No. 13-1010

IN THE

Supreme Court of the United States

M&G POLYMERS USA, LLC, *et al.*,
Petitioners,
v.
HOBERT FREEL TACKETT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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STATEMENT OF FACTS

The facility where this case arose, called Apple Grove, produces polyester resin in Point Pleasant, West Virginia.

For more than 30 years, up to November 1992, Goodyear Tire & Rubber Company owned and operated Apple Grove. During that time Local Union 644 of the United Rubber Workers ("URW") (which later merged with the United Steelworkers)[1] represented Apple Grove's active employees. PA32.[2] Goodyear and the URW negotiated collective bargaining agreements ("CBAs") every few years that provided terms and conditions of employment—including employee benefits—for the active employees. Those CBAs included both "Basic Agreements" and Pension, Insurance and Service Award Agreements ("P&I

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[1] The full name of the United Steelworkers is United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC.

[2] Citation notations in this brief are as follows. "JA__" refers to the Joint Appendix. "PA__" refers to the Petition Appendix. "R__" refers to docket entries in the district court record (S.D. Ohio 2:07-cv-00126-GLF-MLK). "JX__" and "PX__" refer to joint exhibits and plaintiffs' exhibits, respectively, admitted at trial in this matter; a list of those exhibits is found at R214.

"Pet. Br." refers to Petitioners' merits brief. As for briefs by *amici*, "Whirlpool Br." refers to the brief of Whirlpool Corporation; "NAM Br." refers to the brief of National Association of Manufacturers; "ERIC Br" refers to the brief of the ERISA Industry Committee; and "CLLE Br." refers to the brief of the Council on Labor Law Equality and the Society for Human Resource Management.

Agreements"). There was master bargaining between Goodyear and the URW at a number of other facilities, not including Apple Grove, PA31-32, followed by negotiations for Apple Grove in which the parties adopted certain results of master bargaining on the basis of "me, too—with exceptions." PA66.

In 1992, Shell Chemical Company purchased Apple Grove and assumed Goodyear's contractual obligations to the then-active employees. PA31-33. Shell and Local 644 bargained their first CBA in 1994 and agreed to adopt the 1994 Goodyear P&I Agreement, with exceptions, for purposes of continuity. JA457-58, 461. In 1997, Shell and Local 644 created their own P&I Agreement, patterned closely after the 1994 version. JA198-274.

In 2000, Shell sold Apple Grove to Mossi & Ghisolfi Overseas SA, a Luxembourg company, JA302; PA34, and its subsidiary, M&G Polymers, USA ("M&G"). M&G agreed to assume the existing P&I Agreement as well as Shell's liability for future pensions and retiree health benefits to employees who had retired from Apple Grove under Shell's ownership. JA302, 309-10. The parties credited the full actuarial value of that liability toward M&G's purchase price. JA311-13. That valuation—and, thus, the net purchase price—was based on assumptions described in Exhibit 2E2(c) to a Human Resources Agreement relating to the sale. As to the health benefits, those assumptions included "Coverage" described as "Lifetime for Retirees and Spouses" and "Retiree Contributions" described as "None." JA323, 329-30.

After bargaining in 2000, M&G and Local 644 prepared their own P&I Agreement. JA333. The 2000 P&I agreement was still in effect when this case was tried.

The P&I Agreements. Each P&I Agreement describe the pension plan, *e.g.*, JA335, insurance programs, *e.g.*, JA338-54, medical benefits, *e.g.*, JA355, and various other benefits for active employees, *e.g.*, JA356-57. The articles setting out benefits for active employees also contained language providing benefits for employees retiring during the term of each agreement.

The retiree health benefit rule in effect for most of the period relevant to this case made the following promise to long-service retirees "receiving a monthly pension":

> Employees who retire on or after January 1, 1996 and who are eligible for and *receiving a monthly pension* under the 1993 Pension Plan . . . whose full years of attained age and full years of attained continuous service . . . at the time of retirement equals 95 or more points *will receive a full Company contribution* towards the cost of the benefits described in this Exhibit B-1.

JA415 (emphasis supplied). A retiree with fewer than 95 age-and-service points was entitled to an employer contribution reduced in proportion to the difference between the retiree's actual point total and 95; the retiree was required to pay the difference. JA415.[3]

[3] In earlier agreements, the proportionality was less precise. These agreements promised that a retiring employee with at least 10 years continuous service "shall receive the benefits" described in the applicable exhibit, while a retiring employee with less than 10 years continuous service could maintain the benefits by paying for them at the group rate. For employees hired after 1988, the rules required 20 years of continuous service for the full benefit, and those who had between 10 and 20 years would have to pay half of the cost. *E.g.*, JA75-76.

"Exhibit B-1" (or a similar denomination) in each P&I Agreement included detailed descriptions of the particular health benefits that would be provided and the amounts that participants would have to pay as copayments or deductibles. JA377-421.

The P&I Agreements also provided health benefits for spouses of retirees who died while receiving a pension. Such a surviving spouse "shall be entitled to continue to receive the benefits of this Exhibit B-1 *until death or remarriage* under the exact same conditions and amounts that such surviving spouse was entitled to such benefits as a dependent immediately prior to the death of such former Employee." JA417 (emphasis supplied).

In 1994, the parties agreed that an optional "Medical Necessity Program" would be terminated for active employees after 1994, but anyone retiring before January 1, 1995, could elect to keep that program after retirement. JA193. The effective date of that change was later moved to August 1, 1997, with the same understanding that employees retiring before that date could keep the Medical Necessity Program after retirement even though it was no longer provided for active employees. JA272-73. At the time of trial, that coverage was still being provided to the retirees who had elected it. JA497-98.

The 1997 P&I Agreement refers only to retiree health benefits for employees retiring on or after January 1, 1996 and is silent as to health benefits for those who had retired before that date. JA263-65. Nonetheless, Shell—which was the employer in 1997—continued to provide the benefits described in the earlier P&I Agreements. M&G, after purchasing Apple Grove

and assuming Shell's liability, continued to provide retiree health benefits to all of those retirees as well as those who retired afterward. *See* PX255 at 13-16, R189 at 21.

Each P&I Agreement had a duration clause for the agreement as a whole, *e.g.*, JA359-61, and separate duration clauses for each article within it. Each article—including that comprising the pension plan—states that its benefits will be provided for "Employees" "for the duration of this Agreement." *E.g.*, JA335, 338. In the case of health benefits, the language immediately preceding the duration clause refers to the benefits that are the subject of the clause as "benefits for employees and their dependents." JA355, 377.[4]

The "Cap Letters." In 1991 master bargaining with URW locals (not including Local 644), Goodyear proposed and obtained a side letter called "Letter G" that set caps on the amounts Goodyear would be required to pay for retiree health benefits beginning *in 1997*—well beyond the term of the 1991 Agreement. That letter stated:

> The Company shall provide health care benefits under the Medical Necessity Benefits Program, Exhibit B-1, the Major Medical Benefits Program, Exhibit B-2, the Comprehensive Medical Benefits Program, Exhibit C-1, . . . of the Pension, Insurance and Service Award Agreement dated May 15, 1991, to the extent that such benefits shall be subject to the following limitations:

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[4] "Employee" is defined as an employee who is in the bargaining unit during the term of the Agreement. *E.g.*, JA334.

1. The average annual Company contributions to be paid for all health care benefits per retired employee (including their surviving spouses) who retires on or after May 1, 1991, shall not exceed $10,500 for retirees (including surviving spouses) under age 65 and $4,200 for retirees (including surviving spouses) over age 65.

PA4-5; JX14, R185 at 133-34. The letter provided that retirees would pay any excess over those caps, then added: "no retired employee or surviving spouse shall be obligated to contribute for such excess health care cost until July 1, 1997." JX14.

Goodyear and the unions involved in its master bargaining updated the cap letter in each of Goodyear's subsequent agreements, increasing the amount that Goodyear was required to pay and moving the July 1, 1997 date to a later year. PA94 n.1; *e.g.*, JA435-37.

In the 2000 bargaining, M&G's chief negotiator asserted M&G's belief that the Goodyear cap letters had never been part of the Shell agreement that it had assumed, and that the Goodyear cap letter "does not apply to M&G (or Shell previously)." JA331. In the next round of bargaining, however, M&G demanded such a cap letter for the Apple Grove agreement. Ultimately, despite the union's opposition, a "Letter of Understanding 2003-6" was signed August 9, 2005, stating that beginning January 1, 2006, M&G's cost would be capped at the amount stated in Goodyear's 2001 cap letter. JA438-41. Effective January 1, 2007, M&G took the position that Letter 2003-6 applied to current retirees as well as future retirees. M&G changed the retiree benefit design to conform to the

benefits for active employees and began to charge costs above the cap to all Apple Grove retirees. The amounts that M&G required them to pay were so large that 88 out of 238 lost their coverage in the first year. R189 at 217.

The union and retirees sued, asserting under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, that M&G had violated the applicable CBAs by reducing vested benefits, along with claims under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a). A class of retiree plaintiffs was certified. PA26-27.

PROCEEDINGS BELOW

M&G initially moved to dismiss. It did not argue that "duration of the Agreement" clauses meant that retiree health benefit rights had terminated with the respective P&I Agreements, but relied entirely on an argument that the Goodyear cap letters had been part of the Apple Grove agreements when all of the plaintiffs retired and that those letters continued in effect. Pointing to the provision in Goodyear cap letters that retirees would have to pay any amounts exceeding the employer's cost cap, M&G argued that those letters, as a matter of law, "defeat[ ] any claim that the Retiree Plaintiffs had a vested right to lifetime contribution-free benefits." R36 at 6; *see also* R19 at 15. The retirees responded that the parties at Apple Grove had never adopted the Goodyear cap letters, and that the Letter 2003-6 covered only people retiring after it was adopted (and that even if wrongly interpreted to apply to prior retirees, it could not take away rights that had already vested before it was added to the contract). R34 at 8; R35 at 19-20.

The 2007 Dismissal. The district court granted the motion to dismiss, holding that, as a matter of subject-matter jurisdiction under Section 301 of the LMRA, the court needed to resolve the factual dispute whether the Apple Grove agreements included any cap letters before Letter 2003-6, and finding that the agreements did include those letters. PA125-27, 131-32. In the alternative, the district court dismissed the Complaint under Rule 12(b)(6), on the ground that the "95 point" language in the P&I Agreements, in stating that retirees with 95 points were entitled to "a full Company contribution *towards* the cost of the benefits," did not mean that the employer would pay the full cost. PA142-43 (emphasis supplied).

Tackett I. Retirees appealed. M&G defended the appeal by relying on the district court's interpretation of the "full Company contribution" language and on the Goodyear cap letters. M&G did not make any alternative argument that the retiree health benefit promises expired when each agreement terminated. *See* Appellees' briefs in 07-4515 (Dkt. #39) and 07-4516 (Dkt. #41).

The court of appeals reversed. It first held that the district court erred in weighing disputed evidence to hold that Goodyear cap letters were part of the Apple Grove CBAs before 2005, because subject-matter jurisdiction under Section 301 requires only an allegation that a CBA was violated; if the parties disagree about the contents of that agreement, that disagreement cannot be resolved on a motion to dismiss. PA96-104. The court of appeals then held that the "full Company contribution" paragraph could be plausibly interpreted as an agreement that retiree health bene-

fits "vest," *i.e.*, survive the expiration of successive agreements. PA111-13. In preface, in conclusion, and throughout its discussion of the Section 301 claim, the court consistently described its ruling as a conclusion that plaintiffs had plausibly alleged an agreement to vest. PA90, 104 n.5, 113, 119. When it turned to the parallel ERISA claim, the court said that the "determination above that the parties intended health-care benefits to vest carries over to the ERISA § 502(a)(1)(B) claim," but then restated its holding squarely in the terms of Rule 12(b)(6): "Plaintiffs have therefore presented a plausible claim under ERISA § 502(a)(1)(B)." PA114.

Proceedings on Remand. On remand the parties conducted discovery and M&G subsequently moved for summary judgment, again asserting that Goodyear cap letters were in effect at Apple Grove when all of the class members retired, and that "a full Company contribution *towards* the cost of the benefits" required the employer to pay only up to the caps. M&G again did *not* argue that "duration of the agreement" clauses meant that the retiree health benefit promises expired with successive contracts. R135 at 1; R151; R156 at 2. Rather to the contrary, in supporting its argument that the Goodyear cap letters had never expired, M&G argued that general duration language "does not limit retiree benefits, absent specific durational language referring to retiree benefits themselves." R151 at 18. M&G did not argue that the P&I Agreements contained any such "specific durational language." *Id.*

The district court denied M&G's motion. R163. The court addressed the court of appeals' reference,

in discussing the ERISA claim, to "[t]he determination above that the parties intended health-care benefits to vest," and held that the court of appeals "has answered the threshold vesting issue." *Id.* 14. In the alternative, the district court held that if the vesting question was still open, it would hold that the "full Company contribution" paragraph established an intent to create vested rights to some level of benefits: "The question is not *did* vesting occur, but *what* vested." *Id.* 15. The district court then held that there was a genuine dispute of material fact as to "which agreements do in fact apply to the Apple Grove plant." *Id.* 21-22.

The evidence at trial focused on whether the Goodyear cap letters were part of the agreements at Apple Grove. M&G introduced no evidence that the parties intended retiree health benefits to expire with each agreement. Both sides presented testimony about Apple Grove bargaining sessions. M&G's witnesses testified that all of the Goodyear cap letters were adopted at Apple Grove; Retirees' witnesses testified that they were not.

Following trial, the district court resolved that factual dispute against M&G in detailed findings of fact.[5] The court found:

> The pre-August [9], 2005 side agreements to the master agreements [*i.e.*, cap letters] do not apply

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[5] The findings of fact on liability are in the district court record at R177, but are restated in the district court's subsequent opinion on entry of a permanent injunction, which is in the Petition Appendix. We cite to the findings in the Petition Appendix instead of the docket, for the convenience of the Court.

> to Apple Grove. Rather, the intent and effect of the applicable operative documents governing Subclasses One through Four [all who retired before August 9, 2005] present a lifetime benefits scheme for qualifying retirees and beneficiaries without the cost-sharing Defendants wrongly imposed. The cap letters were not part of these agreements, and even if they were, they were wholly abandoned.

PA65-66. The court explicitly based this finding on witnesses' credibility. The court explained that the testimony presented by M&G conflicted with documentary evidence, PA67-68, conflicted with M&G's actions and other communications, PA72, "lacked veracity," PA74, and was "simply not credible," PA72. The court found the testimony of the retirees and the union "more credible," PA68, and "notably more compelling," PA65. The court summarized its findings from the evidence as follows:

> Ultimately, this litigation presents a scenario in which a company faced with ballooning benefits costs uncovered a longshot means by which it could attempt to retroactively rewrite agreements to reduce costs . . . .

PA74.

> Defendants developed the contribution scheme as a self-serving response to economic realities and in contravention of the negotiations conducted and applicable agreement reached.

PA75.

As to Letter 2003-6, the district court held that it applied only to Subclass 5, whose members retired

after the union agreed to the letter. PA70-71. The district court thus concluded that those who retired before August 9, 2005 "are entitled for the company to cover the full cost of the health benefits, without these plaintiffs being required to pay premium contributions." PA75.

The district court then addressed whether the agreements allowed M&G to modify the plan design, or instead gave retirees the right to the same coverage they had when they retired. PA77. On the evidence, the court concluded that "the plan was susceptible to reasonable changes" that did "not disturb the essential nature of the benefit provided." PA79, 82-86. The court therefore entered a permanent injunction requiring reinstatement of pre-August 9, 2005 retirees into the benefit plan and enjoining M&G from charging premiums. PA76, 86-87. Everyone except the subclass of post-August 9, 2005 retirees appealed.

Tackett II. On appeal, M&G again did not rely on "duration of the agreement" clauses and did not argue that retiree health benefit promises expired at the end of each agreement. M&G's only argument on the language of the agreements (apart from the cap letters) was that in the 95-point paragraph the phrase "a full Company contribution towards the cost of the benefits" did not create a vested right to lifetime benefits without contributions, especially when combined with cap letters. *See* Appellants' briefs in 12-3329, First Brief (Dkt. #38) at 59; Third Brief (Dkt. #41) at 36-39, 50-56.

The court of appeals first addressed M&G's argument that Goodyear cap letters were part of the labor agreements and found the question to be one of fact,

reviewable only for clear error. PA14. After considering the evidence, the appellate court concluded that the district court had not clearly erred.

The Sixth Circuit framed the remaining issue, as had M&G, as "whether the collectively bargained agreements between Plaintiffs and Defendants vested in Plaintiffs a right to lifetime no-contribution health care benefits." PA10. Citing *International Union, UAW v. Yard-Man*, 716 F.2d 1476 (6th Cir. 1983), the court held that the question hinged on the parties' intent when they signed the applicable agreements. PA10-11 (internal citations and quotations omitted).

The court of appeals corrected the district court's misimpression that *Tackett I* had finally determined the question of vesting.[6] The court pointed out that it had decided only a Rule 12(b)(6) motion and had "acknowledged the possibility that the district court might determine on remand that Plaintiffs did not have vested benefits." PA13. "For these reasons, *Tackett I* did not conclusively determine that Plaintiffs' retirement benefits had vested." PA13. But, because the district court had "performed its own analysis of the facts," and given that M&G's primary argument against vesting—the applicability of the cap letters—had been discredited, the court affirmed the district court's conclusion that the other language in the agreement, and the other evidence it considered, supported vesting. *Id.*

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[6] Despite this clarification by the court of appeals, Petitioners' Brief twice quotes the district court's erroneous reading of *Tackett I*, while claiming it was quoting from the Sixth Circuit itself. Pet. Br. 11, 39.

The court of appeals reiterated its conclusion that the district court did not err in finding cap letters inapplicable and, "[g]iven that," the district court did not err in interpreting the agreements to vest health benefits. PA14-18. And the court of appeals held that the district court's interpretation of the pre-2005 agreements, on the trial record, was not clearly erroneous. "Interpretation of a CBA is a matter of law only when the parties rely wholly on the terms of the CBA and do not present any extrinsic evidence of intent." PA18. In this case, after both sides introduced extrinsic evidence at trial, the determination of intent was a mixed question of law and fact. PA18.

Turning specifically to the 95-point provision that had been the focus of *Tackett I*, the court said that it had interpreted that language

> standing alone, as indicating intent to vest and this interpretation bound the district court, while leaving it free to make its own conclusion about the ultimate question of vesting based on other portions of the document, extrinsic evidence or both. . . . The qualifying language in *Tackett I* implied that the CBA language, though indicating intent to vest, contained enough ambiguity to permit examination of such additional evidence.

PA19-20. In the absence of extrinsic evidence that the parties did not intend to give eligible retirees continuing rights, and given the finding that the cap letters did not apply, "the district court did not clearly err in finding that pre-August 9, 2005 retirees had a vested right to receive contribution-free health care benefits." PA21-22.

Finally, the court of appeals affirmed the district court's decision that it was reasonable for M&G to modify the benefits of pre-2007 retirees to conform to the health plan covering active employees. PA22-23.

SUMMARY OF ARGUMENT

M&G has framed the question presented as a choice among what it portrays as three special rules that courts of appeals have employed to determine whether a CBA requires an employer to continue providing health benefits to its retirees beyond the expiration date of that particular agreement. This brief will show that no special rules are needed—or appropriate—for that task, but that the courts should employ traditional rules of contract interpretation, to the extent consistent with national labor policy, to resolve this question, just as they employ them to resolve other questions that arise under CBAs. And, applying those rules, the Court should affirm the judgment below.

I. The first principle of contract interpretation is that a court's goal is to determine what the contracting parties actually intended. That principle is especially important in construing CBAs because national labor policy seeks to promote industrial peace by encouraging employers and unions to reach voluntary agreements that best serve their particular needs, and to enforce those agreements without substituting any ideas of what their substantive agreements should be.

No special rule applies when the question is whether the parties intended that a specific provision of their agreement will continue to bind one (or both) of the parties after the contract's termination date. In *Litton Financial Printing Division v. NLRB*, 501

U.S. 190 (1991), the Court held that this question is to be determined in accordance with traditional principles of contract interpretation. M&G's argument that *Litton* required that such an intent be expressed in "explicit terms" is based on a patent misreading of this Court's opinion and is inconsistent with its actual holding.

The other authorities on which M&G relies similarly fail to support the posited requirement of explicit terms to create a continuing health-benefit obligation to retirees. Neither this Court's other decisions nor any traditional principles of contract interpretation require a heightened degree of specificity to support such an obligation. And the decision that Congress made in 1974 not to include in ERISA a mandate that health benefits be vested like pension benefits cannot support an implied limitation on voluntary agreements to provide such benefits.

II. Traditional rules of interpretation support the judgment below. The language of the P&I Agreements, interpreted as a whole and in light of the employers' course of performance, was reasonably susceptible to the interpretation that M&G must continue providing health benefits to employees who retired before August 9, 2005, without retiree contributions.

The specific provisions for retiree health benefits promised that employees who are "eligible for and *receiving* a monthly pension" "will receive" the full company contribution towards the cost of health benefits, and "shall have his medical benefits after retirement provided under Exhibit B." This language indicates that the retiree will receive health benefits as long as he is "receiving a monthly pension," not just for the

very short period between the date of retirement and the expiration of the CBA in effect on that date. That interpretation is reinforced by the promise that after a retiree dies, his surviving spouse will "continue to receive the benefits . . . until death or remarriage," and also by the Agreements' use of open-ended phrases similar to "will receive" or "shall have . . . benefits after retirement provided" in other contexts to describe what is clearly a lifetime promise.

Throughout the relevant time period the employers acted in ways that are consistent only with an understanding that each retiree's rights to health benefits were established by the agreement that was in effect at retirement, and were not affected by subsequent expiration of those agreements. To highlight only one example here, Shell and M&G continued to provide benefits to those who retired before January 1, 1996, although subsequent P&I Agreements were entirely silent about their rights to benefits, and Shell transferred the liability for providing those benefits to M&G as part of the sale of Apple Grove, crediting M&G's purchase price with the value of that liability, calculated on the understanding that the benefits were for life. *Supra* at 2.

M&G's new-found argument that the duration clauses expressly limited the duration of retirees' health benefits is not properly before the Court. It is not fairly included in the question presented; it contradicts M&G's argument in the Petition that the agreements were "silent on the duration of the health-care benefits"; and M&G's failure to raise it below meant that Retirees had no notice of a need to present evidence on that question and the courts below had no

reason to consider it. But even if the Court were to consider the new argument, there is no merit in it. The same kind of duration clause language applies to the pension article in the P&I Agreements. That language therefore cannot be interpreted, as M&G would have it, as an unconditional termination of all benefit rights created in those agreements. And the parties' use of words like "vesting" and "nonforfeitable" in the article describing pension rights is readily explained by ERISA's statutory requirements for pension plans, and supports no negative inference as to the absence of the same words in the health benefit article.

Thus, the judgment below rests on traditional rules of interpretation—not on any presumption in favor of vesting. In this case, as in *Yard-Man*, the Sixth Circuit has not proceeded on the basis of any such presumption. The judgment below should be affirmed.

ARGUMENT

I. AS WITH ANY OTHER QUESTION OF CONTRACT INTERPRETATION, WHETHER A RETIREE HEALTH OBLIGATION CONTINUES AFTER THE COLLECTIVE BARGAINING AGREEMENT THAT CREATED THE OBLIGATION HAS EXPIRED DEPENDS ON THE PARTIES' ACTUAL INTENT

As framed by M&G, the question presented asks this Court to adopt one of three court of appeals approaches for deciding whether a CBA provides health benefits for retirees that are intended to survive the agreement's termination. Pet. Br. *i*. Those three approaches are (A) to apply a presumption, which M&G incorrectly attributes to the Sixth Circuit, "that silence concerning the duration of retiree health-care benefits

means the parties intended those benefits to vest (and therefore continue indefinitely)," *id.*; (B) to apply the Third Circuit's opposite presumption, refusing to find any such intent absent "a clear statement that health-care benefits are intended to survive the termination of the collective bargaining agreement," *id.*; or (C) to "require at least some language in the agreement that can reasonably support an interpretation that health-care benefits should continue indefinitely," the approach M&G attributes to the Second and Seventh Circuits, *id.*, and on which M&G places a restrictive gloss.

The answer to the question presented, thus framed as whether the courts should follow alternative A, B, or C, is "No." There is a fourth alternative, which has the virtues of being both simpler and legally correct: to interpret promises of this character through the traditional principles of contract interpretation, just as the courts interpret all other promises in CBAs.

We will show in Part I that this Court's traditional principles for the interpretation of contracts generally, and CBAs in particular, require this simpler approach. Then we will show in Part II, applying those interpretive rules to the Apple Grove agreements directly rather than through the distorting lens of some special rule, that the judgment below should be affirmed.

A. The Goal of Contract Interpretation Is To Determine The Parties' Actual Intent

The "fundamental rule in the construction of all agreements" is to "ascertain the substantial intent of the parties." *Chesapeake & Ohio Canal Co. v. Hill*, 82 U.S. 94, 100 (1872); *see also* Restatement

(Second) of Contracts ("Restatement") § 201, cmt. c (1981); Pet. Br. 16 ("the parties' intent . . . is the touchstone of the analysis").

Interpreting and enforcing agreements in accordance with the parties' intent is particularly important with respect to a CBA, which is "not an ordinary contract," *John Wiley & Sons v. Livingston*, 376 U.S. 543, 550 (1964), but one that must be interpreted and enforced so as to further the national policy "to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers" without dictating the "substantive terms" of those agreements. *NLRB v American Nat'l Ins. Co.*, 343 U.S. 395, 401-02 (1952). When parties have resolved a labor dispute through such a voluntary agreement, labor peace between them is promoted by giving that agreement the meaning they intended, not a meaning discerned by reference to "abstract definitions unrelated to the context in which the parties bargained and the basic regulatory scheme underlying the context." *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 430 (1967). *See also Steelworkers v. Am. Mfg.*, 363 U.S. 564, 567 (1960) ("[S]pecial heed should be given to the context in which collective bargaining agreements are negotiated and the purpose they are intended to serve").

As Judge Silberman has succinctly put it, the cardinal principle in construing CBA provisions is to "give the parties' intent controlling weight . . .whether that intent is established by the language of [a particular] clause itself, by inferences drawn from the contract as a whole, or by extrinsic evidence." *IBEW*

Local 1395 v. NLRB, 797 F.2d 1027, 1036 (D.C. Cir. 1986) (internal quotation marks omitted).

B. The Parties' Intent That A Retiree Health Benefit Obligation Will Continue In Force After A CBA Has Expired Need Not Be Expressed In Explicit Terms

1. The parties' intent determines whether a retiree health obligation continues after the termination of the CBA, just as it determines any other question of contract interpretation.

Parties to a CBA, like parties to any contract, are free to agree, and often do agree, to promises that will continue in force after the contract has expired by its terms. Thus, in *Litton Financial Printing Division v NLRB*, 501 U.S. 190 (1991), the Court recognized that the proposition that "an expired contract has by its own terms released all its parties from their respective contractual obligations" does *not* apply to "obligations already fixed under the contract but as yet unsatisfied." *Id.* at 206. And the *Litton* Court also recognized that a CBA provision states a continuing obligation "where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement." *Id.*

As was stated with respect to the NLRB in *IBEW Local 1395*, under those normal principles of contract interpretation, in construing CBAs courts and agencies "may not, in the guise of enforcing the 'plain meaning' of contractual language, erect an inflexible presumption on an issue turning on the parties' *actual*

intent." 797 F.2d at 1036 (emphasis in original). Indeed, to subject rights claimed pursuant to a CBA, whether predicated on "express or implied terms," *Consol. Rail Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S. 299, 308 (1989), to a "selectively heightened level of scrutiny ([such as] a 'clear and patent' . . . standard) . . . would, in effect, be impermissibly to 'pass upon the desirability of the substantive terms of labor agreements,' *American National Insurance Co.*, 343 U.S. at 408-09, by affording [those] terms a less favored status." *Consolidated Rail Corp.*, 491 U.S. at 309.

2. There consequently is no room for M&G's proposed rule for construing CBA retiree health benefit provisions, under which "[t]he vesting of health-care benefits must be clear and express in the language of the agreement." Pet. Br. 25. M&G presents this as a corollary to what it portrays as this Court's "holding [in *Litton*] that 'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement,' unless the 'collective-bargaining agreement provides in explicit terms that certain benefits continue after the agreement's expiration.'" *Id.* 17 (purporting to quote *Litton*, 501 U.S. at 207-08). But *Litton* in fact holds to the contrary: Whether a party's contractual obligation continues in force after the contract's expiration depends on the parties' actual intent, however expressed, determined by the traditional principles of contract interpretation.

a. The question presented in *Litton* was whether an employer was required to arbitrate a grievance asserting that, after the CBA had expired, the employer selected employees for layoff in a manner that vio-

lated seniority rights created by that agreement. The Court began by recognizing that "constraints upon the employer after the expiration date of a collective-bargaining agreement . . . may arise . . . from the express *or implied* terms of the expired agreement." *Litton*, 501 U.S. at 203 (emphasis supplied). The Court cited the example of *Nolde Brothers, Inc. v. Bakery Workers*, 430 U.S. 243 (1977), where the Court held that an employer was required to arbitrate a claim for severance pay arising from a plant closing after the CBA was terminated, even though the agreement did not explicitly provide that either the severance pay obligation or the obligation to arbitrate survived expiration of the agreement.

In *Litton*, as in *Nolde*, the CBA did not explicitly provide that the obligation to arbitrate would continue after the agreement expired; and the agreement contained a duration clause that, as the Court described it, required observance of the contractual terms "until the date of expiration and no longer." 501 U.S. at 205. Nevertheless, in view of the purpose of an arbitration clause to resolve all disputes that arise under the contractual relationship, the *Litton* Court held that "if a dispute arises under the contract here in question, it is subject to arbitration even in the post-contract period." *Id.*

The Court thus found it necessary to determine whether the dispute over the employer's post-expiration layoffs arose under the contract, *i.e.*, whether the CBA's layoff provisions created rights and obligations that continued after the agreement expired. The Court noted that one circumstance in which "a post-expiration grievance can be said to arise under the contract" is "where an action taken after expira-

tion infringes a right that accrued or vested under the agreement," and the Court explained that other rights also can continue to be enforceable after expiration of the CBA if "normal principles of contract interpretation" show that that the parties intended to provide that the contractual obligation in question was to continue in force. 501 U.S. at 206. Applying that analysis, the Court concluded that the use of seniority as one factor in determining which employees would be laid off did not constitute a "form of deferred compensation for time already worked," *id.* at 209, and therefore did not create accrued or vested rights like the severance pay provision in *Nolde*, which, as the *Litton* Court recognized, "was viewed as a form of deferred compensation," *id.* at 210.[7]

b. M&G patently distorts *Litton* when it says *Litton* held

> that "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement" unless the "collective-bargaining agreement provides in explicit terms that certain benefits continue after the agreement's expiration."

Pet. Br. 17. The two quoted excerpts that M&G stitches together with the condition "unless" are connected by no such condition. The full passage is this:

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[7] Although the *Nolde* Court did not decide the merits of the severance pay dispute, holding only that it should be arbitrated, it observed that severance pay scaled to years of service and salary could be regarded as deferred compensation. 430 U.S. at 248 n.4, 249.

> [O]ther contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement. Exceptions are determined by contract interpretation. Rights which accrued or vested under the agreement will, as a general rule, survive termination of the agreement. And of course, if a collective-bargaining agreement provides in explicit terms that certain benefits continue after the agreement's expiration, disputes as to such continuing benefits may be found to arise under the agreement.

Litton, 501 U.S. at 207.

The reference to "explicit terms" in the final sentence, beginning as it does with "And of course," is plainly given as just one of several circumstances in which a court should find that an obligation continues post-expiration.[8] No parsing of language could lead to the conclusion that *Litton* holds that "explicit terms" are required in order for a contractual obligation to continue after the contract has expired, for in *Litton* there were no explicit terms stating that the arbitration obligation would continue (and there was a provision requiring compliance with the contract "until the date of expiration and no longer"), and the Court held nonetheless that the arbitration promise continued after the contract expired. In addition, the *Litton* Court recognized that a CBA promise in the nature of deferred compensation, such as the sever-

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[8] No party argued in *Litton* that applicable principles of contract interpretation require "explicit terms" before a right—even one that does not "accrue" or "vest"—can survive expiration of the agreement, nor did the Court cite any authorities that espouse such a proposition.

ance pay at issue in *Nolde*, could survive expiration of the agreement, despite the absence of any explicit terms so providing.

An "explicit terms" requirement also would be at odds with the *Litton* Court's recognition that employers may remain bound by "express *or implied* terms of the expired agreement," 501 U.S. at 203 (emphasis added), and that "obligations already fixed under the contract but as yet unsatisfied," *id.* at 206, which must be satisfied after the agreement has expired, include "form[s] of deferred compensation," *id.* at 210.

3. M&G also claims to find support for an "explicit terms" requirement in other authorities, but it misreads the sources it cites.

In *John Wiley & Sons*, *Inc. v. Livingston*, 376 U.S. 543 (1964), this Court did *not* state that an intention that a provision will survive the termination of a CBA "must be clearly spelled out in the agreement itself." Pet. Br. 17. What the Court actually stated was that it was not "plainly unreasonable," 376 U.S. at 555, for the union to maintain that its post-expiration grievances concerned matters as to which the parties had "agree[d] to the accrual of rights during the term of [the] agreement and their realization after the agreement had expired," *id.*

M&G attributes to Professor Farnsworth the proposition that "benefits" are not established in the first place "without a clear intent on the face of the agreement to confer [those] benefits." Pet. Br. 16, citing A. Farnsworth, *Contracts* §§ 3.1, 3.3 (1982). The sections of the Farnsworth treatise M&G cites, which

address the baseline requirements of assent and definiteness, and offer and acceptance, in the formation of an enforceable contract, do *not* require that "benefits" be established by "a clear intent on the face of the agreement"; such a requirement would be at odds with what Farnsworth describes as "the overarching principle of contract interpretation . . . that the court is free to look at all of the relevant circumstances surrounding the transaction." A. Farnsworth, *Contracts* § 7.10 p. 467 (3d ed. 1999).

M&G also contends that, "as the duration and cost of the supposed promise increase," "so does the level of formality required to conclude that a promise exists." Pet. Br. 22 (quoting *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 618 (7th Cir. 1993) (Easterbrook, J., dissenting)). *See also* ERIC Br. 12. However, the dissent M&G quotes relied on authorities dealing with the special interpretive problems posed by "contracts providing for some *perpetual or unlimited* contractual right." *William B. Tanner Co. v. Sparta-Tomah Broad. Co.*, 716 F.2d 1155, 1159 (7th Cir. 1983) (emphasis supplied). As the *Bidlack* majority recognized in rejecting the dissent's analysis, retiree health obligations are *not* perpetual. *See* 993 F.2d at 607 (Posner, J.) ("[T]he obligation for which the plaintiffs contend in this suit is not perpetual, because retired people and their widows (or widowers) do not live forever."). *See also Int'l Union, UAW v. ZF Boge Elastmetall LLC*, 649 F.3d 641, 648 (7th Cir. 2011) (explaining that post-expiration retiree benefits are unlike the "perpetual" obligations at issue in *Tanner*); 3 A. Corbin, *Corbin on Contracts* § 553 (1960) at 212-15 (explaining, in a section entitled "Promises of Performance Without a Time Limit," that a "promise to do, or not to

do, some act or series of acts in perpetuity," is to be distinguished from a promise "to pay a specified pension, or retirement allowance, or other compensation 'for life,'" as the latter kind of promise presents "no special problem of interpretation").

4. As M&G points out, Pet. Br. 25-26, in *International Union, UAW v. Skinner Engine Co.*, 188 F.3d 130, 139 (3d Cir. 1999), the Third Circuit stated that, "[b]ecause vesting of welfare plan 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." That proposition rests on three distinct and fatal errors.

First, *Skinner Engine* assumes that an employer will not wish to provide any benefits beyond whatever is required by law. That assumption ignores that employers use their total compensation packages to compete for employees (which is one reason why most employers pay more than the minimum wage). *Second*, *Skinner Engine* assumes that in collective bargaining, employers that do not wish to provide any more than the law requires will succeed in obtaining union agreement to that position. *Third*, *Skinner Engine* proceeds on the erroneous notion that if something is "not to be inferred *lightly*," it cannot be inferred from anything but "*clear and express language*."

In sum, nothing in this Court's caselaw, or in traditional rules of contract interpretation, or in ERISA, supports the Third Circuit's *Skinner Engine* rule.

5. M&G and its *amici* suggest that an "explicit terms" requirement should be adopted as an in-

terpretive rule for construing CBA retiree health provisions in order to simplify the task of interpreting such provisions. Even if such a new rule would have merit as applied to *future* agreements, courts may not impose *post hoc*, in the interests of clarity for the future, an interpretive rule of which contracting parties were not on notice when they made their contract, and which would result in their agreements being construed contrary to their intent. For parties bound by a contract already negotiated, "[a new] default rule comes too late for them—*the bargain has been struck*." *Bidlack*, 993 F.2d at 612 (Cudahy, J., concurring in the judgment) (emphasis in original).

But even for future agreements, clarity would be equally served by a presumption *in favor of* construing retiree health benefit promises as continuing beyond contract expiration as by a presumption *against*. And, as much as M&G and its *amici* extol the advantages employers would receive from an "anti-vesting" presumption, they ignore that the result would be to shift costs to retirees who generally live on modest fixed incomes. Nothing in the principles of contract interpretation or anything else calls for adopting a legal rule aimed at accomplishing that result.

Running through the briefs of M&G and its *amici* is the suggestion that it would be unreasonable to conclude that an employer would agree to an arrangement under which retiree health obligations would continue for a retiree's lifetime, because the expense involved may be substantial and unpredictable. But, to whatever extent such concerns might make an employer wish to

limit its obligations,[9] an employer cannot simply dictate what will be in its collective bargaining agreement. Such an agreement must reconcile the competing interests of *both* parties, in a context where, to achieve a substantial benefit in one area, a party may agree to substantial concessions in other areas.

Employers, of course, may not want to agree to a retiree health obligation that cannot be unilaterally terminated or changed after retirement. But by the same token, unions may not want to agree to a retiree health obligation the employer may unilaterally terminate or change to the detriment of retirees living on fixed incomes, with the employer having no post-retirement duty to bargain over the benefits to be provided to retirees, and with the union having no right to exert economic pressure in the event that the employer eliminates or reduces such benefits.[10] The stakes are equally high for both parties.

In addition to those considerations, to presume that a union has agreed to an arrangement under which the employer is entitled to eliminate health ben-

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[9] Although many employers today may have strong concerns about the present and potential costs of retiree health benefits, that was not necessarily the case in the days before substantial healthcare inflation. For example, it was not until 1991 that Goodyear negotiated agreements (not applicable to Apple Grove) to cap its costs with respect to future retirees. *See supra* at 5.

[10] *See Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n.20 (1971) (benefits for employees already retired are not a mandatory subject of bargaining); *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958) (a party to a collective bargaining relationship may not insist to impasse on a proposal regarding a non-mandatory subject of bargaining).

efits on the date the agreement under which an employee retired expires is to presume that the union did not take into account that such benefits are a form of deferred compensation for decades of service the retired employee has provided to the employer, and that one or two years of benefits does not come close to providing a retiree deferred compensation in satisfaction of those many years of service.[11] For retirees involved in this case, the 95-point rule meant that an employee who retired at age 65 generally would have had to work for the Company for *30 years* in order to earn a "full Company contribution" toward health benefits costs. It is not reasonable to presume that in negotiating retiree health benefits, a union will proceed on the view that what is due an employee for such service is a retirement benefit that the employee stands to lose after only a year or two of retirement (if that).[12]

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[11] We use the term "deferred compensation" in accordance with its common usage as reflected in *Nolde* and *Litton*, to describe a financial benefit that is earned through a specified period of employment and received after the employment has ended. *See, e.g.*, *Bidlack*, 993 F.2d at 620 (Cudahy J., concurring) ("Healthcare after retirement is deferred compensation"); Financial Accounting Standards Board, Statement of Financial Accounting Standards No. 106 (Dec. 1990), ¶ 146, *available at* www.fasb.org/summary/stsum106.shtml (last accessed 9/11/14) (explaining, with regard to retiree health benefits, that "[p]ostretirement benefits are . . . part of an employee's compensation for services rendered. Since payment is deferred, the benefit is a type of deferred compensation").

[12] *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960), is instructive in this regard. In that case the Court considered an employer's argument that "the union's breaches of its promises should give rise to a defense against the duty assumed by an employer to contribute to a welfare fund . . . ." *Id.* at 471. The

Thus, in collective bargaining, employer concerns about potential costs of long-term retirement benefits are met by union concerns about the potential impact on retirees of the potential loss of such benefits. No basis exists to presume that this clash of interests eventuates in an agreement on retiree health benefits that incorporates the employer's favored position rather than the union's. Faced with the need to reconcile these competing interests, unions and employers have in fact arrived at any number of resolutions, depending on the circumstances, including the parties' relative bargaining power and the trade-offs they can accept involving other elements of the compensation package.

Thus, some bargaining parties may have decided that retiree health benefits should not be subject to change in any respect during a retiree's lifetime. *E.g.*, *Trull v. Dayco Products*, *LLC*, 329 F. Supp. 2d 658, 669-70 (W.D.N.C. 2004), *aff'd*, 178 F. App'x 247 (4th

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Court recognized that, "in the generality of third-party beneficiary contracts," there may be "reasons making it appropriate" to "infer . . . an intention" that a third party's right to performance by the promisor is dependent on faithful performance by the promisee. *Id.* at 468. But, mindful of the fact that the employer contributions to the Welfare and Retirement Fund in that case were "to provide security for employees and their families to enable them to meet problems arising from unemployment, illness, old age or death," *id.*, the Court reasoned that the welfare plan contributions "are really another form of compensation to the employees," and to construe the CBA as allowing the employer to withhold those contributions in order to offset damages caused by the union's breach of contract would be no more reasonable than to suggest that the employer "might recoup its damages by decreasing [the] wages [specified in the agreement]," *id.* at 469.

Cir. 2006). Others may have decided that such benefits should be subject to change if, but only if, the union and employer mutually agree. *E.g.*, *Keffer v. H.K. Porter Co.*, 872 F.2d 60, 63 (4th Cir. 1989). Others may have decided that retiree benefits will be subject to modifications that are made in the insurance program for active employees but no others. *E.g.*, *Bidlack*, 993 F.2d at 610 ("A vested right to benefits equal to and hence varying with those of the active employees would give the retirees a good deal of protection, since health benefits are an important fringe benefit.")[13] Some may have agreed that reasonable changes in deductibles, copayments and related provisions will be allowed as long as the fundamental nature of the benefits remains the same—as the courts below found to be the intent of the agreements here. PA22-23, 76-86.[14] Others may have agreed that retirees

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[13] As the discussions of "vesting" in the cited cases reflect, that word can be used in a number of different senses. Sometimes it is used to refer to benefits that, once created, can never be altered in any way. And sometimes it refers to a right to benefits that can "vary[ ]," *Bidlack*, 993 F.2d at 610, but only as contemplated by the contract that created the right. Where the asserted rights depend on contract, the question is simply to determine what rights the parties created in that contract. To the extent we refer in this brief to "vested" benefits, we refer to benefits that cannot be changed except in ways, if any, that are permitted by the contract that created the rights.

[14] The district court found that the parties' actions in negotiating certain changes in benefits evinced an understanding that the agreements permitted such changes. *See supra* at 12; PA83, 86. Respondents do not believe that the evidence in this case supported that finding, and pursued a cross-appeal on the point, but did not cross-petition for certiorari; consequently, that matter is not before the Court.

may be required to pay contributions for their benefits if specified conditions occur—as would have been the situation here if the cap letters that were in effect at other facilities had been adopted at Apple Grove, as M&G contended but both courts below found not to have been the case. *See supra* at 10-13; *e.g.*, *Quesenberry v. Volvo Trucks N. Am. Retiree Health Benefit Plan*, 651 F.3d 437, 440-42 (4th Cir. 2011).

And of course, some parties may agree to what M&G seeks here: an unrestricted right on the employer's part to reduce or eliminate benefits for retired employees as soon as the CBA under which they retired has expired. There may be circumstances where, all things considered, a union finds that its best option is to agree to such an arrangement. But, for the reasons discussed, there can be no *presumption* that this, rather than any of the other possible arrangements, is the arrangement to which a particular union and employer have agreed.[15]

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[15] Contrary to the assumption reflected in the *amicus* brief of Goldstein & Russell, P.C., the intent of parties to a CBA regarding the duration of retiree medical benefits often is not expressed in a single phrase of an agreement; and it is a fundamental rule that "a writing is interpreted as a whole." Restatement § 202(2); *see infra* at 39. The relevant provisions in this case, discussed *infra* at 40-42, 45-46, 49-52, do not fit neatly into the taxonomy set out by Goldstein. Furthermore, the statements in the Goldstein brief regarding the relative frequency of various kinds of provisions are unreliable, not only because of the arbitrary nature of the taxonomy employed, but because half of the agreements in the very limited sample are from the public sector, where CBAs are negotiated under varying state and local laws and constitutions, such that the terms thus negotiated may not fairly be compared to private-sector agreements that are negotiated under the National Labor Relations Act and enforced through the LMRA.

C. ERISA Does Not Establish A Presumption That Rights To Retiree Health Benefits Continue Only As Long As The Agreement That Was In Effect When An Employee Retired

M&G and its *amici* make much of the fact that for pension plans, ERISA imposes vesting, accrual, participation, and minimum funding requirements "that cannot be bargained away," Pet. Br. 4, whereas for welfare plans, all those matters are subject to whatever terms parties may agree in collective bargaining to adopt. M&G would have it that this aspect of ERISA represents a "congressional assessment under ERISA that welfare benefits should not vest unless there is an express agreement that they should." *Id.* 25. M&G's *amici* go so far as to declare that, "[b]y exempting health and welfare plans from its vesting and anti-cutback rules, ERISA grants plan sponsors the unfettered, statutory right to terminate or modify such plans and to discontinue or decrease any benefits provided thereunder," unless the employer "waive[s] its ERISA rights to amend or terminate welfare benefits . . . through clear, express, and unmistakable language." Whirlpool Br. 6, 8. *See also* NAM Br. 20; ERIC Br. 12; CLLE Br. 9.

Like the presumption that was unsuccessfully advocated by the petitioners in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), the presumption against welfare benefit vesting that M&G and its *amici* would draw from ERISA lacks a basis in the statutory law.

In ERISA, Congress enacted highly specific vesting

and accrual requirements for pension benefits.[16] As M&G recognizes, these requirements are imposed regardless of the plan sponsor's intent, and "cannot be bargained away." Pet. Br. 4. Thus, the pension requirements are imposed by *law*, without regard to the intent of the parties who adopted the plan. That the ERISA Congress did not similarly impose mandatory vesting requirements on welfare benefits does not even remotely suggest a congressional purpose to curtail the parties' preexisting rights to determine through collective bargaining whether the welfare benefits they negotiate will continue beyond the term of their CBA.

The "congressional assessment" M&G posits, Pet. Br. 25, is *not* evidenced by the statement M&G cites from the 1974 House Report, that "[t]o require the vesting of these ancillary benefits would complicate the administration and increase the cost of plans whose primary function is to provide retirement income." Pet. Br. 6, quoting H. Rep. No. 807, p. 16, *reprinted in* 1974 U.S.C.C.A.N. 4670, 4726 (1973).[17] That statement

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[16] For defined benefit plans, pension benefits must accrue ratably over a participant's service in accordance with a statutory formula that prevents backloading, *see* 29 U.S.C. § 1054; *see generally Kifafi v. Hilton Hotels Ret. Plan*, 701 F.3d 718, 722 (D.C. Cir. 2012); and benefits derived from employer contributions must vest (*i.e.*, become nonforfeitable) in accordance with either of two statutorily-prescribed schedules, under which the longest period of service that can be required before vesting is seven years, 29 U.S.C. § 1053.

[17] The same language appears in S. Rep. No. 93-383, p. 51, *reprinted in* 1974 U.S.C.C.A.N. 4889, 4935 (1973). *See Inter-Modal Rail Emps. Ass'n v. Atchison, Topeka & Santa Fe R.R. Co.*, 520 U.S. 510, 515 (1977) (quoting this language but omitting the final eight words).

refers to *pension plans* that offer welfare programs as "ancillary benefits," and it expresses a concern that a statutory requirement that those ancillary benefits be "vest[ed]"—presumably under the strict statutory vesting rules that apply to pensions, *see* note 16 *supra*—might adversely affect "plans whose primary function is to provide retirement income." That observation does not relate to this case, in which retiree health benefits are not provided out of pension plan assets and the retirees are not seeking anything like the prescriptive vesting arrangements Congress mandated for pension plans.

And at least equally to the point, in explaining why pension plans should not be "require[d]" *by statute* to vest "ancillary" benefits, the House Report did not suggest that parties should be limited in their right to *agree* that retiree health benefits will vest; nor did the Report suggest that such an agreement should not be allowed unless it is stated in "express" terms, Pet. Br. 25.

Finally, even if M&G's interpretation of the ERISA Congress's views regarding retiree health benefits were not as unfounded as it is, a congressional "assessment" (*id.*) is not a *law*. In view of the fact that ERISA "was enacted … to protect contractually defined benefits," *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989) (internal quotation marks omitted), and the statute provides that "nothing in [the statute] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States," 29 U.S.C. § 1144(d), an "assessment" evidenced by congressional inaction or by a statement in a committee report is not the equivalent of, or a substitute for, a congressional en-

actment, and such an "assessment" cannot possibly trump parties' rights to enforce through LMRA Section 301 their lawfully bargained agreement.

There consequently is no foundation for Whirlpool's argument that Congress conferred on employers and plan sponsors a "statutory right" to modify or terminate welfare benefits, which statutory right could be "waive[d]" only through "clear, express, and unmistakable language," Whirlpool Br. 8. One searches ERISA in vain for a provision creating such a right. No such provision exists, because Congress had not the slightest intention of preventing or limiting the enforcement of *negotiated agreements* regarding the continuation of welfare benefits.

II. TRADITIONAL RULES OF CONTRACT INTERPRETATION SUPPORT THE JUDGMENT BELOW

As we have shown, M&G's principal contention—that the Court should adopt an interpretive rule that retiree health benefit obligations do not continue beyond the expiration date of the agreement in effect when an individual retires unless the agreement provides in "explicit terms" that the obligations do continue—cannot be squared with the traditional rules of contract interpretation that govern the intrepretation of CBAs. M&G's alternative contention is that, if there is no "explicit terms" requirement, then the Court should adopt what M&G says is the interpretive rule followed by other courts of appeals that "there must be language in the agreement capable of being reasonably interpreted as a promise of vesting;" and M&G asserts that there "is no such language in the agreement here." Pet. Br. 30, 34. In what follows we show that M&G's alternative contention also fails.

A. Traditional Rules Of Contract Interpretation Require Only That The Parties' Language Be "Reasonably Susceptible" To The Asserted Meaning When Read In The Context Of All Related Agreements And The Parties' Course Of Performance

Traditional principles of contract interpretation simply require that the language of a contract, read in context, be "reasonably susceptible" to the asserted meaning. Restatement § 215, cmt. b (1981). In considering whether a contract's words are "reasonably susceptible" to an asserted meaning, a court does not consider a single phrase or clause in isolation. It is a "cardinal principle of contract construction[] that a document should be read to give effect to all its provisions and to render them consistent with each other." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995); *see also* Restatement § 202(2). And the parties' words must be considered in light of their course of performance, because what parties actually do under a contract provides "highly significant" evidence of what they understood the contract to mean. *Alabama v. North Carolina*, 560 U.S. 330, 346 (2010); *see also* Restatement § 202(5).

The Court has held that these traditional rules apply fully to the interpretation of CBAs. "In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements." *Transp.-Commc'n Emps. Union v. Union Pac. R.R. Co.*, 385 U.S. 157, 161 (1966).

Nothing in these principles allows for the impo-

sition of a vaguely defined requirement that some particular kind of language must be employed if a CBA's retiree health promises are to continue in force, after the agreement's expiration, through retirement. Instead, the task for the courts is to consider the language the parties actually used in their agreement considered in the context provided by all their agreements and their course of performance, and determine what they actually intended.[18]

B. Under Traditional Rules, The Agreements Were Reasonably Interpreted To Provide That The Retiree Health Benefits Were Promised For Life

The language of the Apple Grove retiree health benefit provisions, read in context, is "reasonably interpreted as a promise of vesting," Pet. Br. 30, and that intepretation is the only one that is consistent with the employers' course of performance.

1. The Language Of The Retiree Health Promise Is Reasonably Susceptible To The Lower Courts' Interpretation

a. The P&I agreements provided for a benefit—the "full company contribution" for health benefits after retirement—that was due upon completion of

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[18] This case does not present an occasion to decide whether a contract must first be found ambiguous before evidence of course of performance (or any other evidence) is admissible to show the parties' intent. In the proceedings below, M&G relied on extrinsic evidence from the very first, *supra* at 7, 10, and asserted no objection to any evidence in the record based on an argument that the agreements were unambiguous and that such evidence therefore could not be considered.

lengthy service and was proportioned to the length of the service. Under the 95-point formula, an employee retiring at age 65 generally needed 30 years of service to receive this benefit. Employees with fewer points received a reduced employer contribution based on the difference between their point totals and 95. *Supra* at 3. This kind of retirement benefit is reasonably understood to constitute a form of deferred compensation—something to be paid to an employee in the future in consideration of the employee's lengthy service. *Nolde*, 430 U.S. at 248 n.4.

b. The contracts also addressed the length of time for which these benefits would be payable. They provided that retirees "who are eligible for and *receiving* a monthly pension" "will receive" the full company contribution toward health benefits. *Supra* at 3 (emphasis supplied). *See also* JA218 (employee "who retires and receives a monthly pension . . . shall have his medical benefits after retirement provided under Exhibit B"). The phrase "eligible for and *receiving* a monthly pension" is more than an eligibility provision. If it were just an eligibility provision, it only would need to say "eligible for a monthly pension." Instead, it adds the word "receiving"—using the verb form that describes a continuing process. And it does so in a context where both parties well understood that retirees "receiv[e] a monthly pension" from the date of retirement until death. *See* JA366-69. The language thus is most naturally read to provide health benefits for that entire period.

c. That understanding is reinforced by the agreements' provision that, after an eligible retiree dies, the

spouse is "entitled to continue to receive the benefits of this Exhibit B-1 until death or remarriage," *supra* at 4. This provision both states that surviving spouses are entitled to lifetime benefits unless they remarry, and confirms that the parties intended the retirees themselves to have lifetime benefits, as a promise of lifetime benefits to spouses after a retiree's death makes sense only if the retiree himself had a lifetime benefit.

d. The intent to provide lifetime health benefits to retirees is reinforced by the parties' use of open-ended phrases like "will receive" to create other benefits intended to last for a lifetime. The P&I agreements promised that life insurance would be "continued in force" for someone retiring directly from Apple Grove with a normal retirement pension. JA17. Someone who worked only until age 60, left, and later received a deferred vested pension, was promised similar coverage using the explicit term "during his lifetime." JA18. Both of these promises must have been intended to create a lifetime benefit, because it is not plausible that the parties would intend to give someone who worked faithfully until retirement anything less than someone who left before retirement age. As the parties used "continued in force" to describe a lifetime benefit in life insurance, their use of "shall receive" and "shall have his medical benefits after retirement provided" should equally be understood to intend a lifetime promise of health benefits, lasting as long as the retiree is "receiving a monthly pension."

2. The Employers' Course Of Performance Is Not Consistent With Any Other Interpretation

The employers' course of performance in provid-

ing health benefits to retirees is consistent only with the employers' understanding that the promises to provide those benefits continued in force after the expiration of the agreement in effect when an employee retired.

a. The 1997 P&I agreement was silent about health benefits for employees who had retired before January 1, 1996, instead describing such benefits only for "Employees who retire on or after January 1, 1996 and who are eligible for and receiving a monthly pension . . . . " JA263. Shell nonetheless continued to provide health benefits to the pre-1996 retirees while the 1997 P&I agreement was in effect, and M&G assumed the liability to provide health benefits for pre-1996 retirees as part of its purchase price for the facility. *Supra* at 2, 4. The 2000 P&I agreement was to the same effect as the 1997 Agreement, and M&G continued to provide health benefits to Shell's pre-1996 Apple Grove retirees. *Supra* at 4-5. Shell's and M&G's post-1997 payment of those benefits is highly significant evidence that the parties intended and understood the health benefit promises in their CBAs to be promises that continued in force after the agreement expired. That the employers understood this to be a binding obligation is confirmed by the agreement between Shell and M&G that, for assuming Shell's retiree health obligation, M&G would receive a credit against the purchase price for the Apple Grove facility in the amount of the full actuarial value of the retiree health benefits, calculated on the assumption that the benefits were for life. *Supra* at 2.

b. Further evidence that the employers understood that the promise to provide retiree health benefits

continued in force after an agreement expired is found in the way the employers dealt with the Medical Necessity Program. In 1994 negotiations, the parties agreed to discontinue that program for active employees as of December 31, 1994.[19] They entered into a side letter stating that "[e]mployees who retire prior to January 1, 1995" (a date that was later extended to 1997, *see* JA194) could still choose that program, "with coverage to be effective on the date of their retirement." JA192-93. The parties thus permitted an employee to elect the Medical Necessity Program as his retiree benefit program as long as he retired at any point *up to the date on which the Medical Necessity Program was to terminate.*

Authorizing such an election only made sense on the parties' mutual understanding that the retirees' entitlement to benefits thus elected would continue after the expiration of the agreement under which they retired.[20] No subsequent P&I agreement provided for the Medical Necessity Program, and no active employees received these bene-fits after 1997, yet at the time of trial M&G was still providing these benefits to pre-1997 retirees who had timely elected them. *Supra* at 4.

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[19] *See* R186 at 3-4, 78, 82, 85.

[20] Consistent with these facts, when the termination of the Medical Necessity Program was imminent, and an employee who was about to retire asked the employee's benefit office whether he would continue to receive Medical Necessity benefits after the termination date if he elected coverage before that date, he was told that he would. JA497-98.

3. Other Provisions In The P&I Agreements Confirm This Intent

Other provisions in the agreements also reflect the parties' intent that retiree health benefits continued in force after the P&I agreement in effect when an employee retired had expired.

a. The P&I Agreements contained provisions pertaining to retiree health benefits that could only take effect after an agreement terminated. Most notably, the 1994 agreement provided that in the event there was "a change in the plan design," retirees who were required to pay contributions for their health benefits (*i.e.*, those with fewer than 95 points) would be given an opportunity to change the benefit option they had elected, JA190, yet no provision in the P&I agreement allowed for plan designs to be changed during the term of a P&I agreement. Consequently, this provision could not take effect during the 1994 P&I agreement, thereby evidencing the parties' mutual understanding that retiree health benefits would continue after that agreement had terminated.

b. The P&I Agreements also promised retiree benefits to certain employees as long as 10 years after they left the employer's service—and none of the P&I Agreements were written with such a long term. For example, employees who left the employer's service after reaching age 60 with entitlement to a deferred vested pension starting at a later date were promised retiree health benefits beginning when the pension started. JA75. Similarly, those who retired before age 65 were promised that the Special Medicare Benefit would begin upon "the attainment of age 65," JA78-79, even though in many cases of early retirement, the re-

tiree would not reach 65 during the term of the P&I agreement.[21]

c. The Goodyear cap letters—although not applicable at Apple Grove—are further evidence that the parties understood that retiree health benefits would continue after the expiration of the then-current agreement. To take the 1991 agreements as an example, the P&I Agreement, which contained the "for the duration" language on which M&G relies, was accompanied by a letter stating that "[t]he Company *shall provide* health care benefits" as described in the P&I Agreement, subject to a dollar limit that would take effect no earlier than July 1, 1997—more than three years after the stated term of the agreement. *Supra* at 5-6.

C. The Duration Clauses Did Not Terminate Retiree Health Benefits

Ignoring this evidence of the parties' intent and course of performance, M&G argues now—for the first time in these lengthy proceedings—that "dura-

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[21] M&G quotes a portion of the eligibility rule for the Special Medicare Benefit (which reimbursed eligible individuals for a portion of Medicare Part B premiums, *see* JA139-40), arguing that it shows that the parties understood there must be circumstances in which a pensioner would no longer be covered by retiree health benefits under the P&I Agreements, thus proving that the health benefits were not vested. Pet. Br. 37. This argument is readily refuted by the recognition that retirees with fewer than 95 points were required to pay contributions to maintain their health coverage. The possibility of losing coverage based on failure to pay—a condition that was part of the agreement when these individuals retired—is fully consistent with an intent to create vested benefits subject to specific conditions.

tional language in the operative agreements indicates that the health-care benefits were to end with those agreements." Pet. Br. 34.

1. **M&G's Argument From The Duration Clauses Is Not Properly Before The Court**

As we detailed *supra* at 7-12, at no time in the proceedings below did M&G argue that the duration clauses limited the retiree health benefits at issue in this case. In the Petition for Certiorari M&G described the Apple Grove agreements as "silent" on the question of duration of retiree health benefits, defining such "silence" as "the absence of a durational term." Petition 14; *see also id.* 23 ("There is no factual dispute that the collective bargaining agreement at issue was silent on the duration of the health-care benefits conferred.") M&G offered this case as "an ideal vehicle for resolving" the question of "how to construe . . . contractual silence" about the duration of retiree health benefits. *Id.* 2. Now, M&G asserts the opposite: "with respect to the health-care benefits at issue in this case, [t]he agreement expressly limits those benefits to 'the duration of this Agreement.'" Pet. Br. 37 (quoting JA377). This is not offered as an alternative argument. *See id.* 34.

The Court's Rule 14.1(a) provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." The question presented in M&G's petition was to determine the rule to be applied in intepreting a CBA where there is "silence concerning the duration of retiree health-care benefits." M&G's current duration-clause argument is not that question, nor is it "fairly included." Rather, that new argument asks only whether the particular

agreements in this case contain language that limited the duration of retiree health benefits, without regard to any broad question of how to interpret agreements that are silent. The Court should not consider this argument. *See Yee v. City of Escondido*, 503 U.S. 519, 536 (1992).

We could not have called this to the Court's attention earlier. As in *City of Springfield v. Kibbe*, 480 U.S. 257, 260 (1987), because M&G chose not to make the duration clause argument either below or in the Petition, Retirees had no notice that M&G believed that the language of the agreements "expressly limits" the duration of retiree health benefits at issue here or that M&G would so argue on the merits.

It was open to M&G under Sixth Circuit precedent, *see* Petition 14, to argue below what it now asserts to this Court, namely, that the Apple Grove duration clauses "expressly" limited those benefits. Because M&G chose not to do so, neither the district court nor the court of appeals considered whether the language of the agreements or the employers' course of performance supported M&G's "expressly limits" argument. As a matter of prudence, this Court "ordinarily will not decide questions not raised or litigated in the lower courts." *City of Springfield*, 480 U.S. at 259; *Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 136 (2007). This case is ill-suited for an exception. Not only does M&G's current argument require analysis of detailed contract language that was not considered below, but Retirees had no notice that they should offer evidence relevant to that argument.

2. **If The Court Considers M&G's New Argument, It Should Conclude That The Duration Clauses Do Not Limit Retiree Health Benefits**

If this Court does consider on the merits M&G's new argument about what its agreements mean, the Court should conclude that the agreements' duration clauses do not limit retiree health benefits to an agreement's term. Indeed, M&G's own submission shows that the clauses do not impose such a limit.

a. Although M&G declares that the language of the duration clauses "plainly indicates that the health-care benefits were intended to last only as long as the agreement was in place," Pet. Br. 36, M&G acknowledges that the agreements' pension benefits, which were prefaced by the same duration language,[22] were

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[22] For example, the 2000 P&I Agreement states that "the [Pension] Plan . . . shall be continued in effect with respect to . . . Employees [covered by this Agreement] for the duration of this Agreement." JA335. The other clauses cited at Pet. Br. 35 are not materially different. *See* JA196-97 (Letter A provides that "for the duration of" the Basic Agreement, "the benefit plans currently applicable to employees" at Apple Grove "will be continued"); JA85 (1991 Exhibit B-1 to P&I agreement provides that "for the duration of this Agreement" Goodyear would "provide the following program of . . . health benefits . . . for eligible employees and their dependents").

M&G also quotes a 1994 Supplemental P&I Agreement ("this Agreement terminates on April 19, 1997 *and shall not be continued beyond that date*," JA97). Pet. Br. 35 (emphasis supplied). M&G asserts that other P&I Agreements and CBAs contain "similar language." Pet. Br. 35 n.9. In point of fact, none of the provisions M&G cites, nor any others that we have located, contain language similar to the "shall not be continued"

not intended to last only as long as the agreement was in place. *Id.* 37. To be sure, M&G argues that the "vesting" language in the pension article is explicit while the language in the health benefits article is not. *Id.* 36-37. We will show in a moment that the conclusion M&G seeks to draw from that asserted distinction is invalid. But in any case, M&G cannot and does not maintain that there is any relevant difference between the *duration clause* language that applies to those respective articles. Consequently, M&G's acknowledgment that pension benefits described in the P&I Agreement continue beyond the term of the agreement necessarily means that the duration clause language that applies equally to pension and to health benefits does *not*, by its own force, operate upon expiration of an agreement to terminate benefit obligations that arise while the agreement is in effect.[23]

b. Nor is there any force to M&G's alternative contention (unrelated to the interpretation of the duration clauses themselves) that, because the pension

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phrase. The explanation for that additional language is simple. The Supplemental P&I Agreement contained the agreement to continue the Medical Necessity Program until December 31, 1994. *Supra* at 4, 44. The language stating that the Supplemental P&I Agreement "shall not be continued" after that date served to make clear that the employer's concession in agreeing to continue the Health Necessity Program for three more years was intended to last for only that short term.

[23] The duration clauses lend themselves to several possible meanings. They could be understood to apply only to the benefits that the employer promised to provide for active employees, as each of the specific duration clauses in the P&I Agreements referred either to benefits "for regular full time employees" or

article uses specific language regarding nonforfeitability of benefits, the parties must have had a practice of using that kind of language whenever they intended that any kind of benefit arising under an agreement would continue after expiration. Such an inference, far from being compelled, is not even reasonable, because there is a ready explanation for the parties' use of specific language relating to nonforfeitability of pensions. ERISA requires that "[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age. . ." 29 U.S.C. § 1053(a). Drafters of pension plans must take care to include such language.[24] No statute similarly requires that rights to continuing health benefits be expressed in any particular form of words. That the parties did not employ pension-like language to describe benefits that are not subject to similar statutory rules provides

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to programs of benefits that were themselves described as benefits "for employees and their dependents." *See* JA201, 218, 223, 335. Alternatively, the duration clauses could be understood to provide that the employer was obligated to continue the specific packages of benefits defined in a P&I Agreement without change (except as that agreement might authorize) during the term of the agreement, and to provide the same package of benefits during retirement to employees who retired during that term, with the employer having the right *thereafter* to make the limited kinds of changes that the courts below found permissible here, *supra* at 33.

[24] *See also* 26 U.S.C. § 401(a)(10)(B)(ii) (a pension trust "shall constitute a qualified trust under this section only if such plan contains [specified] provisions [relating to "top-heavy" benefits]"); Pet. Br. 37 (quoting "top-heavy" provisions in the Apple Grove pension article).

no ground for a negative inference as to the parties' intent.[25]

c. It bears repeating in this context that if Shell and M&G had understood that retiree health obligations were limited by the duration clauses, Shell would not have reduced M&G's purchase price by a credit for the health benefit liabilities for pre-1996 retirees that was calculated on the understanding that the duration of health benefits coverage was "Lifetime for Retirees and Spouses" and that retiree contributions were "None." JA323, 329-30.

D. This Agreement Is Not "Silent" On The Duration Of Retiree Health Benefits, And The Sixth Circuit's Judgment Does Not Depend On Any Presumption Based On Such "Silence"

It should be apparent from the foregoing that M&G is wrong when it asserts (apart from its new-found duration clause argument) that the P&I Agreements

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[25] The life insurance article also is preceded by similar duration language, *see supra* at 5, and contains no language describing retiree life insurance benefits as "vested" or "nonforfeitable." But, in addition to the life insurance benefits already discussed, *supra* at 42, the agreements provide optional contributory life insurance, under which an employee who elected supplemental coverage and made contributions for at least ten years leading up to retirement was promised in exchange a higher level of coverage after retirement. As an optional benefit fully paid by the employee before retirement, this coverage cannot be reconciled with M&G's argument that everything in the P&I agreement that was not labeled "vested" was intended to terminate when the agreement ended.

were "silent" on the duration of the retiree health benefit promise. *E.g.*, Pet. Br. 16, 27, 30, 41. The agreements required interpretation to determine the parties' intent in that regard, but they were far from "silent."[26]

It should also be apparent that M&G is wrong in asserting that the judgment below depends on a "presumption" that the Sixth Circuit supposedly applies to agreements that are silent about the duration of retiree health benefits. Pet. Br. 40-41. Even if Petitioners' parsing of the lower court's body of decisions had merit, no such presumption is needed here and this Court need not approve one, even implicitly, to affirm the judgment below. But the Sixth Circuit's caselaw is not as M&G describes it; instead it is consistent with the traditional rules for interpreting CBAs. The Sixth Circuit has been emphatic that its decision in *Yard-Man* did

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[26] M&G cites Seventh Circuit caselaw for the proposition that the "presumption" that retiree benefits expire with the contract can only be "knocked out by a showing of genuine ambiguity, either patent or latent, *beyond silence*." Pet. Br. 31-32 (quoting *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 543 (7th Cir. 2000) (M&G's emphasis). As we have shown in Part I, there is no such presumption. Nor, given the numerous contractual provisions we have discussed that bear on the duration of the retiree health benefits here, can the agreements properly be described as "silent" on that subject. Furthermore, in *Rossetto* the court recognized that "the silence of [a] collective bargaining agreement with respect to vesting [can] make[ ] the agreement genuinely ambiguous," 217 F.3d at 546; and the court found a latent ambiguity in the Pabst contract due, *inter alia*, to the fact that Schlitz, operating under the same language, had continued to provide retiree benefits after its CBAs were no longer in effect due to plant closings. *See id.* at 545-46.

not create a presumption in favor of vesting. *E.g.*, *Bender v. Newell Window Furnishings, Inc.*, 681 F.3d 253, 261-62 (6th Cir. 2012). *Yard-Man* itself expressly holds that the continuation of retiree insurance benefits "depends on the intent of the parties," 716 F.2d at 1479. To determine what that intent is, traditional rules of contract interpretation are used to the extent consistent with federal labor policy. *Id.* Contract language is considered first, in "the context which gave rise to its inclusion," and each disputed provision is interpreted "as part of the integrated whole." *Id.* at 1479-80.

Yard-Man's "examination of the context in which the[ ] benefits arose," *id.* at 1482, is unexceptional, and the Sixth Circuit was correct in regarding that context as supporting "the likelihood that continuing insurance benefits for retirees were intended," *id.* That "such benefits . . . are typically understood as a form of delayed compensation or reward for past services," *id.*, is highly relevant to the question of their duration, as this Court recognized with respect to severance pay in *Nolde* and *Litton*. *See supra* at 23-24. Where, as here, the eligibility criteria for the benefits require lengthy service, and the benefits that are promised increase in proportion to an employee's length of service, it is reasonable to doubt that the benefits "would be left to the contingencies of future negotiations," 716 F.2d at 1482, in which continuation of the benefits would be "only [a] permissive not [a] mandatory subject[ ] of collective bargaining," *id.* *See supra* at 30 n. 10. And where, as in this case, the contract language makes continuing receipt of a pension, rather than simply some specified number of years of service, the factor that determines whether and when

retiree health benefits will be received, such language shows an intent that the benefits will be received as long as the pension is received. *See supra* at 40-41.

To be sure, those considerations, separately and together, are not *conclusive* as to the contracting parties' intent. But the Sixth Circuit does not say that they are. *Yard-Man* could hardly have been clearer on that point:

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

716 F.2d at 1482.

In this case, the Sixth Circuit did not discuss all of the related terms of the P&I Agreements or the evidence of course of performance, but that is because M&G did not argue below that the text of the P&I agreements should be interpreted as it now contends. What M&G argued in both courts below was that the parties at Apple Grove had adopted cap letters that authorized M&G to charge retirees for all costs in ex-

cess of a cap. *Supra* at 7-10, 12.[27] Although M&G failed on that issue, on credibility grounds, it cannot bring itself to acknowledge those adverse rulings anywhere in its brief and even now urges this Court to consider the cap letters in interpreting the Apple Grove agreements. *E.g.*, Pet. Br. 42 ("the evidence here (i.e., the cap agreements) makes plain that the benefits did not vest"). The cap letters are not part of the Apple Grove agreements. The courts below found sufficient evidence otherwise that the parties intended to create rights to health benefits continuing, without retiree contributions, as long as the retiree is receiving a pension. Their judgment should be affirmed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[27] The only argument that M&G made from the language of the agreements that applied at Apple Grove, rather than from the cap letters that did not apply, was that a "full company contribution towards the cost of the benefits" did not mean 100% of the cost, but just the amount up to any applicable cap. *Supra* at 8, 9, 12.

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