 65)		
Year	20 to 65 – workers	Over 65 - retirees
1950	7.3	1
2003	4.7	1
2035	2.7	1

PERCENTAGE OF FIRMS WITH 200 OR MORE WORKERS OFFERING RETIREE HEALTH BENEFITS 1988 – 2004



Source: Employer Health Benefits 2004 Annual Survey, The Kaiser Family Foundation and Health Research and Educational Trust, Exhibit 11.1, p. 131.

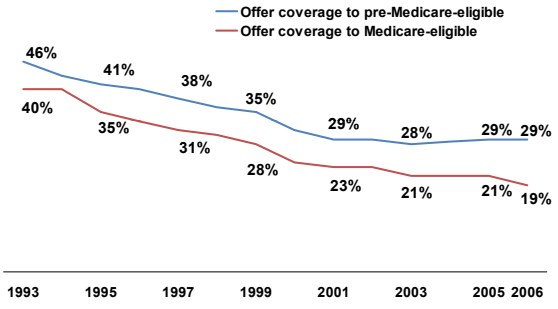
EMPLOYERS OFFERING HEALTH BENEFITS TO NEW PRE-65 AND 65+ RETIREES BY SHARE OF PREMIUM PAID BY RETIREES

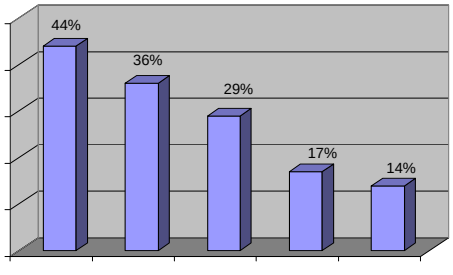
Pre-65 Retirees		65+ Retirees
22%	Retiree Pays 100% of Premium	21%
7%	Retiree Pays 61-91% of Premium	5%
14%	Retiree Pays 41-60% of Premium	18%
24%	Retiree Pays 21-40% of Premium	22%
25%	Retiree Pays 1-20% of Premium	23%
8%	Retiree Pays 0% of Premium	11%

Share of Total Premium Paid by both Pre-65 and 65+ retirees, on average = 39%

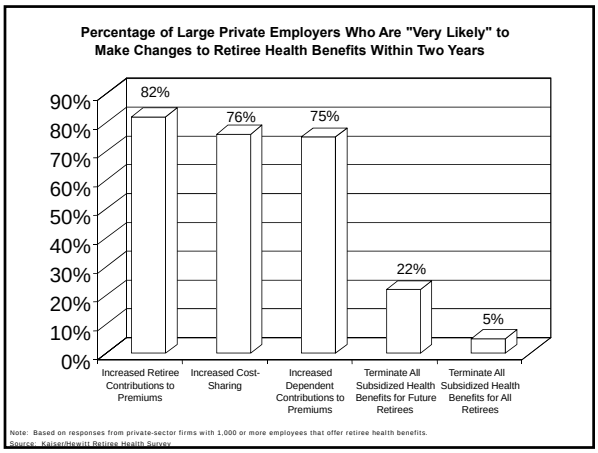
Note: Based on responses from private-sector firms with 1,000 or more employees that offer retiree health benefits.
Source: Kaiser/Hewitt Survey on Retiree Health Benefits.

Large employers drop coverage for Medicare-eligible retirees





Note: Based on responses from private-sector firms with 1,000 or more employees that offer retiree health benefits.
Source: Kaiser/Hewitt Retiree Health Survey



Vesting Analysis

- **The Law**
  - **ERISA**
    - **Welfare Benefits are not treated like Pensions**
  - **LMRA**
    - **Retiree ≠ Employee**
- **The "Yardman Presumption"**
- **The Facts**
  - **Plan Document**
  - **Collective Bargaining Agreement**
    - **Specific Duration Clause**
    - **Continuation Clause**
  - **Summary Plan Description (SPD)**
    - **Reservation of Rights**
    - **Termination Clause**
    - **Coordination Clause**
  - **Extrinsic Evidence**

Extrinsic Evidence

- **Plan Modifications**
- **Written Communication with Retirees**
- **Oral Communication with Retirees**
- **Collective Bargaining History**
- **Administration of Retiree Benefits During Strike**

Circuit Courts Split on "Yardman Presumption"

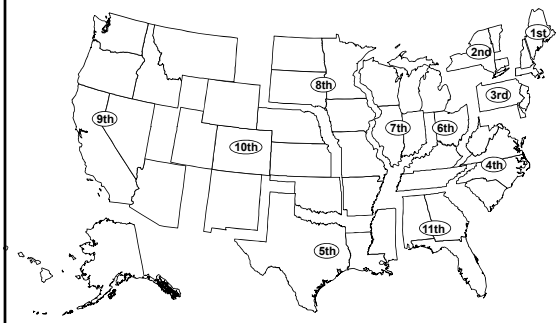
6th Circuit

- **"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 [i.e., as a retiree] is maintained"**
- **"absent specific durational language, there was an inference of vesting when the company and union provided for retiree health benefits in a collective bargaining environment"**
- ***UAW vs. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), cert. denied 465 U.S. 1007 (1984)**

8th Circuit

- **"We believe that it is not at all inconsistent with labor policy to require plaintiffs to prove their case without the aid of gratuitous inferences."**
- ***Anderson v. Alpha-Portland Industries*, 836 F. 2d 1512 (8th Cir. 1988)**

Location, Location, Location



Class Action Lawsuits

Class Action Lawsuits

Rule 23 of the Federal Rules of Civil Procedure permits multiple individuals, who have common questions of law or fact that predominate their potential causes of action, to aggregate their claims into one class action lawsuit.

A class-certification decision rests within the sole discretion of the district court.

Class Action Lawsuits

Prerequisites Fed. R. Civ. P. 23(a):

- that the members of the class are so numerous that the joinder of all class members is impractical (numerosity)
- that there are questions of law or fact common to the class (commonality)
- that the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality)
- that the representative parties will fairly and adequately protect the interests of the class (adequacy of representation)

Class Actions: Federal Court Fed. R. Civ. P. 23

In addition to satisfying all four prerequisites of Fed. R. Civ. P. 23(a), the class action must be found to be maintainable on one of the three grounds set forth in Fed. R. Civ. P. 23(b)(1), 23(b)(2), or 23(b)(3).

Purpose or Function of Class Action Under Fed. R. Civ. P. 23

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide incentive for any individual to bring a solo action prosecuting his or her rights; a class action solves this problem by aggregating relatively paltry potential recoveries into something worth someone's time, usually an attorney's labor.

Purpose or Function of Class Action Under Fed. R. Civ. P. 23

A class action is designed to avoid multiplicity of actions; unify and render manageable litigation in which there are many members of a class with common claims against a defendant; avoid the need for class members to become parties; allow individual claimants to present claims that for economic reasons might not otherwise be brought; and prevent inconsistent adjudications.

Construction of Class-Action Rule

The rule governing class actions is liberally interpreted in favor of the maintenance of class actions. Though courts may exercise broad discretion when determining whether to certify a class, the court must still employ rigorous analysis to ensure that the requirements of Fed. R. Civ. P. 23 are satisfied.

Numerosity

The numerosity requirement for class certification is intended to limit the class-action device to those cases in which the number of parties makes traditional joinder of the parties unworkable.

The numerosity requirement of Rule 23 is designed to prevent members of a small class from being unnecessarily deprived of their rights without a day in court and is one of the safeguards against the indiscriminate use of a class action to avoid joinder.

Commonality

Under the commonality requirement for class certification, a class action must involve issues that are susceptible to class-wide proof. The critical inquiry in determining whether the commonality requirement for class certification is met is whether the common questions are at the core of the cause of action alleged.

Typicality

The typicality requirement of rule governing prerequisites to class action is designed to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals.

Adequacy of Representation

The "adequacy of representation" requirement for class certification encompasses class representatives, their counsel, and the relationship between the two.

Adequacy of representation analysis for class action certification encompasses two separate inquiries:

(1) whether any substantial conflicts of interest exist between the representatives and the class; and

(2) whether the representatives will adequately prosecute the action.

Adequacy of Representation

Stated another way, the adequacy of class representation is twofold: the proposed class representative must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members.

Discretion of Court

A class-certification decision rests within the discretion of the district court, so long as that discretion is exercised within the framework of Rule 23.

It has been variously said that the district courts exercise a wide discretion, sound discretion, great discretion, substantial discretion, and broad discretion in making the class-certification decision.

However, although a court has considerable discretion in determining whether to certify a class, it must undertake a rigorous analysis to determine if the requirements for certification are met.

Propriety of Defendant Class Action

Though it is unusual for a class to consist of defendants rather than of plaintiffs, Fed. R. Civ. P. 23(a) is clear that a class may sue or be sued as representative parties, and Fed. R. Civ. P. 23(b)(1) permits suits against a defendant class.

Choice of Law in Class Actions

Federal courts sitting in diversity apply federal procedural law and must apply the forum state's choice-of-law rules to determine the controlling substantive law.

Requirement of Independent Jurisdictional Basis

Fed. R. Civ. P. 23 does not extend or limit the jurisdiction of the United States district courts because Fed. R. Civ. P. 23 is a rule of procedure, not jurisdiction.

Fed. R. Civ. P. 23 cannot be invoked unless the court has subject-matter jurisdiction.

Requirement of Independent Jurisdictional Basis

Accordingly, to bring a class action in federal court, in addition to the requirements under Fed. R. Civ. P. 23, the court must have jurisdiction over the members of the class and the requirements of some jurisdictional statute must be met, such as the existence of a federal question, diversity of citizenship between the parties, or a cause of action arising under a specific federal statute conferring jurisdiction on a federal court.

Diversity Jurisdiction Under 28 U.S.C.A. § 1332(a)

For actions commenced prior to February 18, 2005, the effective date of the CAFA, 28 U.S.C.A. § 1332(a), as amended on October 19, 1996, conferring jurisdiction on federal courts for civil actions where the matter in controversy exceeds $75,000 and there is diversity of citizenship between the parties, applies to diversity-only class actions under Rule 23.

Diversity Jurisdiction Under 28 U.S.C.A. § 1332(a)

The citizenship requirement for purposes of 28 U.S.C.A. § 1332(a) in a class action hinges on the citizenship of the named plaintiffs, and only the named plaintiffs need be diverse with the defendants. It is not necessary to examine the citizenship of absent class members.

Note: Once the diversity is found to exist as to "the class", the court can exercise supplemental jurisdiction over the claims of absent class members.

Exhaustion of Administrative Remedies

Where administrative remedies exist in a controversy involving members of a proposed class of plaintiffs, the exhaustion of these remedies by at least one member seeking to represent the class is a prerequisite for standing to maintain a class action; however, it is not necessary for each member of an alleged class to exhaust administrative remedies.

Venue: Residence of Class Representative is Controlling

The relevant venue question in a class action is whether venue is proper as to the parties representing, and in effect standing in for, the absent class members. Thus, in determining whether venue for a putative class action is proper, courts are to look only at the allegations pertaining to the named representatives.

Fed. R. Civ. P. 23(b): Class Action Maintainable

Rule 23(b) provides that an action may be maintained as a class action if the prerequisites of Rule 23(a) are satisfied and, in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of:

a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interest of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

Fed. R. Civ. P. 23(b): Class Action Maintainable

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the **questions of law or fact common to the members of the class** predominate over any questions affecting only individual members, and that a **class action is** superior to other available methods for the fair and efficient adjudication of the controversy.

Fed. R. Civ. P. 23(b)

An action may be maintained as a class action only if all four requirements of Rule 23(a) are met and, in addition, any one of the three conditions set forth in Rule 23(b) is satisfied. Thus, requirements of both Rule 23(a) and (b) must be satisfied independently before a court can certify a class, and disqualification under Rule 23(a) moots discussion of Rule 23(b) requirements. In other words, if a party seeking class certification fails to demonstrate any single one requirement, the case may not continue as a class action.

When Does a Class Get Certified?

Fed. R. Civ. P. 23(c):

(1)(A) When a person sues or is sued as a representative of a class, the court must--at an early practicable time--determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

Advantages to the Defendant Class Action

- **Choose Location**
- **Choose Law**
- **Choose Judge**
- **Choose Speed to Resolution**
- **Personal Jurisdiction and Venue**

Hurdles to the Defendant Class Action

- **Subject Matter Jurisdiction**
- **Personal Jurisdiction and Venue**
- **Judge's Discretion Under DJ Act**
- **Transfer**
- **"Natural Plaintiff" and Right to Select Forum**
- **Fed. R. Civ. Proc. 23**

Federal Rules of Civil Procedure
Rule 23, Class Actions

(a) Prerequisites to a Class Action.

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable.

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.

(1) (A) When a person sues or is sued as a representative of a class, the court must, at an early practicable time, determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

(2) (A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,
- that a class member may enter an appearance through counsel if the member so desires,
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members under Rule 23(c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions.

In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Settlement, Voluntary Dismissal, or Compromise.

(1) (A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4) (A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

(f) Appeals.

A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel.

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

- the work counsel has done in identifying or investigating potential claims in the action,
- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
- counsel's knowledge of the applicable law, and
- the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

(2) Appointment Procedure.

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class

counsel, the court must appoint the applicant best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

(h) Attorney Fees Award.

In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) Motion for Award of Attorney Fees.

A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) Objections to Motion.

A class member, or a party from whom payment is sought, may object to the motion.

(3) Hearing and Findings.

The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

(4) Reference to Special Master or Magistrate Judge.

The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

VESTING OF RETIREE WELFARE BENEFITS BY CIRCUIT

- **SUPREME COURT**

***Schoonejongen v. Curtiss-Wright Corp.*, 514 U.S. 73 (1995).**

- **FIRST CIRCUIT**

***Senior v. Nstar Electric and Gas Corp.*, 449 F.3d 206 (1st Cir. 2006).**

***Senior v. Nstar Electric and Gas Corp.*, 372 F. Supp.2d 159 (D. Mass. 2005).**

***Coffin v. Bowater Inc.*, 2005 WL 2129173 (D. Me. 2005).**

***Utility Workers, Local 369 v. Nstar Electric and Gas Corp.*, 317 F. Supp.2d 69 (D. Mass. 2004).**

***Center v. First Int'l Life Ins. Co.*, 1997 U.S. Dist. LEXIS 3480 (D. Mass. 1997).**

***United Steelworkers of America v. Newman-Crosby Steel, Inc.*, 822 F. Supp. 862 (D.R.I. 1993).**

***United Steelworkers of America v. Textron, Inc.*, 836 F.2d 6 (1st Cir. 1987).**

- **SECOND CIRCUIT**

***Bouboulis v. Transp. Workers Union of Am.*, 442 F.3d 55 (2nd Cir. 2006).**

***Hope v. Bd. of Trustees of Operative Plasterers' and Cement Masons' Int'l Assoc.*, 2006 U.S. Dist. LEXIS 42475 (E.D.N.Y. 2006).**

***Wilson v. UFCW Int'l Union*, 2006 U.S. Dist. LEXIS 12825 (S.D.N.Y. 2006).**

***Aleo v. KeySpan Corp.*, 2006 U.S. Dist. LEXIS 55049 (E.D.N.Y. 2006).**

***Baldwin v. Motor Components, L.L.C.*, 155 Fed.Appx. 16 (2nd Cir. 2005) (unpublished).**

***Adams v. Tetley USA, Inc.*, 363 F.Supp.2d 94 (D.Conn. 2005).**

***Devlin v. Empire Blue Cross and Blue Shield*, 274 F.3d 76 (2nd Cir. 2001).**

***Abbruscato v. Empire Blue Cross and Blue Shield*, 274 F.3d 90 (2nd Cir. 2001).**

***Berg v. Empire Blue Cross and Blue Shield*, 105 F. Supp. 2d 121 (E.D.N.Y. 2000).**

***Joyce v. Curtis-Wright Corp.*, 171 F.3d 130 (2nd Cir. 1999).**

***In Re: Raytech Corp.*, 242 B.R. 222 (Bankr. D. Conn. 1999).**

American Federation of Grain Millers, AFL-CIO v. International Multifoods Corp., **116 F.3d 976 (2nd Cir. 1997).**

Schonholz v. Long Island Jewish Medical Center, **87 F.3d 72 (2nd Cir. 1996).**

Webb v. GAF Corp., **936 F. Supp. 1109 (N.D.N.Y. 1996).**

Maywalt v. Auburn Technology, Inc., **1996 U.S. Dist. LEXIS 15342 (N.D.N.Y. 1996).**

GAF Corporation v. Poole, **715 F. Supp. 1212 (S.D.N.Y. 1989).**

Moore v. Metropolitan Life Insurance Co., **856 F.2d 488 (2nd Cir. 1988).**

Johnson v. Plainville Casting Co., **1988 U.S. Dist. LEXIS 17076 (D. Conn. 1988).**

Tourangeau v. Uniroyal, Inc., **1987 U.S. Dist. LEXIS 14577 (D. Conn. 1987).**

Eardman v. Bethlehem Steel Corp., **607 F. Supp. 196 (W.D.N.Y. 1985).**

- **<u>THIRD CIRCUIT</u>**

Markowitz v. Celanese Corp., **2006 U.S. Dist. LEXIS 66723 (D.N.J. 2006).**

Foss v. Lucent Techs., Inc., **2006 U.S. Dist. LEXIS 89217 (D.N.J. 2006).**

USW v. Ppg Indus., **2005 U.S. Dist. LEXIS 41666 (W.D.Penn. 2005).**

Lettrich v. J.C. Penney Co., **90 Fed.Appx. 604 (3rd Cir. 2004) (unpublished).**

In Re: Unisys Corp. Retiree Medical Benefits Litigation, **2000 U.S. Dist. LEXIS 22347 (E. D. Penn 2000).**

International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, U.A.W. v. Skinner Engine Company, **188 F.3d 130 (3rd Cir. 1999).**

Gramm v. Bell Atlantic Mgmt. Pension Plan, **983 F. Supp. 585 (D. NJ 1997).**

In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation, **58 F.3d 896 (3rd Cir. 1995).**

***In Re: Unisys Corp. Retiree Medical Benefit "ERISA" Litigation,* 57 F.3d 1255 (3rd Cir. 1995).**

***Local 56, United Food and Commercial Workers Union, et. al. v. Campbell Soup Co.,* 898 F. Supp. 1118 (D. NJ 1995).**

***Schoonejongen v. Curtiss-Wright Corp.,* 18 F.3d 1034 (3rd Cir. 1994).**

***Alexander v. Primerica Holdings, Inc.,* 967 F.2d 90 (3rd Cir. 1992).**

***United Mine Workers of America International Union v. Nobel,* 720 F. Supp. 1169 (W.D. Penn. 1989).**

***McBain v. Hills-McCanna Retirement Plan,* 1988 U.S. Dist. LEXIS 14742 (E.D. Penn. 1988).**

- **<u>FOURTH CIRCUIT</u>**

***Trull v. Dayco Products, LLC,* 178 Fed. Appx. 247 (4th Cir. 2006) (unpublished).**

***Chapman v. ACF Industries LLC,* 430 F.Supp.2d 570 (S.D.W.Va. 2006).**

***Hensley v. P.H. Glatfelter Co.,* 2005 WL 2000322 (W.D.N.C. 2005) (unpublished).**

***Trull v. Dayco Products, LLC,* 214 F.R.D. 394 (W.D.N.C. 2003).**

***United Mine Workers of America International Union v. Bethenergy Mines, Inc.,* 2001 WL 737558 (S. D. W. Va. 2001).**

***Gable v. Sweetheart Cup Co., Inc.,* 35 F.3d 851 (4th Cir. 1994).**

***Ayres v. National Bank of Fredericksburg,* 860 F. Supp. 1114 (E. D. Va. 1994).**

***Pierce v. Security Trust Life Ins. Co.,* 979 F.2d 23 (4th Cir. 1992).**

***Keffer v. H.K. Porter Co., Inc.,* 872 F.2d 60 (4th Cir. 1989).**

***District 29, United Mine Workers of America v. Royal Coal Co.,* 768 F.2d 588 (4th Cir. 1985).**

- **FIFTH CIRCUIT**

***Halliburton Co. Bens. Comm. v. Graves*, 463 F.3d 360 (5th Cir. 2006).**

***Int'l Association of Machinists and Aerospace Workers v. Masonite Corp.*, 122 F.3d 228 (5th Cir. 1997).**

***Eaton v. IBM Corp.*, 925 F. Supp. 487 (S. D. Tex. 1996).**

***Wise v. El Paso Natural Gas Company*, 986 F.2d 929 (5th Cir. 1993).**

***United Paperworkers Int'l v. Champion Int'l*, 908 F.2d 1252 (5th Cir. 1990).**

- **SIXTH CIRCUIT**

***Wood v. Detroit Diesel Corp.*, 2007 U.S. App. LEXIS 1309 (6th Cir. 2007) (unpublished).**

***Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571 (6th Cir. 2006).**

***Cole v. Arvinmeritor, Inc.*, 2006 U.S. Dist. LEXIS 65078 (E.D.Mich. 2006).**

***Prater v. Ohio Educ. Ass'n*, 2006 U.S. Dist. LEXIS 70447 (S.D.Ohio 2006).**

***Noe v. Polyone Corp.*, 2006 U.S. Dist. LEXIS 92098 (W.D.Ky. 2006).**

***Lemon v. BWX Technologies, Inc.*, 369 F. Supp.2d 919 (N.D. Ohio 2005).**

***McCoy v. Meridian Automotive Systems, Inc.*, 390 F.3d 417 (6th Cir. 2004).**

***Yolton v. El Paso Tennessee Pipeline Co.*, 318 F. Supp.2d 455 (E.D. Mich. 2003).**

***UAW Local 540 v. Baretz*, 159 F. Supp.2d 968 (E.D. Mich. 2001).**

***Maurer v. Joy Technologies, Inc.*, 212 F.3d 907 (6th Cir. 2000).**

***Bertram v. NuTone, Inc.*, 107 F. Supp.2d 957 (S.D. Ohio 2000).**

***Gilbert v. Doehler-Jarvis, Inc.*, 87 F. Supp.2d 788 (N.D. Ohio 2000).**

***Int'l Union v. BVR Liquidating, Inc.*, 190 F.3d 768 (6th Cir. 1999).**

***Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998).**

***Bittinger v. Tecumseh Products Co.*, 83 F. Supp.2d 851 (E.D. Mich. 1998).**

***Helwig v. Kelsey-Hayes Co.*, 93 F.3d 243 (6th Cir. 1996).**

***Golden v. Kelsey-Hayes Co.*, 73 F.3d 648 (6th Cir. 1996).**

***Fox v. Varity Corp.*, 1996 U.S. App. LEXIS 19150 (6th Cir. 1996).**

***Int'l Union, UAW v. Aluminum Company of America*, 932 F. Supp. 997 (N.D. Ohio 1996).**

***Fox v. Massey-Ferguson, Inc.*, 172 F.R.D. 653 (E.D. Mich. 1995).**

***United Rubber, Cork, Linoleum & Plastic Workers of America v. Pirelli Armstrong Tire Corp.*, 873 F. Supp. 1093 (M.D. Tenn. 1994).**

***Hinckley v. Kelsey-Hayes Co.*, 866 F. Supp. 1034 (E.D. Mich. 1994).**

***Int'l Union v. Loral Corp.*, 873 F. Supp. 57 (N.D. Ohio 1994).**

***Boyer v. Douglas Components Corp.*, 986 F.2d 999 (6th Cir. 1993).**

***Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991).**

***Schalk v. Teledyne, Inc.*, 751 F. Supp. 1261 (W.D. Mich. 1990).**

***Smith v. ABS Industries, Inc.*, 890 F.2d 841 (6th Cir. 1989).**

***Int'l Union UAW Local 91 v. Park-Ohio Industries, Inc.*, 876 F.2d 894 (Table) (6th Cir. 1989).**

***Musto v. American General Corp.*, 861 F.2d 897 (6th Cir. 1988).**

***United Paper Workers Int'l v. Muskegon Paper Box Co.*, 704 F. Supp. 774 (W.D. Mich. 1988).**

***Mamula v. Satralloy, Inc.*, 1988 U.S. Dist. LEXIS 4019 (S.D. Ohio 1988).**

***Gentile v. Youngstown Steel Door Co.*, 802 F.2d 457 (Table) (6th Cir. 1986) (unpublished).**

***In re White Farm Equipment Co.*, 788 F.2d 1186 (6th Cir. 1986).**

***Local 836 of UAW v. Echlin, Inc.*, 670 F. Supp. 697 (E.D. Mich. 1986).**

***Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669 (6th Cir. 1985).**

***Policy v. Powell Pressed Steel Co.*, 770 F.2d 609 (6th Cir. 1985).**

***Int'l Union v. Cadillac Malleable Iron Co.*, 728 F.2d 807 (6th Cir. 1984).**

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

- **SEVENTH CIRCUIT**

***Cherry v. Auburn Gear, Inc.*, 441 F.3d 476 (7th Cir. 2006).**

***Barnett v. Ameren Corp*., 436 F.3d 830 (7th Cir. 2006).**

***Bialoszynski v. Milwaukee Forge*, 419 F. Supp. 2d 1045 (E.D.Wis. 2006).**

***UMW v. Brushy Creek Coal Co.*, 410 F. Supp. 2d 723 (S.D.Ill. 2006).**

***Bland v. Fiatallis North Am., Inc.*, 401 F.3d 779 (7th Cir. 2005).**

***Zielinski v. Pabst Brewing Co., Inc.*, 360 F. Supp.2d 908 (E.D. Wis. 2005).**

***Cherry v. Auburn Gear, Inc.*, 2005 WL 1888731 (N.D. Ind. 2005).**

***Vallone v. CNA Financial Corp.*, 375 F.3d 623 (7th Cir. 2004).**

***Int'l Union of United Automobile, Aerospace and Agricultural Implement Workers of Am., et al. v. Rockford Powertrain, Inc.*, 350 F.3d 698 (7th Cir. 2003).**

***Burroughs v. Georgia Pacific Corp. and SHPS Inc.*, 2003 WL 214 87142 (E.D. Wis. 2003).**

***International Union v. Rockford Powertrain, Inc.*, 2003 WL 715653 (N.D. Ill. 2003).**

***Rossetto v. Pabst Brewing Co.*, 217 F.3d 539 (7th Cir. 2000).**

***In Re Sears Retiree Group Life Insurance Litigation*, 90 F. Supp. 2d 940 (N.D. Ill. 2000).**

***Vallone v. CNA Financial Corp.*, 128 F. Supp. 2d 1131 (N.D. Ill. 2000).**

***Pabst Brewing Company, Inc. ("Pabst") v. Corrao*, 161 F.3d 434 (7th Cir. 1998).**

***Salamouni v. Daiwa Bank Ltd.*, 966 F. Supp. 672 (N.D. Ill. 1997).**

***Oil, Chemical, Atomic Workers International Union v. Amoco Corp*., 1997 WL 11233 (N.D. Ill. 1997).**

***Diehl v. Twin Disk Inc.*, 102 F.3d 301 (7th Cir. 1996).**

***Boisvert v. American Service Bureau, Inc.*, 1996 WL 494263 (N.D. Ill. 1996).**

***Murphy v. Keystone Steele and Wire Company* 61 F.3d 560 (7th Cir. 1995).**

***Cooper v. Washington National Insurance Co.*, 1995 WL 632050 (N.D. Ill. 1995).**

***Frahm v. Equitable Life Assurance Society*, 1995 WL 579282 (N.D. Ill. 1995).**

***Bidlack v. Wheelabrator Corporation,* 933 F.2d 603 (7th Cir. 1993).**

***Senn v. United Dominion Industries, Inc.*, 951 F.2d 806 (7th Cir. 1992).**

***Leahy v. Page Engineering Co.*, 1992 WL 51710 (N.D. Ill. 1992).**

***Arndt v. The Wheelabrator Corp.*, 763 F. Supp. 396 (N.D. Ind. 1991).**

***Etherington v. Bankers Life and Casualty Co.*, 747 F. Supp. 1269 (N.D. Ill. 1990).**

***Ryan v. Chromalloy American Corp.*, 877 F.2d 598 (7th Cir. 1989).**

***Williams v. Wellman Thermal Systems Corp.*, 684 F. Supp. 584 (S.D. Ind. 1988).**

- **EIGHTH CIRCUIT**

***Crown Cork & Seal Company, Inc. v. IAM*, 2007 WL 2701208 (8th Cir. 2007).**

***Rexam Inc. v. USW*, 2006 U.S. Dist. LEXIS 62382 (D.Minn. 2006).**

***Angotti v. Rexam Inc.*, 2006 U.S. Dist. LEXIS 78087 (D.Minn. 2006).**

***ACF Industries LLC v. Chapman*, 2004 WL 3178257 (E.D. Mo. 2004) (unpublished).**

***Eide v. Grey Fox Technical Services Corp.*, 329 F.3d 600 (8th Cir. 2003).**

***Stearns v. NCR Corp.*, 297 F.3d 706 (8th Cir. 2002).**

***Hughes v. 3M Retiree Medical Plan*, 281 F.3d 786 (8th Cir. 2002).**

***In Re Bridge Information Systems of America, Inc.*, 288 B.R. 565 (E.D. Miss. 2002).**

***Beaver v. The Earth Grains Baking Companies, Inc.*, 216 F. Supp. 2d 920 (N.D. Iowa 2002).**

***Hutchins v. Champion Int'l Corp.*, 110 F.3d 1341 (8th Cir. 1997).**

***Barker v. Ceridian Corp.*, 122 F.3d 628 (8th Cir. 1997).**

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***Varity Corp. v. Howe*, 516 U.S. 489 (1996).**

***McPeek v. Beatrice Company*, 936 F. Supp. 618 (N.D. Iowa 1996).**

***Morrell v. United Food and Commercial Workers Int'l Union*, 37 F. 3d 1302 (8th Cir. 1994).**

***Jensen v. Sipco Inc.*, 38 F.3d 945 (8th Cir. 1994).**

***Houghton v. Sipco Inc.*, 38 F.3d 953 (8th Cir. 1994).**

***Howe v. Varity Corp.*, 36 F.3d 746 (8th Cir. 1994).**

***Barkdoll v. H & W Motor Express Company*, 820 F. Supp. 410 (N.D. Iowa 1993).**

***United Paperworkers International Union v. Jefferson Smurfit Corp.*, 961 F.2d 1384 (8th Cir. 1992).**

***Howe v. Varity Corp.*, 896 F.2d 1107 (8th Cir. 1990).**

***Anderson v. Alpha-Portland Industries*, 836 F. 2d 1512 (8th Cir. 1988).**

***DeGeare v. Alpha Portland Indus. Inc.*, 837 F.2d 812 (8th Cir. 1988).**

***Jansen v. Greyhound Corp.*, 692 F. Supp. 1029 (N.D. Iowa 1987).**

***United Food and Commercial Workers Int'l Union v. Dubuque Packing Co.*, 756 F.2d 66 (8th Cir. 1985).**

- **<u>NINTH CIRCUIT</u>**

***Asarco, Inc. v. USW*, 2005 U.S. Dist. LEXIS 20873 (D.Ariz. 2005).**

***Poore v. Simpson Paper Co.*, 2005 U.S. Dist. LEXIS 35798 (D.Or. 005).**

***Bumgardner v. Smurfit-Stone Container Corp.*, 347 F. Supp.2d 927 (D. Or. 2004).**

***Pisciotta v. Teledyne Industries, Inc.*, 91 F.3d 1326 (9th Cir. 1996).**

***Krishan v. McDonnell Douglas Corp.*, 873 F. Supp. 345 (C.D. Cal. 1994).**

***Cinelli v. Security Pacific Corp.*, 1993 WL 795226 (N.D. Cal. 1993).**

***Chervin v. Sulzer Bingham Pumps, Inc.*, 1990 WL 303125 (D. Or. 1990).**

***Puzis v. Masters Mates and Pilots Plans*, 875 F.2d 870 (9th Cir. 1989).**

***Bower v. Bunker Hill Co.*, 675 F. Supp. 1263 (E.D. Wash. 1986).**

***Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984).**

- **TENTH CIRCUIT**

***Welch v. UNUM Life Ins. Co. of Am.*, 382 F.3d 1078 (10th Cir. 2004).**

***Conkin v. CNF Transp., Inc.*, 2004 U.S. Dist. LEXIS 15434 (D.Wy. 2004).**

***Deboard v. Sunshine Mining and Refining Co.*, 208 F.3d 1228 (10th Cir. 2000).**

***Chiles v. Ceridian Corp.*, 95 F.3d 1505 (10th Cir. 1996).**

***Alday v. Container Corp. of America*, 906 F.2d 660 (10th Cir. 1990).**

- **ELEVENTH CIRCUIT**

***Burks v. American Cast Iron Pipe Co.*, 212 F.3d 1333 (11th Cir. 2000).**

***Groover v. Michelin North America, Inc.*, 90 F. Supp. 2d 1236 (M.D. Ala. 2000).**

***Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451 (11th Cir. 1996).**

***Stewart v. KHD Deutz of America Corp.*, 980 F.2d 698 (11th Cir. 1993).**

***United Steelworkers of America v. Connors Steel Co.*, 855 F.2d 1499 (11th Cir. 1988).**

***Box v. Coalite, Inc.*, 643 F. Supp. 709 (N.D. Ala. 1986).**

- **D.C. CIRCUIT**

No on point case law in this circuit.

International Union, United Auto., Aerospace, and Agr. Implement Workers of America (UAW) v. Yard-Man, Inc.
C.A.Mich.,1983.

United States Court of Appeals,Sixth Circuit.
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), and Local 134, UAW, Plaintiffs-Appellees,
v.
YARD-MAN, INCORPORATED, Defendant-Appellant.
No. 81-1718.

Argued Sept. 3, 1982.
Decided Sept. 9, 1983.
Certiorari Denied Jan. 23. 1984.
See 104 S.Ct. 1002.

Employer appealed order of the United States District Court for the Eastern District of Michigan, Ralph M. Freeman, J., granting summary judgment that employer breached collective bargaining agreement by terminating life and health insurance benefits of retired employees at expiration of collective bargaining agreement and in substituting payment of present cash value for its bargained obligation to purchase annuities to fund supplemental pensions. The Court of Appeals, Cornelia G. Kennedy, Circuit Judge, held that: (1) collective bargaining agreement did not unequivocally entitle company to terminate those insureds' benefits when benefits of all active employees were terminated upon plant closure, and (2) genuine issues of material fact existed with respect to whether affirmative defense of accord and satisfaction was available to employer, precluding summary judgment.

Affirmed in part and reversed and remanded in part.

Holschuh, District Judge for the Southern District of Ohio, sitting by designation, filed an opinion concurring in part and dissenting in part.

West Headnotes

[1] Labor and Employment 231H 553(1)

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(G) Eligibility, Participation, and Coverage
231Hk550 Forfeiture; Loss of Eligibility or Coverage
231Hk553 By Former Employees or Retirees
231Hk553(1) k. In General. Most Cited Cases
(Formerly 296k66.1, 296k66, 232Ak131.4 Labor Relations)
Whether retiree insurance benefits continue beyond expiration of collective bargaining agreement depends upon intent of parties.

[2] Labor and Employment 231H 1302

231H Labor and Employment
231HXII Labor Relations
231HXII(E) Labor Contracts
231Hk1296 Duration and Termination
231Hk1302 k. Operation and Effect of Termination. Most Cited Cases
(Formerly 232Ak261 Labor Relations)
Parties to a collective bargaining agreement may provide for rights which will survive termination of their contractual relationship.

[3] Labor and Employment 231H 553(1)

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(G) Eligibility, Participation, and Coverage
231Hk550 Forfeiture; Loss of Eligibility or Coverage
231Hk553 By Former Employees or Retirees
231Hk553(1) k. In General. Most Cited Cases
(Formerly 296k66.1, 296k66, 232Ak131.4 Labor Relations)
Parties may provide for retiree insurance benefits which survive expiration of collective bargaining agreement.

[4] Federal Courts 170B 421

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk421 k. Labor and Employment;

Workers' Compensation. Most Cited Cases

Labor and Employment 231H 1242

231H Labor and Employment
231HXII Labor Relations
231HXII(E) Labor Contracts
231Hk1242 k. What Law Governs. Most Cited Cases
(Formerly 232Ak257.1, 232Ak257 Labor Relations)

Labor and Employment 231H 1269

231H Labor and Employment
231HXII Labor Relations
231HXII(E) Labor Contracts
231Hk1268 Construction
231Hk1269 k. In General. Most Cited Cases
(Formerly 232Ak257.1, 232Ak257 Labor Relations)
Enforcement and interpretation of collective bargaining agreements is governed by substantive federal law; however, traditional rules of contractual interpretation are applied as long as their application is consistent with federal labor policies. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

[5] Labor and Employment 231H 1271

231H Labor and Employment
231HXII Labor Relations
231HXII(E) Labor Contracts
231Hk1268 Construction
231Hk1271 k. Intent of Parties. Most Cited Cases
(Formerly 232Ak257.1, 232Ak257 Labor Relations)
In discerning parties' intent in collective bargaining agreement, trial court should first look to explicit language of collective bargaining agreement for clear manifestations of intent.

[6] Labor and Employment 231H 1271

231H Labor and Employment
231HXII Labor Relations
231HXII(E) Labor Contracts
231Hk1268 Construction
231Hk1271 k. Intent of Parties. Most Cited Cases
(Formerly 232Ak257.1, 232Ak257 Labor Relations)
In discerning parties' intent in collective bargaining agreements, trial court should interpret each provision in question as part of an integrated whole and if possible, each provision should be construed consistently with entire document and relative positions and purposes of parties.

[7] Labor and Employment 231H 1269

231H Labor and Employment
231HXII Labor Relations
231HXII(E) Labor Contracts
231Hk1268 Construction
231Hk1269 k. In General. Most Cited Cases
(Formerly 232Ak257.1, 232Ak257 Labor Relations)
As in all contracts, collective bargaining agreement's terms must be construed so as to render none nugatory and avoid illusory promises.

[8] Labor and Employment 231H 1272

231H Labor and Employment
231HXII Labor Relations
231HXII(E) Labor Contracts
231Hk1268 Construction
231Hk1272 k. Language of Agreement. Most Cited Cases
(Formerly 232Ak257.1, 232Ak257 Labor Relations)
Where ambiguities in collective bargaining agreement exist, trial court may look to other words and phrases in agreement for guidance in discerning parties' intent.

[9] Labor and Employment 231H 1272

231H Labor and Employment
231HXII Labor Relations
231HXII(E) Labor Contracts
231Hk1268 Construction
231Hk1272 k. Language of Agreement. Most Cited Cases
(Formerly 232Ak257.1, 232Ak257 Labor Relations)
In discerning intent of parties in collective bargaining agreement, trial court should review interpretation ultimately derived from its examination of language, context and other indicia of intent for consistency with federal labor law.

[10] Labor and Employment 231H 452

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(B) Plans in General
231Hk448 Termination of Plan
231Hk452 k. Cessation, Reduction, or Transfer of Business. Most Cited Cases
(Formerly 296k66.1, 296k66, 232Ak131.4 Labor Relations)
Collective bargaining agreement providing that company would provide insurance benefits equal to active group benefits for retirees did not unequivocally entitle company to terminate those insurance benefits when benefits of all active employees were terminated upon plant closure.

[11] Labor and Employment 231H 610

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(J) Determination of Benefit Claims by Plan
231Hk610 k. In General. Most Cited Cases
(Formerly 296k135, 232Ak131.1 Labor Relations)
Retirees may, consistent with federal labor law, settle their contractual disputes over benefits directly with former employer by means of accord and satisfaction without notice to or consent of union.

[12] Labor and Employment 231H 610

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(J) Determination of Benefit Claims by Plan
231Hk610 k. In General. Most Cited Cases
(Formerly 296k135, 232Ak131.1 Labor Relations)
Direct settlements between retirees and former employer entered into without notice or consent of union are not precluded when union undertakes legal representation of retirees in litigation. Labor Management Relations Act, 1947, § 301(a), 29 U.S.C.A. § 185(a).

[13] Labor and Employment 231H 1131

231H Labor and Employment
231HXII Labor Relations
231HXII(C) Collective Bargaining
231Hk1123 Particular Subjects of Bargaining
231Hk1131 k. Pensions and Retirement. Most Cited Cases
(Formerly 232Ak178 Labor Relations)
Benefits for retired workers are not a mandatory but only a permissive subject of collective bargaining.

[14] Labor and Employment 231H 1208

231H Labor and Employment
231HXII Labor Relations
231HXII(D) Bargaining Representatives
231Hk1207 Duty to Act Impartially and Without Discrimination; Fair Representation
231Hk1208 k. In General. Most Cited Cases
(Formerly 232Ak218.1, 232Ak218 Labor Relations)
The union has no duty to represent retirees with employer although it may choose to do so.

[15] Federal Courts 170B 412.1

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk412 Contracts; Sales
170Bk412.1 k. In General. Most Cited Cases
(Formerly 170Bk412)
It is federal substantive law which controls resolution of contractual dispute between retirees and employer and whether there has been an accord and satisfaction of the contractual obligations to the retirees, but in the absence of controlling federal law principles, the trial court may look for guidance to general common-law principles including substantive law of state in which contract arose.

[16] Accord and Satisfaction 8 1

8 Accord and Satisfaction
8k1 k. Nature and Requisites in General. Most Cited Cases
Under affirmative defense of accord and satisfaction, there must have been a disputed claim, substituted performance agreed upon and accomplished, and valuable consideration.

[17] Federal Civil Procedure 170A 2497.1

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2497 Employees and Employment

Discrimination, Actions Involving
170Ak2497.1 k. In General. Most Cited Cases
(Formerly 170Ak2497)
In action in which it was alleged that employer breached collective bargaining agreement with union by terminating life and health insurance benefits of retired employees at the expiration of collective bargaining agreement and in presenting payment of present cash value for its bargained obligation to purchase annuities to fund supplemental pensions, genuine issues of material fact existed with respect to whether defense of accord and satisfaction was available to employer, precluding summary judgment.

***1477** Joseph Kochis, Garan, Lucow, Miller, Seward, Cooper & Becker, Mark R. Bendure (argued), Gromek, Bendure & Thomas, Detroit, Mich., for defendant-appellant.
***1478** Nancy J. Schiffer, Detroit, Mich., Leonard Page (argued), UAW Intern. Union, Detroit, Mich., for plaintiffs-appellees.

Before KENNEDY, Circuit Judge, BROWN, Senior Circuit Judge, and HOLSCHUH, District Judge.[FN*]

FN* The Honorable John D. Holschuh, United States District Court for the Southern District of Ohio, sitting by designation.

CORNELIA G. KENNEDY, Circuit Judge.
Yard-Man appeals the District Court's grant of summary judgment that it breached its collective bargaining agreement with appellees, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW or Union) and its Local 134, UAW, by terminating the life and health insurance benefits of Yard-Man's retired employees at the expiration of the collective bargaining agreement and in substituting the payment of present cash value for its bargained obligation to purchase annuities to fund supplemental pensions. We affirm the District Court's holding that the retirees are entitled to continued insurance benefits but reverse its holding that Yard-Man could not, even with the consent of its pensioners, substitute cash value for annuities.

In August 1974, Yard-Man and the UAW entered into a collective bargaining agreement covering employees at Yard-Man's Jackson, Michigan, plant. The contract bore a stated expiration date of June 1, 1977. Less than a year after the signing of the contract the plant closed.

In April 1977, Yard-Man notified its Jackson retirees that existing health and life insurance benefits would terminate upon the collective bargaining agreement's expiration. Soon thereafter, the UAW filed grievances claiming that Yard-Man's unilateral action in terminating the retirees' life and health insurance violated that agreement. When Yard-Man refused to arbitrate, the UAW filed this action under § 301(a) of the National Labor Management Relations Act of 1947, 29 U.S.C. § 185 (1976), seeking to compel arbitration. Alternatively, it sought on behalf of the retirees specific performance of Yard-Man's obligation to provide health and life insurance benefits beyond the term of the collective bargaining agreement. It also sought damages to compensate retirees who had paid insurance premiums or medical expenses since the expiration of the collective bargaining agreement.

In a second count, the UAW requested specific performance of Yard-Man's acknowledged obligation under the collective bargaining agreement to purchase annuities to fund its supplemental pension plan. After this suit was filed, and without notice or consultation with the UAW, Yard-Man distributed lump sum payments of the present value of the supplemental pension rights directly to each retiree.

The UAW waived its demand for arbitration and the parties filed cross-motions for summary judgment. Relying solely upon the language of the collective bargaining agreement, the District Court found that Yard-Man breached its contractual obligations when it cancelled the retirees' insurance upon expiration of that agreement. Yard-Man was ordered to provide health and life insurance for its retirees and their dependents, and to reimburse employers for losses due to termination of this insurance. The District Court also found that Yard-Man had failed to purchase annuities to fund the supplemental pension plan. It rejected Yard-Man's claim that it had performed this obligation by paying the cash value of the annuities to individual employees. The court ordered Yard-Man to purchase the collectively bargained annuities upon repayment by retirees of the lump sum distributions theretofore made. Damage questions were reserved.

The District Court certified its judgment under 28 U.S.C. § 1292(b) as a decision involving a controlling question of law as to which there is substantial ground for difference of opinion. This court permitted ***1479** Yard-Man's appeal from the

summary judgment, granting specific performance on both counts, and the UAW's cross-appeal from that portion of the District Court's judgment requiring repayment of the cash distribution made in lieu of supplemental pension annuities, as a condition of receiving such an annuity.

Resolution of the UAW's claim of lifelong insurance benefits for retirees requires interpretation of key contractual language in the collective bargaining agreement. The Union's second claim, the undisputed failure by Yard-Man to purchase the annuities called for in the collective bargaining agreement, requires evaluation of Yard-Man's affirmative defense of substituted performance and the legitimacy of offering such performance directly to the retirees after suit had been filed and without notice to the union.

I. The Parties Intended to Create Lifelong Vested Insurance Benefits for the Yard-Man Retirees

[1][2][3] The District Court properly recognized that whether retiree insurance benefits continue beyond the expiration of the collective bargaining agreement depends upon the intent of the parties. Clearly the parties to a collective bargaining agreement may provide for rights which will survive termination of their collective bargaining relationship. *John Wiley & Sons v. Livingston*, 376 U.S. 543, 555, 84 S.Ct. 909, 917, 11 L.Ed.2d 898 (1964). The parties may, for example, provide retiree insurance benefits which survive the expiration of the collective bargaining agreement. *Upholsterer's International Union v. American Pad & Textile Co.*, 372 F.2d 427, 428 (6th Cir.1967); *International Union, UAW, Local 784 v. Cadillac Malleable Iron Co., Inc.*, No. G82-75-CA1 (W.D.Mich. April 20, 1982); *American Standard, Inc.*, 57 Lab.Arb. (BNA) 698 (1971) (Warns, Arb.); *Roxbury Carpet Co. and Textile Workers of America, AFL-CIO*, 73-2 Lab.Arb. Awards (CCH) ¶ 8521 (1973) (Summers, Arb.). Any such surviving benefit must necessarily find its genesis in the collective bargaining agreement. *See John Wiley & Sons, supra*, 376 U.S. at 550, 555, 84 S.Ct. at 914, 917; *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass*, 404 U.S. 157, 181 n. 20, 92 S.Ct. 383, 398 n. 20, 30 L.Ed.2d 341 (1971); *Local 1251, International Union, UAW v. Robertshaw Controls Co.*, 405 F.2d 29, 33 (2d Cir.1968); *American Pad, supra*, 372 F.2d at 427-28.

[4] The enforcement and interpretation of collective bargaining agreements under § 301 is governed by substantive federal law. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456, 77 S.Ct. 912, 917, 1 L.Ed.2d 972 (1957). However, traditional rules for contractual interpretation are applied as long as their application is consistent with federal labor policies. *Id.* at 457, 77 S.Ct. at 918. *See John Wiley, supra*, 376 U.S. at 548, 84 S.Ct. at 913; *Transportation-Communication Employees Union v. Union Pacific R.R.*, 385 U.S. 157, 160-61, 87 S.Ct. 369, 371-72, 17 L.Ed.2d 264 (1966); *Kellogg Company v. NLRB*, 457 F.2d 519, 524 (6th Cir.1972).

[5][6][7][8][9] Many of the basic principles of contractual interpretation are fully appropriate for discerning the parties' intent in collective bargaining agreements. For example, the court should first look to the explicit language of the collective bargaining agreement for clear manifestations of intent. *Kellogg Co., supra*, 457 F.2d at 524. The intended meaning of even the most explicit language can, of course, only be understood in light of the context which gave rise to its inclusion. *See Randall v. Lodge No. 1076, International Ass'n of Machinists and Aerospace Workers, AFL-CIO*, 648 F.2d 462 (7th Cir.1981); *Forrest Industries, Inc. v. Local Union No. 3-436, International Woodworkers of America, AFL-CIO*, 381 F.2d 144, 146 (9th Cir.1967); *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 570, 80 S.Ct. 1343, 1364, 4 L.Ed.2d 1403 (1960) (Brennan, J., concurring). The court should also interpret each provision in question as part of the integrated whole. If possible, each provision should be construed consistently with the entire document and the relative positions and purposes of the parties.***1480** *Kellogg Co., supra*, 457 F.2d at 524. *See Randall, supra*, 648 F.2d at 466; *Florida Canada Corp. v. Union Carbide & Carbon Corp.*, 280 F.2d 193 (6th Cir.1960). As in all contracts, the collective bargaining agreement's terms must be construed so as to render none nugatory and avoid illusory promises. *See Cordovan Associates, Inc. v. Dayton Rubber Company*, 290 F.2d 858, 861 (6th Cir.1961). Where ambiguities exist, the court may look to other words and phrases in the collective bargaining agreement for guidance. Variations in language used in other durational provisions of the agreement may, for example, provide inferences of intent useful in clarifying a provision whose intended duration is ambiguous. *See American Pad, supra*, 372 F.2d at 427-28; *Kellogg Co., supra*, 457 F.2d at 524. Finally, the court should review the interpretation ultimately derived from its examination of the language, context and other indicia of intent for consistency with federal labor policy. This is not to say that the

collective bargaining agreement should be construed to affirmatively promote any particular policy but rather that the interpretation rendered not denigrate or contradict basic principles of federal labor law.

[10] Application of these basic rules of construction to the present case demonstrates the correctness of the District Court's conclusion that the parties intended to create nonterminating lifelong insurance benefits for the Yard-Man retirees.[FN1]

> FN1. The parties presented no extrinsic evidence of intent in this case and elected to rely exclusively on the terms of their collective bargaining agreement. The issues on appeal, therefore, are purely issues of law and not subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a). *See Industrial Equipment Co. v. Emerson Electric Co.*, 554 F.2d 276, 284 (6th Cir.1977). On appeal Yard-Man has raised arguments based on economic considerations which were not part of the record before the District Court. These do not, therefore, constitute any part of our analysis.

The key provision of the collective bargaining agreement, Article XVII, Section 4, states:
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.*

(Emphasis added.)

Appellant Yard-Man asserts that this provision is plain and unambiguous on its face. Under Article XVII, Section 1 of the agreement, active employee benefits expressly terminate one month after an employee's "layoff." The benefits of all active employees thus terminated upon plant closure. Yard-Man argues that since the insurance benefits of former employees are defined as "equal" to active employee benefits, those benefits must be equivalent in all respects *including duration.* Retiree benefits could then also be terminated at plant closure or, as actually occurred, with the expiration of the collective bargaining agreement.

We agree with the District Court that the key provision of the collective bargaining agreement is ambiguous. The language "will provide insurance benefits equal to the active group" could reasonably be construed, if read in isolation, as either solely a reference to the nature of retiree benefits or as an incorporation of some durational limitation as well. This phrase is no less ambiguous as to intended duration than language construed as creating continuing benefits in the various cases and arbitration decisions cited by the parties. *See, e.g., American Pad, supra*, 372 F.2d at 427 ("will continue to provide"); *Cadillac Malleable Iron Co., supra*, slip op. at 8 ("will pay the cost ... for retired employees"); *Roxbury Carpet, supra*, 73-2 Lab.Arb. Awards ¶ 8521 ("shall continue to receive"); *Wellman Dynamics and UAW, Loc. No. 804.*, Amer.Arb.Assoc. Case No. 54-30-0505-72 (1973) (Herman, Arb.) ("shall provide").

This ambiguity requires that we look to other provisions of the collective bargaining agreement for evidence of intent and an interpretation which is harmonious with the entire document. This examination persuades***1481** us that Yard-Man and the Union intended to create vesting insurance benefits in the Yard-Man retirees which continue beyond the life of the collective bargaining agreement.[FN2]

> FN2. We agree with Yard-Man that traditional rules of contractual interpretation require a clear manifestation of intent before conferring a benefit or obligation. *See, e.g., Kellogg Co., supra*, 457 F.2d at 524. We do not agree, however, that the duration of the benefit once clearly conferred is subject to this stricture.

First, termination of insurance benefits for active employees was explicitly and clearly set out and yet under conditions-the layoff of seniority employees-typically inapplicable to retirees.[FN3] Moreover, there are variations in the duration of insurance benefits available to active employees dependent upon their seniority.[FN4] These variations and the impracticality of hinging retiree benefits to events as unpredictable and unstable as active worker layoffs make it improbable that retiree benefits were intended to depend in duration upon the fortunes of the active employees. Yard-Man's own course of conduct in continuing retiree insurance benefits after plant closure beyond the point as which insurance benefits could have been terminated for active employees indicates that it did not consider retiree benefits to be tied to the durational limitations of that active group.[FN5]

FN3. Although the inappropriateness as to retirees of the language used to limit the duration of benefits available to the active group might indicate that the parties never considered or perhaps never resolved the issue of whether retiree benefits would continue after plant closure, it seems unlikely that retiree insurance benefits were meant to be tied to the layoff of active employees. As a practical matter layoff would be an inappropriate measure of retiree benefits, since typically only part of the work force would be laid off at any one time. A partial layoff of the work force rather than plant closure was more probably the contemplated purpose of the duration limitations created for active employees.

FN4. Article XVII, Section 1, of the collective bargaining agreement provides that for seniority employees with one year or more seniority the cost of continuing insurance would be paid for out of the company's "Supplemental Unemployment Benefits Fund" while funds were available and thereafter at the employee's cost. For seniority employees with less than one year's seniority, insurance was to be continued for one month after layoff and then made available at their cost.

FN5. The record is silent as to whether Yard-Man terminated benefits to its active employees at plant closure in accordance with the explicit terms of the collective bargaining agreement. Therefore, we consider only Yard-Man's failure to actually terminate retiree benefits at the point it now claims controls the duration of those benefits and not Yard-Man's treatment of the active group as well. Yard-Man's actual conduct is, in any case, inconsistent with the interpretation of the agreement it now urges upon this Court.

Second, the insurance provisions limit health insurance coverage for a retiree's spouse and dependent children in case of the retiree's death to expiration of the collective bargaining agreement.[FN6] While this limitation does not preclude an intent to also terminate the retiree's benefits with the expiration of the collective bargaining agreement in any event, it is more reasonable to infer that the spouse-dependent child provision was meant as an exception to the anticipated continuation of benefits beyond the life of the collective bargaining agreement.

FN6. Article XVII, Section 4, states: "In the event of death of the retiree who is age 65, the Company will continue to insure the surviving spouse and dependent children of the retiree until 6/1/77."

Third, the retiree insurance provisions, Article XVII, Section 1, contain a promise that the company will pay an early retiree's insurance upon such retiree reaching age 65 but that the retiree must bear the cost of company insurance until that time. Since an employee is entitled under the collective bargaining agreement to retire at 55, the company's promise could remain outstanding for a ten-year period. If retiree 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.

Fourth, the inclusion of specific durational limitations in other provisions of the current collective bargaining agreement suggests that retiree benefits, not so specifically***1482** limited, were intended to survive the expiration of successive agreements in the parties' contemplated long term relationship. Article XIX, for example, provides that "savings and pension plan programs" continue only for the duration of the collective bargaining agreement. No such specific limitation was provided to similarly restrict payment of retiree insurance benefits to the life of the collective bargaining agreement.[FN7]

FN7. We acknowledge that the collective bargaining agreement specifically provides a method for continuation of supplemental pension benefits beyond the agreement's duration by requiring the purchase of annuities in the event of plant closure, and yet, fails to provide a mechanism for funding retiree benefits. However, this failure does not necessarily imply that retiree benefits were not intended to survive the agreement. The survival of the pension benefits is not dependent on the existence of an annuities provision. Even though the agreement does not explicitly so provide, these benefits undoubtedly would have survived independent of any such

> mechanism. The mechanism itself merely confirms and provides the means of their survival.

Finally, examination of the context in which these benefits arose demonstrates the likelihood that continuing insurance benefits for retirees were intended. Benefits for retirees are only permissive not mandatory subjects of collective bargaining. *Pittsburgh Plate Glass Co., supra,* 404 U.S. at 181-82, 92 S.Ct. at 398-99. As such, it is unlikely 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. *See, e.g., Cadillac Malleable Iron, supra,* slip op. at 12-13; *Cantor v. Berkshire Life Ins. Co.*, 171 Ohio 405, 171 N.E.2d 518 (1960); *Roxbury Carpet, supra,* 73-2 Lab.Arb. Awards ¶ 8521, p. 4940. The employees are presumably aware that the union owes no obligation to bargain for continued benefits for retirees. If they 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. Contrary to Yard-Man's assertions, the finding of an intent to create interminable rights to retiree insurance benefits in the absence of explicit language, is not, in any discernible way, inconsistent with federal labor law.[FN8]

> FN8. The appellants misapprehend the meaning of *Pittsburgh Plate Glass* insofar as vested retiree benefits are concerned. Clearly, the union may choose to forego such benefits in future negotiations in favor of more immediate compensation. It may not, however, bargain away retiree benefits which have already vested in particular individuals. Such rights, once vested upon the employee's retirement, are interminable and the employer's failure to provide them actionable under § 301 by the retiree. 404 U.S. at 181 n. 20, 92 S.Ct. at 398 n. 20.

Further, 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. This is not to say that retiree insurance benefits are necessarily interminable by their nature. Nor does any federal labor policy identified to this Court presumptively favor the finding of interminable rights to retiree insurance benefits when the collective bargaining agreement is silent. Rather, as part of the context from which the collective bargaining agreement arose, the nature of such benefits simply provides another inference of intent. Standing alone, this factor would be insufficient to find an intent to create interminable benefits. In the present case, however, this contextual factor buttresses the already sufficient evidence of such intent in the language of this agreement itself.

Yard-Man urges that a general durational clause which provided that the collective bargaining agreement should remain in force until June 1, 1977 demonstrates an intent that all benefits described in the agreement also terminate at that date. We do not agree. The clause does not specifically refer to the duration of benefits. The persuasive considerations we have discussed demonstrate that retiree benefits were intended***1483** to outlive the collective bargaining agreement's life and outweigh any contrary implications derived from a routine duration clause terminating the agreement generally. Such an intent takes precedence over a non-specific, general clause.

II. The Purchase of Annuities

Yard-Man agreed in the collective bargaining agreement to purchase annuities to fund its supplemental pension plan in the event of business failure. It is undisputed that Yard-Man has failed to do so. Instead, after the commencement of this suit, Yard-Man distributed directly to the individual retirees lump sum payments of the present value of these pension benefits.[FN9] The UAW was neither consulted or notified prior to this distribution. Noting that the required annuities were available but not purchased because they would be uneconomical for Yard-Man, the District Court found Yard-Man in breach of its contractual obligations and ordered specific performance.[FN10]

> FN9. Yard-Man also sent the retirees notice explaining the reasons for this substituted performance. While the amount of the lump sum distribution was solely determined by Yard-Man, there is no dispute as to its adequacy *as a cash distribution.* The Union's disagreement is whether *any*

lump sum distribution could constitute an adequate substitute for the bargained for annuity.

FN10. The District Court excused specific performance with respect to monthly benefits which were so small that it was not reasonably possible to purchase annuities.

Yard-Man asserts two defenses to liability which were rejected without discussion by the District Court: accord and satisfaction (substituted performance) and estoppel. Yard-Man argues that its offer of substituted performance in the form of lump sum distribution checks was accepted and the distribution retained by the retirees, thereby discharging its original obligation. Moreover, Yard-Man contends that since it could not invest or utilize those funds after the retirees accepted them, the retirees and the union which is suing on their behalf are estopped from seeking specific performance by virtue of Yard-Man's detrimental reliance.[FN11] The UAW in response asserts that ***1484** neither defense can be effective in the present case because Yard-Man failed to notify the retirees' legal representative, the UAW, of the proposed substituted performance.

FN11. As pointed out by the dissent, Yard-Man is precluded from raising the defense of estoppel here on appeal because it failed to present such a defense or its equivalent in any form to the District Court.
We cannot agree, however, with the dissent's view that Yard-Man should also be precluded from maintaining a defense of accord and satisfaction or substituted performance by virtue of its failure to amend its answer and plead the defense affirmatively. Both sides in this dispute have argued on appeal over whether Yard-Man's substituted performance of providing lump sum cash distribution instead of purchasing annuities constituted a legitimate defense to the retirees' contract action. Before the trial court Yard-Man contended "that performance of the literal language of Article XVIII, Section 1, was impossible and that *a reasonable alternative form of compliance was adopted.*" Yard-Man also asserted that its substituted performance "constitute[d] substantial compliance with the contract provision." Yard-Man's arguments essentially raised, albeit in a confused fashion, three contract defenses; substantial compliance, substituted performance and impossibility. (The District Court ruled only on impossibility.) As is generally true under contract law, there is no essential difference between the defense of substituted performance as raised below and accord and satisfaction. 6 Corbin on Contracts, § 1276, p. 115; § 1278, p. 124. The arguments presented on appeal by Yard-Man are essentially the same as those it presented to the District Court; that is, that it has substantially complied with its contractual obligations *by virtue of offering an alternative means of performance which was accepted by the retirees.* The only difference, and one which is apparently deemed of paramount significance by the dissent, is that the words "accord and satisfaction" were never utilized before the District Court and the defendant's answer never amended to reflect its asserted defense. We believe that this defense, although unartfully presented, was placed before the trial court and fully addressed by the parties. Moreover, under the circumstances of this case, we do not deem Yard-Man's failure to amend its answer to affirmatively and formally plead the defense as dispositive of whether we can review this issue now. The Union, although fully aware of the nature of the defense, has never challenged Yard-Man's position on such procedural grounds. Indeed, if the Union had so challenged Yard-Man's reliance on the defense, Yard-Man would undoubtedly have been granted leave to amend. The case was still in a pretrial posture when the defense arose. Refusal to allow amendment to allege a defense which came into being after the answer had been filed might well have been an abuse of the trial court's discretion. Since the substance of the defense was raised before the trial court in conjunction with the summary judgment motions and litigated by the parties without assertion of procedural error, it would be unfair to now, *sua sponte*, foreclose Yard-Man's legitimate defense.

[11][12] The contentions of the parties raise two related legal issues. First, whether retirees may, consistent with federal labor law, settle their contractual disputes over benefits directly with their former employer by means of accord and satisfaction without notice to or the consent of their union?

Second, even if they may, are such direct settlements between retirees and the former employer, entered into without notice to or consent of the union, precluded once the union undertakes the legal representation of the retirees in a § 301(a) litigation?

The prime consideration in resolving the initial question must be whether direct settlement between retirees and their former employer without notice to or the consent of the union is in any fashion inconsistent with the national labor statutes and their primary purpose of promoting industrial peace. *Lincoln Mills*, 353 U.S. at 457, 77 S.Ct. at 918. *See United Ass'n of Journeymen, Plumbers & Pipefitters v. Local 334, United Ass'n of Journeymen, Plumbers & Pipefitters*, 452 U.S. 615, 636-37, 101 S.Ct. 2546, 2557-58, 69 L.Ed.2d 280 (1981) (Stevens, J., dissenting). *See generally* 29 U.S.C. § 151 (1976).

Initially, a distinction must be recognized between retiree contractual benefits under a collective bargaining agreement and the terms and conditions of employment created by that agreement for active employees. In the case of active employees, Congress has spoken directly on the issue of settlements between employer and employee. Title 29 U.S.C. § 159(a) specifically permits "adjustments" between employer and employee without intervention of the union so long as the agreement is not inconsistent with the terms of the bargaining agreement and the union has been given an opportunity to be present.

[13][14] In *Pittsburgh Plate Glass Co.*, 404 U.S. at 176-82, 92 S.Ct. at 396-99, the United States Supreme Court held that employers are under no obligation to bargain with unions over benefits for already retired workers. The Court reasoned that retired workers were neither "employees" under federal labor law nor properly members of the appropriate bargaining unit. As such, benefits for retired workers are not a mandatory but rather only a permissive subject of collective bargaining. Id. at 170, 180-82, 92 S.Ct. at 393, 398-99. Similarly, the union has no duty to represent retirees with the employer, although it may choose to do so. *Id.* at 181 n. 20, 92 S.Ct. at 398 n. 20. Thus, since retirees are not employees under the Act, § 159(a) itself clearly does not apply.

There is no provision parallel to § 159(a) relating to settlements between retirees and former employers. Nor would creation of a § 159(a) type notice by analogy be appropriate. Section 159(a) represents a policy favoring settlements while protecting the union's interest in the integrity of the collective bargaining agreement and the *terms and conditions of employment of the active employees.* The statute requires notification to the union prior to employer settlements with active employees out of recognition of the union's status as the active employee's sole bargaining representative. In the case of retirees, who are not employees or members of the bargaining unit and whose relationship to the employer and union is not directly controlled by the labor statutes, this primary rationale for notification no longer exists. While the union may have bargained for and received benefits for retirees, it does not have the same interest in the enforcement of those contractual rights on the behalf of individual retirees that it has in the terms and conditions of employment of active employees. Unlike the active employees, retirees ***1485** face no restrictions whatever in seeking fulfillment of contractual benefits directly from their former employer. *See Rehmar v. Smith*, 555 F.2d 1362, 1370 n. 6 (9th Cir.1976); 404 U.S. at 181 n. 20, 92 S.Ct. at 398 n. 20. *See also Smith v. Evening News Ass'n*, 371 U.S. 195, 200-201, 83 S.Ct. 267, 270-271, 9 L.Ed.2d 246 (1962). Similarly, the union is under no obligation to seek enforcement of such rights. *See, e.g., Nedd v. United Mine Workers of America*, 556 F.2d 190, 200 (3d Cir.1977).

While a collective bargaining agreement is not simply an ordinary contract, *see, e.g., Hendricks v. Airline Pilots Association, International*, 696 F.2d 673, 676 (9th Cir.1983), the vested rights of a retiree are essentially contractual in nature. *Cf.* 404 U.S. at 181 n. 20, 188, 92 S.Ct. at 398 n. 20, 402. Thus, the relationship of retiree and employer is unadorned with those special considerations peculiar to the relationship between an active employee, his union and the employer which justified creation of those minimal notice requirements that do exist for active employees under the national labor laws.[FN12] In settling a claim for vested benefits, the retiree does not modify the collective bargaining agreement. Nor can the retiree affect the terms and conditions of employment by doing so, as an active employee might upon direct settlement of a grievance with the employer. A direct settlement between an active employee and the employer which is inconsistent with the terms of the collective bargaining agreement might, for example, result in an unfair labor practice. This is not the case for retirees who are free to settle their differences with the former employer on whatever terms desired, including a compromise over disputed contractual benefits.

FN12. The principle of accord and satisfaction has actually already been applied to the claims of an active employee in a context distinct from those at bar. *See Keppard v. International Harvester Co. and International Union, UAW*, 581 F.2d 764 (9th Cir.1978). The Ninth Circuit in this case did not, however, explicitly analyze whether application of the principle was consistent with national labor policies.

Active union members need their joint common strength to bargain most effectively for improvements in wages, hours and working conditions. That need is explicitly recognized in the federal labor statutes. 29 U.S.C. § § 151, 157, 159. *See also Pittsburgh Plate Glass*, 404 U.S. at 174-75, 175 n. 15, 92 S.Ct. at 395-96 n. 15. As retirees, however, former employees do not need that joint common strength to enforce their vested contractual rights against their former employer. *See*404 U.S. at 181 n. 20, 92 S.Ct. at 398 n. 20. *See* also *id.* at 172-73, 92 S.Ct. at 393-95; *Pittsburgh Plate Glass Co., Chemical Div. v. NLRB*, 427 F.2d 936, 942 n. 9, 946 (6th Cir.1970), *aff'd*404 U.S. 157, 92 S.Ct. 383, 30 L.Ed.2d 341 (1971). Each retiree has an undisputable and effective remedy against the employer for a breach of contract under § 301(a).[FN13] *See*404 U.S. at 176, 188, 92 S.Ct. at 396, 402. The retiree, no longer a member of the union, may not want the union to be notified of what the retiree wishes or intends to do. This Court is unable to discern any policy basis in federal labor law which would be served by rejecting application of the well-established principle of accord and satisfaction to disputes over retiree benefits merely because they were created in collective bargaining agreements. Such a rejection would not in any fashion promote labor peace or the interests of the individual retirees.

FN13. Nor is a need for joint assertion of contractual rights by retirees anywhere explicitly recognized by the labor laws. Title 29 U.S.C. § § 158(d), 159(a) (1976), cited by the UAW in support of its contention of exclusive representation of retirees, are clearly inapposite. Under the rationale of *Pittsburgh Plate Glass*, retirees are *not* employees or members of the bargaining unit and, therefore, not subject to the protections or strictures of those provisions. *See*404 U.S. at 181-182, 92 S.Ct. at 398-399.

The case for creating such a notice rule in the narrow circumstances in which a union has actually undertaken representation of the retirees in a § 301(a) litigation is somewhat more compelling. Under these circumstances the union has clearly manifested its interest in the preservation of the disputed benefits and presumably believes ***1486** collective legal representation to be in the best interests of its former members. Yet, all of the reasons for not creating such a notice requirement in the absence of a union instituted § 301 suit apply with equal force when the union has undertaken such representation. Nor is there any new discernible inconsistency between direct retiree-employer settlements and national labor policies brought about by the union's active role in initiating a § 301(a) litigation.[FN14] Most importantly, we do not believe that the union's interest in the retirees' contractual claims is sufficient to either demand judicial creation of a procedural notice requirement or override the right of individual retirees to settle their contractual disputes directly with their former employer.

FN14. The UAW does not claim that Yard-Man's legal counsel, either directly or through its client, was the actual instigator of the present settlement. Such contact is prohibited by the Code of Professional Responsibility of the American Bar Association. *See* EC 7-18; DR 7-104.

The UAW contends that there can be no meeting of the minds on a substituted performance when the legal representative of the suing party has not been contacted. Since this is not true in normal civil litigation, *see, e.g., Lewis v. S.S. Baune*, 534 F.2d 1115, 1122 (5th Cir.1976); *Cook v. Moran Atlantic Towing Corp.*, 76 F.R.D. 481 (S.D.N.Y.1977); *Krause v. Hartford A. & I. Co.*, 331 Mich. 19, 26-27, 49 N.W.2d 41 (1951), the validity of this assertion depends upon the existence of special considerations particular to federal labor law. As discussed above no such special considerations exist.

We do not suggest that the union has no standing to bring a suit on behalf of retirees. *United Steelworkers of America, AFL-CIO v. Canron, Inc.*, 580 F.2d 77, 80 (3d Cir.1978). As a signatory to the contract it could bring an action for the third party beneficiary retirees. Nor do we suggest that the union is without interest in the outcome of potential settlements between the employer and the retirees. *See, e.g.,*404 U.S. at 176 n. 17, 92 S.Ct. at 396 n. 17. *See also Toensing v. Brown*, 528 F.2d 69, 72 (9th

Cir.1975); *Rosen v. Public Service Electric and Gas Company*, 477 F.2d 90, 94 n. 8 (3d Cir.1973); *UAW v. Acme Precision Products*, 515 F.Supp. 537, 539-40 (E.D.Mich.1981). Clearly the union's efforts in ensuring employer compliance with all of the terms of a collective bargaining agreement are a significant consideration for the active employees when choosing to retain the union as their exclusive bargaining representative. In this sense the union has a direct interest in maintaining the integrity of the retiree benefits created by the collective bargaining agreement.[FN15] *See*404 U.S. at 176 n. 17, 92 S.Ct. at 396 n. 17. Yet, the issue here is not whether or not the union has some residual representation interest in the fate of former members of the bargaining unit.[FN16] Rather, the issue essentially concerns the right of individual retirees to resolve disputes over contractual benefits directly with the former employer without the union's involvement. There are simply no discernible federal labor law policies which restrict the right of individual retirees to settle their contractual disputes ***1487** directly with their former employer without notice to the union.

FN15. The Union in this case, however, has presented no evidence that settlement by individual retirees in any way compromises the rights of other retirees or interests of the Union itself as signatory to the collective bargaining agreement. We are sympathetic of the Union's distress at not being notified by Yard-Man prior to their settlement offer to the retirees. This Court will nevertheless not speculate as to the existence of some unknown harm not asserted by the parties in interest.

FN16. The dissent strongly implies that a union's duty to fairly represent the claims of its members extends to retirees. This proposition overlooks that the very rationale for creating a duty of fair representation-the exclusivity of contractual grievance and arbitration remedies-does not exist in the context of retirees who, without restraint, may litigate their disputes with their former employers directly under § 301. *See Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967); *Pittsburgh Plate Glass*, 404 U.S. at 181 n. 20, 92 S.Ct. at 398 n. 20. However, since this issue is not squarely presented by the facts of the present case, we leave its ultimate resolution for another time.

Even accepting that some minimal form of notice to the union may be desirable once the union has undertaken legal representation on the retirees' benefits, there are compelling reasons why we should not adopt a judicially mandated procedural requirement. First, it is important that in requiring notice we would be creating a procedural rule, something courts are reluctant to do, unless required by due process. There would be the problem, of defining when notice must be given. Should it be required for every settlement with every retiree? Clearly this would be inappropriate. Yet which rights or benefits are so significant that notice would be required? And by what measure do the district courts determine that question? This procedural rule would presumably be applied not only in this litigation, but in a myriad of unknown pending controversies. We cannot know its effect in those unknown cases. Without clear justification of significance beyond the special circumstances presented in the case at bar this uncertainty strongly cautions against judicial adoption of any rule.

This is particularly true where, as in this case, the law already provides protection against the harm perceived. If, on remand, the District Court determines that the retirees had been victims of overreaching, the present settlements could be set aside. *See, e.g.*, *S.S. Braune*, 534 F.2d at 1122. Collectively bargained benefits for retirees have existed for scores of years now and so far as can be determined there has been no need for such notice. This is another pragmatic reason for not creating such a duty now in the absence of some clear policy reason to do so.

[15][16] In the present case the District Court held that, as a matter of law, Yard-Man could not provide a substituted performance in accord and satisfaction [FN17] of contractual obligations to the retirees. Since we have found this to be in error, it is necessary to determine what principles of accord and satisfaction should be applied. Even though essentially contractual in nature, the disputed retiree benefits in this case nevertheless arise under a collective bargaining agreement and may be, as here, the subject of a federal suit under § 301 of the National Labor Relations Act. Under these circumstances, it is clear that it is federal substantive law which controls resolution of the contractual dispute. *Lincoln Mills*, 353 U.S. at 456-57, 77 S.Ct. at 917-18. In the absence of controlling federal law principles, however, we may look for guidance to general common law principles, including the substantive law

of the state in which the contract arose. These borrowed principles in this context, of course, are "absorbed as federal law" and become the federal common law of labor disputes. See id. at 457, 77 S.Ct. at 918. The principles of accord and satisfaction are well established in both the general common law and the law of Michigan where the present contract originates. The basic elements of this affirmative defense align themselves with normal contract principles of offer and acceptance. There must be a disputed claim,[FN18] a substituted performance agreed ***1488** upon and accomplished, and valuable consideration. *E.g.*, *Risk v. Wells*, 362 Mich. 414, 420, 107 N.W.2d 776 (1961); 262 (1933). *See also Keppard v. International Harvester Co.*, 581 F.2d 764 (9th Cir.1978) (applying California law); *Brock & Blevins Company v. United States*, 343 F.2d 951, 955 (Ct.Cl.1965). *See generally* 6 Corbin on Contracts § 1276 (1962 & Kaufman, Supp.1982); 5 Williston on Contracts § 680 at 259-61 (3d Ed.1961). For the reasons already discussed we see no discernible inconsistency between these general principles and federal labor law.

FN17. The Restatement (Second) of Contracts (Revised Ed.1981) makes a distinction between the principles of substituted performance and accord and satisfaction based on the existence or not of an executory contract. *Compare* § 278 (substituted performance) *with* § 281 (accord and satisfaction). Other authorities do not seem to recognize such a distinction. *See, e.g.*, 5 Williston on Contracts § 680 at 258-61 (3d ed.1961); 6 Corbin on Contracts § 1276 (1962). Although the present settlement would appear to technically fit best into the Restatement's § 281 definition, the distinction is one without a difference under the facts of the present case. The defense raised in this case requires the same essential elements whether characterized as substituted performance or accord and satisfaction.

FN18. Professor Corbin indicates that it is not necessary for the defense of accord and satisfaction that the claim is doubtful or disputed. *See* 6 Corbin on Contracts § 1278, p. 126. Whether a "dispute" is necessary or not is, however, irrelevant in the present case since a bona fide dispute was clearly created by Yard-Man's initial protestation to the union that performance of the strict terms of the collective bargaining agreement was sufficiently unreasonable to excuse literal performance. No more "dispute" than this is needed in order for the principles of accord and satisfaction or substituted performance to apply.

[17] The factual predicates for Yard-Man's defense remain unresolved and summary judgment, therefore, is inappropriate. On remand the District Court must apply the basic elements of the affirmative defense of accord and satisfaction to determine whether such defense is viable. The court should also consider any contention that the actions of Yard-Man constituted overreaching. We affirm in part and reverse in part and remand this issue to the District Court for further proceedings consistent with this opinion.

HOLSCHUH, District Judge, concurring in Part I, dissenting in Part II.

I fully concur in the majority's holding in Part I of its opinion that Yard-Man, in terminating the life and health insurance benefits of its retired employees at the expiration of the collective bargaining agreement, breached that agreement.

However, I must respectfully dissent from the majority's holding in Part II of its opinion. I believe that the judgment of the District Court ordering specific performance of Yard-Man's contractual obligation to purchase an annuity for its retirees should be affirmed for several reasons. First, the District Court's rejection of Yard-Man's sole defense in the lower court of substantial performance is not contested on this appeal, and Yard-Man cannot raise for the first time on appeal the alleged affirmative defenses of accord and satisfaction and estoppel. Second, even if these defenses could be asserted for the first time on appeal, there is no evidence in this record that would support them. Third, and of great importance, even if these defenses could now be asserted for the first time, the application of these defenses under the circumstances of this case would be inconsistent with national labor policies and should not be incorporated into the substantive federal law governing this action. The majority opinion finding the defense of accord and satisfaction to be applicable in this case represents, in my view, a troublesome precedent that could encourage an employer who desires to change retirement benefits to ignore the union that won those benefits in the collective bargaining process and to deal directly with the unorganized and economically vulnerable retirees.

I.

Under the collective bargaining agreement between Yard-Man and the UAW, employees and retirees at Yard-Man's Jackson, Michigan plant were covered by two separate pension plans-the Basic Plan, a qualified plan under the Employee Retirement Income Security Act of 1974 (ERISA), and the Improved Plan, a non-qualified plan under ERISA. With respect to the Improved Plan, Article XVIII of the agreement expressly and unequivocally required Yard-Man, in the event of a business failure, to "fund the balance of the pension benefits payable to employees then on retirement through the purchase of an annuity from a life insurance company." Yard-Man does not dispute that the closing of the Jackson plant was an event under Article XVIII that triggered Yard-Man's duty to purchase the required annuity.

Following the closing of the Jackson plant in 1975, the union brought this action in October 1977 seeking, among other forms of relief, specific performance of Yard-Man's obligation to purchase the required annuity. After this action had been commenced, Yard-Man requested from five major insurance companies bids for an annuity to cover benefits under both the Basic Plan ***1489** and the Improved Plan. Three of the five companies responded with quotations. New York Life Insurance Company refused to bid on the Improved Plan because it was a non-qualified pension plan; the Travelers Insurance Company submitted a bid on the Improved Plan contingent upon the award of the annuity for the Basic Plan; and the Metropolitan Life Insurance Company submitted a bid for both plans on the assumption that the Improved Plan was a qualified pension plan. Yard-Man chose to accept Metropolitan's bid to cover the Basic Plan only, thereby rejecting Travelers' bid to cover both the Basic and Improved Plans.

Yard-Man decided that, rather than purchasing the required annuity for the Improved Plan (at considerable expense to Yard-Man), it would unilaterally, without notice to the union, terminate all further payments that the annuity would have provided and distribute instead lump sum cash payments in amounts determined by Yard-Man to be equal to the present value of the expected future payments under the Plan. Yard-Man then sent the following notice to the retirees participating in the Improved Plan:

NOTICE TO FORMER PARTICIPANTS IN THE YARD-MAN PENSION PLAN-JACKSON

The Improved Yard-Man Pension Plan-Jackson was an arrangement by which Yard-Man Inc. made gratuitous payments out of general assets to supplement benefits provided under the Yard-Man Pension Plan-Jackson. The Improved Plan was designed to provide at least a minimum amount of benefits to participants who retired on or before July 31, 1975. Improved Plan benefits were included in with your periodic payments made under the Yard-Man Pension Plan-Jackson through October 31, 1978.

Effective November 1, 1978, each participant in the Improved Yard-Man Pension Plan-Jackson will receive a lump sum payment equal to the present value of all his or her expected future payments (see cover letter for figures). There will be no further payments made after the lump sum distribution. This lump sum distribution is *not* being made from a qualified retirement plan.

Any overpayments made under the Yard-Man Pension Plan-Jackson will be recovered by reducing the amount of any lump sum distribution. However, if the overpayment exceeds the amount of any lump sum distribution, there will be no additional reduction in benefits. If you have any questions, please contact Yard-Man Inc., Montgomery Ward Plaza, 3N, Chicago, Il 60671.

II.

It is undisputed that at the time this lawsuit was filed on October 5, 1977, Yard-Man had not purchased the annuity required by Article XVIII of Yard-Man's contract with the union. Accordingly, in Count II of its Complaint the union sought specific performance of Yard-Man's contractual obligation to fund by purchase of an annuity the balance of the pension benefits due under the Improved Plan.

Yard-Man's Answer to Count II was basically an admission of its obligation but a denial of the breach and a denial of the union's claimed right of arbitration (subsequently waived by agreement of the parties). Although the Answer set forth a list of affirmative Defenses, it included neither estoppel, as it is now asserted,[FN1] nor accord and satisfaction. It is understandable, of course, why Yard-Man initially did not plead in its Answer the affirmative defenses of accord and satisfaction and estoppel based upon receipt by retirees of the cash distributions, since no

such distribution had yet been made. Yard-Man filed its Answer on February 6, 1978, and made the cash distributions on or about November 1, 1978.

> FN1. Affirmative defense Number 7 asserted estoppel, but not as Yard-Man now asserts it: "plaintiffs are estopped from bringing this action because they failed to file timely grievances under the labor contract and are further barred by the doctrine of laches and/or the applicable statutes of limitations."

***1490** Although Yard-Man in its Answer reserved the right "to plead such further defenses after continuing investigation and discovery pursuant to court rules," the record is clear that Yard-Man never filed any supplemental Answer raising the defenses of accord and satisfaction and estoppel arising from the cash distribution or sought to add either of those defenses to the list of affirmative defenses attached to its original Answer. The record is also clear that Yard-Man had ample opportunity subsequent to the cash distribution to raise these defenses. The union filed its motion for summary judgment in February 1979, and Yard-Man responded to that motion and filed its cross-motion for summary judgment in March 1979. The District Court held a hearing on the motions for summary judgment in April 1979-some five months after the cash distributions were made. At no time did Yard-Man assert either of the defenses it now raises as any defense to the union's motion for summary judgment or as a basis to support its own motion for summary judgment-either in the briefs filed or in the oral arguments made in the District Court.

In its trial court brief, Yard-Man contended that "the lump sum distribution constitutes substantial compliance with the contract provision and was the only viable alternative open to defendant by which the benefits of the Improved Plan could be distributed," (J.A. 81A), and that "performance of the literal language of Article XVIII Section 1 was impossible and that a reasonable alternative form of compliance was adopted." (J.A. 83A). In the oral argument, Yard-Man again argued that in view of "the practicalities of the situation," Yard-Man "attempted to do what was reasonable, what was fair." (J.A. 166-167A). The District Judge found neither the argument of "substantial compliance" nor that of "impossibility of performance" to be meritorious, finding, instead, that Yard-Man could have purchased the required annuity but chose to make the cash distributions simply because it was the most economical course for Yard-Man to take. (J.A. 110A).

My examination of the Joint Appendix reveals that the defenses of accord and satisfaction and estoppel were raised for the first time before this Court in the brief filed by Yard-Man.[FN2] Although the union responded to the appellant's arguments, I do not believe appellee's response prevents this Court from adhering to its firmly established principle of considering on appeal only questions that were presented to the District Court. *Ash v. Board of Education of Woodhaven School Dist.*, 699 F.2d 822, 827 (6th Cir.1983); *Roberts v. Berry*, 541 F.2d 607, 610 (6th Cir.1976); *Compton v. Tennessee Dept. of Public Welfare*, 532 F.2d 561, 563 n. 1 (6th Cir.1976).

> FN2. Yard-Man's arguments in the trial court that it had substantially performed its obligation or that complete performance of its obligation was impossible do not constitute an assertion of the affirmative defenses of accord and satisfaction or estoppel. Yard-Man's arguments were simply that its conduct in sending the retirees cash payments constituted sufficient performance of its contractual duty and did not raise any issue regarding Yard-Man's intention that these payments were to be in settlement of a disputed claim or that the beneficiaries in accepting those payments intended to do so as a settlement of a disputed claim. Yard-Man's arguments concerned only the sufficiency of defendant's conduct and were based upon different factual and legal considerations than those relevant to the defenses of accord and satisfaction or estoppel, which involve alleged conduct on the part of the plaintiffs. Yard-Man's arguments of performance could properly be made under its general denial of a breach of the agreement. Any defense based upon the beneficiaries' alleged conduct in acceptance of the cash payments, however, would avoid the question of performance and seek to escape liability on other grounds. As matters of avoidance and affirmative defenses, therefore, accord and satisfaction and estoppel were required to be set forth in defendant's pleadings, Fed.R.Civ.P. 8(c), and cannot be raised for the first time after a judgment has been

rendered in favor of the plaintiff. *Cf. Marx & Co., Inc. v. Diners' Club, Inc.*, 550 F.2d 505, 512 (2d Cir.1977).

This appeal, therefore presents a situation in which the defendant failed to raise before the trial court two defenses that are required by Fed.R.Civ.P. 8(c) to be raised as affirmative defenses and now, after judgment***1491** has been rendered in favor of plaintiff, defendant raises them for the first time on appeal from that judgment. Clearly, in my view, under these circumstances an appellate court should not consider these waived defenses and belated arguments, thereby giving the defendant an undeserved "second bite of the apple." Inasmuch as the affirmative defenses were not raised in the trial court, it is incorrect to say, as the majority does, that they were "rejected without discussion by the District Court" or that "the District Court held that, as a matter of law, Yard-Man could not provide a substituted performance in accord and satisfaction of contractual obligations to the retirees." The District Court did not reject these defenses nor did it reach any conclusion regarding their applicability, simply because they were never presented to that Court. The District Judge having committed no error, the judgment below should be affirmed.[FN3]

FN3. I do not deem it "of paramount significance," as the majority suggests, that the words "accord and satisfaction" were never utilized before the District Court, although it does seem to me that if Yard-Man truly intended to raise that well recognized defense in the trial court it would have referred to it by its name at some point somewhere in its briefs or in its oral argument to the trial Judge. Nor do I deem the failure of Yard-Man to amend its answer to assert this affirmative defense to be in and of itself dispositive of the question whether it can now raise that defense, although, again, it seems to me that if Yard-Man truly intended to raise that defense in the trial court it would have taken the simple step of seeking leave of the District Court to amend its Answer. Instead, I base my conclusion that Yard-Man is now foreclosed from asserting this defense on the fact that the record simply does not show any attempt by Yard-Man-until it reached the appellate court-to rely upon this defense, to argue its applicability, to cite authority in support of the defense or to otherwise, in some manner, let the trial Judge know that it was being raised and presented to him for decision. I do not regard the few words in a single sentence in a brief, "a reasonable alternative form of compliance was adopted," as presenting to the trial court a defense of accord and satisfaction or substituted performance. Those few words appeared in the context of Yard-Man's argument that it was impossible to perform the contract as written and that the alternative chosen by Yard-Man constituted substantial performance of a contract, a defense considered and rejected by the District Court.

III.

Even if it is assumed that the applicability of the defenses of accord and satisfaction and estoppel is properly before the appellate court for review, then it is important, at the outset, to determine specifically what issues this case does and does not present for our consideration. In my opinion, the reasoning of the majority is based in part upon issues that are *not* involved in this case.

No dispute has ever existed in this case concerning Yard-Man's express, unambiguous promise in the collective bargaining agreement to purchase for the retirees the insurance company annuity set forth in Article XVIII of the contract. Yard-Man has never denied this obligation. Instead of fulfilling that promise, however, Yard-Man unilaterally, without any prior notice to the union or retirees and without any prior consent or agreement of the union or retirees, decided that it would *not* fulfill that promise because of the cost to Yard-Man but, instead, would terminate the Improved Plan and send lump sum cash payments, in amounts determined solely by Yard-Man, to the retirees. This attempt by Yard-Man unilaterally to modify the contract by selecting a benefit of Yard-Man's choosing for a benefit that was included in its collective bargaining agreement with the union was an obvious breach of that agreement. The issue, therefore, is more correctly stated as follows: whether an employer, having contractually bound itself in a collective bargaining agreement to provide certain vested benefits to its retirees, may unilaterally modify that contract, without notice to or consent of the union, the other contracting party, by selecting different types of benefits for the retirees and then assert, in a breach of contract action by the union, the defenses of accord and satisfaction and estoppel based upon the failure of the retirees to

reject those benefits.

***1492** While it is important to state the precise issue that is before us, it is equally important to state what is *not* before us. Contrary to the majority's statement of the issues, this case does *not* involve any "settlements" by the retirees of any disputed claims, either collectively or individually. Yard-Man never denied its contractual obligation to the retirees. This case is to be distinguished, therefore, from cases in which an employee or a retiree seeks in a § 301 action to enforce the terms of a collective bargaining contract, the employer denies any liability under the contract, and a third party is called upon to resolve a *dispute* over the interpretation or applicability of the contract.[FN4] The present case, to the contrary, involves an attempt by the employer to *change* the terms of a collective bargaining agreement regarding an entire class of beneficiaries. Instead of providing the benefits admittedly required by the contract, the employer, on its own initiative and without notice to or approval of the other contracting party, unilaterally chose to provide an entirely different kind of benefit. It is, purely and simply, a unilateral modification of the contract, constituting a breach of that contract, and it is my belief that under the circumstances of this case the common law defenses of accord and satisfaction and estoppel are not applicable as a matter of common law. Even if applicable as a matter of common law, the assertion of such defenses under the circumstances of this case would be contrary to firmly established policies of federal labor law.

> FN4. In such a case it is possible that the doctrines of accord and satisfaction and estoppel may be asserted as defenses to the individual's lawsuit. *Cf.* *Keppard v. International Harvester Co.*, 581 F.2d 764 (9th Cir.1978), cited by the majority in footnote 12 and discussed *infra* in this dissenting opinion.

IV.

The majority sets forth the basic elements of the common law defense of accord and satisfaction as follows: "there must be a disputed claim, a substituted performance agreed upon and accomplished and valuable consideration." As Judge Frank noted in *Fleming v. Post*, 146 F.2d 441 (2d Cir.1944), "[a] condition precedent to a valid accord and satisfaction is the establishment of a bona fide dispute over liability." I fail to see any "bona fide dispute over liability" in the present case. Yard-Man never denied its obligation to purchase an annuity to fund the Improved Plan; it simply tried to discharge that obligation in a manner different than that required by the contract. In other words, the dispute in this case is *not* over Yard-Man's contractual liability; the dispute is over the payments themselves, *i.e.*, did they constitute "substantial compliance" with Yard-Man's contractual duty. The payments were not in *response* to a disputed claim; they *created* a disputed claim.

Furthermore, I have difficulty in finding any evidence that "a substituted performance agreed upon and accomplished" existed under the facts of this case. Yard-Man's idea of what would be a "substituted performance" was Yard-Man's idea and no one else's. It did not discuss this possible substitution with the union; it did not discuss it with the retirees. In fact it never sought approval of anyone, other than perhaps its own attorney, to make this substitution. The majority, however, finds nothing wrong with Yard-Man's conduct in bypassing the union, citing a number of cases in which there has been a "meeting of the minds on a substituted performance when the legal representative of the suing party has not been contacted." Those cases, however, all involved actions in which parties to litigation, without the approval of their attorneys, settled their disputes. I have absolutely no quarrel with the established principle that parties have a right to settle or compromise their litigation without the knowledge or consent of their attorneys. That proposition would be applicable here if defendant Yard-Man and plaintiff union had met and reached an agreement, subject to the vested rights of the beneficiaries, to settle this litigation, even though the agreement was reached without the knowledge ***1493** or consent of their respective attorneys. However, I do not think the principle is applicable when the *parties* to this litigation never reached a settlement, compromise or agreement.

The plaintiff in this action was never consulted about Yard-Man's proposed substituted performance. Moreover, Yard-Man's notice to the retirees did not constitute a suggestion, a request or a choice. It was a statement of a fact accomplished-*not* an offer to be accepted or rejected by the retirees. Few, if any, elderly retirees are familiar with the subtle refinements of the doctrine of accord and satisfaction, and no basis exists for any finding that an accord and satisfaction defense could be available to Yard-Man under the circumstances of this case.

Nor, of course, could any estoppel defense be available to Yard-Man. In *Lovetri v. Vickers, Inc.*, 397 F.Supp. 293 (D.Conn.1975), the employer, upon closing a plant, sent termination notices that gave plaintiff retirees the option of receiving a cash payment or an annuity. The plaintiffs elected the option of receiving the cash but subsequently brought suit claiming that the employees were entitled to a more favorable choice of benefits. In rejecting any estoppel defense, the court said,

[p]laintiffs, however, cannot be estopped because they took cash "in lieu of" their pension benefits. They were not offered the cash as a liquidation of a disputed right, *Fleming v. Post*, 146 F.2d 441 (2d Cir.1944), or as a part of a plant closing agreement intended to supersede the pension plan and their rights thereunder, *cf. Craig v. Bemis Co., Inc.*, 374 F.Supp. 1251 (S.D.Ala.1974). Whatever the language used in the notice of termination of employment, plaintiffs were offered what defendant even now maintains were their rightful options under the pension plan. They did not forfeit the right to challenge the adequacy of the choice simply because they elected one or the other of the options they were given.

Id. at 297.

The employer in the present case did not give the retirees *any* option; the employer did not offer cash payments as a liquidation of a disputed right; the employer does not allege the existence of a plant closing agreement intended to supersede the collective bargaining agreement; and clearly the retirees are not estopped from demanding enforcement of their contract rights by virtue of Yard-Man's arbitrary decision to substitute something else in place of what the union bargained for. Aside from the fact that the required elements of an estoppel are nowhere present in this record insofar as the retirees are concerned, the plaintiff seeking enforcement of the contract in this action is the other signatory to the contract, the employees' union. Yard-Man does not assert-nor could it-any claim that the union has done anything that would be the basis for an estoppel defense.

V.

Even if Yard-Man had raised accord and satisfaction and estoppel as defenses in the lower court and even if some evidence existed in this record to legitimately support such defenses, I would hold-as a matter of federal substantive law-that in suits under § 301 the assertion of such state law defenses under the circumstances of this case is incompatible with federal labor policy.

A.

As the majority correctly notes in Part I of its opinion, it is well settled that the enforcement of collective bargaining agreements under § 301 is governed not by state law but by federal substantive law. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456, 77 S.Ct. 912, 917, 1 L.Ed.2d 972 (1956). The majority also recognizes that in the absence of express federal substantive law a federal court may look to state law in fashioning new federal substantive law. However, the *Lincoln Mills* Court cautioned that courts are to utilize state law only if it is compatible with the purposes of § 301 and only if it is "the rule that will *best* effectuate the federal policy." *Id.* at 457, 77 S.Ct. at 918 (emphasis added).

***1494** The majority has apparently concluded that the application of the Michigan law of accord and satisfaction to the facts of this case is to no extent inconsistent with national labor policies, that application of such law "will best effectuate the federal policy," and that such law is, therefore, properly absorbed as federal law. My opinion, however, is that the state law contract defense of accord and satisfaction *as applied in this case* is inconsistent with federal labor policy and that this is a case in which "preoccupation with the doctrines of ordinary contract law will thwart realization of Congressional policy." *United Brotherhood of Carpenters and Joiners v. Hensel Phelps Construction Co.*, 376 F.2d 731, 735 (10th Cir.1967).

When determining whether the application of state law is compatible with federal labor policy, it is important to note that since *Lincoln Mills* the Supreme Court has repeatedly emphasized that a collective bargaining agreement is not an ordinary contract and is not governed by ordinary contract principles that govern contracts between private parties. *Trans-Communications Employees Union v. Union Pacific Railroad*, 385 U.S. 157, 87 S.Ct. 369, 17 L.Ed.2d 264 (1966); *John Wiley & Sons v. Livingston*, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964). Accordingly, federal courts have not hesitated to depart from basic contract principles in dealing with collective bargaining agreements. For example, in *John Wiley & Sons*, *supra*, the Court held that under certain conditions nonparties may be

bound by a collective bargaining agreement. Similarly, in *Darnel v. East*, 573 F.2d 534 (8th Cir.1978), the Eighth Circuit Court of Appeals rejected the contract defense of lack of consideration as incompatible with federal labor policy. "In dealing with such agreements courts should not be preoccupied with principles which might apply to an ordinary contract." *Hendricks v. Airline Pilots Association International*, 696 F.2d 673, 676 (9th Cir.1983), (citing *Lodge 1327, Int'l Ass'n of Machinists v. Fraser & Johnston Co.*, 454 F.2d 88, 92 (9th Cir.1971)).

B.

In reaching its conclusion that Yard-Man's assertion of the defense of accord and satisfaction, arising from Yard-Man's deliberate bypassing of the union and direct dealing with individual retirees, is not incompatible with federal labor policies, the majority relies heavily upon *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 92 S.Ct. 383, 30 L.Ed.2d 341 (1971). That case does not, in my view, support such a conclusion.

In *Pittsburgh Plate Glass* the employer informed the union of its intention to write each retired employee, offering to pay that retiree's supplemental Medicare premium if the employee would withdraw from the negotiated health insurance plan. Despite the union's objections, the company circulated its proposal or offer to the retired employees, and 15 of the 190 retirees elected to accept it. The union filed an unfair labor practice charge against the employer, contending that the employer's conduct was a refusal to bargain collectively with the union and a unilateral mid-term modification of the contract in violation of 29 U.S.C. § § 158(a)(5) and 158(d). The single and only issue was whether the employer had committed an unfair labor practice. The Supreme Court concluded, as a matter of statutory history and construction, that the statute requiring collective bargaining "with respect to wages, hours, and other terms and conditions of employment" included neither retirement benefits nor retirees within its scope. The Court also held that a "modification" of a collective bargaining contract is a prohibited unfair labor practice only when it changes a term that is a mandatory rather than a permissive subject of bargaining. At the same time, however, the Court pointed out that the narrow issue before it did not concern the enforceability of the contractual obligations to the retirees. *Id.* at 177 n. 17,92 S.Ct. at 396 n. 17. The Court ended its decision with the important statement that,

[t]he remedy for a unilateral mid-term modification to a permissive term lies in ***1495** an action for breach of contract, ... not in an unfair-labor-practice proceeding.

Id. at 188, 92 S.Ct. at 402 (footnote omitted).

The present action is, of course, exactly the type of breach of contract action under § 301 that the Supreme Court indicated is the proper course to enforce compliance with the terms and conditions of the collective bargaining agreement. Nothing in *Pittsburgh Plate Glass* affects to the slightest degree the fundamental law that in such contract enforcement actions considerations of national labor policies override incompatible common law defenses.

Relying upon *Pittsburgh Plate Glass*, the majority concludes that 29 U.S.C. § 159(a), in particular the proviso contained therein, has no application to retirees. The proviso reads as follows:

Provided, that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, that the bargaining representative has been given opportunity to be present at such adjustment.

I agree that this statute has no direct application to the retirees in this case. By its express terms it applies only to employees and only to the presentation of grievances by those employees. But the critically important aspect of this statute is its codification of one of the most fundamental principles of national labor law, *i.e.*, that collective bargaining contracts, once executed, are to be strictly enforced according to their terms. The statute in question permits the employer, after notice to the union, to adjust an employee's grievance under the contract, but it does *not* permit the employer to make any adjustment that is inconsistent with the terms of the agreement.

Just as an employer may adjust or settle an employee's individual grievance, provided it is not inconsistent with the terms of the collective bargaining contract, so may an employer adjust or settle a retiree's individual claim that is in dispute. The employer's freedom to compromise and settle an

individual's disputed claim is not, however, a license to change the terms of the contract itself. In the present case, the issue before us does not concern "the right of individual retirees to resolve disputes over contractual benefits directly with the former employer without the union's involvement," as the majority characterizes it. The issue before us concerns the right of an employer to instigate unilaterally a change of undisputed contractual benefits owed to all its retirees, to bypass the union in dealing directly with the retirees, and then to assert common law defenses of accord and satisfaction and estoppel based upon the retirees' failure to reject the new benefits. I believe that to permit such defenses under these circumstances does violence to (1) the equal bargaining strength concept that is the foundation of collective bargaining between employer and employees, (2) the strong policy of honoring collective bargaining agreements and the union's interest in seeing that collective bargaining contracts, once executed, are enforced according to their terms, and (3) the retirees' interest in preserving vested pension benefits during the years when the old and the infirm depend heavily upon such benefits. Each of these concerns is grounded in national labor policies that greatly overshadow an employer's interest in relying upon state law defenses of accord and satisfaction or estoppel to effectuate a modification of a collective bargaining agreement.

1.

The special protection afforded collective bargaining agreements is grounded in a basic principle of labor law:
National labor policy has been built on the premise that by pooling their economic strength and acting through a labor union freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining ***1496** for improvements in wages, hours, and working conditions.

N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180, 87 S.Ct. 2001, 2006, 18 L.Ed.2d 1123 (1967). It was by this very process of the active Yard-Man employees "pooling their economic strength" that they were able to bargain not only for their own wages, hours and working conditions but also for important economic concessions for their former fellow employees who reached retirement status. Although the employer was not required to negotiate those benefits for the retirees, *Pittsburgh Plate Glass, supra,* it nevertheless chose to do so and to make its obligations a part of the collective bargaining agreement, thereby avoiding a disruption of its business by a strike. The active employees, likewise, were not required to negotiate those benefits for the retirees, but they did so and undoubtedly at some economic sacrifice on their part. The concessions given by the employer and the benefits gained by the retirees were hammered out in the bargaining process and were the product of collective activity by labor-a federally recognized and protected activity.

The concept underlying Congressional labor policy is an attempt to place the employer and its employees in relatively equal positions of bargaining strength. The union used its collective strength in obtaining from the employer the benefits for retirees as a part of the contract negotiated by the union and the employer. The employer cannot now attempt to regain from the individual retirees what it gave up in the collective bargaining process.

I would hold that an employer seeking a modification of a collective bargaining agreement whereby it could distribute benefits different from those it had previously agreed to pay would be required to seek the union's consent to such a modification. To hold otherwise and to permit the employer to completely bypass the union and go directly to individual beneficiaries to effect a change in the contract would pit the sophistication and power of an employer against the unorganized and less sophisticated individual retirees. As this Court itself observed in the *Pittsburgh Plate Glass* case,
[r]etired employees have no economic or bargaining power within this system. Their financial security derives from past economic power pragmatically and prudently exercised. Once retirement benefits have been bargained for, earned, and become payable, the employer may not recant on his contractual obligation to pay them.

Pittsburgh Plate Glass Co. v. N.L.R.B., 427 F.2d 936, 946 (6th Cir.1970), *aff'd sub nom.Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 92 S.Ct. 383, 30 L.Ed.2d 341 (1971).

In my opinion, it would be a dilution of that "past economic power pragmatically and prudently exercised" and a destruction of the balanced power that is the keystone to collective bargaining to permit the employer to "recant on his contractual obligation," do an "end run" around the union with which it bargained, and then claim accord and satisfaction as a result of its direct dealing with the

retirees.

2.

Once Yard-Man executed the collective bargaining agreement, strong federal policy required that it adhere to its commitments, and Congress specifically placed jurisdiction in the federal courts to enforce those obligations. Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a). It is Congressional policy that the administration of collective bargaining contracts be accomplished under a uniform body of federal substantive law. *Smith v. Evening News Ass'n*, 371 U.S. 195, 200, 83 S.Ct. 267, 270, 9 L.Ed.2d 246 (1962).

In the face of this fundamental policy that all collective bargaining contracts should be honored and enforced under a uniform body of federal law, I am at a loss to understand why this policy should be less important in cases concerning bargained for benefits for retirees than in cases concerning bargained for benefits for active employees. I simply cannot agree with the majority's statement that, "[w]hile the union may have bargained for and received ***1497** benefits for retirees, it does not have the same interest in the enforcement of those contractual rights on the behalf of individual retirees that it has in the terms and conditions of employment of active employees." I find it difficult to believe that a union, having negotiated benefits for retirees, undoubtedly at the expense of the active employees, has any less interest in requiring the employer to fulfill its obligations to the retirees under the agreement than it has in requiring the employer to fulfill other obligations contained in the agreement. As the Supreme Court said in *Pittsburgh Plate Glass,*

> [t]he Board stated that "the Union and current employees have a legitimate interest in assuring that negotiated retirement benefits are in fact paid and administered in accordance with the terms and intent of their contracts." 177 N.L.R.B., at 815. That interest is undeniable.

404 U.S. at 176 n. 17, 92 S.Ct. at 396 n. 17.

In a very recent case in our own Circuit involving a union official responsible for assisting retirees, beneficiaries and surviving spouses with benefits under pension and insurance plans, this Court said,

> [o]ne of the most sensitive functions performed by a union is the securing of benefits and the resolution of issues surrounding the rights to benefits. This is of particular concern to union officers since it provides one of the most visible means for the union to show that it is meeting the needs of its members.

Cehaich v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, 710 F.2d 234 at 239 (6th Cir.1983).

Not only does the union have "a legitimate interest in protecting the rights of the retirees," but, as in the present case, when a union actually undertakes representation of the retirees some authority indicates that it has a *duty* to protect their vested rights. See *Toensing v. Brown*, 528 F.2d 69, 70 (9th Cir.1975), in which the court said,

> [i]f the union does undertake to represent retirees, its duty of fair representation requires that their vested retirement rights not be disturbed.

See also *Nedd v. United Mine Workers of America*, 556 F.2d 190, 200 (3d Cir.1977) (when union elects to enforce the employer's obligations, duty of fair representation applies). An employer's circumvention of the union and direct dealing with its retirees in an attempt to modify their contractual vested interests directly interferes with the legitimate interest of the union and its duty to the retirees it represented in the collective bargaining process.[FN5] To condone this, in my opinion, would be a subversion of the concept of collective bargaining and a threat to stable management-labor relationships and the "industrial peace" that is the ultimate goal of federally protected collective activity. *Vaca v. Sipes*, 386 U.S. 171, 182, 87 S.Ct. 903, 912, 17 L.Ed.2d 842 (1967).

FN5. I do not mean to imply that a union is always under some general duty to fairly represent all of the employer's retirees. I suggest only that where, as in the present case, a union has actually undertaken to represent the retirees in a § 301 action to enforce their contractual rights against the employer, a duty of fair representation arises. Inasmuch as the conduct of the union in this regard is not an issue in this case, I fully agree with the majority that any issue of fair representation is "not squarely presented" by the facts of the present case (p. 1486 n. 15). What is presented, however, is the question of whether the employer's deliberate attempt to bypass the union-the plaintiff in this case-interferes with the union's right to prosecute the action on behalf of the retirees as well as the

union's assumed responsibilities to those retirees as their representative in this litigation. In my opinion, it does.

3.

When determining the rule of law that will best effectuate federal labor policies, the Court need not limit itself to considering only those policies that prompted passage of the Labor Management Relations Act, but should look also to other expressions of federal policy. The Employee Retirement Income Security Act of 1974, 29 U.S.C. § § 1001*et seq.* (ERISA), for example, is a strong expression of Congress' concern that retirement benefits be protected. As the Ninth Circuit Court of Appeals stated, "[o]ne of the foremost concerns of Congress***1498** in enacting the Act was to assure workers that retirement benefits would be available when needed." *Connolly v. Pension Benefit Guaranty Corp.*, 581 F.2d 729 (9th Cir.1978). Congressional findings and declaration of policy are set forth in 29 U.S.C. § 1001(a), which provides as follows:

Congress finds that ... the continued well-being and security of millions of employees and their dependents are directly affected by [employee benefit] plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations.

It is undisputed that ERISA does not cover the Improved Plan at issue in this case. However, even though the Act does not cover this plan, the expressed policy considerations that prompted passage of the Act have application to non-ERISA retirement plans and should be considered in determining the rule that will best effectuate federal policy. I believe that the majority's holding that under the circumstances present in this case an employer can assert the affirmative defense of accord and satisfaction is inconsistent with the Congressional concern for the protection of retirement benefits.

C.

I would hold that when an employer initiates a modification of its retirees' vested benefits without the approval of the union that negotiated those benefits and without the *express* approval of the retirees themselves, the employer, as a matter of federal substantive law, cannot later raise accord and satisfaction or estoppel as defenses in an action to enforce the employer's obligations under the collective bargaining agreement. To hold otherwise is contrary, in my opinion, to the Supreme Court's charge that in § 301 actions courts are to utilize state law only if it is "the rule that will best effectuate the federal policy." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457, 77 S.Ct. 912, 918, 1 L.Ed.2d 972 (1972).

Such a holding in this case would not preclude the adoption into federal substantive law of the principle of accord and satisfaction in an appropriate § 301 action. For example, the result reached in *Keppard v. International Harvester Co.*, 581 F.2d 764 (9th Cir.1978) (a case cited by the majority in support of its position), in which the Ninth Circuit Court of Appeals upheld an employer's reliance on the California law of accord and satisfaction, would not necessarily be different under the rule of law that I suggest today. In that case the employee asked his union to press a claim for back wages. The union and the employer eventually settled the claim and the employer tendered to the employee a check for the agreed upon amount. The employee, knowing that the company considered the check a full settlement of his back pay claim, accepted and cashed the check. The district court held, and the court of appeals agreed, that the employee's action completed an accord and satisfaction under California law. *International Harvester*, therefore, involved an individual employee dispute under a collective bargaining agreement in which the employee was represented by the union, a settlement of that dispute by the employer and the union with the recommendation of the union that the employee accept the settlement check, and an awareness by the employee that the check he received was in settlement of the dispute. This type of case is a far cry from one in which the employer decides to change the benefits due an entire class of beneficiaries under the collective bargaining agreement, intentionally bypasses the union representing those beneficiaries, arbitrarily sends the beneficiaries something other than required by its contract with the union, and then relies upon their silence in asserting common law defenses of accord and satisfaction or estoppel.

VI.

While retirees, as a matter of statutory language and legislative history, do not have the protection of the

unfair labor practice statutes against an employer desiring to change their benefits, they do have the protection of federal substantive law as fashioned by the federal courts in a manner consistent with national labor policies. As ***1499** the Supreme Court recently reaffirmed, quoting former Justice Goldberg in *Humphrey v. Moore*, 375 U.S. 335, 358, 84 S.Ct. 363, 376, 11 L.Ed.2d 370 (1964),
[i]t is of the utmost importance that the law reflect the realities of industrial life and the nature of the collective bargaining process. We should not assume that doctrines evolved in other contexts will be equally well-adapted to the collective bargaining process.

Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151at ----, 103 S.Ct. 2281 at 2294, 76 L.Ed.2d 476 (1983).

Under the circumstances of this case, doctrines of accord and satisfaction and estoppel, developed in other contexts, should not enable an employer to bypass the union with which it dealt in the collective bargaining process and to modify vested pension benefits in reliance upon silent acquiescence of retirees who were presented not with an option but with an accomplished fact.

For the reasons set forth above, I respectfully dissent from Part II of the majority opinion.

C.A.Mich.,1983.
International Union, United Auto., Aerospace, and Agr. Implement Workers of America (UAW) v. Yard-Man, Inc.
716 F.2d 1476, 114 L.R.R.M. (BNA) 2489, 98 Lab.Cas. P 10,445, 4 Employee Benefits Cas. 2108

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Anderson v. Alpha Portland Industries, Inc.
C.A.8 (Mo.),1988.

United States Court of Appeals,Eighth Circuit.
Robert ANDERSON, Jr., et al., Appellants,
v.
ALPHA PORTLAND INDUSTRIES, INC., formerly known as Alpha Portland Cement Company, Insurance and Health Plan for Hourly Employees, The Equitable Life Assurance Society of the United States, Appellees,
v.
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, CEMENT, LIME, GYPSUM & ALLIED WORKERS DIVISION OF INTERNATIONAL BOILERMAKERS, Charles F. Fuch, Charles C. Huntbach, (Third Party Defendants Below),
United States of America, (Intervenor Below).
No. 86-2483.

Submitted Oct. 15, 1987.
Decided Jan. 13, 1988.
Rehearings and Rehearings En Banc Denied March 14, 1988.

Class of retired employees brought action against employer and insurer to recover life and health benefits under collective bargaining agreements in effect when they retired. The United States District Court for the Eastern District of Missouri, 558 F.Supp. 913, dismissed action, and retirees appealed. The Court of Appeals, 727 F.2d 177 and 752 F.2d 1293 reversed and remanded. On remand, the United States District Court for the Eastern District of Missouri, William L. Hungate, J., 647 F.Supp. 1109, entered judgment for defendants, and retirees appealed. The Court of Appeals, Floyd R. Gibson, Senior Circuit Judge, held that evidence established that retiree health and life insurance benefits were not vested for lifetime of retiree, but were intended to last only for duration of collective bargaining agreement.

Affirmed.
West Headnotes
[1] Labor and Employment 231H 696(1)

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(K) Actions
231HVII(K)5 Actions to Recover Benefits
231Hk692 Evidence
231Hk696 Weight and Sufficiency
231Hk696(1) k. In General. Most Cited Cases
(Formerly 296k141)
Evidence established that retiree health and life insurance benefits were not vested for lifetime of retirees, but were intended to last only for duration of last collective bargaining agreement; successive collective bargaining agreements stated that benefits previously provided would be continued, provided that terms were subject to amendment, modification, or supplementation at later bargaining sessions, had explicit clause limiting duration, and contained coordination of benefits clause that was inconsistent with theory of vesting. Employee Retirement Income Security Act of 1974, § § 2 et seq., 2(b), 3(1), (2)(A), 201, 203, 29 U.S.C.A. § § 1001 et seq., 1001(b), 1002(1), (2)(A), 1051, 1053.

[2] Labor and Employment 231H 549(1)

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(G) Eligibility, Participation, and Coverage
231Hk546 Vesting
231Hk549 Welfare Plans
231Hk549(1) k. In General. Most Cited Cases
(Formerly 296k62, 232Ak62 Labor Relations)
Welfare plan exemption from Employee Retirement Income Security Act's vesting requirements does not prohibit employer from extending benefits beyond expiration of collective bargaining agreements; rather, exemption allows parties to determine duration of welfare benefits. Employee Retirement Income Security Act of 1974, § § 2(b), 3(1), (2)(A), 201, 203, 29 U.S.C.A. § § 1001(b), 1002(1), (2)(A), 1051, 1053.

[3] Labor and Employment 231H 694

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(K) Actions
231HVII(K)5 Actions to Recover Benefits
231Hk692 Evidence
231Hk694 k. Presumptions and

Burden of Proof. Most Cited Cases
(Formerly 296k142)
Showing that retirees were given welfare benefits did not place burden upon employer to show that benefits were for limited duration. Employee Retirement Income Security Act of 1974, § § 2(b), 3(1), (2)(A), 201, 203, 29 U.S.C.A. § § 1001(b), 1002(1), (2)(A), 1051, 1053.

[4] Labor and Employment 231H 483(2)

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(C) Fiduciaries and Trustees
231Hk479 Notice and Disclosure Requirements
231Hk483 Summary Plan Description
231Hk483(2) k. Inconsistency with Plan Document. Most Cited Cases
(Formerly 296k26, 232Ak26 Labor Relations)
Summary plan description giving retirees lifetime health and life insurance benefits was faulty, requiring retirees to show significant reliance on or possible prejudice flowing from summary in order to recover lifetime benefits; summary was inconsistent with insurance health agreements contained in collective bargaining agreement. Employee Retirement Income Security Act of 1974, § 102, 29 U.S.C.A. § 1022.

[5] Jury 230 28(5)

230 Jury
230II Right to Trial by Jury
230k27 Waiver of Right
230k28 In Civil Cases
230k28(5) k. Form and Sufficiency of Waiver. Most Cited Cases
Retirees waived right to jury trial on issue of whether employer was liable for health and life insurance benefits for lifetime of retirees, by agreeing to bifurcated trial, with court determining liability and jury assessing damages. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

[6] Federal Civil Procedure 170A 840

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(E) Amendments
170Ak839 Complaint
170Ak840 k. Time for Amendment. Most Cited Cases
Denying motion to amend complaint was not abuse of discretion, where motion was filed more than three years after suit was initially filed, ten days before then effective discovery cut off date, and two months prior to projected trial date.

[7] Federal Courts 170B 712

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(H) Briefs
170Bk712 k. Briefs in General. Most Cited Cases
Use of 189 single-spaced footnotes in 50 page brief violated spirit, if not letter of rule limiting length of briefs filed to 50 pages. F.R.A.P.Rules 28(g), 32(a), 28 U.S.C.A.; U.S.Ct. of App. 8th Cir.Rule 8(e), 28 U.S.C.A.

[8] Federal Courts 170B 712

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(H) Briefs
170Bk712 k. Briefs in General. Most Cited Cases
For purposes of rule limiting length of briefs filed in Eighth Circuit to 50 pages, in all cases where additional space is needed, permission of court should be requested. F.R.A.P.Rules 28(g), 32(a), 28 U.S.C.A.; U.S.Ct. of App. 8th Cir.Rule 8(e), 28 U.S.C.A.

***1513** Sheldon Weinhaus, St. Louis, Mo., for appellants.
Michael Biggers, New York City, for appellees.

Before McMILLIAN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and BEAM FN*, Circuit Judge.

FN* The Honorable C. Arlen Beam, United States Chief District Judge for the District of Nebraska at the time this case was submitted, has since been confirmed as a Circuit Judge of this court.

FLOYD R. GIBSON, Senior Circuit Judge.
Plaintiffs appeal from the judgment of the district court FN1 in favor of Alpha Portland Industries, Inc. (Alpha) and The Equitable Life Assurance Society of the United States (Equitable) in this case involving the Employee Retirement Income Security Act

(ERISA) and the Labor Management Relations Act (LMRA). Plaintiffs are a class of former, now retired, hourly employees of Alpha's cement division. This suit developed from Alpha's decision to terminate all retiree health and life insurance benefits on May 1, 1982 when the existing collective bargaining agreement (CBA) expired. Plaintiffs alleged that the welfare benefits were vested lifetime benefits which could not be terminated. After a four day bench trial the district court found that the benefits were terminable because the parties to the CBA intended that the benefits only last for the duration of the CBA. 647 F.Supp. 1109 (E.D.Mo.1986). For the reasons stated below we affirm.

FN1. The Honorable William C. Hungate, United States District Judge for the Eastern District of Missouri.

I. BACKGROUND

In 1946 Alpha unilaterally created a group insurance plan for active hourly employees. In 1948 it extended limited coverage to future retirees. From 1946 through 1955 there were no formal plan documents but there were booklets describing the benefits. The 1948 booklet stated that the plan was to take effect on November 1, 1948 and that Alpha hoped "to continue the Plan indefinitely but reserves the right to change, modify, or discontinue it if future conditions make such action necessary or if reduction of Company earnings make it impossible to continue." In 1950 and 1952 the plan was revised, but each new plan contained the continuation statement found in the 1948 version.

Beginning in 1955, the terms of the plan became subject to bargaining between Alpha and the International Cement, Lime, Gypsum, and Allied Workers Union. The 1955 CBA stated that the "Group Insurance Program currently in effect shall continue in effect for the period" of the agreement. The CBA also stated that it was subject to renewal each year unless either ***1514** party gave notice sixty days prior to its expiration date. The 1956, 1957, and 1958 CBAs each provided that benefits were limited to the duration of the agreement. Further, the 1956 plan booklet stated that Alpha reserved "the right to change, modify, or discontinue" the plan.

The 1959 through 1963 CBAs contained provisions stating that "the Group Insurance Plan currently in effect shall be amended" as provided. The amendments did not affect retirement benefits and contained no language relating to their duration. However, the duration of the entire agreement was limited to one year. In 1959 a booklet was issued describing the benefits of the major medical insurance plan. The booklet stated that the group insurance contract between Alpha and The Equitable Life Assurance Society of the United States "may be altered or discontinued." The CBAs covering the period from 1963 to mid-1965 were substantially similar to those covering the previous four year period.

During negotiations over the 1965 CBA, union representatives submitted a proposal that retiree benefits be paid to the spouse and dependents of the retiree after the death of the retiree, but Alpha rejected it. Thereafter an agreement was entered into which stated that the plan currently in effect would remain in effect until the effective date of the amendments. One of the amendments stated: "Future retirees' life insurance, increased from $2,000 to $2,500. For future retirees, Company will pay full costs of all group insurance for them and their dependents *until death of retiree.*" (Emphasis added). Union negotiators believed that this clause guaranteed insurance benefits for the life of the retiree, but Alpha's negotiators understood the phrase to mean that benefits would not be paid to dependents after the retiree's death.

Beginning in 1967 the CBA existed in the form of a Basic Agreement and was supplemented by Local Agreements. The 1967 Basic Agreement became effective May 1, 1967 and continued until May 1, 1969. On the expiration date the agreement would renew itself for one year unless sixty days written notice was given by either party. The 1967 agreement provided that the plan currently in effect would remain in effect until May 1, 1968, at which time the attached amendments would take effect. The 1969 and 1971 agreements were substantially similar to the 1967 agreement.

Beginning in 1973 the CBAs contained, as an appendix, a separate Insurance and Health Agreement (I & H Agreement) that contained the terms of the plan. Each I & H Agreement was prepared by the Personnel Manager of Alpha's cement division, Robert J. Bonstein, and sent to the Union for approval. The 1973, 1975, and 1978 CBAs each provided that the plan in effect at the expiration date of the previous agreement was to be amended as provided in the I & H Agreement. The 1973 I & H Agreement expressly stated:

This Insurance Agreement shall become effective May 1, 1973, and shall continue in effect until May 1, 1975, during which period neither the Company nor the Union may demand any change in its provisions. After May 1, 1975, the Insurance Agreement shall be automatically renewed for successive one-year periods unless either party to the Agreement has given written notice to the other at least sixty (60) days prior to May 1, 1975 (or any subsequent anniversary of the Effective Date of the Collective Bargaining Agreement) of its desire to amend or modify this Agreement.

Both the 1975 and 1978 I & H Agreements contained duration clauses identical to the 1973 clause, except that the dates were different-the 1975 agreement was effective until May 1, 1978 and the 1978 agreement was effective until May 1, 1981.

Article I of the 1973, 1975, and 1978 I & H Agreements stated that retiree insurance benefits could be altered:
Insurance coverages under the Prior Programs not hereinafter provided shall be continued to the extent applicable to Retirees and their Dependents in accordance with the provisions of the Prior Programs as if fully set out herein and as the same may now or hereinafter be ***1515** amended, modified or supplemented in collective bargaining between the parties.

Also, each agreement provided for coordination of benefits whereby the benefits Alpha paid were reduced by amounts retirees received from other sources such as Medicare.

In 1978 hourly employees were provided a summary plan description (SPD) for the plan. The SPD provided, in part, that "[i]f you retire with 10 or more years of service on or after May 1, 1976, you will continue to receive the Hospital/Surgical and Major Medical portion of plan coverage. *Coverage will continue for the remainder of your life.*" (Emphasis added). The SPD also provided that retirees with 10 or more years service "will continue to receive $4,000 in Company-sponsored life insurance."

On April 31, 1981 the 1978 CBA with the attached I & H Agreement was due to expire, but the parties agreed to extend the existing terms for an additional year. During this period Alpha was experiencing increasing financial difficulties. Alpha's cement division had an operating loss of almost $17 million in 1980 and 1981. Total losses, including plant closings, exceeded $60 million. In 1981 Alpha closed four of its cement plants and by the end of 1982 all of its cement plants were closed.

On March 29, 1982 Alpha sent letters to all of its retired hourly employees stating that it was cancelling their insurance coverage as of May 1, 1982, following the expiration of the current CBA and I & H Agreement. On May 1 Alpha ceased providing insurance benefits for retirees.

Plaintiffs brought suit in the United States District Court for the Eastern District of Missouri alleging violations of ERISA and the LMRA. The district court dismissed the case, holding that plaintiff's claims are subject to arbitration, 558 F.Supp. 913 (E.D.Mo.1982). A panel of this court reversed, 727 F.2d 177 (8th Cir.1984), and upon rehearing en banc the district court again was reversed and the case remanded for trial. *Anderson v. Alpha Portland Industries, Inc.*, 752 F.2d 1293 (8th Cir.)(*Anderson I*),*cert. denied*,471 U.S. 1102, 105 S.Ct. 2329, 85 L.Ed.2d 846 (1985).

During the four day bench trial, the district court heard conflicting testimony about whether retiree benefits were vested for the lifetime of the retiree. Aside from the language in the plan documents, summarized above, the district court also heard other evidence on the issue of intent. For example, union members, including those involved in negotiating the 1975 and 1978 agreements, testified that they had been told by a now deceased Alpha representative that their retirement benefits lasted for life. Plaintiffs introduced into evidence letters drafted by Bonstein and sent to new retirees which stated that "[y]our life insurance will be continued in the amount of ----. * * * Alpha group hospital and surgical insurances for you and your eligible dependents will be continued. * * * Major medical expense benefits will be provided up to a lifetime maximum of ----."

Evidence was produced by Alpha showing that after 1975, the effective date of ERISA, if retiree benefits were to extend beyond the duration of the CBA, it was customary for the plan documents to explicitly state this. Also, International Union President Thomas Miechur (by deposition) and Bonstein testified that under the language they prepared and agreed upon, retiree welfare benefits were not guaranteed beyond the expiration of the CBA.

Miechur's position was corroborated by letters he sent to retirees following Alpha's decision to terminate benefits:

The termination of the retirees' insurance coverage by the company is a traumatic experience for all retirees. I fully understand the impact the termination of insurance benefits has on retirees, and I wish there was something that could be done to provide continued coverage, but under the circumstances there is nothing that the Union can do. There is nothing in the collective bargaining agreement itself, or in the Insurance and Health Agreement which guarantees retirees' benefits for life, nor is there any language in these agreements that talks ***1516** about vesting of these benefits, and these benefits will expire of their own force on May 1, 1982.
Pensions, unlike health and welfare benefits, are paid from an actuarially predetermined fund and are guaranteed for life. Health and welfare benefits are negotiated periodically and are paid for by the employer contributions and last only for the life of a collective bargaining agreement.

The district court weighed this and other evidence and concluded that retiree welfare benefits were not vested for life and entered judgment in favor of Alpha. The court further held that Equitable was not a necessary party to the lawsuit and entered judgment in its favor.

II. DISCUSSION

On appeal plaintiffs raise numerous issues which fall into four general categories. They argue that: 1) the district court erroneously concluded that retiree health and life insurance benefits were not vested for the lifetime of the retiree; 2) the district court erroneously deprived them of a jury trial; 3) the district court committed several errors when conducting the proceedings; and 4) the district court erroneously concluded that Equitable is not a necessary party.

A. Duration of Benefits

[1] In 1974 the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* (1982), was enacted to "protect interstate commerce and the interests of participants in employee benefit plans" by establishing disclosure and reporting requirements, standards of conduct for plan fiduciaries, and access to federal courts. 29 U.S.C. § 1001(b). "Employee benefit plans" are divided into two distinct categories: welfare plans and pension plans. In general, welfare plans are maintained to provide "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment * * * * *"29 U.S.C. § 1002(1). Pension plans, however, "(i) provide[ ] retirement income to employees, or (ii) result [ ] in a deferral of income by employees for periods extending to the termination of covered employment or beyond * * * * *"29 U.S.C. § 1002(2)(A).

Aside from the difference in their purposes, welfare and pension plans also differ in another critical way. While pension plans are subject to ERISA's stringent vesting requirements, 29 U.S.C. § 1053 ("[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age"), welfare plans are specifically exempt from such requirements. 29 U.S.C. § 1051. *See generally* *Anderson v. John Morrell & Co.*, 830 F.2d 872, 876 (8th Cir.1987).

[2] Since welfare benefits do not automatically vest as a matter of law, *see, e.g.*, *Molnar v. Wibbelt*, 789 F.2d 244, 250 (3rd Cir.1986), we must determine whether "the parties intended [that] retirees' benefits would be vested and not tied to the agreement which created them." *UFCW Local 105-A v. Dubuque Packing Co.*, 756 F.2d 66, 70 (8th Cir.1985). The exemption from ERISA's vesting requirements does not prohibit an employer from extending benefits beyond the expiration of the collective bargaining agreement. Rather, the exemption allows the parties to determine the duration of the welfare benefits. Thus, the issue is "simply one of contract interpretation." *Id.*

[3] Plaintiffs argue that once they showed that retirees were given welfare benefits, Alpha had the burden of showing that the benefits were for a limited duration. Plaintiffs principally rely on the decision of the Sixth Circuit in *International Union, United Auto., Aero., and Agric. Implement Workers of America v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir.1983), *cert. denied*,465 U.S. 1007, 104 S.Ct. 1002, 79 L.Ed.2d 234 (1984). In *Yard-Man* the court stated that:
retiree [welfare] 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* ****1517*** *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.* This is not to say that retiree insurance benefits are necessarily

interminable by their nature. Nor does any federal labor policy identified to this Court presumptively favor the finding of interminable rights to retiree insurance benefits when the collective bargaining agreement is silent. Rather, as part of the context from which the collective bargaining agreement arose, the nature of such benefits simply provides another inference of intent. Standing alone, this factor would be insufficient to find an intent to create interminable benefits. In the present case, however, this contextual factor buttresses the already sufficient evidence of such intent in the language of this agreement itself.

Id. at 1482 (emphasis added).

We disagree with the plaintiffs for several reasons. First, assuming we recognize an inference in favor of vesting, the burden of proof still remains on the plaintiffs. Shortly after *Yard-Man* was decided the Sixth Circuit stated that "there is no legal presumption based on the status of retired employees." *International Union, United Auto., Aero. and Agric. Implement Workers of America v. Cadillac Malleable Iron Co.*, 728 F.2d 807, 808 (6th Cir.1984). Inferences do not shift the burden of proof.

Second, we disagree with *Yard-Man* to the extent that it recognizes an inference of an intent to vest. Congress explicitly exempted welfare benefits from ERISA's vesting requirements. It, therefore, seems illogical to infer an intent to vest welfare benefits in every situation where an employee is eligible to receive them on the day he retires. The court in *Yard-Man* recognized that no federal labor policy presumptively favors vesting. Because Congress has taken a neutral position on this issue "traditional rules for contractual interpretation are applied as long as their application is consistent with federal labor policies." *Yard-Man*, 716 F.2d at 1479. We believe that it is not at all inconsistent with labor policy to require plaintiffs to prove their case without the aid of gratuitous inferences. Further, our holding today is consistent with previous opinions of this court. For example, in *Morrell*, this court stated that:
The gist of [plaintiff's] claim is that the employer's oral statement to individual employees of its "policy" became a contract to maintain and improve the plan when the employees thereafter performed service. Yet if that be so, it would equally follow that an employer's announcement of any plan to pay welfare benefits would become a contract to maintain the plan indefinitely upon the performance of service by employees. Congress, however, did not intend that result. Doubtless it is consistent with the intent of Congress for an employer to undertake such an obligation if it elects to do so. We conclude, however, that to accomplish that result, there must be a specific, if not written, expression of the employer's intent to be bound.

830 F.2d at 877. *See also Dubuque Packing*, 756 F.2d at 70 (burden is on plaintiff to prove that benefits are vested).

Proper allocation of the burden of proof in this case leads to the conclusion that the district court correctly held that retiree welfare benefits were intended to last only for the duration of the CBA.

It is axiomatic that when interpreting a contract, or in this case a CBA, we must begin by examining the language of the documents which form the basis of the agreement. *See Yard-Man* 716 F.2d at 1479. "[I]f the contract is deemed ambiguous, then the court may weigh extrinsic circumstances to aid in its construction." *Dubuque Packing*, 756 F.2d at 69. Because the district court considered extrinsic evidence, we will assume the court found the language in the documents ambiguous.

Plaintiffs' argument that retiree welfare benefits were vested falls into two categories: pre-1973 agreements and post-1973 agreements.

1. Pre-1973

Prior to 1973, retiree welfare benefits were provided for by the CBA although the ***1518** actual terms were contained in group insurance policies. Plaintiffs focus on the language in the 1965 CBA which stated that "[f]or future retirees, Company will pay full costs of all group insurance for them and their dependents until death of retiree." Viewed in a vacuum this language is highly probative of intent to vest benefits, but when viewed in the context of the events surrounding its adoption it is less significant. At trial Alpha produced evidence showing that the phrase reflected Alpha's rejection of a union proposal that retirees' dependents' benefits would be continued beyond the death of the retiree.[FN2] Further evidence showed that during the term of the 1965 CBA five Alpha local unions agreed to coordination of benefits with Medicare. The agreement applied to persons already retired and thus was inconsistent with plaintiffs' theories of vesting.

FN2. This construction is not inconsistent with *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609 (6th Cir.1985), *cert. denied*, 475 U.S. 1017, 106 S.Ct. 1202, 89 L.Ed.2d 315 (1986), wherein a district court's interpretation of similar language was overturned on appeal. In *Policy* the agreement provided for the continuation of benefits "for the pensioner and his spouse, if any, during the life of the pensioner at no cost to the pensioner." *Id.* at 616. The district court interpreted the phrase to cut off dependent coverage at the pensioner's death rather than guarantee lifetime benefits to the pensioner. The Sixth Circuit disagreed because the district court's interpretation would have lead to the anomalous result that the spouse would receive benefits at no cost while the pensioner would have to pay. *Id.* The result reached in the present case, however, presents no such problems.

Aside from the phrase "until death" in the 1965 CBA, no credible evidence of intent to vest exists in the pre-1973 period. From 1946 through 1955 Alpha "reserve[d] the right to change, modify, or discontinue [the group insurance plan] if future conditions make such action necessary or if reduction of Company earnings make it impossible to continue." The 1956, 1957, and 1958 CBAs limited benefits to the duration of the agreement and the 1956 Plan Booklet stated that Alpha reserved the right to discontinue the plan. The 1959 through 1963 CBAs each had a one year duration and a booklet issued in 1959 stated that the group insurance plan "may be altered or discontinued." The 1967, 1969, and 1971 Basic Agreements also were of limited duration. In short, nothing prior to the adoption of the I & H Agreements proves that vesting was intended.[FN3]

FN3. Plaintiffs note that during two strikes Alpha continued to pay retiree welfare benefits. While payment of benefits during a strike may show that benefits were thought to be vested, *Bower v. Bunker Hill, Co.*, 725 F.2d 1221, 1225 (9th Cir.1984), the facts in this case do not support such a conclusion. During the 1957 strike, benefits were continued for retirees as well as for all striking employees. Similarly, in 1965 some of the striking employees were also provided benefits during the strike. The fact that Alpha treated retirees and striking employees equally negates any inference of intent to vest retiree benefits.

2. Post-1973

Beginning in 1973 retiree welfare benefits were embodied in I & H Agreements which were appended to the CBA. The relevant portions of these agreements are set forth in the factual statement. The district court held that the agreements reflect an intent to limit benefits to the duration of the then effective agreement because each agreement: 1) states that benefits previously provided would be continued; 2) provides that its terms are subject to amendment, modification, or supplementation at later bargaining sessions; 3) has an explicit duration clause limiting its duration; and 4) contains a coordination of benefits clause which is inconsistent with a theory of vesting. 647 F.Supp. at 1126-27. We agree with each of the district court's conclusions.

First, we agree that *Dubuque Packing* is distinguishable. In *Dubuque Packing* the 1973 and 1976 agreements reaffirmed and continued the retiree benefits established in the previous agreements. However, although the 1979 agreement did not contain reaffirmation and continuation language, the company continued paying the benefits of pre-1979 retirees. This court found that the continuation of benefits was evidence that the benefits were vested. In the present case, however, each I & H Agreement provided for continuation of benefits ***1519** from the previous plan. Were there an intent to vest, continuation language would not be necessary. *See International Union (UAW) v. Roblin Industries*, 561 F.Supp. 288, 298 (W.D.Mich.1983).[FN4]

FN4. Plaintiffs erroneously cite *Upholsterers' Int'l Union v. American Pad & Textile Co.*, 372 F.2d 427 (6th Cir.1967), for the proposition that language providing for continuation of prior programs indicates an intent to vest. The case merely states that the word "continue" as used therein was ambiguous and needed to be supplemented by extrinsic evidence.

Second, the provision of the I & H Agreement allowing amendment, modification, or supplementation is inconsistent with plaintiffs' argument that benefits were vested for life. *See Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 330 (3rd Cir.1984).

Third, the specific durational clauses in the I & H Agreements show an intent to limit benefits to the duration of the agreement. It would render the durational clauses nugatory to hold that benefits continue for life even though the agreement which provides the benefits expires on a certain date. Plaintiffs argue that benefits are non-terminable because the word "terminate" does not appear. However, they cite nothing to support this argument.[FN5] The question before us is not whether any specific words appear, but whether the parties intended benefits to vest. Intent, or lack thereof, may be proved in more ways than one, and the absence of the word "terminate", while relevant to our inquiry, certainly is not dispositive. *See Struble*, 732 F.2d at 330-31 (benefits expired at end of agreement even though the word "terminate" did not appear in agreement).

> FN5. Plaintiffs contend that this court in *Dubuque Packing* demanded that the phrase "terminate retirement benefits" explicitly appear in an agreement before the benefits will be construed as terminable. However, nowhere in the opinion does the phrase "terminate retirement benefits" appear. The closest language-"[t]here is no evidence that the parties agreed to *terminate retirees' benefits* "-falls far short of establishing the bright line test plaintiffs would have us apply in this case. *Dubuque Packing*, 756 F.2d at 69 (emphasis added).

Fourth, coordination of benefits is inconsistent with vesting. When interpreting a contract we must not interpret one provision inconsistently with another. *Yard-Man*, 716 F.2d at 1479-80. The coordination of benefits provision in the I & H Agreements reduces benefits to be paid to all retirees. We agree with the district court that "the Plan cannot be interpreted to provide vested rights for prior retirees in one provision and to take such rights away in another." 647 F.Supp. at 1127.

Plaintiffs also rely on the statement in the 1978 SPD that "[c]overage will continue for the remainder of your life." The district court held that based on the clarity of later I & H Agreements and the conduct of the parties, very little weight would be given to the statement. 647 F.Supp. at 1127. Because the district court's interpretation was based largely on the credibility of the witnesses presented by both parties, and because plaintiffs have not convinced us that the district court erred, we believe that the court correctly held that the 1978 SPD statement is not controlling in light of substantial contra evidence showing no intent to vest benefits.

[4] Plaintiffs further argue that they are entitled to recover under the 1978 SPD alone, independent of the CBAs and I & H Agreements. They base their claim on 29 U.S.C. § 1022 which provides, in pertinent part:

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan.

(b) The plan description and summary plan description shall contain the following information: * * * circumstances which may result in disqualification, ineligibility,***1520** or denial or loss of benefits * * * *

Plaintiffs argue that under the 1978 SPD they are entitled to lifetime benefits because 1) the SPD failed to specify the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits" and 2) the SPD guarantees benefits for life.

This court has stated that "[t]o secure relief on the basis of a faulty summary plan description, the claimant must show some significant reliance on, or possible prejudice flowing from the summary." *Lee v. Union Electric Co.*, 789 F.2d 1303, 1308 (8th Cir.1986), *cert. denied*,479 U.S. 962, 107 S.Ct. 460, 93 L.Ed.2d 406 (1986). *See also Govoni v. Bricklayers, Masons & Plasterers*, 732 F.2d 250, 252 (1st Cir.1984). Plaintiffs argue that these cases are inapposite because the SPD in the present case is not "faulty." We disagree, because to the extent plaintiffs argue that the SPD provides lifetime benefits, and therefore is inconsistent with the I & H Agreements, it necessarily must be faulty. ERISA states that the SPD must "apprise [the] participants and beneficiaries of their rights and obligations under the plan * * * * " If, as plaintiffs argue, the SPD fails to do this, it is faulty.

Plaintiffs further argue that they need not show

detrimental reliance to recover under the SPD, citing *Monson v. Century Mfg. Co.*, 739 F.2d 1293 (8th Cir.1984). In *Monson*, this court stated that "[l]ogically, evidence of detrimental reliance must show that plaintiffs took action, resulting in some detriment, that they would not [otherwise] have taken." *Id.* at 1302. The court further stated that reliance could "be inferred from the defendants' countless representations that the profit sharing program provided a strong incentive for the employees to do extra work and to stay with the company." *Id.* Plaintiffs argue that reliance may also be inferred in the present case. We have reviewed the arguments and briefs of the parties and the record before us and conclude that reliance should not be inferred in this case. Plaintiffs direct us to nothing from which reliance may be inferred. We believe that *Monson* is not controlling in the present case because the facts in *Monson* readily supported an inference of reliance. The plaintiffs in *Monson* were repeatedly told that fifty per cent of the company's profits were to be contributed to the employee profit sharing program and that they could directly increase the contributions by working harder. In the present case, however absent some evidence of reliance, it would be improper to infer that any of the plaintiffs relied to their detriment on the SPD.

Finally, contrary to plaintiffs' assertions this case does not involve breach of fiduciary duties [FN6], unauthorized amendments, or unilateral termination of a benefit plan. It merely involves a decision by Alpha not to renew retiree welfare benefits which by their own terms have expired. The benefits have neither been terminated nor amended; they simply have expired.

FN6. The district court held that plaintiffs did not plead breach of fiduciary duty, 647 F.2d at 1128, and we agree. Further, it would be ludicrous to hold that Alpha breached its fiduciary duties when it discontinued benefits which were no longer required under the applicable agreements. *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir.1986) ("ERISA simply does not prohibit a company from eliminating previously offered benefits that are neither vested nor accrued"), *cert. denied*, 481 U.S. 1016, 107 S.Ct. 1893, 95 L.Ed.2d 500 (1987).

B. Jury Trial

[5] Plaintiffs next argue that pursuant to § 301 of the National Labor Relations Act, 29 U.S.C. § 185, they were entitled to trial before a jury and that under ERISA they are entitled to a jury trial on the separate breach of contract issue. Alpha contends that plaintiffs have no right to a jury trial because their claim is equitable in nature. We need not resolve this dispute because we believe plaintiffs waived any right to a jury trial on the issue of liability. Only if the court found for plaintiffs on the issue of liability would a jury have been required to assess damages. Plaintiffs agreed to a bifurcated trial and that is what they received. Consider the following conversation between the court and plaintiffs' counsel:

THE COURT: Well, the way the court would see it, *the court tries the case. If* ****1521** there should be no liability, we all go home.* If there is liability, then the court would fashion a remedy as to the part that is equitable and the part that is damages. If he's right in his position, that it's 301 related and it is damages and that there are cases would require-that and that only, on that portion of it, would go to the jury.

PLAINTIFFS' COUNSEL: *That's exactly our position.*

(Emphasis added).

C. Other Errors

Plaintiffs also argue that the trial judge committed numerous errors when conducting the proceedings below. Only a few of the alleged errors merit discussion and of those, none warrant the relief sought by plaintiffs.

[6] For example, plaintiffs argue that the court erred in denying their July 3, 1985 motion to amend their complaint. The decision whether to allow amendment of a complaint is left to the sound discretion of the district court and will be reversed only if that discretion is abused. *Niagara of Wisconsin Paper Corp. v. Paper Industry*, 800 F.2d 742, 749 (8th Cir.1986). In the present case plaintiffs' motion was filed more than three years after suit was initially filed, ten days before the then effective discovery cut off date, and two months prior to the projected trial date. Under these circumstances, the district court did not abuse its discretion.

Plaintiffs also argue that the district court set an "oppressive thirty-day schedule" for completion of discovery upon remand. Plaintiffs fail to note, however, that they never sought relief from the

schedule set by the court and that when Alpha filed a motion for an extension of time they countered with a motion in opposition.

Further, plaintiffs argue that the district court erred in failing to recuse himself. We have reviewed the allegations made by the plaintiffs and have found nothing indicating that the district court was less than impartial.[FN7]

> FN7. Plaintiffs other allegations of error have been considered and have been found to be without merit. Also, our disposition of this case makes it unnecessary for us to decide whether the district court correctly dismissed the Equitable Life Assurance Society of the United States.

[7][8] Finally, we note that the fifty page limit on the length of briefs filed in this court must be followed. Plaintiffs' counsel's use of 189 single-spaced footnotes in his fifty page brief violates the spirit, if not the letter, of Fed.R.App.P. 28(g) and 32(a) and 8th Cir.R. 8(e). In all cases where additional space is needed, permission of the court should be requested.

III. CONCLUSION

After careful review of the arguments of the parties, we affirm the judgment of the district court. Plaintiffs failed to carry their burden of proof and prove that retiree welfare benefits were intended to last for the life of the retiree. Also, the district court did not err in denying plaintiffs a jury trial or in conducting the proceedings below.

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Mr. Gwaltney is a member in the firm's Charlotte office concentrating his practice in the areas of criminal defense, corporate regulatory compliance and investigation, and general corporate litigation.

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