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COMMENT

DON'T MOW OVER THE *YARD-MAN* INFERENCE: GUARDING AGAINST IMPROPER MODIFICATION OF WELFARE BENEFITS PROVIDED IN A COLLECTIVE BARGAINING AGREEMENT

I. INTRODUCTION

Employees join a union and allow it to negotiate a collective bargaining agreement because the relationship provides them security during the term of the agreement. In fact, the collective bargaining arrangement generally provides security throughout an employee's relationship with the employer. An agreement may even provide benefits into retirement.[1] At retirement, however, problems may arise, particularly in the area of health and life insurance benefits.

An employee enjoying health and life insurance benefits provided by the collective bargaining agreement may believe that these benefits are going to last for his or her entire life. That is, the employee believes the benefits to be vested.[2] Such benefits would provide a sense of security because the employee and, perhaps, the employee's spouse and family, would be covered for the life of the employee. Unfortunately, this sense of security is often false. Health and life insurance benefits, also known as welfare benefits, are quite fragile once the collective bargaining agreement providing them has expired.

1. *See, e.g.*, Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co., 404 U.S. 157, 160 (1971) (allowing retirees to partake in the employee group health insurance plan by contributing the required premiums).

2. In case it is unclear, "vested" means that the retiree has a right to receive the benefits and the employer has a correlative duty to continue providing the benefits. *See* Deering v. Deering, 437 A.2d 883, 885 (Md. 1981) (stating that a pension is generally regarded as "vested" when the minimum term of employment necessary to receive retirement pay has been completed).

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Employers facing financial ruin or wishing to save money may desire, or even be required, to terminate welfare benefits that are received by retirees.

The contractual nature of the collective bargaining agreement prevents revoking the benefits from active employees during the agreement term, but retirees present a different situation. While the retirees may believe that their benefits are to last a lifetime, or vest, the actual contractual language may be more ambiguous. In this case, an employer might be able to unilaterally terminate the benefits. A retiree facing such a situation may be devastated financially and emotionally. The union no longer has an obligation to represent the individual because he or she has retired,[3] and statutory provisions protecting the retiree's pension do not extend to welfare benefits.[4]

This was the precise situation facing retirees in *United Auto., Aerospace, and Agriculture Workers of America v. Yard-Man*.[5] In this case, it seemed that the employer had decided to terminate welfare benefits when facing financial trouble.[6] In 1983, the Sixth Circuit prevented the unilateral termination, holding that the employer had a contractual duty to continue paying the welfare benefits for the life of the retiree.[7] It reached this decision by using what has come to be known as the *Yard-Man* inference.[8] The collective bargaining agreement had expired and was deemed ambiguous by the Sixth Circuit.[9] In an attempt to discern the parties' intent as to the vesting of benefits, the court decided to use an inference as a factor in making that determination.[10] The *Yard-Man* inference follows the following logic: the court reasoned that because these were welfare benefits, they were considered deferred forms of compensation when the union bargained for them.[11] Since it was presumable that the employees forewent an increase in their present compensation, it would be ridiculous for the parties to leave the welfare benefits to the uncertainties of the next collective bargaining agreement.[12] Thus, an inference was raised that the benefits were to vest. The inference was then added to other factors in determining the parties' intent.[13]

Three Circuits have joined the *Yard-Man* court, while three others have split, refusing to use a "gratuitous inference" in determining the parties'

3. *Pittsburgh Plate Glass*, 404 U.S. at 172.

4. 29 U.S.C. § 1051(1) (1994).

5. International Union, United Auto., Aerospace, and Agric. Implement Workers of Am. v. Yard-Man, Inc., 716 F.2d 1476, 1478 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984).

6. *See id.*

7. *See id.* at 1482-83.

8. *See id.* at 1482. *See also* Shannon P. Duffy, *Health Benefits Not for Life, 3rd Circuit Says*, THE LEGAL INTELLIGENCER, Aug. 12, 1999, at 1.

9. *See Yard-Man*, 716 F.2d at 1479.

10. *See id.* at 1482.

11. *See id.*

12. *See id.*

13. *See id.*

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intentions.[14] Most recently, the Third Circuit has joined the splitting circuits in rejecting the *Yard-Man* analysis.[15] It is possible that the Supreme Court will take up the issue in a future term.[16]

The thrust of this Comment will be in support of using the inference as part of the larger social policy of providing some type of health insurance for retirees who are left rather unprotected by the collective bargaining relationship. With a potentially insolvent Medicare system and rising costs of health insurance, the situation for retirees facing the termination of benefits is not encouraging. The *Yard-Man* inference could be used to maintain benefits that an employer initially promised a retiree until Congress adopts better legislation in pursuit of the larger social policy of lifetime benefits for all retirees.

Part II of this Comment provides a background of the law surrounding collective bargaining, welfare benefits and the *Yard-Man* decision.[17] It also discusses the current circuit split in place.[18] Part III examines the criticisms of the *Yard-Man* decision[19] by briefly summarizing and analyzing each from a critical perspective. Part IV discusses current judicial alternatives to such an inference, concluding that any alternative is inadequate in providing sufficient protection to the parties' intentions.[20] Finally, Part V demonstrates that the *Yard-Man* is an acceptable analysis.[21] In addition, Part V investigates the

14. *See* United Steelworkers of Am. v. Connors Steel, 855 F.2d 1499 (11th Cir. 1988) (holding that the employer was obligated to continue providing benefits after the expiration of the labor agreement); Keffer v. H.K. Porter Co., 872 F.2d 60 (4th Cir. 1989) (finding that retiree medical and life insurance benefits must be provided beyond the life of the collective bargaining agreement); United Steelworkers of Am. v. Textron, Inc., 836 F.2d 6 (1st Cir. 1987) (holding that the former employer, not the successor employer, is obligated to keep retiree benefits current after the sale of the company); International Ass'n of Machinists v. Masonite Corp., 122 F.3d 228 (5th Cir. 1997) (reversing and remanding a district court determination that the company was not obligated to provide lifetime benefits to retirees); International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Skinner Engine Co., 188 F.3d 130 (3rd Cir. 1999) (affirming a lower court's decision that there is no presumption that parties to a collective bargaining agreement intend retiree welfare benefits to continue beyond the expiration of the labor agreement).

15. *See Skinner Engine Co.*, 188 F.3d at 139.

16. *See* Duffy, *supra* note 8, at 1. However, while the split may give rise to the Supreme Court granting certiorari, it is also possible that there will be no resolution. The *Yard-Man* inference is used to determine the intent of the union and the employer, and often is applied to very different language. The Supreme Court could deny certiorari based on the fact that it would be making a determination based largely on the facts of an individual case.

17. *See infra* notes 23-215 and accompanying text.

18. *See infra* notes 162-215 and accompanying text.

19. *See infra* notes 216-80 and accompanying text.

20. *See infra* notes 281-344 and accompanying text.

21. *See infra* notes 345-52 and accompanying text.

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current state of legislation impacting upon this issue and discusses potential legislation to relieve the situation faced by retirees.[22]

II. BACKGROUND

In order to understand the *Yard-Man* decision and its applications, one must first consider the background to the opinion and the cases making up the circuit split. First, it is helpful to investigate the statutes involved in such a decision and how they confer jurisdiction upon the federal courts. Next, it is necessary to discuss the *Yard-Man* decision and the U.S. Circuit Courts of Appeals decisions shaping the analysis of this Comment.

A. Introduction to Jurisdiction, the National Labor Management Relations Act and the Early Cases

1. Jurisdiction

A reader who is new to the world of labor relations will notice that the cases involving the *Yard-Man* analysis are heard in federal court, yet there is little explanation as to how the federal courts maintain jurisdiction.[23] A suit involving a *Yard-Man* problem may be brought by retirees or their union under § 301(a) of the National Labor Management Relations Act ("NLMRA").[24] The NLMRA provides that any suit involving the breach of a contract between an employer and a labor organization shall be heard in a district court of appropriate jurisdiction.[25]

A simple answer to the question of jurisdiction is that the NLMRA confers jurisdiction. However, an astute reader will notice that the federal courts are not relying on state common-law principles as most federal courts do when deciding contracts cases.[26] Rather, the federal courts fashion their own laws when working under § 301.[27] In some cases, the NLRMA itself provides the

22. *See infra* notes 353-66 and accompanying text.

23. *See, e.g.*, *Yard-Man*, 716 F.2d at 1478; *Keffer*, 872 F.2d at 61; *Connors Steel*, 855 F.2d at 1500; *Textron*, 838 F.2d at 7; *Skinner*, 188 F.3d at 130.

24. 29 U.S.C. § 185 (1994).

25. *Id*. § 185(a).

26. *See Yard-Man*, 716 F.2d at 1478; *Keffer*, 872 F.2d at 61; *Connors Steel*, 855 F.2d at 1505; *Textron*, 838 F.2d at 7; *Skinner*, 188 F.3d at 130. Normally, if the federal courts are acting under anything other than federal question jurisdiction conferred by 28 U.S.C. § 1331, they must apply the law as defined in the state from which the case arises. *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

27. *See* Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 457 (1957). Justice Douglas, writing for the majority, decided that § 301 gave the federal courts more than jurisdiction. The majority concluded that § 301 also provided for the authority to create substantive law. *See id*. In addition, the law that was applied under § 301 was federal law. *See id.* at 456. Douglas argued that state law could be used as a guide in determining the substantive

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appropriate substantive law.[28] In other cases, a federal court must use "judicial inventiveness" to fashion a legal solution to the problem facing the court.[29] Regardless, the court looks to national labor policy when developing substantive law.[30] Without the ability to fashion federal substantive law, the Sixth Circuit could not have created an inference of vested retiree benefits.

2. The NLRA and Pittsburgh Plate Glass

The most obvious remedy for a retired union member losing benefits seems to be provided by the National Labor Relations Act (NLRA).[31] But, in *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, the Supreme Court held that the unilateral modification of retiree health insurance provided for in a collective bargaining agreement was not prohibited by the NLRA, even if the modification occurred during the contract term.[32]

The Court in *Pittsburgh Plate Glass* first noted that retirees could not be considered "employees" for purposes of the NLRA.[33] In addition, retirees were not to be considered as part of the bargaining unit represented by the union in negotiations with management.[34] To support this conclusion, the Court reasoned that the interests between the active employees and the retirees were not mutual.[35] In fact, the Court feared that "union representatives on occasion might see fit to bargain for improved wages or other conditions favoring active employees *at the expense of retirees' benefits*."[36] In essence, the Court decided that because of the discrepancies between the interests of the active employees and the retirees, it would be better for the retirees to negotiate alone.[37]

law to be applied to a problem, but once applied the state law was to be subsumed into the federal law. That is, it would become federal law. *Id.* at 457.

28. *See id.* at 457.

29. *Lincoln Mills*, 353 U.S. at 457.

30. *See id.* at 456.

31. After all, the NLRA provides that "terms and conditions" of employment are mandatory subjects of bargaining. 29 U.S.C. § 158(d) (1994). It appears that health and life insurance benefits are such conditions of employment. Usually, management and employees view such benefits as deferred compensation, given to the employees rather than an increase in wages, for instance. *See Yard-Man*, 716 F.2d at 1482.

32. *See* Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co., 404 U.S. 157, 188 (1971).

33. *See id.* at 168.

34. *See id*. at 172-73.

35. *See id.*

36. *Id*. at 173.

37. *Pittsburgh Plate Glass*, 404 U.S. at 173 (emphasis added).

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Next, the *Pittsburgh Plate Glass* Court faced the issue of whether the subject of retiree benefits was a mandatory or permissive bargaining term.[38] The NLRA provides that "terms and conditions of employment" are mandatory terms.[39] The Court decided that health insurance benefits were not "terms and conditions of employment" under the NLRA.[40] Under previous decisions, the Court held that certain terms were mandatory bargaining provisions under the NLRA, even if the worker in question was outside the employment relationship.[41] However, in *Pittsburgh Plate Glass*, the decision turned on the impact of retiree benefits on active employees.[42] The retirees' benefits did not impact the terms and conditions of the employment of active employees to an extent that justified recognizing them as mandatory subjects for collective bargaining.[43]

Finally, the Court in *Pittsburgh Plate Glass* concluded that because the benefits were only permissive terms of bargaining, modifying the benefits, even in mid-term, was not an unfair labor practice under the NLRA.[44] Instead, the retirees were to seek a remedy in an action for breach of contract.[45] Since the parties were not required to bargain for the term under the NLRA initially, the Court refused to find a violation of the statute (i.e. an unfair labor practice).[46] Despite one of the parties' apparent breach of the contract, there was no unfair labor practice.[47]

38. *See id.* at 177-82. In 1958, the Supreme Court held that collective bargaining could take place over issues that were not mandated by the NLRA. *See* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958). Thus, certain issues must be bargained for, while others are simply permissive subjects of bargaining. *See* Donald T. Weckstein, *The Problematic Provision and Protection of Health and Welfare Benefits for Retirees*, 24 SAN DIEGO L. REV. 101, 104 (1987). Weckstein also noted that *Wooster* provided for a third category of benefits, including those items that were illegal over which to bargain. *See id.*

39. 29 U.S.C. § 158(d) (1994).

40. *Pittsburgh Plate Glass*, 404 U.S. at 182.

41. *See id.* at 178 (citing Teamsters Union v. Oliver, 358 U.S. 283 (1959)). *Oliver* involved anti-trust laws and the establishment of minimum rent payments that carriers would pay to truck drivers that owned their own truck. The Court ignored the issue of whether the truck owners were employees and held that the rent payment was a mandatory term of the bargaining agreement, and thus immune from state anti-trust laws. *See id.*

42. *See id.* at 180.

43. *See id.* It had been argued that the employer and active employees would receive the benefit of lower costs for health insurance because adding the retirees would increase the size of the group and thereby lower rates. The Court noted that there was no guarantee that the retirees would not increase the cost because of their higher medical expenses. *Id.*

44. *See Pittsburgh Plate Glass*, 404 U.S. at 188.

45. *See id.*

46. *See id.* at 187.

47. *See id.*

Thus, retirees could not pursue a claim against an employer who modified their benefits through their union under the NLRA.[48] Rather, the Court forced retirees to pursue claims under § 301 of the NLRMA for breach of contract.[49] In writing the opinion for *Pittsburgh Plate Glass*, Justice Brennan pointed out that in his opinion such a remedy provided the retirees with adequate protection.[50] Unfortunately, Brennan could not foresee the problems for retirees who lack representation and try to pursue a claim under general contract principles.

3. Recent Trends and Statistics

Recent trends in employer-provided health insurance for retirees are quite disturbing. At one time, health insurance was considered a low-cost benefit, but now the costs have risen sharply.[51] A Department of Labor study attributed this spike in costs to an aging population and rising medical costs.[52] In response to the rising costs, employers began terminating such benefits, not just for retirees, but across the board. In 1991, forty-nine percent of employees participating in an employer provided medical benefits plan were not required to pay contributions.[53] In 1997, only thirty-one percent of employees were not required to pay a contribution in order to participate in such a plan.[54] Thus, while employers may be maintaining benefit plans, a greater percentage of employers now require the employees to pay the fees.

Such trends were accelerated in 1990, when the Federal Accounting Standards Board changed its regulations and required employers to recognize the cost of retiree insurance when the cost is incurred, rather than deferring recognition until the future liabilities are realized.[55] In firms with a high ratio of retirees to active employees, this represented a large increase in costs. Thus, companies began facing financial difficulties in providing for retirees.[56]

An individual who retires before the age of sixty-five faces a severe plight when a company terminates health insurance benefits after the expiration of a

48. *See id.*

49. *See Pittsburgh Plate Glass*, 404 U.S. at 188.

50. *See id.*

51. Jeannette A. Rogowski & Lynn A. Karoly, *Study 10: Retirement and Health Insurance Coverage*, HEALTH BENEFITS AND THE WORK FORCE 117 (1992).

52. *See id.*

53. Bureau of Labor Statistics, *Employee Benefits Survey Table 5. Percent of full-time employees participating in employer-sponsored medical benefits by type of medical plan and requirement for employee contributions, 1991, 1993, 1995, and 1997*, *available at* http://stats.bls.gov/news.release/ebs3.t05.htm (last modified Nov. 10, 1999).

54. *See id.*

55. *See* Gregory J. Ossi, *It Doesn't Add Up: The Broken Promises of Lifetime Health Benefits, Medicare, and Accounting Rule FAS 106 Do Not Equal Satisfactory Medical Coverage for Retirees*, 13 J. CONTEMP. HEALTH L. & POL'Y 233, 233-34 (1996).

56. *See* Rogowski & Karoly, *supra* note 51, at 117.

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collective bargaining agreement. In such case, there is a gap between the termination and the onset of Medicare benefits. Because of the strong economy and aging population, this has become a common trend.[57] However, retirees who wait until the age of sixty-five to retire may also face economic hardship when a former employer cuts welfare benefits, which the retiree believed were supposed to last a lifetime. Medicare only covers about fifty percent of a person's medical expenses.[58] In addition, Medicare does not cover certain costs, such as long-term hospitalization.[59] Thus, retirees must find supplemental coverage. If the retiree has received insurance through a former employer since retiring, a search for affordable supplemental coverage may be a daunting task. In addition, the issue of an insolvent Medicare system has arisen in recent years.[60]

B. The Yard-Man Decision

The *Yard-Man* incidents began in 1974.[61] Yard-Man, Inc. and the United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) signed a collective bargaining agreement in 1974.[62] The agreement covered employees at the Yard-Man, Inc. plant in Jackson, Michigan.[63] The agreement lasted three years, expiring in 1977,[64] and provided that when a retired employee turned sixty-five years of age, the company would pay insurance benefits equal to those received by active employees.[65]

Unfortunately, the plant closed in 1975, and all employees were discharged.[66] However, under the terms of the agreement, sixty-five-year old retired workers continued receiving the benefits provided for in the agreement.[67] In 1977, the company notified the Jackson, Michigan retirees that they would no longer be receiving those benefits once the agreement expired.[68] The U.A.W. filed a grievance under § 301 claiming that the termination of the benefits constituted a breach of the collective bargaining agreement.[69]

57. *See id.*

58. AARP, THE PUBLIC POLICY AGENDA 1999 6-1 (1999).

59. *See* Ossi, *supra* note 55, at 257 n.207.

60. *See id*. at 257.

61. *See* International Union, United Auto., Aerospace, and Agric. Implement Workers of Am. v. Yard-Man, Inc., 716 F.2d 1476, 1478 (Cin. Cir. 1983).

62. *See id.*

63. *See id.*

64. *See id.*

65. *See id.* at 1480.

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

67. *See id.*

68. *See id.*

69. *See id.* The U.A.W. also filed a second count, which was also dealt with by the Sixth Circuit. *See id*. When *Yard-Man* closed the plant, it offered to pay the employees a lump sum of

Initially, the union waived arbitration, and at trial, Yard-Man and the union moved for summary judgment.[70] The trial judge granted the union's motion, finding that the company had violated the terms of the contract by terminating the benefits at the end of the contract.[71] The trial judge reasoned that the benefits were to last for the entire life of the retiree.[72] That is, the benefits vested upon the retiree attaining the age of sixty-five.[73]

On appeal, the Sixth Circuit began its analysis by stating that general contract principles are to be used so long as they are consistent with national labor policies.[74] Generally, the issue of whether the benefits would continue beyond the expiration of the agreement depended upon the intent of the parties.[75]

The court continued by listing contract principles relevant in deciding whether the parties intended the benefits to vest.[76] The court reasoned that the language of the collective bargaining agreement must be searched for unambiguous demonstrations of intent.[77] However, in order to understand the language, the court stated that it must look to the context giving rise to that language.[78] Generally, that language must be read in light of the contract as a whole, and no part should be interpreted as rendering another nugatory.[79] If the term is ambiguous, the court must look to other parts of the contract to shed light on the ambiguity.[80] Finally, considerations must be made for national labor policies.[81]

With this stated, the court applied the contract principles to the provision of the collective bargaining agreement, which conferred welfare benefits upon retirees.[82] The court found the language ambiguous because it stated that the retiree would receive benefits equal to those received by the active group of

the present value of certain pension rights. *See id.* at 1478. The retirees overwhelmingly accepted this offer, but the U.A.W. requested specific performance of *Yard-Man's* obligation to purchase annuities to cover these pensions. *See id.* The court, reversing the trial court's grant of summary judgment in favor of the U.A.W., held that genuine issues of material fact existed for a jury as to whether *Yard-Man's* payment of lump sums created accord and satisfaction concerning its obligations to purchase annuities. *See id.* at 1488.

70. *See id.* at 1478.

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

72. *See id.*

73. *See id.*

74. *Id.* at 1479 (citing Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 456 (1957)).

75. *See Yard-Man*, 716 F.2d at 1479.

76. *See id.*

77. *See id.*

78. *See id.*

79. *See id.* at 1479-80.

80. *See Yard-Man*, 716 F.2d. at 1480.

81. *See id.*

82. *See id.*

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employees.[83] The court held that this could be interpreted in two ways: (1) as a reference only to the nature of the benefits; or (2) as incorporating the durational limits of the active group.[84] Regardless, the language was unclear whether the benefits were to last the lifetime of the retiree or were to terminate with the collective bargaining agreement.[85]

Because of the ambiguity, the court looked to other parts of the contract and to national labor policy.[86] The court found that the durational language of the provisions for active- employee benefits was inapplicable to retirees.[87] In addition, the employer's behavior was not consistent with the interpretation that the contract term was meant to include the duration of the active group.[88] Once the plant closed, the active employees' benefits were discontinued.[89] There was no provision protecting the employees if they left before retirement.[90] However, the retirees continued to receive benefits after the plant closed.[91] If the contract was intended to incorporate the same duration as active-employees' benefits, then the company would have terminated the retiree benefits immediately upon closing the facility as it did with the active employees.[92]

The provisions for health insurance were limited in the event that the retiree died.[93] This fact raised a reasonable inference 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."[94]

In addition, the collective bargaining agreement allowed an early retirement at age fifty- five, but retirees could not claim benefits until age sixty-five.[95] Applying the principle that no contract term should be interpreted in a way that renders another nugatory or illusory,[96] the court reasoned that if someone retired at age fifty-five, that person had to pay for insurance until attaining the age of sixty-five. After age sixty-five, the company's promised benefits took effect.[97] "If retiree benefits were terminated at the end of the

83. *See id.*
84. *See id.*
85. *See Yard-Man*, 716 F.2d at 1480.
86. *See supra* notes 80-81 and accompanying text.
87. *See Yard-Man*, 716 F.2d at 1481.
88. *See id.*
89. *See id.*
90. *See id.*
91. *See id.*
92. *See Yard-Man*, 716 F.2d at 1481.
93. *See id.*
94. *See id.*
95. *See id.*
96. *See id.* at 1480.
97. *See Yard-Man*, 716 F.2d at 1481.

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collective bargaining agreement's three-year term, this promise is completely illusory for many early retirees under the age of 62."[98]

The crux of the debate surrounding *Yard-Man* focuses on the court's last point.[99] The court held that "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."[100] Parties to a collective bargaining agreement generally understand retiree benefits to be deferred forms of compensation and only a permissive topic for bargaining.[101] Thus, reasonable parties would not leave them to such an uncertain future as being contingent on future negotiations.[102] For this reason, the court stated that these benefits carried a special "status," and they would, in the absence of explicit language, create an inference that the parties intended the benefits to last the entire life of the retiree.[103]

It is important to note that the Sixth Circuit did not create a presumption in favor of vested benefits in every case.[104] That is, the inference created by the context of the collective bargaining agreement does not shift the burden of proof to the employer.[105] A presumption would be unfair for employers who may never have intended welfare benefits to vest and later found themselves in financial trouble.[106] Instead, the burden of proof is still upon the retirees to demonstrate that, more likely than not, the parties intended the benefits to

98. *Id.*

99. *See id.* at 1482.

100. *Id.* "The employees [were] presumably aware that the union owe[d] no obligation to bargain for continued benefits for retirees. If they fore[went] wages now in expectation of retiree benefits, they would [have] want[ed] assurance that once they retire[d] they [would] continue to receive such benefits regardless of the bargain reached in subsequent agreements." *Id.*

101. *See id.*

102. *See Yard-Man*, 716 F.2d at 1482.

103. *Id.*

104. *See id.* The Sixth Circuit actually reversed a case in which the district court held that health insurance benefits vest as a matter of federal common law, regardless of the collective bargaining agreement's terms. *See* Michael S. Melbinger & Marianne W. Culver, *The Battle of the Rust Belt: Employer's Rights to Modify the Medical Benefits of Retirees*, 5 DEPAUL BUS. L.J. 139, 145 (1992-1993) (citing Hansen v. White Farm Equip. Co., 42 B.R. 1005, 1016-19 (N.D. Ohio 1984), *rev'd*, In Re White Farm Equip Co., 788 F.2d 1186 (6th Cir. 1986)).

105. *See Yard-Man*, 716 F.2d at 1482. "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." *Id.*

106. It is not the intent of this Comment to suggest that welfare benefits should vest in every collective bargaining agreement with ambiguous language. A presumption in favor of vested benefits would come close to doing this. Instead, it is only suggested that the *Yard-Man* inference is a method for forcing employers to live up to the agreement originally struck with the union and employees.

vest.[107] The inference may or may not be created by the context of the agreement.[108] It is this final part of the *Yard-Man* analysis that provides the subject of this Comment.

C. The Development of the Analysis in the 6th Circuit

The inference has seen the most development in the circuit in which it originated.[109] *Yard-Man's* use in other circuits that adopted the inference has not been as widespread.[110] Because much criticism focuses on the dangers involved in the potentially broad development of the analysis, it will be helpful to discuss how the Sixth Circuit has analyzed similar problems since the initial decision.

Just one year after *Yard-Man*, the Sixth Circuit took up the same issue in *Weimer v. Kurz-Kasch, Inc.*[111] An employer had again ceased to provide health and life insurance benefits to retirees after a collective bargaining agreement expired.[112] The court, applying *Yard-Man*, found that the company breached the terms of the collective bargaining agreement in cutting the benefits.[113] The court, after finding ambiguity in the terms of the agreement, again turned to the intent of the parties.[114]

However, upon an initial read, it would appear that the court broadened the inference into a presumption in favor of vested rights.[115] In fact, the court focused on the language in *Yard-Man* which stated that "when parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue so long as the beneficiary remains a retiree."[116] This makes it sound as if the mere existence of welfare benefits along with ambiguous language in the agreement alone would be enough to vest the benefits in the retirees.[117]

107. *See Yard-Man*, 716 F.2d at 1482; Anderson v. Alpha Portland Indus. Inc., 836 F.2d 1512, 1517 (8th Cir. 1988).

108. *See Yard-Man* at 1482.

109. *See* Weimer v. Kurz-Kasch, Inc., 773 F.2d 669, 676 (6th Cir. 1985); Armistead v. Vernitron Corp., 944 F.2d 1287, 1293-97 (6th Cir. 1991); Golden v. Kelsey-Hayes, 73 F.3d 648, 654-56 (6th Cir. 1996); Fox v. Varity Corp., No. 95-1730, 1996 WL 382272, at *2 (6th Cir. July 5, 1996); International Union v. Loral Corp., No. 92-02391, 1997 WL 49077, at *3 (6th Cir. Feb. 3, 1997).

110. *See infra* notes 126-58 and accompanying text.

111. *See Weimer*, 773 F.2d at 669-77.

112. *See id.* at 670-71.

113. *See id.* at 676.

114. *See id.* at 672.

115. *See id.* at 672-76. The court indicated at the beginning of this analysis that such retiree benefits are normally vested. *Id.* at 672.

116. *See Weimer*, 773 F.2d at 676 (citing *Yard-Man*, 716 F.2d at 1489).

117. *See id.*

Actually, the court continued to interpret the inference as an inference. The court stated, "in light of the insurance provisions' conditioning the grant of retiree insurance benefits only on the retiree's remaining retired and unemployed, and in light of the parties' failure to specify that retiree insurance benefits expired with the termination of the collective bargaining agreements, we hold that the general termination clause does not support a finding that retiree benefits ended when the agreements expired."[118] Thus, the court continued *Yard-Man*'s trend of considering the existence of retiree benefits in light of other factors. [119] The court also considered the language and absence of certain language in the collective bargaining agreement in concluding that the parties must have intended vested benefits.[120]

In 1991, the Sixth Circuit took another case involving the termination of welfare benefits paid to retirees in accordance with collective bargaining agreements.[121] In *Armistead v. Vernitron Corp.*, the court again found for the retirees and did so on the basis of the deferred compensation argument used in *Yard-Man*.[122] The court never stated that the existence of welfare benefits alone was enough to establish vested benefits.

Perhaps the clearest interpretation of the inference came in *Golden v. Kelsey-Hayes Co*.[123] In reviewing a preliminary injunction, the court held that the employees could likely show that the employer breached its contractual obligations by terminating benefits received by retirees and the spouses of deceased retirees.[124] The court was clear that "*Yard-Man* does not shift the burden of proof to the employer, nor does it require specific anti-vesting language before a court can find that the parties did not intend the benefits to vest."[125] The court instead sought to use the inference and other factors as guides in discerning the parties' intent.[126]

118. *Id*.

119. *See id.*

120. *See id.*

121. *See* Armistead v. Vernitron Corp., 944 F.2d 1287, 1289-90 (6th Cir. 1991).

122. *See id.* at 1297. "A basic premise of the *Yard-Man*, that retirement insurance benefits are a form of deferred compensation applies equally to this case. Because these benefits are deferred compensation, it is unreasonable to suppose that the parties to the [collective bargaining agreement] intended to permit Vernitron to terminate the retirement insurance program unilaterally." *Id.*

123. *See* Golden v. Kelsoy-Hayes, 73 F.3d 648, 654-56 (6th Cir. 1996). The *Golden* court was faced with the issue of whether or not to affirm the District Court's grant of a preliminary injunction preventing the employer from terminating benefits. *See id.* at 651-52. As one element of a preliminary injunction, the court had to decide if the plaintiff-retirees were likely to succeed on the merits. *See id.* at 653. Thus, the court had to apply the *Yard-Man* analysis. *See id.* at 653-56.

124. *See id.* at 657.

125. *Id*. at 656.

126. *See id.*

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The Sixth Circuit continues to use this analysis in deciding cases involving the termination or modification of welfare benefits provided for in collective bargaining agreements.[127] In addition, other circuits have also adopted the analysis.

D. The Yard-Man *Inference Used in Other Circuits*

In 1987, four years after the *Yard-Man* decision, the First Circuit faced a similar issue.[128] In *Textron*, the Steelworkers Union became embroiled in a dispute with Textron, Inc. Textron sold a division to another company that agreed to assume liability of the welfare benefits in question.[129] The Union requested that Textron guarantee the payment of benefits, and after Textron refused, the Union filed a grievance seeking arbitration.[130] In the meantime, the new company paid the benefits for a few months, but stopped once it experienced business problems.[131]

The Union successfully obtained a preliminary injunction requiring Textron to pay for the benefits.[132] The court noted one element that must be shown when requesting a preliminary injunction is the likely success of the party on the merits.[133] While the court noted that Textron might be able to succeed by showing an intent to terminate the benefits through the durational language of the collective bargaining agreement, it cited with approval *Yard-Man's* characterization of welfare benefits as "status" benefits.[134] Because of the strength of the Union's argument using a *Yard-Man* analysis, the court held that the preliminary injunction was properly granted.[135]

127. *See* Fox v. Varity Corp., No. 95-1730, 1996 WL 38227, at *2 (6th Cir. July 5, 1996) (reviewing a preliminary injunction); International Union v. Loral Corp., No. 92-02391, 1997 WL 49077, at *3 (6th Cir. Feb. 3, 1997) (rejecting the employer's argument that the inference could only be used when the employer attempted to terminate, rather than modify, retirees' welfare benefits).

128. *See* United Steel Workers of Am. v. Textron, Inc., 836 F.2d 6, 6-7 (1st Cir. 1987). Although the opinion is not an explicit affirmation of the *Yard-Man* inference, the case revolved around the issue of whether a preliminary injunction was properly granted, and the relevant standard is whether the moving party is *likely* to succeed on the merits.

129. *See id.* at 7.

130. *See id.*

131. *See id.*

132. *See id.*

133. *See Textron*, 838 F.2d at 7 (citing Planned Parenthood League of Mass. v. Bellotti, 641 F.2d 1006, 1009 (1st Cir. 1981)).

134. *Id.* at 9 (citing International Union, United Auto., Aerospace, and Agric. Implement Workers of Am. v. Yard-Man, Inc., 716 F.2d 1476, 1482 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984)).

135. *See id.* at 10.

In 1988, the Eleventh Circuit also joined in affirming the *Yard-Man* analysis in *United Steelworkers of America v. Connors Steel Co*.[136] Connors Steel Company, a subsidiary of H.K. Porter, terminated retiree benefits that had been provided since the execution of a collective bargaining agreement in 1974.[137] Connors began encountering financial trouble in 1979.[138] Each collective bargaining agreement, signed during the relevant time periods, lasted three years before being renegotiated.[139] A Connors plant in Alabama was unable to execute a collective bargaining agreement with the union to replace a 1980 agreement.[140] In 1983, Connors notified retirees that it intended to cut health insurance benefits upon the expiration of the collective bargaining agreement in 1984.[141]

The provision that provided health insurance benefits for retirees was quite clear as to the parties' intent. It stated that the benefits were to be paid as long as the retiree remained retired, "notwithstanding the expiration of [the collective bargaining] agreement."[142] Thus, the case could have been decided on the language alone.[143] However, in dicta, the court went on to cite the *Yard-Man* inference with approval.[144] In general, the court stated that the language here was much clearer than the language involved in *Yard-Man*.[145] In addition, the Eleventh Circuit agreed that the general duration of the contract should not support a finding that retiree benefits expire with the collective bargaining agreement, even when the language of the benefits provision is ambiguous.[146] The court emphatically stated: "We fully concur with the decisions of the Court of Appeals for the Sixth Circuit."[147]

A year later, the Fourth Circuit joined the Sixth more explicitly.[148] *Keffer v. H.K. Porter Co.* involved the same parties with nearly identical facts as *Connors Steel*.[149] The only differences were the location of the plant and the fact that the retirees brought suit rather than the union.[150] Here, the retirees were granted summary judgment in the district court, which held that the

136. *See* United Steelworkers of Am. v. Connors Steel, 855 F.2d 1499, 1504-05 (11th Cir. 1988).
137. *See id.* at 1500-01.
138. *See id.* at 1501.
139. *See id.*
140. *See id.*
141. *See Connors Steel*, 855 F.3d at 1501.
142. *Id*.
143. *See id.*
144. *See id.* at 1504-05.
145. *See id*.
146. *See Connors Steel*, 855 F.3d at 1505.
147. *Id.* at 1505.
148. *See* Keffer v. H.K. Porter Co., 872 F.2d 60, 64 (4th Cir. 1989).
149. *See id.* at 61.
150. *See id.*

Steelworkers Union and H.K. Porter had intended the benefits to vest upon retirement.[151] The court also ruled that Connors was an agent of H.K. Porter, and thus, H.K. Porter could be liable for Connors' operation.[152]

The Fourth Circuit affirmed the district court's decision.[153] The court first focused on the language of the contract provisions specifying the benefits.[154] Generally, the court found that the language supported the district court's conclusion that the parties intended the benefits to vest upon retirement.[155] However, the circuit court then turned to *Yard-Man* stating that "[s]uch a determination is also consistent with a more far-reaching understanding of the context in which retiree benefits arise."[156]

Just as the *Yard-Man* court reasoned, the Fourth Circuit indicated that it would be ridiculous to presume that the benefits did not vest.[157] After all, employers and employees generally understand retiree benefits as deferred forms of compensation. In addition, they are not mandatory subjects for bargaining.[158] Thus, no reasonable party to the contract would believe that the compensation was to "be left to the contingencies of future negotiations."[159] Because the employees would want assurance that the deferred compensation would come through when they retired, it is reasonable to presume that the parties intended that the benefits vest upon retirement.[160] The Fourth Circuit went on to hold that because Connors Steel was an agent of H.K. Porter, H.K. Porter was liable for the costs of the benefits.[161]

Thus, four circuits have provided affirmations of the inference. However, just as quickly as the First, Fourth and Eleventh affirmed the Sixth Circuit's analysis, other circuits were quick to split and criticize the inference of vesting benefits.

E. The Formation of a Solid Split Among the Circuits

The first real criticism of *Yard-Man* came in 1988. The Eighth Circuit, in *Anderson v. Portland Indus.*, decided that it was "not at all inconsistent with labor policy to require the plaintiffs to prove their case without the aid of

151. *See id.* at 62.
152. *See id.*
153. *See Keffer*, 872 F.2d at 65.
154. *See id.* at 62.
155. *See id*. at 63.
156. *Id.* at 64.
157. *See id*. (citing International Union, United Auto., Aerospace, and Agric. Implement Workers of Am. v. Yard-Man, Inc., 716 F.2d 1476, 1482 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984)).
158. *See Keffer*, 872 F.2d at 64 (citing *Yard-Man*, 716 F.2d at 1482).
159. *Id.* (citing *Yard-Man*, 716 F.2d at 1482).
160. *See id.*
161. *See id.* at 65.

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gratuitous inferences."[162] In this case, retirees brought a class action suit against their former employer, Alpha Portland.[163] Alpha Portland provided health care coverage since the 1950s.[164] Many of the collective bargaining agreements provided for rather explicit terms that allowed the employer to terminate or modify health insurance after the collective bargaining agreement providing those benefits expired.[165] However, this case involved an added element.

In 1974, Congress passed the Economic Retirement Income Security Act ("ERISA"). ERISA provides certain disclosure and vesting requirements for benefits plans.[166] However, while ERISA requires the vesting of pension plans, it does not require the vesting of welfare benefits,[167] which include life and health insurance coverage.[168] As stated above, the parties to a collective bargaining agreement may bargain for vested benefits.[169]

In *Anderson*, the company and union negotiated their final collective bargaining agreement in 1978.[170] As part of ERISA's requirements, a summary plan description ("SPD") was distributed to employees.[171] The SPD provided employees with ten years or more of service would continue to receive health coverage for the remainder of their lives.[172] However, previous statements of that type had been understood by the company to mean that the employee's family would not receive the benefits in the event of the retiree's death.[173] The language of the 1978 agreement was ambiguous at best, and testimony revealed that a deceased company representative had indicated that the benefits were to vest upon achieving ten years of service.[174]

162. Anderson v. Alpha Portland Indus. Inc., 836 F.2d 1512, 1517 (8th Cir. 1988).

163. *See id.* at 1513.

164. *See id.* at 1513-14.

165. *See id.* at 1514. The language varied, but that "Alpha reserved 'the right to change, modify, or discontinue' the plan" was a common provision from the beginning of the bargaining relationship. *See id.*

166. *See id.* at 1516 (citing 29 U.S.C. § 1001(b) (1994)).

167. *See Anderson*, 836 F.2d at 1516 (citing 29 U.S.C. § 1051 (1994)).

168. 29 U.S.C. § 1002(1) (1994).

169. *See* International Union, United Auto., Aerospace, and Agric. Implement Workers of Am. v. Yard-Man, Inc., 716 F.2d 1476, 1479 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984) (citing John Wiley & Sons v. Livingston, 376 U.S. 543, 555 (1964)). In *Livingston*, Justice Harlan wrote: "We see no reason why parties could not if they so chose agree to the accrual of rights during the term of an agreement and their realization after the agreement had expired." *Livingston*, 376 U.S. at 555.

170. *See Anderson*, 836 F.2d at 1515.

171. *See id.*

172. *See id.* The SPD also provided that the company would continue to provide $4,000 yearly in life insurance. *Id.*

173. *See id.* at 1514.

174. *See Anderson*, 836 F.2d at 1515.

In 1982, the agreement expired, and Alpha Portland was forced to close all of its plants.[175] In March, it notified retirees that their health and life insurance benefits were to be terminated.[176] Adding to the confusion, the union president sent a letter informing retirees that the union's hands were tied because health insurance benefits did not vest under the last collective bargaining agreement.[177] Thus, the retirees brought suit in a class action without union representation. The district court, in a bench trial, concluded that the benefits had not vested and were vulnerable to termination by Alpha Portland.[178]

The court, once it determined that the provisions providing welfare benefits to retirees were ambiguous as to vesting, turned to the intent of the parties.[179] The plaintiffs argued that the mere existence of welfare benefits created a presumption that the benefits vested, and that the burden of proof shifted to the employer to show clear language to the contrary.[180] This interpretation of *Yard-Man* then led the court to reject the idea of inferring vested rights from the context of the collective bargaining agreement. First, the court held that even if it "recognize[d] an inference in favor of vesting, the burden of proof still remain[ed] on the plaintiffs. . . . Inferences do not shift the burden of proof."[181]

Next, the court rejected the favorable inference entirely.[182] This argument centered on the fact that ERISA explicitly exempted welfare benefits from its vesting requirements.[183] Because Congress demonstrated an explicit intent not to allow the automatic vesting of welfare benefits, "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."[184] Thus, the court

175. *See id.*

176. *See id.*

177. *See id.* at 1515-16. Although it is pure speculation, this could be an example of the fear of a union forced to drop retirees because of a need to work harder for active employees expressed by Justice Brennan in *Pittsburgh Plate Glass*. Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co., 404 U.S. 157, 172-73 (1971).

178. *See Anderson*, 836 F.2d at 1513.

179. *Id.* at 1516.

180. *See id.* at 1516. This is a misread of *Yard-Man*. *See supra* notes 102-06 and accompanying text. *Yard-Man* is clear that because the union does not have to bargain for these rights, and the rights are normally understood to be deferred compensation, the court held that it was *not inconsistent* with national labor policy *to infer* that the parties intended vested benefits. *See* International Union, United Auto., Aerospace, and Agric. Implement Workers of Am. v. Yard-Man, Inc., 716 F.2d 1476, 1482 (6th Cir. 1983). In fact, the court went on to say that no "federal labor policy identified . . . presumptively favor [sic] the finding of interminable rights to retiree insurance benefits when the collective bargaining agreement is silent. *Id. Yard-Man* only established an inference rather than a presumption, which shifts the burden of proof. *Id.*

181. *Anderson*, 836 F.2d at 1517.

182. *See id.*

183. *See id.*

184. *Id.*

did not grant the plaintiffs a favorable inference. Instead, turning to the language of earlier decisions of the Eighth Circuit, the court indicated that any intent to vest the retirement benefits must be clear and specific from the contract.[185]

The most recent rejection of the *Yard-Man* inference builds upon the arguments of *Anderson*. However, the Third Circuit, in *International Union v. Skinner Engine Co.*, spent much more time dealing with the inference created by *Yard-Man*.[186] The U.A.W. executed collective bargaining agreements with Skinner beginning in 1970.[187] Each of the agreements provided that retirees would continue to receive benefits after they retired, but they were silent as to the duration.[188] Likewise, all the collective bargaining agreements contained general duration provisions that were normally three years in length.[189]

As in previous cases, Skinner ran into financial trouble, but not to the extent that it was forced to shut down. In fact, the trouble would not have arisen but for a decision made by the Financial Accounting and Standards Board ("FASB").[190] The FASB issued an order, No. 106, in 1991.[191] It provided that companies would have to recognize the costs of post-retirement benefits as employees rendered services rather than when they were paid.[192] Thus, Skinner felt it financially wise to cut the benefits being paid to retirees who were covered by collective bargaining agreements that had expired.[193] The union and the retirees filed a class action against Skinner under § 301 of the NLRMA.[194]

After the district court granted summary judgment to Skinner, the union and retirees appealed to the Third Circuit.[195] On August 10, 1999, the Third Circuit handed down its decision explicitly rejecting any inferences in favor of vested rights.[196] Like the Eighth Circuit in *Anderson*, the court followed *Yard-Man's* analysis of the provisions until arriving at the union's argument that the benefits raised an inference that they were vested.[197]

185. *See id.* (citing Anderson v. John Morrell & Co., 830 F.2d 872, 877 (8th Cir. 1987) and UFCW Local 105-A v. Dubuque Packing Co., 756 F.2d 66, 70 (8th Cir. 1985)).

186. *See* International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Skinner Engine Co., 188 F.3d 130, 139-41 (3rd Cir. 1999).

187. *See id.* at 134.

188. *See id.* at 135.

189. *See id.*

190. *Id.*

191. *See Skinner*, 188 F.3d at 136.

192. *See id.*

193. *See id.*

194. *See id.* at 136-37.

195. *See id.*

196. *See Skinner*, 188 F.3d at 142.

197. *See id.* at 137-39.

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Unlike the *Anderson* court, however, the Third Circuit divided the *Yard-Man* inference into two parts. First, the Sixth Circuit, according to the *Skinner* court, had rested its decision on the fact that retirement benefits are ordinarily vested because the benefit terms are only permissive and take the form of deferred compensation.[198] Thus, the parties would not logically intend to leave them to the uncertain contingency of negotiation.[199] Next, the court claimed that the Sixth Circuit had created a presumption in favor of vested rights to welfare benefits because the Yard-Man court had declared them to be "status" benefits.[200]

The court quickly rejected any notion of a presumption. The argument against a presumption that shifted the burden of proof was based on the Eighth Circuit's argument that ERISA's explicit exemption of welfare benefits from its vesting requirements precluded a presumption that parties intended the benefits to vest.[201] In fact, the court went so far as to say that "because vesting of welfare benefits constitutes an extra-ERISA commitment, an employer's commitment to vest such benefits is not to be inferred lightly and *must be stated in clear and express language*."[202]

The court went on to reject the argument that because the provisions were only permissive, rather than mandatory, the court should infer that the parties intended the benefits to vest.[203] Here, the court turned to the Seventh Circuit's decision in *Bidlack v. Wheelabrator*.[204]

In *Bidlack*, the Seventh Circuit faced a similar issue involving retiree welfare benefits, but the court did not directly address the *Yard-Man* inference.[205] Instead, the court reasoned, in an opinion by Judge Richard Posner, that in one sense, one could argue that the benefits should not vest because the union would never bargain for retiree benefits.[206] It would have no reason to do so because the retirees did not pay benefits or contribute to the union.[207] One could also argue that because the current employees that will retire under the current collective bargaining agreement would want the benefits to vest, they would have lobbied the union to bargain for vested

198. *See id*. at 140.

199. *See id.* (citing International Union, United Auto., Aerospace, and Agric. Implement Workers of Am. v. Yard-Man, Inc., 716 F.2d 1476, 1482 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984)).

200. *Id.*

201. *See Skinner*, 188 F.3d at 140-41.

202. *Id.* at 139 (emphasis added).

203. See *id*. at 141.

204. *See id*. (citing Bidlack v. Wheelabrator Corp., 993 F.2d 603 (7th Cir. 1993) (en banc)). It should not be overlooked that this opinion was written by the founder of law and economics, Judge Richard Posner.

205. *See Bidlack*, 993 F.2d at 609-10.

206. *See id.* at 609.

207. *See id.*

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benefits.[208] Thus, the parties could have intended vested benefits.[209] Because the contract was ambiguous and the intent of the parties unclear, the Seventh Circuit refused to grant summary judgment to either party and remanded the case for a jury to make the determination.[210]

The Third Circuit, rather than remanding for a jury determination, used Posner's argument to support its position that the *Yard-Man* inference should not be used in determining the parties' intent.[211] In either of Posner's situations, the Third Circuit indicated that the current employees have the burden to lobby the union for vested benefits.[212] Thus, if the language is not clear, the benefits should not vest.[213] After applying general contract principles, the court held that the parties did not intend the benefits to vest upon retirement and granted summary judgment in favor of Skinner.[214]

This decision has created a solid split among the U.S. Circuit Courts of Appeals. Because the Supreme Court has not yet ruled on the issue, litigants are forced to fit their case within the law of the particular circuit in which they lie.[215]

The background that has been provided in Section II of this Comment will serve in understanding the analysis. Not only are the principles of law established in each case important to the analysis, but the facts of the cases are also important. The combination of facts and law show that the *Yard-Man*

208. *See id.*

209. *See id.* at 610.

210. *See Bidlack*, 993 F.2d at 609. Judge Posner based his decision not to infer vested rights on grounds that a jury would be best suited to resolve a dispute over the parties' intent. *Id.* "Only a posture, not easy to reconcile with the Seventh Amendment, of extreme mistrust of juries would entitle us to permit a factual inquiry and apply an interpretive canon or other tie-breaker before we know that the sides are actually tied." *Id.*

211. *See Skinner*, 188 F.3d at 141.

212. *See id.*

213. *See id.*

214. *See id*. at 147. The court then rejected the plaintiffs' claim that the employer breached its fiduciary duty under ERISA. *See id.* at 147-51. Finally, the court rejected an argument based on equitable estoppel. *See id*. at 151-52. These latter analyses will be further discussed when evaluating alternative arguments upon which retirees may rest a claim when their welfare benefits are unilaterally terminated or modified.

215. *See* Duffy, *supra* note 8, at 1. The *Skinner* decision could ultimately be determined by the U.S. Supreme Court thus settling the rule unless Congress makes a determination that a statute is necessary. *Id.* The Supreme Court has held that an employer that is not subject to a collective bargaining agreement may provide for the amendment of welfare benefits using a standard provision in the ERISA summary plan description. Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73 (1995). The Court has also noted that the courts may find that parties provided for vested benefits through contractual interpretation. Litton Fin. Printing Div. v. N.L.R.B., 501 U.S. 190, 207-08 (1991). The Court has not ruled on the issue of whether an employer may alter or terminate welfare benefits provided for in a collective bargaining agreement. Golden v. Kelsey-Hayes, 73 F.3d 648, 655-56 (6th Cir. 1996).

principle should not be scrapped by the courts until some better alternative is established in the way of legislation.

III. *YARD-MAN'S* UNFOUNDED CRITICISM

The *Yard-Man* decision has been criticized by both the courts and the commentators.[216] Now that the background of the issue has been discussed, it will be helpful to analyze common criticisms of the Sixth Circuit's decision. Each criticism, whether it originates in the courts or in commentary, will be evaluated with a focus on showing that the inference is not inconsistent with solid legal principles. In addition, any problem with the inference is overshadowed by a retiree's loss of health care coverage or life insurance when that retiree had expected the benefits to vest upon retirement. As will be demonstrated, the criticisms do not require the elimination of the principle and are generally outweighed by the inference's necessity.

A. Criticism in the Courts

It has already been shown that the criticism of *Yard-Man* began in the Eighth Circuit with *Anderson v. Alpha Portland Indus*.[217] There, the Eighth Circuit's main criticism of the inference was that the retirees should not be afforded a "gratuitous inference" because it cut against the congressional intent in passing ERISA without vesting requirements for welfare benefits.[218] The court stated that because Congress explicitly exempted welfare benefits from the vesting requirements, "[i]t . . . 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."[219]

The Third Circuit adopted an identical argument in *Skinner*.[220] The court, after quoting *Anderson's* language, stated that "we echo these concerns and add that the *Yard-Man* inference may be contrary to Congress' intent in choosing specifically not to provide for the vesting of employee welfare benefits."[221]

216. *See generally* Anderson v. Alpha Portland Indus. Inc., 836 F.2d 1512 (8th Cir. 1988); *Skinner*, 188 F.3d at 140; and Gregory Parker Rogers, *Rethinking Yard-Man: A Return to Fundamental Contract Principles in Retiree Benefits Litigation*, 37 EMORY L.J. 1033 (1988); *Cf.* Weckstein, *supra* note 38, at 132 (arguing that legislation is needed to protect such benefits, but that a presumption against vesting benefits should be used by the courts until such legislation is adopted).

217. *See Anderson*, 836 F.2d at 1517.

218. *Id.* ERISA's vesting requirements "shall apply to any employee benefit plan described in section 4(a) . . . other than an employee welfare benefit plan." 29 U.S.C. § 1051(1) (1994).

219. *Anderson*, 836 F.2d at 1517.

220. *See Skinner*, 188 F.3d at 141.

221. *Id.* (citing *Anderson*, 836 F.2d at 1517).

This ERISA-based argument appears to be a strong argument at first glance. The legislative history of the statute indicates that Congress feared that by allowing health insurance benefits to vest, it would cause the costs of such insurance to rise.[222] In that case, no employer would even attempt to purchase such benefits. However, after examining the language of ERISA and considering what the *Yard-Man* court really held, the criticism of the Eighth and Third Circuits is less convincing.

The language of ERISA explicitly states that Congress found that "despite the enormous growth in [pension benefit] plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans."[223] The statute goes on to say "that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits."[224] To remedy these situations in which retirees and their families unexpectedly lose benefits, ERISA proposed disclosure and vesting requirements.[225] The disclosure requirements apply to health and life insurance benefits, but these "welfare benefits" are excluded from the vesting requirements.[226]

Retirees obtain these benefits as employees and often believe that they are to last a lifetime.[227] Unlike *Anderson* and *Skinner*, where it did not appear that the retirees ever believed the benefits were to vest, a more recent case from the Eighth Circuit provides a more shocking result.[228] In *John Morrell & Co. v. United Food and Commercial Workers Int'l Union*, the collective bargaining agreement and ERISA documents varied greatly from term to term.[229] At least some of the agreements provided that if the retiree died, the coverage was to last for the lifetime of the retiree's spouse until he or she died or remarried.[230] Even though the language seemed clear, the company was able to point to

222. *See* S. REP. NO. 93-383, at 51 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4890, 4935 ("To require the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income.").

223. 29 U.S.C. § 1001(a) (1994).

224. *Id.*

225. *See id.* § 1001(b), (c).

226. *Compare id.* § 1021 *with* § 1051(a).

227. *See, e.g.*, *Anderson*, 838 F.2d at 1515; *Skinner*, 188 F.3d at 147; John Morrell & Co. v. United Food and Commercial Workers Int'l Union, 37 F.3d 1302, 1313-14 (8th Cir. 1994) (Heaney, J., dissenting) (suggesting the retirees never objected when the company changed the benefits in each collective bargaining agreement signed because they believed that their right to health benefits previously conferred had not been diminished).

228. *See John Morrell & Co.*, 37 F.3d at 1303-08.

229. *See id.* at 1303-07.

230. *See id.* at 1307.

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other language creating an ambiguity.[231] The court, citing to *Anderson*, found that the language of the collective bargaining agreements and ERISA documents did not show an intention of the parties to provide for vesting benefits.[232]

While it must be conceded that ERISA does not require these benefits to vest, the inference is not antithetical to ERISA. [233] In addition, the Eighth Circuit misinterpreted the *Yard-Man* inference when applying the argument that ERISA prevents any "gratuitous inference."[234] In *Anderson*, the court began by rejecting the plaintiff's argument that *Yard-Man* provided for a presumption in favor of vesting benefits.[235] In fact, *Yard-Man* does not provide for such a presumption.[236] The Sixth Circuit insisted that there was not a presumption.[237] Rather, the benefits were classified as "status benefits" and in light of the other evidence, the court indicated that such "status benefits" would raise an *inference* that the parties intended the benefits to vest.[238] Thus, the retirees still maintained the burden of proof in showing that the parties intended the benefits to vest.[239]

The Eighth Circuit then went on to make its argument that because ERISA explicitly exempts welfare benefits from vesting, it would be "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."[240] The court indicated that *Yard-Man* created the presumption that it had previously insisted was not part

231. *See id.* In particular, the court pointed out that the provisions of each collective bargaining agreement lacked explicit language vesting welfare benefits while pension benefits were explicitly vested. *See id*.

232. *See id*. at 1308. In addition, the court refused to find that Morrell breached its fiduciary duty under ERISA because ERISA does not prevent the employer from exercising business judgment, even if the employer is also acting as fiduciary under the statute. *See id.*

233. *See* 29 U.S.C. § 1051(a) (1994).

234. *See Anderson*, 838 F.2d at 1517.

235. *See id.* at 1516-17.

236. *See* International Union, United Auto, Aerospace and Agric. Implement Workers of Am. v. Yard-Man, Inc. 716 F.2d 1476, 1482 (6th Cir. 1983); *supra* notes 104-108 and accompanying text.

237. *Yard-Man*, 716 F.2d at 1482.

238. *Id.* Standing alone, the "status benefits" would not be sufficient to create the inference that the parties intended the benefits to vest. *Id.*

239. *See id.* It has been argued that the practical effect of the inference is to create a presumption and shift the burden of proof. Melbinger & Culver, *supra* note 104, at 147. However, while the burden of production may switch to the employer once evidence has been shown to establish the inference, the burden of proof remains with the retirees to show that more likely than not the benefits were intended to vest. In reality, this situation is no different from any breach of contract case in which the plaintiff establishes the parties' intent.

240. *Anderson*, 838 F.2d at 1517.

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of *Yard-Man's* holding.[241] *Yard-Man* never held that benefits should vest in every case.[242] Rather, it was clear that the existence of "status benefits" alone would not be enough to even create the inference.[243] *Yard-Man* stood for establishing an inference by looking at the context of the agreement.[244] The fact that the benefits were welfare benefits was simply another factor to be considered in establishing that inference.[245] While the congressional intent of ERISA may cut against the idea of a presumption of vested benefits, it certainly does not prevent establishing an inference such as this.

In light of this interpretation of *Yard-Man*, it is no longer "illogical to infer an intent to vest," even with the exemption of welfare benefits under ERISA's vesting requirements. Instead, such an inference is consistent with Congress' intent to "protect . . . the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of the employees."[246]

The next criticism used by the courts rejecting the *Yard-Man* inference is not as much a criticism than it is an argument against the inference. The Third Circuit used it to decide *Skinner*.[247] The Third Circuit began with Judge Posner's position in *Bidlack* that one could argue that the union would never have intended vested benefits since retirees are not in the union and pay no dues (i.e. the union would get no benefit).[248] However, one could also argue that because the employees know they will not be protected by the union, nor the NLRA once they retire, they would never intend anything but vested benefits upon retirement.[249] Leaving the benefits open to change would leave retirees without protection against the company's whims. Judge Posner concluded that because both arguments could be made, no judicial

241. *See id.* at 1516-17. First, the court reasoned that the Sixth Circuit only created an inference in *Yard-Man* to defeat the plaintiff's argument that welfare benefits created a presumption of vested benefits. *See id.* Then, it stated that it would be "illogical to infer" vested benefits in every case. *Id.* at 1517. That is, the court seemed to indicate that it would be illogical to allow the benefits alone to create a presumption of vesting. *See id.*

242. *Yard-Man*, 716 F.2d at 1482.

243. *See id.*

244. *See id.*

245. *See id.* "Rather, as part of the context from which the collective bargaining agreement arose, the nature of such benefits simply provides another inference of intent." *Id.* This was not the result of any special presumption, but rather, a result of the reasoning that the benefits, as deferred compensation, would not have been left to the irregularities of future bargaining. *See id.*

246. 29 U.S.C. § 1001(c) (1994).

247. *See* International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Skinner Engine Co., 188 F.3d 130, 140-41 (3rd Cir. 1999).

248. *See* Bidlack v. Wheelabrator Corp., 993 F.2d 603, 609 (7th Cir. 1993) (en banc).

249. *See id.*

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determination could be made as a matter of law.[250] Rather, the Seventh Circuit in *Bidlack* remanded the case to a jury.[251]

The Third Circuit reasoned differently.[252] Instead of finding that both arguments were reasonable in determining the intent of the parties, the Third Circuit decided that if the parties really intended vesting benefits, then the language would be clear.[253] If the employees knew that they would lose union protection upon retirement, then they "need only see to it that specific vesting language protecting [welfare benefits] is incorporated into the collective bargaining agreement."[254] Thus, there is no need for an inference or presumption because the employees have the burden of incorporating the proper language into the contract.[255]

The problem with this argument is that it assumes that the employees, via the union, knew what type of language to incorporate into the contract. It starts with the proposition that if they had wanted the benefits to vest, the language would be there to make that happen.[256] The chances are equally strong, if not stronger, that the employees, leaving such technicalities to the union, thought they were getting vested benefits.[257] They may or may not have lobbied their union to obtain vested benefits, and upon reading the ambiguous language of the collective bargaining agreement and ERISA documents, thought that the union was successful.[258] Demanding that the retirees show clear language makes for an efficient bright-line rule because it allows a determination to be made on the face of the collective bargaining agreement. However, it will certainly provide for harsh results in situations in which the retirees had believed they were to receive vested benefits and relied on that belief.

250. *See id.* at 609-10.

251. *See id.* at 610.

252. *See Skinner*, 188 F.3d at 141.

253. *See id.*

254. *Id.*

255. *See id.* at 141-42.

256. *See id.* at 141. Employees who want the union to bargain for continued benefits for retirees should include "specific language protecting those benefits" in the collective bargaining agreement. *Id*. This is illogical for another reason. The employee cannot "see to it" that the language will be placed into the agreement. The union is the exclusive representative for the employee bargaining unit. If the employer were to deal with the employee directly, it would violate § 8(a)(5) of the NLRA.

257. *See* John Morrell & Co. v. United Food and Commercial Workers Int'l Union, 37 F.3d 1302, 1313-14 (8th Cir. 1994) (Heaney, J., dissenting). Here the retirees and their spouses testified that they believed that the benefits were to last a lifetime and cover a retiree's spouse in the event that the retiree died. *See id.* at 1310.

258. *See id*. at 1313-14.

This rule eliminates the need to search for the parties' intent.[259] Each time a court determines that the language of the collective bargaining agreement is ambiguous, it would be impossible for the retirees to show that the parties intended vested benefits. The Third Circuit actually creates a presumption that the parties did not intend vested benefits.[260] Much like a presumption favoring vested benefits in every case, this opposite extreme is unconscionable. Not only does it throw out *Yard-Man's* inference, it throws out traditional contractual interpretation.[261]

While some courts have not been friendly to the *Yard-Man* inference, the criticism continued in the commentary following the initial decision.[262] Some of these criticisms present valid points, but none successfully present an argument against using an inference as an added factor in deciding the intent of the parties.

B. Criticisms from Academic Commentary

Donald Weckstein, an expert in labor and collective bargaining issues, criticized the congressional response to the problems of non-vesting benefits.[263] However, he was quick to criticize *Yard-Man* despite his concern for protecting retirees and their needed welfare benefits.[264] He accepted the public policy needs for an inference as created in *Yard-Man*, but attacked the deferred compensation analysis.[265]

Weckstein reasoned that the *Yard-Man* court was correct in concluding that sometimes retiree health benefits are taken in lieu of additional compensation such as wages or immediate benefits.[266] He went on to argue, however, that "the current employees may not have acted on the assumption that, once granted, retiree health and welfare benefits may not be reconsidered

259. *See* generally International Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Yard-Man, Inc., 716 F.2d 1476, 1479-80 (6th Cir. 1983) (explaining that once it has been established that a contract is ambiguous, the court should then seek to discern the intent of the parties).

260. *See Skinner*, 188 F.3d at 141. *See also* Bidlack v. Wheelabrator Corp. 493 F.2d 603, 607 (7th Cir. 1993). In *Bidlack*, the court refused to establish a rule requiring clear language to establish vested benefits. *See id.* "[C]ourts should be cautious about adding formal hoops that contract parties must jump through. . . ." *Id.*

261. *See generally Yard-Man*, 716 F.2d at 1479-80. The Sixth Circuit clearly presented the traditional contract principles needed for the analysis. *See id. See also* notes 74-81 and accompanying text.

262. *See, e.g.*, Weckstein, *supra* note 38, at 128-32; Rogers, *supra* note 216, at 1054-56.

263. *See* Weckstein, *supra* note 38, at 133-36. Weckstein indicated that Congress had made "step[s] in the right direction, but [Congress was] still a long way from a solution." *Id.* at 135.

264. *See id.* at 130-32, 134.

265. *See id.* at 128-31.

266. *See id.* at 130.

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at future bargaining sessions when conditions have changed."[267] Thus, the deferred compensation analysis requires the court to assume too much regarding the union's and employees' intent.[268]

Weckstein then turned his attention to the *Weimer* court's use of this analysis.[269] There, the Sixth Circuit made the statement that because the benefits were viewed as deferred compensation, and because the parties could not have left them to the uncertainties of future bargaining, the welfare benefits were normally vested.[270] Weckstein insisted that *Yard-Man* never stood for such an analysis.[271] He insisted that this expands *Yard-Man* and "ignores the statutory distinction made in ERISA . . . between pension retirement benefits, which do normally vest, and welfare retirement benefits which do not vest absent a contractual undertaking of that nature."[272]

First, Weckstein is correct that the statement from *Weimer* is an undue expansion of the *Yard-Man* inference.[273] This statement may be the reason why the courts have dismissed *Yard-Man* as a presumption rather than a mere inference to be considered with other factors in determining intent.[274] However, it has already been shown that the *Weimer* court, while making such a statement, really continued to apply the *Yard-Man* inference correctly.[275] That is, it considered it in addition to other factors in determining that the parties intended the benefits to vest.[276]

Next, Weckstein raised a valid point in regard to the deferred compensation analysis, but his attack was too extreme.[277] Perhaps a party would be willing to accept benefits left to the uncertainties of later bargaining.[278] Indeed, the union may not have been able to obtain the vested language from the employer. If this is the case, then the interpretation of the collective bargaining agreement raises the possibility of an illusory provision.[279] The courts have always shied away from interpreting an

267. *Id.*

268. *See generally* Weckstein, *supra* note 38, at 130 ("The difficulty with this analysis is that it proves too much, some of which does not logically follow.").

269. *See id.* at 131.

270. *Id.* (citing Weimer v. Kurz-Kasch, Inc., 773 F.2d 669, 672 (6th Cir. 1985)).

271. *See id.* After quoting from *Weimer*, Weckstein insisted that "*Yard-Man* did not make any such statement." *Id.*

272. *Id.*

273. *See supra* notes 115-20 and accompanying text.

274. *See Skinner*, 188 F.3d at 140. "We cannot agree with *Yard-Man* and its progeny that there exists a presumption of lifetime benefits in the context of employee welfare benefits." *Id.*

275. *See supra* notes 116-20 and accompanying text.

276. *See supra* notes 118-19 and accompanying text.

277. *See* Weckstein, *supra* note 38, at 130.

278. *See id.* (citing *Yard-Man*, 716 F.2d at 1482 n.8).

279. *See generally, e.g.*, Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214, 214-15 (N.Y. 1917). It is conceded that providing some benefits is better than no benefits. However, there is

agreement in such a way because it is difficult to believe that any party would engage in such a one-sided deal.[280] Thus, the deferred compensation analysis, though requiring the court to assume that parties would not enter into a one-sided agreement, is not so unreasonable as to avoid using it. In addition, any questionable assumption is outweighed by the courts' use of other factors in determining the parties' intent. Again, the *Yard-Man* inference was only one factor among many pointing to an intent to vest benefits. [281]

The courts and commentators have been creative in attacking *Yard-Man*'s analysis. At the same time, very little has been suggested as an alternative to avoiding the harsh results that are possible when the inference is not used. Alternatives that have been suggested do not prevent unconscionable results or have not been adopted by the courts or legislatures.

IV. THE INSUFFICIENCY OF CURRENT ALTERNATIVES AVAILABLE TO RETIREES

Perhaps the best argument for preserving the *Yard-Man* decision is that any alternative analyses of problems involving the termination of welfare benefits are insufficient to protect the interest of the parties. Current judicial alternatives range from requiring specific language formulae[282] to using pure contractual analyses such as equitable estoppel.[283] As with the criticism of *Yard-Man*, a cross-section of these alternatives will be evaluated based on their ability to provide efficient results, protect the retirees and protect the ability of employers to continue providing benefits to retirees.

nothing keeping an employer in the Third and Eighth Circuits from terminating the welfare benefits being paid to retirees immediately upon termination of the collective bargaining agreement. *See Skinner*, 188 F.3d at 140-41; Anderson v. Alpha Portland Indus. Inc., 836 F.2d 1512, 1517 (8th Cir. 1988). While some of the current employees covered by the pertinent collective bargaining agreement will retire during the term of the agreement, other employees, perhaps even a majority, that presumably gave up the same compensation, would never see the compensation deferred to retirement. It is not being argued that employers must grant vested benefits in every case. Rather, the employees should not be misled into believing that they are receiving lifetime benefits when they are not. The deferred compensation analysis is only part of the reasoning in raising the inference. *See Yard-Man*, 716 F.2d at 1482. Ultimately, it is only a single part of the *Yard-Man* analysis. *Id.*

280. Bidlack v. Wheelabrator Corp., 493 F.2d 603, 607 (7th Cir. 1993). The Seventh Circuit used this to reason that courts will, on occasion, look outside the terms of the contract to imply meaning. *Id.*

281. The *Yard-Man* court used a number of factors in determining that the parties must have intended the benefits to vest. *See supra* notes 61-108 and accompanying text.

282. *See, e.g.*, *Bidlack*, 993 F.2d at 607.

283. *See Skinner*, 188 F.3d at 151-52; Rogers, *supra* note 216, at 1072-74. *See also* Melbinger & Culver, *supra* note 104, at 150-152.

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A. Language Formulae

In approaching a situation in which an employer has terminated welfare benefits, a court may consider a number of possibilities for analysis.[284] While it is has not been a choice, even for the courts most skeptical of retiree claims, one of these possibilities is requiring specific language in order to vest benefits.[285] That is, a court may hold that there will not be vested benefits unless the collective bargaining agreement uses the words, "vested benefits" or "benefits for the life of the retiree." If this was the case, retirees would seldom be able to bring a claim under § 301 of the NLRMA.[286] The outcome of any case could be pre-determined.

This analysis would provide efficient results. The courts could decide a claim without considering the role and impact of a jury in the proceedings.[287] Judges could rule as a matter of law because they would need to only look for the prescribed formula. If that formula was not present, then the retirees could not succeed under § 301.

This efficiency is outweighed by the harsh results generated by such formalism. Even when the language indicates that welfare benefits are to vest, the retirees could not recover unless the prescribed formula was present. In *Bidlack*, the Seventh Circuit reasoned, "[i]t is one thing for a court to lay down default rules to solve contractual disputes when the parties' intentions cannot be determined. . . . It is another thing for us to say to the contract parties, we can see what you're driving at but as you have not used our preferred form of words we shall not enforce your contract."[288]

The courts developed the idea of consideration to show that the contract should be enforced rather than prescribed formulae.[289] Even if it is apparent that the parties did not intend vested benefits, the collective bargaining agreement is enforceable because the current employees are providing consideration through their labor. Thus, requiring specific words for the benefits to vest is simply not appropriate.[290]

284. *See, e.g.*, Melbinger & Culver, *supra* note 104, at 145-52. Melbinger and Culver consider six different analyses, but draw no conclusions. *Id.* Rather, their article was merely a survey of the status of the issue in the early 1990s. *Id.*

285. *See generally Bidlack*, 993 F.2d at 607. The Seventh Circuit eventually rejected this analysis as an extreme position. *Id.*

286. 29 U.S.C. § 185(a) (1994).

287. *See generally Bidlack*, 993 F.2d at 607-09 (rejecting this analysis, a presumption in favor of vested benefits, and remanding the case for a jury to decide).

288. *Id.* at 607.

289. *See id.*

290. *See id.*

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B. Equitable Estoppel

Another option available to the courts would be to use a pure contractual analysis.[291] Some of the commentators and courts have suggested that equitable estoppel is sufficient to protect the retirees and provide for efficient results.[292]

Often employers become confused after they leave the bargaining table. The negotiators may not have intended for the benefits to vest. At a subsequent time, some authorized agent of the employer will explain to employees subject to the collective bargaining agreement that they have been provided with lifetime welfare benefits.[293] Another common occurrence is that the employer continues to provide welfare benefits to retirees for years after the collective bargaining agreement in question has expired.[294]

In an argument criticizing the *Yard-Man* analysis, Gregory Parker Rogers argued that equitable estoppel was a "rational alternative" to the "strained contract interpretation" of *Yard-Man*.[295] Thus, if an employee reasonably relies on a promise of lifetime benefits from a company agent, then the employer should be "estopped from standing on the contract terms."[296] The only danger pointed out by Rogers is in avoiding the enforcement of promises on which no reasonable person would rely.[297]

Unfortunately, when this analysis is applied to real situations, the results are sometimes too harsh. For example, in a case involving an employer who unilaterally terminated medical benefits, the Third Circuit discussed the possibility of an equitable estoppel analysis.[298] In *In re Unisys Corp. Retiree Med Benefit "ERISA" Litig*, the retirees were denied recovery under equitable estoppel.[299] In that case, the company distributed summary plan descriptions pursuant to ERISA § 1021(a)[300] which contained a provision reserving the

291. *See* Melbinger & Culver, *supra* note 104, at 150-52.

292. *See* Rogers, *supra* note 216, at 1072-74.

293. *See id.* at 1072.

294. *See* John Morrell & Co. v. United Food and Commercial Workers Int'l Union, 37 F.3d 1302, 1305-06 (8th Cir. 1994). *John Morrell & Co.* went so far as to continue providing retirees with health insurance benefits even when the union went on strike and welfare benefits were terminated for active employees. *Id.* at 1306. The Eighth Circuit did not use an equitable estoppel analysis however. *See id.* at 1302-07.

295. Rogers, *supra* note 216, at 1072.

296. *Id.* at 1073.

297. *See id.*

298. In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig., 58 F.3d 896, 907 (3rd Cir. 1995). In this case, the court dealt only with ERISA and did not address a *Yard-Man* analysis because there was no collective bargaining agreement involved. *See id.* at 898-900. Instead, the retirees claimed to have relied on words in the summary plan description, which indicated the benefits would be vested "for life." *Id.* at 898.

299. *See id.* at 908.

300. 29 U.S.C. § 1021(a) (1994 & Supp. III 1997).

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right to terminate in the employer, but also included words indicating that the benefits were "for life."[301]

The court listed the elements of equitable estoppel.[302] The plaintiff had to show a material misrepresentation on the part of the company and reasonable, detrimental reliance on that misrepresentation.[303] Because of the provision in the summary plan description reserving the right to terminate, the court determined that the retirees could not have reasonably relied on the other language.[304] The court stated: "While we acknowledge that many retirees may have relied to their detriment on their interpretation of the summary plan descriptions as promising vested or lifetime benefits, we nonetheless must reject their estoppel claim."[305]

Likewise, in *Skinner*, the Third Circuit concluded that the retirees could not recover under equitable estoppel.[306] In this case, the retirees had failed to show detrimental reliance or other extraordinary circumstances.[307] As the court noted, "[h]ere, the appellants have presented no evidence which supports an inference of bad faith and/or fraudulent conduct on the part of the [employer], misrepresentations over an extended course of dealing, or the particular vulnerability of the appellants."[308]

Showing reliance on company promises is almost impossible. The reliance must be reasonable.[309] Thus, it is almost necessary for a retiree to be told by a company executive during an exit interview that welfare benefits are to last a lifetime in order to pursue a claim under equitable estoppel.[310] Though there are probably no studies dealing with this issue, it is likely that companies seldom send top executives to conduct exit interviews, but that does not mean a retiree does not reasonably rely on what he or she is told.[311]

Likewise, it is also difficult to show reasonable reliance on language in a summary plan description. A retiree could not make an argument of reasonable reliance unless the documents were clear that the benefits were to

301. *See Unisys*, 58 F.3d at 898.

302. *See id.* at 907 (citing Curcio v. John Hancock Life Ins. Co., 33 F.3d 226, 235 (3rd Cir. 1994)); Smith v. Hartford Ins. Group, 6 F.3d 131, 137 (3rd Cir. 1993)).

303. *See id.*

304. *See id.*

305. *Id.*

306. *See* International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Skinner Engine Co., 188 F.3d 130, 152 (3rd Cir. 1999).

307. *See id.*

308. *Id.*

309. *See Unisys*, 58 F.3d at 907; *Skinner*, 188 F.3d at 151 (citing *Unisys*, 58 F.3d at 907; *Curcio*, 33 F.3d at 235).

310. *See* Rogers, *supra* note 216, at 1073.

311. "Courts must be careful . . . not to enforce promises on which no reasonable person would rely. If the [person conducting an exit interview] has no such authority [to explain that benefits are to last a lifetime], then retirees should not rely on these promises." *Id.*

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vest.[312] If the description contained conflicting language, then the retiree was not reasonable in relying on words that do indicate lifetime benefits.[313] Thus, the summary plan description would have to be clear in providing vested benefits. It is then questionable whether or not a retiree could reasonably rely on such language if a separate document (i.e. a collective bargaining agreement) contained conflicting language.[314] Regardless, the employer will almost always be able to create an argument against the reasonable reliance of the retiree. "Clear language addressed to the employer's right to terminate or modify its obligation to continue health and welfare benefits for retirees . . . is the exception. And even when it does occur, other actions or language of the employer may create an ambiguity."[315]

While the efficiency of the equitable estoppel analysis is not a problem, it simply is not sufficient to protect the retirees from harsh consequences. The union conducts negotiations in lieu of the employees.[316] If the employees had directly negotiated with the employer and settled on the contract provisions, then maybe the equitable estoppel analysis would make more sense.[317] Instead, the employee, who will later be the retiree, is left to rely on what the union and company tells the employees regarding the status of welfare benefits under a collective bargaining agreement. Still, once the bargaining agreement is executed, the employees are held to the terms of the agreement, even if they disagree with the terms.[318] Thus, a retiree could seldom satisfy the reasonable reliance requirement of equitable estoppel, even if there was actual reliance on

312. *See Unisys*, 58 F.3d at 907-08.

313. *See id.* at 907.

314. *Skinner* would suggest that an employee cannot reasonably rely upon language in one document when there is language in another indicating that the company reserved the right to terminate the benefits. *See Skinner*, 188 F.3d at 151-52. However, *Skinner* does not provide a clear answer because, while there was language in the summary plan descriptions reserving a right to terminate, the summary plan descriptions were never distributed to the employees or retirees. *See id.* at 152. Thus, the court instead decided that equitable estoppel was not possible because there was *no evidence* of reliance on the language in the collective bargaining agreement indicating that benefits were vested and there were no extraordinary circumstances. *See id.*

315. *See* Weckstein, *supra* note 38, at 120.

316. *See* 29 U.S.C. § 159(a) (1994).

317. In that situation, there would be a reason to consider reliance on language unreasonable when there is conflicting language. However, when the union negotiates, the employees cannot be expected to be experts on the language of the collective bargaining agreement and ERISA documents. That's what they select the union to do. *Id.*

318. *See* Emporium Capwell Co. v. Western Addition Cmty. Org., 420 U.S. 50, 65-70 (1975). The Supreme Court has held that the employees are bound by the terms of the collective bargaining agreement even if they are challenging the employer's discriminatory practices. *Id.*

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the words of the employer, summary plan description, or collective bargaining agreement.[319]

C. Breach of Fiduciary Duty Under ERISA

The final analysis to be evaluated has also been discussed by courts rejecting *Yard-Man*. This analysis is based on the creation of a fiduciary duty under ERISA. When an employer establishes a benefits plan, it must be administered under ERISA.[320] The administrator maintains a fiduciary duty to the plan participants.[321] Thus, the employer may actually have a double relationship with the employees under a plan: employer-employee and a fiduciary relationship.[322]

A fiduciary must discharge the plan only in the interest of the participants.[323] The argument presented by retirees having their benefits terminated is that the employer breached its fiduciary duties when it led them to believe that they were receiving a vested benefit.[324] The courts generally hold that an employer who affirmatively misleads plan participants breaches the fiduciary duty required by ERISA.[325] The retirees can argue that they were affirmatively misled, and thus, the employer acted to the detriment of the plan participants in allowing the retirees to believe the benefits were vested when they were not.[326]

It would appear that this presents a safety valve, eliminating the need for the *Yard-Man* inference. After all, ERISA was meant to cover and protect pension and benefit plans. Retirees pursuing this route have been unsuccessful.[327] Even presuming a retiree could show that the employer

319. *See Skinner*, 188 F.3d at 151; *Unisys*, 58 F.3d at 907; Gordon v. Barnes Pumps, Inc., 999 F.2d 133, 137 (6th Cir. 1993) (holding that all the plan participants *should have known* that the employer could modify the terms according to the provisions of the plan).

320. *See* Janilyn S. Brouwer, *Retiree Health Benefits: The Promise of a Lifetime*? 51 OHIO ST. L.J. 985, 990 (1990).

321. *See id.* A fiduciary is anyone who "exercises any discretionary authority or discretionary control respecting management of [a benefits] plan or exercises any authority or control respecting management or disposition of its assets." 29 U.S.C. § 1002(21)(A) (1994).

322. *See* Amato v. Western Union Int'l, Inc., 773 F.2d 1402, 1416 (2nd Cir. 1985); Fischer v. Phila. Elec. Co., 994 F.2d 130, 133 (3rd Cir. 1993).

323. *See* 29 U.S.C. § 404(a)(1) (1994); *Skinner*, 188 F.3d at 148.

324. *See* Ossi, *supra* note 55, at 248.

325. *See Skinner*, 188 F.3d at 148. Generally, to make out a claim for breach of a fiduciary duty, the Third Circuit requires a showing of: (1) the employer acted as a fiduciary, (2) the employer/fiduciary made affirmative misrepresentations, (3) the fiduciary knew it was confusing participants, and (4) the participants were harmed. *Id.*

326. *See* Brouwer, *supra* note 320, at 991.

327. *See id*. *See also* Ossi, *supra* note 55, at 248 (arguing that retirees are unsuccessful with this analysis with or without provisions expressly providing for the employer's reserved right to amend or terminate the benefit).

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misled the plan participants without showing the benefits are actually vested, the courts, through interpretation of the fiduciary duty and ERISA requirements, have made it nearly impossible to obtain equitable relief under the fiduciary duty analysis.[328] Generally, to raise a breach of fiduciary duty, retirees would have to show that the employer misled them into believing that benefits were vested, and then terminated the benefits.

First, in *Amato v. Western Union Int'l*, the Second Circuit allowed the employer to distinguish acts committed as the fiduciary and acts committed as the employer.[329] In general, an employer should not be prevented from deciding what benefits are to confer.[330] Thus, if the employer decides not to confer any benefits, the employee has no recourse.[331] This is a decision employers are allowed to make. Likewise, if the employer decides to modify benefits that have not been vested, then the employer has not breached a fiduciary duty because the employer has not acted as a plan administrator and owes no fiduciary duty.[332] Because of this precedent, retirees could not claim breach of the fiduciary duty for simply terminating the benefits.[333] In addition, to argue that the employer breached a fiduciary duty by cutting or modifying benefits that were vested begs the question of whether the benefits were vested in the first place. The question of the *Yard-Man* inference would still be unresolved.

In order to state a cause of action for a breach of fiduciary duty, the courts have created elements that make it just as difficult to bring it as a claim under equitable estoppel.[334] In fact, the courts look for many of the same elements to establish both.[335] In *Skinner*, the court listed the elements needed to bring a breach of fiduciary duty under ERISA.[336] One of the elements that must be shown is that the "company made affirmative misrepresentations or failed to adequately inform plan participants and beneficiaries."[337]

In *Skinner*, the court refused to find an affirmative misrepresentation even though the employees actually believed the benefits were to vest under the

328. *See supra* notes 324-27.

329. *See Amato*, 773 F.2d at 1416; Brouwer, *supra* note 320, at 991.

330. *See id.* at 991.

331. *See id.*

332. *See id.* at 991-92.

333. If an employer decides to cut welfare benefits, a fiduciary duty claim cannot be brought because the employer was not acting as the plan administrator when the benefits were cut. *See id.* at 991. "The courts have decided that modifying the terms of employee benefit plans is an 'employer' function." *Id.*

334. *See supra* notes 291-319 and accompanying text.

335. *Compare supra* notes 291-319 and accompanying text *with supra* notes 320-36 and accompanying text.

336. *See supra* note 325.

337. International Union, United Auto., Acrospace & Agric. Implement Workers of Am. v. Skinner Engine Co., 188 F.3d 130, 148 (3rd Cir. 1999).

plan.[338] The court found that there was no evidence showing that the employer placed the thought in the employees' mind.[339] Nor was there evidence that the employer stood silent while knowing that the employees believed they were to receive vested benefits.[340] Because of this, there could be no breach of a fiduciary duty under ERISA.[341]

Under *Skinner*, it seems that in order to bring a breach of fiduciary duty, the retirees, prior to retirement, have to ask the employer whether or not the benefits vested and the employer has to give an affirmative response.[342] Employees who believe they are going to receive vested benefits would have no reason to ask such a question. Employers, even if they believe benefits are supposed to vest, can avoid liability under a fiduciary duty analysis by keeping quiet.[343] The analysis will only prevent incidents of the employer making explicit statements that the benefits are to vest, but those situations are rare as demonstrated by the multitude of litigation making its way to the U.S. Circuit Courts of Appeals.[344]

Because other judicial alternatives do not provide an acceptable alternative, the next question that arises is whether the *Yard-Man* inference is acceptable, or whether a legislative alternative is needed. One must answer both questions affirmatively. The *Yard-Man* inference is acceptable. At the same time, legislation could clarify the positions the employer and union should take in negotiation regarding such benefits. Legislation could also better protect health and life insurance benefits that retirees believe are to last a lifetime. Perhaps it would allow all parties involved to avoid the harsh consequence of being forced into court each time an employer, for whatever reason, decides to cut benefits.

V. THE YARD-MAN INFERENCE SERVING AS A SUBSTITUTE UNTIL LEGISLATION IS AVAILABLE TO PROTECT RETIREES

The thrust of this Comment has been to establish the validity of the *Yard-Man* inference through a critique of its criticisms and the shortcomings of judicial alternatives.[345] In fact, the *Yard-Man* inference can stand on its own as a valid principle. Currently, it is the only choice retirees have to challenge an improper termination of benefits. However, because the employers and union

338. *See id.* at 150-51.

339. *See id.* at 150.

340. *Id.*

341. *See id.* at 150.

342. *See Skinner*, 188 F.3d at 150-51. The retirees would also have had a claim if the employer went about making explicit statements that the benefits were to vest upon retirement. *See id.*

343. *See id.*

344. *See supra* notes 61-215 and accompanying text.

345. *See supra* notes 216-344 and accompanying text.

should be able to enter negotiations knowing the status of welfare benefits, this should not be an invitation to abandon calls for legislation to remedy the situations discussed.

A. The Yard-Man as a Valid Principle of Interpretation

Critics of the inference focus on the dangers of a "presumption" that benefits vest.[346] It has been demonstrated that the *Yard-Man* decision did not establish such a presumption.[347] Instead, the burdens of persuasion and production of evidence remain with the retirees in establishing that the benefits vested upon retirement. The *Yard-Man* inference is only a factor contributing to a general inference that benefits in a specific situation were to vest upon retirement.[348] Employers should not fear *Yard-Man*. Because it is only an inference, rather than a presumption, finders of fact would be free to reject the inference of vested benefits. Thus, the inference only works to preserve a promise made to retirees before they retired. It acts only as an additional tool in discerning the intent of the parties.

Perhaps the courts could run wild with the inference and establish a presumption that benefits are to vest in every situation. However, it has been shown that this has not happened in the Sixth Circuit, even though the court has adopted broader language when discussing the law.[349] The application of the law has remained the same.[350]

One drawback to the inference is that anytime there is an alleged wrongful termination of benefits, retirees must fight the employer in the courts. The union no longer has a duty to represent the retirees.[351] Even though the union may find it in its interest to help its former members along, retirees may have to fight alone. For retirees and employers alike, this presents huge legal fees. This is a harsh reality of solving the problem through the courts. Despite the validity of the inference, legislation is needed. Any legislation should allow the employer and employee to know ahead of time whether or not benefits are going to vest in the employee upon retirement. Current legislation is simply inadequate.[352]

346. *See supra* notes 217-81 and accompanying text.

347. *See id.*

348. *See supra* notes 105-08 and accompanying text.

349. *See supra* notes 109-26 and accompanying text.

350. *See id.*

351. *See* Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co., 404 U.S. 157, 168 (1971).

352. *See infra* notes 353-64 and accompanying text.

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B. The Inadequacy of Current Legislation and the Search for Other Alternatives

From the analysis thus far, it is clear that ERISA does not solve the problem of *Yard-Man*. ERISA does not require the vesting of welfare benefits, and its fiduciary duty requirements do not provide retirees with a remedy.[353] Commentators on ERISA have admitted as such.[354] Knowing that retirees were facing serious problems trying to afford health care, Congress went back to the drawing board.

The Consolidated Omnibus Budget Reconciliation Act ("COBRA") was passed to provide protection against the unilateral termination of health insurance benefits.[355] The law requires that retirees be allowed to continue participating in the group health insurance plan provided to active employees for eighteen months after separating from employment.[356] Thus, retirees were given at least eighteen months to find new coverage. This was positive legislation in light of the confusion among the circuits regarding whether and when welfare benefits should vest.[357]

COBRA only gives protection for eighteen months.[358] Retirees will then have to find new coverage. The expense of health insurance, even coverage supplemental to Medicare, looms for a retiree losing benefits at the end of the eighteen months.[359]

Next, COBRA does not require employers to continue paying for retirees' coverage. Rather, it only requires that retirees be allowed to participate in the coverage provided to active employees at the group rate.[360] Thus, while this coverage will be cheaper than other insurance, the retiree is still required to pay the premiums. In addition, the employer may charge a 2% surcharge.[361]

353. *See infra* notes 354-65 and accompanying text.

354. *See* Ossi, *supra* note 55, at 249; Brouwer, *supra* note 320, at 992. In addition, at least one commentator argued that "E.R.I.S.A. provides little control over employers' self interested behavior and arguably has been interpreted by courts as a protective cover for employer decisions that are decidedly harmful to their employee-principals where health insurance benefits are concerned." Dayna Bowen Matthew, *Article: Controlling the Reverse Agency Costs of Employment-Based Health Insurance:Of Markets, Courts, and a Regulatory Quagmire* 31 WAKE FOREST L. REV. 1037, 1067 (1996).

355. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272. *See also* Weckstein, *supra* note 38, at 134-35.

356. *See id.* at 134-45.

357. *See id.*

358. *See id.*

359. *See id.*

360. *See id.*

361. *See* David L. Gregory, *COBRA: Congress Provides Partial Protection Against Employer Termination of Retiree Health Insurance*, 24 SAN DIEGO L. REV. 77, 84 (1987).

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Thus, the retiree still has to pay 102% of the cost of health insurance after retirement.[362]

In recent years, legislation has been introduced that would prevent employers from terminating benefits when retirees challenged the company's obligations in court.[363] In addition, the legislation also placed the burden of persuasion on the employer to prove that the termination was allowed by ERISA documents or collective bargaining agreement.[364] This type of legislation has failed to muster enough votes on two separate occasions.[365]

The failure of this legislation is a disappointment for retirees. Like COBRA, it would be a step in the right direction. This would encourage employers to be clear about the benefits from the beginning. Thus, the union could better negotiate for the vested benefits at the bargaining table. It would not necessarily chill offers of welfare benefits because it is not an absolute vesting requirement.[366] Neither would it require an employer to bargain over retirement benefits in the first place. It only requires continuing benefits if the retirees challenge the employer's obligations until a court can resolve the issue. In addition, negotiators for both unions and employers could establish positions knowing who would have the burden of proof if a dispute was to arise. While the law would still require going to court, the retirees would be better protected because they would maintain the benefits until the case was decided.

VI. CONCLUSION

It is easy to argue that the problem of *Yard-Man* is not a problem because Medicare acts as a retirees' safety net. That is, if a retiree loses health insurance from a former employer, Medicare is there to soften the blow. However, Medicare is inadequate.[367] Retirees must find supplemental coverage for anything that Medicare does not cover.

The *Yard-Man* inference is necessary to prevent employers from breaking a promise of lifetime benefits. When the employer allows its employees to believe they are receiving vested health insurance benefits, the employer should be held accountable when it attempts to terminate those benefits after the collective bargaining agreement expires. The *Yard-Man* inference adds to

362. *See id. See also* Weckstein, *supra* note 38, at 135.

363. Retiree Health Benefits Protection Act, S. 1268, 104th Cong. (1993). S*ee also* Ossi, *supra* note 55, at 256.

364. *See id.* at 256.

365. *See id.*

366. Presumably, if an employer knows that benefits have to vest, the issue would never reach the bargaining table. As a permissive subject of bargaining under the NLRA, the employer has no duty to bargain for the retiree benefits. Rather, whether such benefits enter negotiations is a function of the bargaining power and desires of the union. *Id.*

367. *See supra* notes 25-27 and accompanying text.

the factors that can be shown by a retiree trying to demonstrate what the parties actually meant when the collective bargaining agreement was negotiated. Employers should not fear a situation in which they end up paying for benefits when such benefits were never promised. The existence of the benefits alone is not enough to establish vested benefits. Retirees still bear the burden of proof and production of the original intent of the employer and union. The finder of fact can then determine whether to accept or reject the inference based on the credibility of the parties.

ERISA and COBRA are positive laws that provide some assistance, but they do not solve the problems faced by retirees and employers in a *Yard-Man* situation.[368] Courts should continue using the Sixth Circuit inference. It is possible that the inference will not be enough to demonstrate vested benefits, and the retirees will suffer the loss of benefits. Regardless, it is imperative that the circuits stop mowing over Y*ard-Man* until alternative legislation is possible.

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368. *See supra* notes 353-66 and accompanying text.

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