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 Courts of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE

FOX RETIREE COMMITTEE *GOLDEN* RETIREE COMMITTEE *YOLTON* RETIREE COMMITTEE

IN SUPPORT OF RESPONDENTS

ROGER J. MCCLOW
Counsel of Record
MCKNIGHT, MCCLOW, CANZANO, SMITH & RADTKE, P.C.
400 Galleria Officentre, Suite 117
Southfield, MI 48034
rmcclow@michworklaw.com
(248) 354-9650

Counsel for Amicus Curiae

Peake DeLancey Printers, LLC - (301) 341-4600 - Cheverly MD

QUESTION PRESENTED

Whether collectively bargained promises of retiree healthcare should be construed in the same manner as all contracts – to ascertain and enforce the actual intent of the contracting parties?

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FEDERAL STATUTES

I. INTEREST OF THE AMICUS CURIAE [1]

The *Fox*, *Golden* and *Yolton* Retiree Committees, formed as a result of class action settlement agreements, submit this brief as amicus curiae in support of respondents.[2] The settlement agreements, reached after years of litigation, provide for fully paid, lifetime retiree health care benefits for retirees and surviving spouses.[3] The basic legal issue in each case was whether the employer had promised in collective bargaining agreements (CBAs) to provide lifetime health care benefits for retirees and surviving spouses.

The Retiree Committees submit this brief because they are concerned that other retirees may lose their contractual entitlement to lifetime healthcare benefits. Imposing a "clear statement" requirement as advocated by petitioners and their amicus curiae would

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[1] This Brief was authored entirely by undersigned counsel. No person or entity other than undersigned counsel made a monetary contribution to the preparation or submission of this Brief.

[2] The *Fox* Retiree Committee was established under the 1998 Settlement Agreement in *Fox v. Massey-Ferguson* to administer that agreement. The *Golden* Retiree Committee was established for the same purpose under the 2000 Settlement Agreement that concluded *Golden v. Kelsey-Hayes*. The *Yolton* Retiree Committee was established under the 2011 Settlement Agreement in *Yolton v. El Paso Tennessee Pipeline Co*.

[3] Over the years, the *Fox* and *Golden* Retiree Committees have enforced the rights of retirees and surviving spouses to healthcare benefits provided by those Settlement Agreements *See, e.g.*, *Fox v. Massey-Ferguson, Inc.*, 2009 U.S. Dist. LEXIS 118404, 48 Emp. Ben. Cases (BNA) 1737 (E.D. Mich. 2009) and 2008 U.S. Dist. LEXIS 100481 (E.D. Mich. 2008)

foreclose full judicial inquiry into the actual intent of the contracting parties, contrary to traditional rules of contract interpretation.

II. SUMMARY OF ARGUMENT

Most often, when unionized employers agreed to lifetime retiree healthcare benefits in the 1960s and 1970s, they did so in CBAs that did not use the words *lifetime* or *vested*. Despite the absence of such "clear" terms, as this brief shows, retirees in the ensuing decades have conclusively proved, and courts have rightly held, that employers unequivocally intended to promise lifetime retiree healthcare benefits.

Petitioners and their allied amicus curiae ask the Court to impose a "clear statement" requirement; that is, that unless a CBA contains certain "magic words" like *lifetime* or *vested*, courts must rule in the employer's favor. This rigid rule is contrary to the traditional rules of contract interpretation that have guided the judiciary since courts first began enforcing private contracts. It is also contrary to the practicality and flexibility applied under federal labor law to the enforcement of collectively bargained contracts reflected in the *Steelworkers Trilogy*.[4]

If a "clear statement" rule had been applied to the four cases discussed below, the definitive evidence of the employers' actual intent might have been deemed inadmissible. Employers would have evaded their

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[4] *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

promises and thousands of retirees would have been deprived of the benefit of their bargain, earned by decades of industrial labor. That did not happen because the courts applied traditional rules of contract interpretation to determine the employers' intent, rejecting the rigidity of the "clear statement" rule proposed by petitioners.

The Retiree Committees urge the Court to retain the traditional rules of contract interpretation. Under these rules, courts consider contract terms, contractual context, admissions, the parties' conduct and other probative evidence of the parties' actual intent. These time-tested rules should not be eroded to provide special treatment to employers at the expense of the historical function of courts or of retirees seeking to enforce employer promises.

III. ARGUMENT

A. The History of Collectively Bargained Retiree Healthcare

Collectively bargained retiree healthcare dates back at least fifty years. During the 1960s and early 1970s, coincident with the 1965 enactment of Medicare, private sector employers and industrial unions regularly negotiated promises of lifetime, employer paid retirement healthcare benefits in collective bargaining. Employers saw promising retiree healthcare as a good idea. It helped attract and retain qualified employees; retiree healthcare was not costly, especially because employers traded it for reduced wages for active employees; there were more active workers and fewer retirees; and retirements did not start as early or last as long.

In the intervening years, circumstances changed. Globalization, technology, increased life expectancy, new accounting standards, mergers and acquisitions, medical inflation, economic recessions and other systemic factors have made healthcare obligations harder to keep and provided the incentive for employers to break their longstanding promises.

The Sixth Circuit first construed CBAs promising vested retiree welfare benefits shortly after those promises were made. In *Upholsterers v. American Pad & Textile Co.*, 372 F.2d 427 (6th Cir. 1967), the Sixth Circuit held that a CBA provided vested retiree life insurance benefits. In *Pittsburgh Plate Glass v. NLRB*, 427 F.2d 936, 947 (6th Cir. 1970), *aff'd sub nom Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), the Sixth Circuit addressed collectively bargained retiree healthcare promises:

> Once retirement benefits have been bargained for, earned and become payable, the employer may not recant on his contractual obligations to pay them. Section 301, Labor Management Relations Act, 1947, 29 U.S.C. §185(a)(1964).

It was in this historical context that the Sixth Circuit decided U*AW v. Yard-Man*, *Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984). The Sixth Circuit relied on traditional contract principles for interpreting collectively bargained promises of retiree health care. Whether those benefits vest depends on the intent of the contracting parties. Citing *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 457-58 (1957), the court noted that "substantive federal law" developed under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, governs.

716 F.2d at 1479. "However, traditional rules for contractual interpretation are applied as long as their application is consistent with federal labor policies." *Id.* A "court should first look to the explicit language of the [CBA] for clear manifestations of intent," remembering that "even the most explicit language can, of course, only be understood in light of the context which gave rise to its inclusion." *Id.* Each CBA provision should be interpreted "consistently with the entire document and the relative positions and purposes of the parties." *Id.* CBAs should be construed to render no terms "nugatory" and to "avoid illusory promises." *Id.* at 1480. Where ambiguities exist, the court "may look to other words and phrases in the [CBA] for guidance" in clarifying ambiguous durational provisions relating to retiree benefits. *Id.*

Applying these principles, the Sixth Circuit agreed with the district court that the CBA provided for lifetime retiree health benefits. *Id.* It then examined the context in which retiree benefits arose, noting that under federal labor law, retiree benefits are a permissive subject of bargaining. *Id.* at 1482. It was "unlikely that such benefits, which are typically understood as a form of delayed compensation," would be left to "the contingencies of future negotiations." *Id.* The court referred to retiree benefits as "status" benefits that carry an inference that they last as long as the prerequisite status – retirement – lasts, that is, for life. *Id.* Retiree healthcare benefits are not "interminable" by nature: "Rather, as part of the context from which the collective bargaining agreement arose, the nature of such benefits simply provides another inference of intent." *Id.* While this "inference" alone cannot prove inter-

minable benefits, this "contextual factor buttresses the already sufficient evidence of such intent in the language" of the CBA. *Id.*

Yard-Man was decided on the CBA language alone. *Id.* at 1478. Neither party introduced extrinsic evidence of the contracting parties' intent. The language of the CBA, not the *Yard-Man* "inference," was the basis of the court's decision that retiree healthcare vested. The inference was simply a "buttress," drawn from the context of federal labor law and the collective bargaining process, confirming the court's interpretation of the CBA. *Id.*

Retirees did not, and did not need to, rely on any "inference" in the four cases surveyed below. The evidence of employer intent submitted to the district court was overwhelming and unequivocal. As in many other cases, the retirees proved their entitlement to "lifetime" benefits by conclusively showing, under the traditional rules of contract interpretation, that this is precisely what the contracting employer intended.

B. The Function Of Courts In Contract Cases Is To Ascertain And Enforce The Parties' Original Intent

The "cardinal rule" of contract interpretation has always been that a court must first ascertain and then enforce the intention of the contracting parties. In *Bradley v. Washington, Alexandria & Georgetown Steam Packet Co.*, 38 U.S. 89, 97 (1839), the Court wrote:

> It is a principle recognised and acted upon by all Courts of justice, as a cardinal rule in the construction of all contracts, that the intention of the par-

> ties is to be inquired into; and if not forbidden by law, is to be effectuated.

Accord George v. Tate, 102 U.S. 564, 570 (1881) ("intent of the parties is the contract, and whenever that is ascertained, however inartificially [sic] expressed, it is the duty of courts to give it effect"). In *Chesapeake & Ohio Canal Co. v. Hill*, 82 U.S. 94, 99-100 (1872), the Court stated:

> [W]e should look carefully to the substance of the original agreement . . . as contradistinguished from its mere form, in order that we may give it a fair and just construction, and ascertain the substantial intent of the parties, which is the fundamental rule in the construction of all agreements.

Contracts must be interpreted and enforced according to the parties' intent when the contract was made, irrespective of subsequent events. *Davison v. Von Lingen*, 113 U.S. 40, 50 (1885). Words contracting parties use to express their agreement must be viewed according to their contemporaneous meaning. Justice Holmes wrote in *Towne v. Eisner*, 245 U.S. 418, 425 (1918):

> A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

Judge, now Justice, Kennedy, concurring in *Williams v. Fenix & Scission, Inc.*, 608 F.2d 1205, 1210-11 (9th Cir. 1979), rejected the concept that judicial inquiry into the contractual intent could be short-circuited by a so-called "plain meaning" approach:

> This approach to contractual interpretation has been rejected by the circuit and it is out of line with the better-reasoned contract law cases. It results in the exclusion of evidence clearly probative of the parties' understanding of their obligations. Examination of the circumstances which gave rise to the agreement, and of the subsequent acts and communications which bear on the parties' intent at the time of contracting, are relevant to show the intended meaning of a provision in a contract.

While traditional rules of contract interpretation generally apply to CBAs, they are not traditional contracts. CBAs are negotiated in unique circumstances and assessed in the broader context of federal labor policy. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 457 (1957); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579-82 (1960). But, the goal of all contract interpretation, including the interpretation of CBAs, is the same – to ascertain and enforce the intent of the contracting parties through analysis of all available evidence.

Justice Brennan, concurring in *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 570, (1960), wrote:

> Words in a collective bargaining agreement, rightly viewed by the Court to be the charter instrument of a system of industrial self-government, like words in a statute, are to be understood only by reference to the background which gave rise to their inclusion.

The Court has rejected the "plain meaning" rule as a short cut for determining legislative intent. In

Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928), the Court wrote:

> It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.

In *United States v. Witkovich*, 353 U.S. 194, 199 (1957), the Court refused to enforce what appeared to be the literal words of a statute, stating: "[O]nce the tyranny of literalness is rejected, all relevant considerations for giving a rational content to the words become operative." In *United States v. American Trucking Ass'ns*, 310 U.S. 534, 542 550 (1934), the Court reiterated the rule that the "literal meaning" of a statute would be disregarded if necessary to enforce Congressional intent.

A contracting party's understanding of its contractual obligations, revealed in word or deed, is a significant, if not controlling, indicator of intent and the meaning of the contractual words chosen. *Old Colony Trust Co. v. City of Omaha*, 230 U.S. 100, 118 (1913) ("the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence"); *Brooklyn Life Ins. Co. v. Dutcher*, 95 U.S. 269, 273 (1877) ("There is no surer way to find out what parties meant, than to see what they have done.").

Here, petitioners and their allied amicus curiae propose a "tyranny of literalness" for CBAs. They say that, unless a CBA is crystal clear about the em-

ployer's obligation to provide lifetime retiree healthcare benefits, there can be no obligation. They argue that, absent *vesting* or *lifetime* "magic words" in the CBA, courts are precluded from considering: 1) context – what Justice Brennan called the "background which gave rise" to the inclusion of the contractual words; and 2) other extrinsic evidence of the employer's actual intent. The adoption of such a rigid rule is contrary to the historical function of the judiciary: to ascertain and enforce the actual intent of the contracting parties.[5]

Federal courts must be able to consider all probative evidence in determining whether an employer to

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[5] Even in the Third Circuit, which petitioners cite in their Questions Presented as requiring a "clear statement" of intent to vest retiree healthcare benefits, the court recognizes the relevance and importance of direct extrinsic evidence of intent. In *UAW v. Skinner Engine Co.*, 188 F.3d 130, 143-44 (3d Cir. 1999), the court concluded that the CBA was unambiguous, in part because the language that healthcare benefits "will continue" or "will remain" applied to retirees and active employees, and no one contended that active employees had vested healthcare benefits. The court rejected testimony from the company's former chief operating officer that, in his opinion, retirees had a right to vested healthcare benefits. The court cited the traditional rule that extrinsic evidence cannot be used to create an ambiguity where none exists (although it can be used to disclose an ambiguity). *Id.* at 145. The court stated that the former COO's testimony was not based on the language of the CBA, "but on his notion of moral responsibility." *Id.* at 146. According to the court, the former COO did not testify that, in using the phrases "will continue" or "will remain," the company intended that language to mean that retiree benefits were vested. The court observed, however: "If he had, the outcome of this case would no doubt be different." *Id.* at 147.

a CBA actually promised lifetime retiree healthcare benefits. This analysis must be free of rigid constraints that ignore context and foreclose traditional judicial evidentiary analysis. District courts in the Sixth Circuit have fulfilled their historic legal role of ascertaining the parties' contractual intent. In the four cases surveyed below, the district courts meticulously reviewed the contract language, the context in which it was negotiated, admissions and other relevant extrinsic evidence of intent. Despite the absence of words like *vested* or *lifetime* in the CBAs, this evidence proved conclusively that the employers intended their contractual promise of healthcare benefits to last for the lifetimes of retirees and their surviving spouses.

C. ERISA Provides No Guidance On Contractual Intent

The Employee Retiree Income Security Act of 1974 (ERISA), 29 U.S.C. §1001 et seq., was enacted on September 2, 1974. In ERISA, Congress required vesting and funding of pension benefits, but did not mandate vesting or funding of welfare benefits. Courts routinely reference this statutory history to preface discussion of the legal standards applicable to interpreting collectively bargained retiree healthcare provisions. *See, e.g. UAW v. Skinner Engine Co.*, 188 F.3d 130, 137-38 (3d Cir. 1999); *Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130, 133 (2d Cir. 1999) (citing "the general rule" under ERISA "that an employee welfare plan is not vested and that an employer has the right to terminate or unilaterally to amend the plan at any time.") (*quoting Schonholz v. Long Island Jewish Medical Center*, 87 F.3d 72, 77 (2d Cir. 1996).

References to what ERISA requires, however, provide no guidance on what parties intended to require of themselves in collective bargaining.

Promises in CBAs to provide lifetime retiree healthcare benefits precede the effective date of ERISA by up to a decade. In enacting ERISA, Congress did not retroactively alter existing contractual promises enforceable under federal labor laws. Indeed, Congress expressly "prohibited" the modification or impairment of *any* existing law of the United States. 29 U.S.C. §1144(d).

Nor did Congress impose limitations on future employer agreements promising retiree healthcare benefits. ERISA left the substance and duration of welfare benefits to the discretion of "at will" employers and, in the case of unionized employers, to promises made in CBAs. *InterModal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510, 515 (1997). And, under federal labor law pre-dating ERISA, Congress and the courts freed employers and unions from government interference or compulsion in reaching collective bargained agreements. *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212, 218-19 (1979). Once an agreement is reached, Section 301 provides the legal standards for judicial interpretation and enforcement of CBAs.

As noted, federal courts construed labor agreements promising vested retiree welfare benefits in Section 301 suits long before ERISA. *Upholsterers v. American Pad & Textile Co.*, 372 F.2d 427 (6th Cir. 1967) (life insurance vested under CBA); *Pittsburgh Plate Glass v. NLRB*, 427 F.2d 936, 947 (6th Cir. 1970) (when retiree welfare benefits have been bargained

for and earned under CBA, employer cannot recant contractual obligations). In affirming *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n.20 (1971), the Court emphasized that the source of retiree rights to enforce the collectively bargained promise of lifetime healthcare benefits is Section 301:

> Under established contract principles, vested retirement rights may not be altered without the pensioner's consent. . . . The retiree, moreover, would have a federal remedy under § 301 of the Labor Management Relations Act for breach of contract if his benefits were unilaterally changed. (citation omitted).

Congress' expressed policy in ERISA is to "protect . . . the interests of participants in employer benefit plans . . . ." 29 U.S.C §1001(b). While ERISA provided another basis for enforcing collectively bargained benefit promises, obligations under CBAs are determined according to original intent of the contracting parties. As with all contracts, that intent is ascertained from the words used in those contracts, from contractual context and from evidence of how the parties themselves view and act on their obligations. In ERISA, Congress did not, and did not intend to, erect rigid barriers or "magic word" hurdles to the traditional judicial inquiry into what contracting employers intended collectively bargained benefit plans to provide.

D. Retiree Healthcare Litigation In The Sixth Circuit

This brief focuses on four cases litigated by under-

signed counsel over the past quarter century. In each case, the courts considered the retirees' evidence of the employer's actual intent without relying on presumptions or inferences.[6] The courts rejected the employer's argument for a heightened legal standard that would have foreclosed probative evidence of what the employers actually intended when they first promised in CBAs to provide retiree healthcare. *See*, *e.g.*, *Yolton v. El Paso Tennessee Pipeline Co.*, 435 F.3d 571, 580 n.5 (6th Cir. 2006); *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 655 (6th Cir. 1996).[7]

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[6] Other district courts conducted similar analyses of all evidence of intent – including CBA language, contractual context, admissions and other extrinsic evidence – and concluded that the overwhelming evidence demonstrated that employers had obligated themselves to providing lifetime retiree healthcare benefits. *See e.g.*, *Cole v. ArvinMeritor*, *Inc.*, 516 F. Supp. 2d 850, 858-864 (E.D. Mich. 2005)(citing extensive employer admissions by word and deed and other definitive extrinsic evidence of employer intent). The district subsequently granted the retirees' motion for summary judgment. *Cole v. ArvinMeritor*, *Inc.*, 515 F. Supp. 2d 791 (E.D. Mich. 2006), *aff'd*, 549 F.3d 1064 (6th Cir. 2008).

[7] Each CBA also contained a general durational clause, and, in some cases, a durational clause in the insurance agreement itself, that the employer argued was inconsistent with a promise of lifetime retiree healthcare. Nevertheless, in each case, the court concluded that the language of the CBA as a whole and the extrinsic evidence of intent showed the employer had promised lifetime benefits to retirees and surviving spouses. *See*, *e.g.*, *Yolton v. El Paso Tennessee Pipeline Co.*, 318 F. Supp. 2d 455, 467 (E.D. Mich. 2003), *aff'd*, 435 F.3d 571, 580-81 (6th Cir. 2006); *Golden v. Kelsey-Hayes Co.*, 845 F. Supp. 410, 414 (E.D. Mich. 1994), *aff'd*, 73 F.3d 648 (6th Cir. 1996); *Fox v. Massey-Ferguson*, *Inc.*, 172 F.R.D. 653, 677 (E.D. Mich. 1995), *aff'd*, 91 F.3d 143 (6th Cir. 1996); *Gilbert v. Doehler-Jarvis Co.*, 87 F. Supp. 2d 788, 791 (N.D. Ohio 2000).

In discussing these cases, the Retiree Committees set forth the language of the CBAs relating to retiree healthcare, followed by a summary of evidence conclusively showing that contracting employers promised, and intended to promise, healthcare benefits for the lifetimes of retirees and surviving spouses.

1. *Golden v. Kelsey-Hayes Co.*[8]

In 1965 negotiations with the UAW, Kelsey-Hayes agreed to provide fully paid healthcare coverage for hourly retirees at its Detroit, Heintz, Speco and Gunite plants and to allow the retirees' surviving spouses to continue healthcare coverage by paying the premium. In the 1968 negotiations, Kelsey-Hayes agreed to pay the full cost of healthcare for surviving spouses. *Golden v. Kelsey-Hayes Co.*, 954 F. Supp. 1173, 1178 (E.D. Mich. 1996).

The CBA language pertaining to retiree healthcare remained basically unchanged over the years after 1968. The following are excerpts from the Insurance Supplement to the 1980 Detroit CBA:

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[8] In *Golden v. Kelsey-Hayes*, the district court issued a preliminary injunction restoring retiree healthcare benefits shortly after Kelsey-Hayes unilaterally imposed benefit cuts. *Golden v. Kelsey-Hayes Co.*, 845 F. Supp. 410 (E.D. Mich. 1994), *aff'd*, 73 F.3d 648 (6th Cir. 1996). After the district court granted the retirees' motion for summary judgment, *Golden v. Kelsey-Hayes Co.*, 954 F. Supp. 1173, 1178 (E.D. Mich. 1996), the parties entered into a Settlement Agreement, under which Kelsey-Hayes provides fully-paid, lifetime retiree healthcare benefits at the levels in place immediately before the January 1994 reductions.

ARTICLE I
ESTABLISHMENT, FINANCING AND ADMINISTRATION OF INSURANCE PROGRAM

. . .

Section 3. Company Contributions and Administration

. . .

(b) Company Contributions for Health Care Coverages

. . .

(7) For Retired Employes . . .

The Company shall contribute the full premium or subscription charge for Health Care (including Vision effective March 1, 1981) Coverages continued in accordance with Article III, Section 5, for:

(i) A retired employe and his eligible dependents, if any, provided such retired employe is eligible for benefits under Article II of the Kelsey-Hayes Hourly-Rate and Salaried Employes Within a Bargaining Unit Pension Plan.

. . .

(8) For Surviving Spouses

(i) The Company shall contribute the full premium or subscription charge for Health Care (including Vision effective March, 1981). Coverages continued in accordance with Article III, Section 6(b) on behalf of a surviving spouse as defined in Article III, Section 6(b), (1), (2), (3), (4) . . .

ARTICLE III
HEALTH CARE BENEFITS

. . .

Section 5. Continuation of Health Care Coverages Upon Retirement . . .

(a) The Health Care (Other Than Vision prior to March 1, 1981)

Coverages an employe has under this Article at the time of retirement . . . shall be continued thereafter provided that such continuation can be made with the carrier(s). Contributions for such coverages so continued shall be in accordance with Article I, Section 3(b)(7).

Section 6. Continuation of Health Care (other than Vision) Coverages for Surviving Spouse of an Employe or a Retired or Certain Former Employe

. . .

(b) The Company shall make suitable arrangements for a surviving spouse.

(1) of an employe or retired employe, (but not a former employe eligible for a deferred pension) if such spouse is receiving or is eligible to receive a benefit under Article II of the Kelsey-Hayes Hourly-Rate Employes and Salaried Employes Within a Bargaining Unit Pension Plan

(2) of a retired employe if, prior to his death, he was receiving a benefit under Article II of the Kelsey-Hayes Hourly-Rate Employes and Salaried Employes Within a Bargaining Unit Pension Plan,

. . .

> (4) of an employe who at the time of his death was eligible to retire on an early or normal pension under Article II of the Kelsey-Hayes Hourly-Rate Employes and Salaried Employes Within a Bargaining Unit Pension Plan, to participate in the Health (other than Vision prior to March 1, 1981). . . .

Immediately after the 1965 negotiations, Joseph Carey, a Kelsey-Hayes' bargainer, created a "list of insurance procedures" for Detroit hourly employees.[9] One such procedure was that a surviving spouse receiving a pension could continue healthcare coverage "by contributing the monthly group rate. Coverage would be continued for the lifetime of the retiree's spouse."

In 1973, Rene Slater, a Kelsey-Hayes corporate benefit representative, provided benefit personnel with summaries of "insurance continuation rights" under the 1965, 1968 and 1971 Detroit and Jackson CBAs. Each summary described retiree hospital, surgical and medical benefits for retirees as "continuation with Company contribution for life."

Beginning in early 1967, and continuing for twenty years, Kelsey-Hayes, through a dozen benefit representatives, responded to retirees' requests; wrote condolence letters to surviving spouses; and prepared benefit summaries. All assured retirees and their surviving spouses they were entitled to continued Com-

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[9] The Detroit CBA Insurance Supplement and other documents referenced in this section can be viewed at http://www.michworklaw.com/goldenvkelseyhayes/

pany paid healthcare benefits for life. In February 1967, a Detroit insurance-pension department representative told a retiree he would continue to be covered with healthcare coverage "until death."

In August 1972, the director of industrial relations in Detroit wrote to a surviving spouse that "the company will continue monthly payments for hospital, medical surgical and prescription drug benefits for your lifetime." In 1975, a Gunite personnel representative wrote an attorney that the surviving spouse of an hourly retiree would "retain medical insurance coverage for her lifetime." In 1976, a Detroit personnel representative wrote the Veteran's Administration that an hourly retiree that his medical insurance "is paid for by the Company for the rest of his life." In 1979, a Detroit employee benefits representative advised an attorney that a surviving spouse was "entitled to continued Company paid BC/BS, Dental and Hearing Aid Expense coverage for the rest of her life."

In 1981, a Speco benefits administrator wrote a note on a letter to the surviving spouse of an hourly employee eligible to retire that she was "entitled to Company-paid healthcare for her further lifetime." In 1983, an employee services supervisor wrote to a surviving spouse she was "entitled to life-time Healthcare Benefits." In 1986, a Gunite benefits representative responded to the inquiry of an hourly retiree that if he died before his spouse, she "would be covered until her death. The coverage would be the same as it is now." In November 1986, a Speco benefits representative prepared a benefit summary for the widow of an hourly retiree that medical coverage "will

be continued at no cost to you for your further lifetime."

Kelsey-Hayes prepared a form entitled "Surviving Spouse Benefit Summary" that provided "All Kelsey-Hayes healthcare coverage will continue through your life time at the expense of Kelsey-Hayes Company." A Romulus employee benefits coordinator sent a completed summary to the surviving spouse of a deceased hourly employee who signed and returned it in October 1987.

Kelsey-Hayes continued to provide healthcare benefits for hourly retirees and surviving spouses after the expiration of CBAs, including during strikes and for more than six years after it sold the Heintz, Speco and Gunite plants.

Kelsey-Hayes prepared and distributed summary plan descriptions during the late 1970s and early 1980s stating, *inter alia*, that "when you are retired, . . . all of your Healthcare coverages are continued without cost to you" and "[I]f you die after retirement . . . all Healthcare . . . benefits will be provided and Kelsey-Hayes will pay the full cost for the lifetime of your surviving spouse."

In its 1996 decision granting summary judgment for the retirees, the district court concluded that the CBA language provided for vested healthcare benefits. It supported that conclusion by reference to the "veritable mountain of evidence" demonstrating Kelsey-Hayes' intent to provide lifetime healthcare benefits to retirees and surviving spouses. *Golden v. Kelsey-Hayes Co.*, 954 F. Supp. 1173, 1176-82, 1188 (E.D. Mich. 1996).

2. *Fox v. Massey-Ferguson, Inc.*[10]

In 1964 negotiations with the UAW, Massey-Ferguson agreed to pay the full cost of retiree healthcare benefits. *Fox v. Massey-Ferguson, Inc.*, 172 F.R.D. 653, 678 (E.D. Mich. 1995). In 1967 negotiations, Massey-Ferguson agreed to pay the cost of healthcare benefits for surviving spouses of retirees. Subsequent CBAs retained basically the same language on retiree healthcare benefits.

The 1980 Insurance Agreement contained the following provisions:

> 1.07 Surviving Spouse of Deceased Employee or Pensioner. A surviving spouse:
>
> . . .
>
> (b) of a pensioner retired on or after January 1, 1965, under any pension agreement between the parties . . . whether or not the pensioner elected a survivor option:
>
> . . .
>
> shall effective August 1, 1968, have the option

[10] Massey-Ferguson, like Kelsey-Hayes, implemented cuts to retiree healthcare benefits effective January 1, 1994. After considerable discovery and litigation over venue, the district court granted the retirees' motion for a preliminary injunction in May 1995. *Fox v. Massey-Ferguson, Inc.*, 172 F.R.D. 653, 678 (E.D. Mich. 1995), *aff'd*, 91 F.3d 143 (6th Cir. 1996). In September 1996, the district court conducted a bench trial during which additional evidence was introduced. Massey-Ferguson thereafter agreed to provide fully-paid, lifetime benefits for retirees and surviving spouses under a 1998 Settlement Agreement.

of continuing company paid health benefit coverage . . . by electing such coverage for herself and any eligible dependents not later than three (3) months after the death of the . . . pensioner. . . . Commencing with the month in which the spouse becomes eligible for Medicare . . . , the company will continue premium contributions only for months in which the spouse has the voluntary coverage that is available under [Medicare].

. . .

5.05 Health Benefits.

(a) Effective March 1, 1980, pensioners, surviving spouses and their dependents . . . shall be eligible for the dental expense benefits coverage set forth in Article III, the vision expense benefits coverage set forth in Article IV, the hearing aid benefits as set forth in the agreement on Hearing Aid Program and Benefits and the health benefits coverage set forth in 2.07, 2.08, and 2.10.

Effective with the first day of the month following the month in which a pensioner or dependent who is eligible for health benefits under 5.05 becomes eligible for hospital, surgical and medical benefits, under the Federal Social Security Act, such benefits shall be coordinated with the health benefits plan provided by the company with the company considered secondary carrier. . . .

7.01 The following terms shall have the meanings set forth below unless the context clearly indicates otherwise:

. . .

> (i) Pensioner. A former bargaining unit employee . . . who has retired from employment with the company and who is receiving or is entitled to receive a current pension.

Massey-Ferguson's corporate benefit manager, who participated in the 1965 and 1968 negotiations, testified that "it was always the understanding [of Massey-Ferguson] that these benefits were not only negotiated but in the mind of the Company provided for the pensioner's life . . . it wasn't just something that was dragged out of [the company] and we made a point of telling our pensioners so."

Documents created by Massey-Ferguson thereafter bear this out.[11] In December 1969, a corporate benefit representative wrote a memo to Detroit plant labor relations representative about the surviving spouse of an hourly employee: "Mrs. Lindow will receive helth [sic] insurance coverage for remainder of her lifetime company paid."

Beginning with a May 1979 condolence letter, at least six Massey-Ferguson corporate benefit representatives assured surviving spouses of recently-deceased hourly retirees over a ten-year period that, for example: "As the survivor of an MF pensioner, you will continue to be eligible for company paid health and dental benefits for the rest of

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[11] The Insurance Agreement and other referenced documents can be viewed at http://www.michworklaw.com/foxvmasseyferguson/

your life" or that "Massey-Ferguson will continue your health, dental, vision and hearing aid benefit coverage for the rest of your life at no cost to you." More than 70 of these letters were discovered in corporate benefit files during litigation.

Corporate benefit representatives consistently responded to individual inquiries from employees, pensioners and surviving spouses with the same assurances: "Your wife will have medical benefits for the rest of her life . . . ;" "Should you die before your wife, she will receive Company-paid health coverage for the rest of her life;" "You and your wife both have medical benefits from Massey-Ferguson for the rest of your lives;" "If you pass away, your spouse will receive a pension . . . . She will also have medical coverage for her lifetime." In February 1991, a corporate benefits representative responded to an inquiry from the Iowa Department of Human Resources that a retiree "has family coverage for medical, dental, vision and drugs. Non-contributory premium. Coverage for lifetime of retiree and spouse."

Massey-Ferguson continued to provide benefits to retirees and surviving spouses for nearly ten years after it closed its Detroit manufacturing plant in 1985 and the Master CBA had terminated.

Based on the CBA language and extrinsic evidence such as this, the district court granted the retirees' motion for a preliminary injunction in May 1995. *Fox v. Massey-Ferguson, Inc.*, 172 F.R.D. 653, 676-78 (E.D. Mich. 1995), *aff'd*, 91 F.3d 143 (6th Cir. 1996).

3. *Gilbert v. Doehler-Jarvis, Inc.*[12]

Retiree healthcare benefits were first negotiated for Doehler-Jarvis hourly retirees in 1965. In 1980, Doehler-Jarvis agreed to provide surviving spouses with fully-paid retiree healthcare benefits "until such time as the surviving spouse shall remarry." The CBA pertaining to retiree healthcare benefits remained substantially unchanged through the 1996 CBA.

The 1996 Doehler-Jarvis Insurance Program, a CBA supplement, provided at Article III:

Section 3. Company Contributions

. . .

(c) For Retired Employees

The Company will make monthly contributions for the following month's coverage on behalf of

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[12] NL sued the UAW in New York for a declaratory judgment that it had no contractual obligation to provide retiree healthcare benefits. *NL Industries, Inc. v. UAW*, C.A. 87-1292 (W.D.N.Y.). Farley sued the UAW and an individual retiree in Pennsylvania in 1990 for a similar declaratory judgment. *Farley, Inc. v. UAW*, C.A. 90-6915 (E.D. Pa.). In each case, a class of retirees filed a coercive action to enforce their rights to lifetime healthcare benefits. In 1992, the parties reached separate settlement agreements under which NL and Farley agreed to provide comprehensive, healthcare benefits for the lives of retirees and for life or until the remarriage of surviving spouses.

In 1990, Farley sold the assets of Doehler-Jarvis to Harvard Industries. In 1999, Harvard announced that it intended to terminate retiree healthcare benefits at the end of the then current CBA and filed a declaratory judgment action in Pennsylvania. Post-Farley retirees filed an action in the Northern District of Ohio where the case was ultimately litigated.

(1) Retired Employees (not including a former Employee entitled to or receiving a deferred vested pension) and,

(2) Employees terminating after age 65 (except those whose discharge for cause has not been appealed, or if appealed, has been finally upheld) with insufficient credited service to entitle them to a retirement benefit under the Retirement Plan and their eligible dependents, towards the cost of Hospital-Surgical-Medical and Prescription Drug Coverages equal to the full monthly charge.

The continued coverage to which retired Employees are entitled will be only the applicable coverages as described in Section 1 above. The Company may, from time to time, request that retired Employees attest to the eligibility status of their dependents towards whose coverage the Company contributes. If the retired Employee fails to comply with such request, the Company may reduce the retired Employee's coverage to that of "self-only," unless it can be demonstrated that he has an eligible dependent.

(d) For Surviving Spouse

The Company will make monthly contributions for Hospital-Surgical-Medical and Prescription Drug Coverages on behalf of the surviving spouse (and the spouse's eligible dependents).

(1) Of an Employee, as long as monthly Survivor Income Benefits provided in Article II, Section 5 are payable.

(2) Of an Employee who at the time of his death was eligible to retire on an Early or Normal Pension under Article II of the Doehler-Jarvis, Inc. Pension Plan for Wage Basis Employees.

(3) Of a retired Employee if, prior to his death, he was receiving a benefit under Article II of the Doehler-Jarvis, Inc. Pension Plan for Wage Basis Employees.

Contributions shall be continued until such time as the surviving spouse shall remarry.

The Company may from time to time request that surviving spouses attest to the eligibility status of themselves and their dependents towards whose coverage the Company contributes. If the surviving spouse fails to comply with such request, the Company may cease contributions toward the surviving spouse's coverage.

Robert Bressler, the chief negotiator for Doehler-Jarvis in the 1965 negotiations, stated in his 1990 Affidavit: "It was the intention of the Company that the retiree medical insurance would last for the life of the retiree. . . . When an employee fulfilled the requirements for retiree medical insurance, he or she was entitled to those benefits for life regardless of what happened to the underlying collective bargaining agreement." [13]

[13] The Insurance Program, affidavits and other documents referenced in this section can be viewed at http://www.michworklaw.com/gilbertvdoehlerjarvis/

Edward Roman participated in the 1965 negotiations as the industrial relations manager for Toledo Plants 1 and 2. Mr. Roman stated in his 1990 Affidavit: "During the 1965 negotiations with the UAW, Doehler-Jarvis agreed to provide company-paid medical insurance benefits for hourly rated employees. This benefit was intended by Doehler-Jarvis to last for the life of the retiree." He and Mr. Bressler represented Doehler-Jarvis on the Union Management Committee that finalized the language for the 1965 CBA. He stated: "It was my intention that the language that was drafted by the Union Management Committee for retiree medical insurance reflect the fact that those benefits were to last as long as the individual was retired or, in other words, for life."

Donald Burkel was the assistant employment manager at the Batavia, New York plant from 1966 through 1970 and insurance administrator through 1973. Mr. Bressler came to the Batavia facility and told Mr. Burkel that the person conducting exit interviews for hourly retirees should inform them they would have medical insurance benefits for the rest of their lives. Mr. Burkel did so.

Doehler-Jarvis agreed in the 1980 negotiations to extend company paid medical insurance coverage to surviving spouses of retirees "until the surviving spouse shall remarry." According to Jack Johnson, Doehler-Jarvis' manager of compensation and benefits, who participated in the 1977 and 1980 negotiations with the UAW:

> These benefits were negotiated on the same basis as my understanding about retiree medical insurance benefits, that is, that they were lifetime

benefits. With respect to surviving spouses, however, Doehler-Jarvis and the UAW agreed that the benefits would be terminated if the surviving spouse remarried. Otherwise, it was a lifetime benefit.

Six division and plant benefits personnel at three Doehler-Jarvis facilities provided affidavits stating that they informed retiring hourly employees they were entitled to lifetime healthcare benefits. Doehler-Jarvis division and plant benefits personnel consistently made the same assurances in writing. From at least 1976 through 1989, a dozen division and corporate benefit representatives wrote dozens of letters to retiring employees, retirees and surviving spouses. Retiring employees were informed: "Your healthcare coverage will be continued for you and your dependents at no cost to you for your lifetime." Hourly retirees were told: "your Blue Cross-Blue Shield insurance will be covered for the rest of your life." Surviving spouses were assured that they were entitled to continued health coverage "for your lifetime or until you remarry."

Before NL's sale of Doehler-Jarvis to Farley in 1982, NL's director of industrial relations Richard Henzel met with the purchaser William Farley and they discussed the duration of collectively bargained retiree healthcare benefits. Mr. Henzel testified at his 1990 deposition: "And I told Bill that those were lifetime benefits that had been agreed upon. It didn't come as any revelation to him."

After it sold Doehler-Jarvis to Farley in 1982, NL continued to provide retiree health care benefits to retirees and surviving spouses from its

closed Grand Rapids and Batavia plants. Corporate benefits representatives continued to send condolence letters to surviving spouses of Doehler-Jarvis hourly retirees, assuring them they would have: "Continued medical coverage for the rest of your life or until you remarry." At least seven corporate benefit representatives sent these letters. Two NL officers admittedly knew these letters were being mailed to surviving spouses. NL benefit representatives gave the same assurances in response to direct inquiries from retirees: "Should you pre-decease your wife, her medical coverage will continue for the rest of her life or remarriage." NL sent these letters assuring surviving spouses they were entitled to healthcare benefits for life or until remarriage through 1987.

After its 1982 purchase of Doehler-Jarvis, and through 1989, Farley benefit representatives consistently assured surviving spouses that they would "continue to be covered under the group healthcare plan for the rest of your life or until you would remarry."

In 2000, the district court granted summary judgment to post-1990 retirees. *Gilbert v. Doehler-Jarvis, Inc.*, 87 F. Supp. 2d 788 (N.D. Ohio 2000). After analyzing the language of the CBA, the court summarized the "unrebutted evidence" of employer intent, including the affidavits of "individuals who negotiated the original CBA" and the correspondence from company benefit representatives to retirees and surviving spouses assuring them that they were entitled to lifetime healthcare benefits. *Id.* at 792.

4. *Yolton v. El Paso Tennessee Pipeline Co.*[14]

Case Corporation (then known as JI Case) agreed to provide fully paid retiree healthcare benefits for retirees over age 65 in the 1971 negotiations with the UAW. In the 1974 negotiations, Case agreed to extend fully-paid healthcare benefits for retirees and surviving spouses under age 65, effective January 1, 1975.

Article III of the 1974 JI Case Group Insurance Plan, a supplement to the 1974 CBA, has the following provisions pertaining to retiree healthcare benefits:

J. Provisions Applicable to Employees Retired on Company Pension and Surviving Spouses Receiving Company Pension:

1) Employees who retire under the JI Case Pension Plan for Hourly Paid Employees, or their surviving spouses eligible to receive a spouse's pension under the provisions of that Plan, shall be eligible for the Group Insurance benefits as described in the following paragraphs.

. . .

(i) Major Medical Expense Insurance

(ii) Prescription Drug Plan

. . .

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[14] Beginning September 2002, El Paso, the plan sponsor for pre-reorganization Case Corporation retirees, required hourly retirees and surviving spouses to pay premiums to continue their healthcare coverage. The retirees sued and obtained a preliminary injunction restoring their benefits. *Yolton v. El Paso Tennessee Pipeline Co.*, 318 F. Supp. 2d 455 (E.D. Mich. 2003), *aff'd*, 435 F.3d 571 (6th Cir. 2006).

3) Contribution for Coverage

. . .

b) Major Medical Expense Insurance and the Prescription Drug Plan

(i) For eligible Retired Employees and Surviving Spouses who have enrolled and are age 65 or older, the Company shall pay the full premium cost of the above coverages.

(ii) Effective January 1, 1975, for eligible Retired Employees and Surviving Spouses who have enrolled and are under age 65, the Company shall pay the full premium cost of the above coverages.

Clement Devine participated in the 1971 negotiations when the current retiree healthcare language was first negotiated, as Case's director of benefits and one of three management representatives on the company's benefit subcommittee. After the negotiations, Mr. Devine wrote a December 30, 1971 letter to hourly retirees and surviving spouses.[15] He explained what Case had agreed to do for them in collective bargaining. He wrote the letter in a question and answer format because that would "be the most understandable and anticipating the questions most of you have in

[15] The Group Insurance Plan and documents described in this section can be viewed at http://www.michworklaw.com/yoltonvelpaso/

mind." Question 3 was "Will a Premium be Required?" The "answer" was: "Retirees and Surviving Spouses, age 65 or older, are not required to pay a premium, either for themselves or any dependent. Instead, the coverage shall be fully paid by the Company." In answer to Question 9, "Will my spouse be able to keep this coverage if I pass away?" Mr. Devine assured the retirees: "If you have elected the Spouse's Optional Form of Pension and your spouse will receive a pension as a result, your spouse will be able to keep this coverage for the remainder of her lifetime."

Nearly 20 years later, after participating in the 1990 negotiations, Mr. Devine wrote to the surviving spouse of a disabled employee. He told her that, during the 1990 negotiations, the company had agreed to extend the same healthcare coverage to her as "those provided to other surviving spouses of deceased retirees . . . ." He added: "You will have these coverages for your lifetime."

Other corporate and plant benefit representatives told hourly retirees and surviving spouses the same thing. In 1980, a benefits specialist at the Burlington plant wrote to an attorney for the widow of an hourly retiree: "Mrs. Rambo will be entitled to full medical and dental coverage. This coverage will continue in effect for her lifetime or, in the event of her remarriage, until the date of her remarriage." She wrote other letters and benefit summaries for retirees and surviving spouses through 1997.

In the early 1980s, JI Case provided retiring hourly employees with a written summary of the benefits they would have in retirement: "Your [sic] are entitled to full coverage for Medical, dental, vision, prescrip-

tion drugs, and hearing aids the same as when you were employed as long as you have ten years of service at the time of your retirement. Your spouse is also covered just the same as you. If you have completed the portion of the retirement application electing the spouse's option (no charge if spouse is within ten years of your age) then if you should die before that person, their coverage would continue as before. Their coverage would terminate if they remarry. . . ." Later in the summary, Case stated: "In the event you should die before your spouse and a spouse's option was spplied [sic] for, she will receive 55% of your pension for her lifetime along with the insurance which was mentioned previously. . . ."

Robert Lacke, a signatory to the 1974, 1977 and 1980 CBAs for JI Case from its Bettendorf plant, wrote a notation relating to benefits due an hourly employee, in which he compared long term disability (LTD) benefits with benefits under a disability pension. In the LTD column, Mr. Lacke wrote "no automatic spouse option without thirty years of service therefore no Med. Ins." In the disability pension column, Mr. Lacke wrote: "spouse option $135.33 + Med. Ins. Balance of Spouses life."

In 1986, a corporate benefits representative wrote to the surviving spouse of an East Moline retiree stating that "Group Insurance coverage will be continued for you at no cost for your lifetime. Coverage will, however, cease if you remarry." In 1989, the benefits coordinator at the Racine plant wrote to the surviving spouse of an hourly employee who died before retirement: "As Richard was eligible to retire, you are entitled to an automatic spouse's pension for life. You are

also entitled to free group coverage (unless you remarry)."

At Terre Haute, when an hourly employee retired, the supervisor of benefits explained the pension and insurance benefits the retiring employee would receive. Often, the employee's spouse and a union representative would also be present. She informed retiring employees that Case would provide them fully paid healthcare benefits for life. She told retiring employees that, if they were married and chose the survivor pension benefit, their spouses would have lifetime healthcare benefits if they died first. She prepared worksheets showing the benefits available for surviving spouses in the event of the retiree's death, including life insurance benefits, transition and bridge benefits and the duration of those benefits (bridge benefits were payable to age 62 or remarriage) and the amount of the survivor pension benefit. As to the healthcare benefits, she, sometimes wrote and sometimes typed: "Medical: For lifetime."

When a Terre Haute hourly retiree died in November 1984, his surviving spouse received a summary informing her she was entitled to an automatic spouse's pension benefit and "[t]he major medical, dental, vision, hearing and prescription drug coverage will also continue unchanged for your lifetime, or date of remarriage."

When the Terre Haute plant closed in 1987, the benefits supervisor wrote to employees who had selected a "grow in" option under the plant closing agreement. She included healthcare cards that expired on the date the special early retirement began. She wrote: "You will then receive a permanent

(plastic) card from Metropolitan which will reflect your lifetime coverage." Thereafter, hourly retirees were issued MediMet cards containing the language "Lifetime Coverage" or "Lifetime." The company continued to provide healthcare to retirees and surviving spouses from Terre Haute and other plants for fifteen years after they were closed and the CBA terminated.

At the East Moline plant, Case benefit representatives conducted seminars for hourly employees considering retirement under a special early retirement program available in 1991 and 1992. Benefit summary sheets were prepared for and distributed at the meetings describing pension benefits available to employees who elected to retire under the program. The summary stated: "the surviving spouse will continue coverage for all medical, dental, vision, etc. benefits for life."

In 1993, Case announced the closings of Wausau, Southhaven Depot and part of the Hinsdale plant. Case and the UAW entered into a plant shutdown agreement. Case's corporate Human Resources Department prepared a summary for the plant closing entitled "Closed Plant Benefits." Hourly employees who selected special early retirement benefits would: "Receive retiree medical benefits for life."

In December 2003, the district court granted the retirees' motion for a preliminary injunction. *Yolton v. El Paso Tennessee Pipeline Co.*, 318 F. Supp. 2d 455 (E.D. Mich. 2003), *aff'd*, 435 F.3d 571 (6th Cir. 2006). In 2008, after extensive discovery unearthed further evidence of the company's intent, the district court granted Plaintiffs' motion for summary judgment.

Yolton v. El Paso Tennessee Pipeline Co., 2008 U.S. Dist. LEXIS 17619 (E.D. Mich. 2008).

IV. CONCLUSION

In these four cases, evidence of the employer's intent came from the language of the CBAs, but not from "clear statements" using terms like lifetime or vested. Rather, the definitive evidence that employers had promised to provide lifetime retiree healthcare benefits came from: 1) the context provided by other CBA terms; 2) employer representatives who testified that they intended the CBA language to convey their promise of lifetime retiree healthcare benefits; 3) contemporaneous internal communications of employer negotiators describing the new contractual promise as one lasting a "lifetime;" 4) the employer's words and deeds – in providing retiree healthcare benefits during strikes and after plant closings; and 5) "lifetime" communications written over decades by employer representatives entrusted with the responsibility of explaining retirement benefits to employees, retirees and surviving spouses.

In each of the four cases, the CBA expressed the parties' intent in language without the words *lifetime or vested* or any other "magic words" that would satisfy the rigid "clear statement" standard desired by petitioners and their amicus curiae. Yet, in each case, the evidence of the employer's intent and its promise to provide "lifetime" healthcare benefits was overwhelming and irrefutable. If a "clear statement" standard – or any similar limitation on the courts' ability to fully consider probative evidence – had been imposed in these cases, the result likely would have been contrary to the contracting parties' unequivocal "life-

time" intent. The employers would have evaded their promises. The retirees would have been deprived of the "benefit of their bargain" *after* having earned the right to "lifetime" healthcare benefits by decades of industrial labor.

In each of the four cases, the traditional contract interpretation rules allowed the courts to ascertain and enforce the actual intent of the contracting parties. In each case, the parties' original intent was ascertained and enforced.

Petitioners' requested *post hoc* limitations on the traditional rules of contract interpretation would facilitate the work of the courts. Rigid rules are easier to enforce. But, one-sided restrictions on interpretation of CBAs are inconsistent with the traditional judicial function: to ascertain and enforce the actual intent of the contracting parties. Barriers to the determination of one party's contractual intent would elevate form over substance at the expense of retirees who earned the right to healthcare benefits through decades of work. The Retiree Committees ask the Court to confirm that the traditional rules of contract interpretation apply to CBAs promising retiree healthcare in the same manner they do to all other contracts.

Respectfully Submitted,

ROGER J. MCCLOW
Counsel of Record
MCKNIGHT, MCCLOW, CANZANO,
SMITH & RADTKE, P.C.
400 Galleria Officentre, Suite 117
Southfield, MI 48034
rmcclow@michworklaw.com
(248) 354-9650