RETIREE HEALTH CARE AND *REESE V. CNH AMERICA*

THE BEGINNING OF THE END OF CONTRACT LAW AS WE KNOW IT?

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I. INTRODUCTION

During the 1960s and early 1970s, coincident with the 1965 enactment of Medicare, private sector employers and industrial unions, the UAW and the Steelworkers prominent among them, negotiated lifetime, employer-paid retirement healthcare promises in collective bargaining agreements (CBAs).[1] Over the years, cities, counties, and states made similar CBA promises to public sector workers. It also became common for employers to make "me, too" commitments to salaried employees, promising retirement healthcare benefits "at least as good as" those bargained for by their "unionized" co-workers.

Promising retirement healthcare seemed to employers to be a good idea in the 1960s and 1970s. The promises helped attract and retain qualified employees; retiree healthcare benefits were not costly; employers traded them for reduced wage proposals from union bargainers; there were many more active workers than retirees; and retirements did not start as early or last as long. That was then; this is now. Globalization, technology, increased life expectancy, FASB and GASB OPEB (other post-employment benefits) accounting requirements, mergers and acquisitions, medical inflation, financial exigencies, and other systemic factors have made healthcare promises

1. For example, retirement healthcare promises first bargained in 1962 were enforced in *Cole v. ArvinMeritor, Inc.*, 516 F. Supp. 2d 850 (E.D. Mich. 2005) (preliminary injunction), *Cole v. ArvinMeritor, Inc.*, 515 F. Supp. 2d 791 (E.D. Mich. 2006) (summary judgment and permanent injunction), and *Cole v. ArvinMeritor, Inc.*, 549 F.3d 1064 (6th Cir. 2008) (affirming preliminary and permanent injunctions and summary judgment). J. I. Case Company agreed to pay the full cost of health coverage for Medicare-eligible retirees in 1971; Case agreed to fully-paid coverage for all retirees starting on January 1, 1975. *See* Yolton v. El Paso Tenn. Pipeline Co., 318 F. Supp. 2d 455, 460 (E.D. Mich. 2003), *aff'd*, 435 F.3d 571 (6th Cir. 2006).

harder to keep and have increased employer incentives to break those promises.

The result has been litigation. Employers unilaterally change or eliminate retirement healthcare. Retirees sue. In the private sector, the battleground typically is federal court. Hourly retirees and unions sue employers, often in class actions, under § 301 of the Labor-Management Relations Act (LMRA) and the Employee Retirement Income Security Act (ERISA).[2] Salaried retirees sue under ERISA and contract theories and, sometimes, tort theories.[3] In the public sector, hourly retirees and unions sue in state court for CBA breach and sometimes make constitutional and tort claims, and salaried and non-union retirees sue in state court making constitutional, contract, and tort claims.[4]

In the Sixth Circuit, the foundation for retirement healthcare law is *UAW v. Yard-Man, Inc.*, decided in 1983.[5] In this article, we review thirty years of post-*Yard-Man* litigation in the Sixth Circuit and the ongoing lawsuit at the center of current employer efforts to diminish or eliminate the "legacy" costs of promised retirement healthcare: *Reese v. CNH America LLC.*[6]

II. THIRTY YEARS OF RETIREE HEALTHCARE LITIGATION IN THE SIXTH CIRCUIT

A. Yard-Man

Yard-Man enunciated the now-familiar principles. Whether retiree healthcare vests depends on the intent of the contracting parties.[7] CBA enforcement and interpretation are governed by "substantive federal law"

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2. LMRA § 301 is 29 U.S.C. § 185; ERISA is 29 U.S.C. §§ 1001-1461. When a union and an employer agree to vested retirement healthcare benefits, the employer's breach of the collectively bargained benefit promises "is an ERISA violation as well as an LMRA violation." Bender v. Newell Window Furnishings, Inc., 681 F.3d 253, 261 (6th Cir. 2012), *cert. denied,* 133 S. Ct. 436 (2012).

3. *See, e.g.*, Helwig v. Kelsey-Hayes Co., 857 F. Supp. 1168 (E.D. Mich. 1994) (preliminary injunction), *aff'd,* 93 F.3d 243 (6th Cir. 1996), *cert. denied,* 519 U.S. 1059 (1997) (enforcing healthcare promises made to salaried retirees).

4. *See, e.g.*, Loftis v. City of Oak Park, No. 304064, 2012 WL 3021659 (Mich. Ct. App. July 24, 2012) (enforcing healthcare promises bargained for public safety officers).

5. UAW v. Yard-Man, Inc., 716 F.2d 1476 (6th Cir. 1983), *cert. denied,* 465 U.S. 1007 (1984).

6. Reese v. CNH Am. LLC, 574 F.3d 315 (6th Cir. 2009) [hereinafter *Reese I*], *reh'g denied,* 583 F.3d 955 (6th Cir. 2009); Reese v. CNH Am. LLC, 694 F.3d 681 (6th Cir. 2012) [hereinafter *Reese II*].

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

developed under LMRA § 301.[8] The "traditional rules for contractual interpretation" apply as long as they are consistent with federal labor policies.[9] A "court should first look to the explicit language of the [CBA] for clear manifestations of intent," keeping in mind that "even the most explicit language can, of course, only be understood in light of the context which gave rise to its inclusion."[10] Each CBA provision should be interpreted "consistently with the entire document and the relative positions and purposes of the parties."[11] CBAs should be construed so as to render no terms "nugatory" and to "avoid illusory promises."[12] Where ambiguities exist, the court "may look to other words and phrases in the [CBA] for guidance."[13] In particular, other CBA provisions may help clarify ambiguous durational provisions.[14]

Applying these principles in *Yard-Man*, the Sixth Circuit agreed with the district court that the parties intended retiree health benefits to extend beyond the CBA's expiration.[15] The negotiation context underscored that the parties intended retiree health benefits to vest.[16] Under federal labor law, benefits for retirees are permissive collective bargaining subjects, and 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."[17] Retiree benefits are "status" benefits.[18] They carry the inference that they are to last as long as the prerequisite status—retirement—that is, for life.[19] Retiree healthcare benefits are not

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8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 1480.
13. *Yard-Man*, 716 F.2d at 1480.
14. *Id.* at 1479-80. *Accord* Cole v. ArvinMeritor, Inc., 549 F.3d 1064, 1069-70 (6th Cir. 2008); Yolton v. El Paso Tenn. Pipeline Co., 435 F.3d 571, 579 (6th Cir. 2006); Golden v. Kelsey-Hayes Co., 73 F.3d 648, 654-55 (6th Cir. 1996), *cert. denied*, 519 U.S. 807 (1996). No "extrinsic" evidence was offered in *Yard-Man*. 716 F.2d at 1480 n.1. In later cases, the Sixth Circuit considered extrinsic evidence—bargaining history, course of conduct, and the parties' words and deeds—to determine the meaning of ambiguous CBA language or to confirm unambiguous CBA language. *See, e.g.*, Moore v. Menasha Corp., 690 F.3d 444, 451-55 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 1643 (2013) (applying extrinsic evidence to resolve CBA ambiguities); *Cole*, 549 F.3d at 1074 (affirming that CBA language alone warrants judgment for retirees, but also noting that the extrinsic evidence "weighs heavily" to confirm the CBA promises).
15. *Yard-Man*, 716 F.2d at 1482.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*

"interminable" by nature.[20] "Rather, as part of the context from which the collective bargaining agreement arose, the nature of such benefits simply provides another inference of intent."[21] This "inference" alone is insufficient to prove interminable benefits, but this "contextual factor buttresses the already sufficient evidence of such intent in the language" of the CBA.[22]

B. The 30-Year War Over Yard-Man

Employers have waged fierce battles seeking to overturn *Yard-Man* or, at least, to shrink it, to borrow from Grover Norquist, so they "can drown it in the bathtub."[23] For 30 years, however, the Sixth Circuit has held the line and, rightly so, by applying "the traditional rules for contractual interpretation."[24]

Employers complain that *Yard-Man* improperly creates a *presumption* of vesting. The Sixth Circuit has repeatedly instructed that this is not so, emphasizing that *Yard-Man* merely supports, in some circumstances, an *inference*, helping to resolve ambiguities or confirm intent, that is entirely consistent with traditional contract interpretation

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20. *Id.*

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

22. *Id.* The "*Yard-Man* inference" is the common sense proposition that retiree benefits—pension, life insurance, healthcare—by their nature are intended to continue for the duration of retirement unless the CBA *specifies* a limited duration. See *infra* notes 34, 49 and accompanying text.

23. Norquist, of Americans for Tax Reform, is quoted (and critiqued) at *The Anti-Government Campaign*, GOV'T IS GOOD, http://www.governmentisgood.com/articles.php?aid=9 (last visited Mar. 1, 2014) ("My goal is to cut government in half in twenty-five years, to get it down to the size where we can drown it in the bathtub.").

24. *Yard-Man*, 716 F.2d at 1479. *Accord Reese I*, 574 F.3d 315, 321 (6th Cir. 2009) ("ordinary principles of contract interpretation"). *See supra* notes 7-14 and accompanying text.

rules.[25] The Sixth Circuit has characterized the *Yard-Man* inference as a "nudge in favor of vesting in close cases."[26]

Employers point to other circuits that reject any contextual inference favoring vesting and ask the Sixth Circuit to reverse *Yard-Man*. The Sixth Circuit has declined the invitation.[27] Especially since *Sprague v. General Motors Corp.*,[28] a 1998 salaried retiree healthcare case, employers argue that healthcare can vest only when there is "clear and express" language indicating lifetime intent.[29] The Sixth Circuit has rejected this argument[30] and differentiates between bargained promises and unilateral commitments.[31] CBA promises of vested retirement healthcare may be shown by "explicit contractual language," "implied terms," and "extrinsic evidence indicating an intent to vest benefits."[32]

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25. *See* UAW v. Cadillac Malleable Iron Co., 728 F.2d 807, 808-09 (6th Cir. 1984) ("[T]here is no legal presumption based on the status of retired employees"); Golden v. Kelsey-Hayes Co., 73 F.3d 648, 656 (6th Cir. 1996); Maurer v. Joy Techs., Inc., 212 F.3d 907, 917 (6th Cir. 2000); Yolton v. El Paso Tenn. Pipeline Co., 435 F.3d 571, 579 (6th Cir. 2006) (citation omitted) (internal quotation marks omitted) (stating that the "teachings" of *Yard-Man* "simply guide courts faced with the task of discerning the intent of the parties from vague or ambiguous CBAs"); Noe v. PolyOne Corp., 520 F.3d 548, 552 (6th Cir. 2008); Schreiber v. Philips Display Components Co., 580 F.3d 355, 364 (6th Cir. 2009). Many of these clarifications that came after *UAW v. BVR Liquidating, Inc.*, 190 F.3d 768, 772 (6th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000), muddied the waters by referring to the *Yard-Man* inference interchangeably as a presumption and an inference.

26. *See Reese I*, 574 F.3d 315, 321 (6th Cir. 2009); Bender v. Newell Window Furnishings, Inc., 681 F.3d 253, 262 (6th Cir. 2012); Moore v. Menasha Corp., 690 F.3d 444, 450 (6th Cir. 2012). In *Reese I*, Judge Sutton wrote that the "ordinary principles of contract interpretation" apply and that the "nudge"—"to the extent we put a thumb on the scales in this setting" that "favors vesting"—applies only in "close" cases and only if "we can find either explicit contractual language or extrinsic evidence indicating an intent to vest benefits." *Reese I*, 574 F.3d at 321 (citations omitted) (internal quotation marks omitted). *See supra* text accompanying notes 18-22 and *infra* text accompanying note 32.

27. *See, e.g.*, *Golden*, 73 F.3d at 654-55; *Yolton*, 435 F.3d at 579-580; *Bender*, 681 F.3d at 262 n.7.

28. 133 F.3d 388 (6th Cir. 1998) (en banc).

29. *Id.* at 400.

30. *See, e.g.*, *Golden*, 73 F.3d at 655; UAW v. BVR Liquidating, 190 F.3d 768, 772-73 (6th Cir. 1999); *Maurer*, 212 F.3d at 917; *Yolton*, 435 F.3d at 580 n.5.

31. *See Moore*, 690 F.3d at 450.

32. Retirees may prove CBA promises of vested healthcare by "explicit contractual language," "implied terms," and "extrinsic evidence indicating an intent to vest benefits." *Yolton*, 435 F.3d at 580. *See Reese I*, 574 F.3d at 321 ("explicit contractual language or extrinsic evidence indicating an intent to vest benefits"); *Maurer*, 212 F.3d at 907, 915 ("CBAs may contain implied terms, and the parties' practice, usage, and custom can be considered."); Noe v. PolyOne Corp., 520 F.3d 548, 552 (6th Cir. 2008) ("A court may find vested rights under a CBA even if the intent to vest has not been explicitly set out in the agreement.") (citations omitted) (internal quotation marks removed). *See also* UAW v. Yard-Man, Inc., 716 F.2d 1476, 1482 (6th Cir. 1983) ("[T]he finding of an intent to

Yard-Man rejected the employer argument that a CBA's general duration clause proves the absence of intent to vest retiree benefits.[33] Since then, the Sixth Circuit has repeatedly confirmed that general duration clauses do not limit retiree benefits to the term of the agreement when other evidence shows otherwise.[34] The Sixth Circuit also has repeatedly rejected employer arguments that ERISA—which mandates vesting for pension benefits but not for "welfare" benefits like healthcare—requires the court to revisit and reverse *Yard-Man*.[35]

Employers invoke unilaterally-promulgated summary plan description (SPD) clauses asserting the "right" to modify or terminate retiree benefits at will. Employers argue that these "reservation of rights" (ROR) clauses trump contrary evidence in CBAs. After an early partial victory for this view in *Maurer v. Joy Technologies*,[36] the Sixth Circuit has severely limited the force of unilateral RORs.[37]

Recently, employers have argued that retiree healthcare disputes should be arbitrated under CBA grievance procedures. Employers have won some forum battles[38] but have lost on the merits; arbitrators have

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create interminable rights to retiree insurance benefits in the absence of explicit language, is not, in any discernible way, inconsistent with federal labor law."); *id.* at 1482 n.8 (stating that healthcare benefits, "once vested upon the employee's retirement, are interminable").

33. *Yard-Man*, 716 F.2d at 1478, 1482.

34. *See, e.g.*, *Maurer*, 212 F.3d at 917-18; *Yolton*, 435 F.3d at 580-81; *Noe*, 520 F.3d at 553-54; Cole v. ArvinMeritor, Inc., 549 F.3d at 1071-73; Bender v. Newell Window Furnishings, Inc., 681 F.3d 253, 263-64 (6th Cir. 2012). *See also Moore*, 690 F.3d at 453 (stating that amount and durational limitations in other CBA terms, and the absence of such limitations in the retirement healthcare terms, means that there are "no such limitations" on retirement healthcare, and "not that [the employer] could provide coverage in the amount and for the duration as determined by its sole discretion").

35. *See, e.g.*, *Maurer*, 212 F.3d at 917; *Moore*, 690 F.3d at 459. In *Cole* and *Yolton*, and other cases, the CBA language promising lifetime retiree healthcare preceded ERISA—the Pension Reform Act of 1974—by years. *See supra* note 1. ERISA does not trump privately-bargained contractual obligations when those obligations do not conflict with ERISA.

36. *Maurer*, 212 F.3d at 919.

37. *See, e.g.*, McCoy v. Meridian Auto. Sys., Inc., 390 F.3d 417, 424-25 (6th Cir. 2004); Prater v. Ohio Educ. Ass'n, 505 F.3d 437, 444 (6th Cir. 2007); *Reese I*, 574 F.3d at 323 (6th Cir. 2009); *Bender*, 681 F.3d at 265; *Moore*, 690 F.3d at 458; Engelson v. UNUM Life Ins. Co. of Am., 723 F.3d 611, 617 (6th Cir. 2013). *See also* Zino v. Whirlpool Corp., No. 5:11CV01676, 2013 WL 4544518, at *22 (N.D. Ohio Aug. 27, 2013) (citing *Moore*, 690 F.3d at 455-56) (holding that group insurance plans (GIPs) and SPDs are not "contractually binding," although they may be "used as extrinsic evidence to resolve ambiguities latent" in CBAs, and rejecting the employer's "claim that because the Union could review and propose revisions, the GIPs and SPDs were not unilaterally drafted").

38. *See, e.g.*, UAW v. TRW Auto. U.S., LLC, No. 11-CV-14630, 2012 WL 4620879 (E.D. Mich. Sept. 30, 2012); Van Pamel v. TRW Vehicle Safety Sys., Inc., No. 12-CV-

ruled for retirees based on the same CBA interpretation principles employed by *Yard-Man* and its progeny.[39]

Employers have repeatedly petitioned the Supreme Court for writs of *certiorari* in retirement healthcare cases, citing what the employers argue to be a split among the circuits. All the petitions have been denied.[40]

C. Vested Retiree Healthcare Before Reese

In *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*,[41] the Supreme Court, addressing collectively bargained retiree healthcare, stated, "Under established contract principles, vested retirement rights may not be altered without the pensioner's consent."[42] *Yard-Man*, relying on *Pittsburgh Plate Glass*, held that a bargaining union may forego benefits for *future* retirees in return for more immediate compensation but "may not, however, bargain away retiree benefits which have *already vested* in particular individuals" and that "benefits, once vested upon the employee's retirement, are interminable."[43]

UAW v. Loral Corp.[44] rejected, as inconsistent with Sixth Circuit precedent, the employer's argument that a court should presume that the parties to a retiree healthcare agreement contemplated future

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10453, 2012 WL 3134224 (E.D. Mich. Aug. 1, 2012), *aff'd*, 723 F.3d 644 (6th Cir. 2013); UAW v. Kelsey-Hayes Co., No. 11-14434, 2012 WL 2135505 (E.D. Mich. June 13, 2012). *But see* UAW v. Kelsey-Hayes Co., No. 12-1824, 2014 WL 805274 (6th Cir. Mar. 3, 2014) (affirming partial denial of the employer's motion to compel arbitration); USW v. Kelsey-Hayes Co., 862 F. Supp. 2d 690 (E.D. Mich. 2012) (denying the employer's motion to compel arbitration).

39. *See, e.g.*, Van Pamel & TRW Vehicle Safety Sys., Inc., No. 54-300-00003-13 (Am Arb. Ass'n Sept. 13, 2013) (Glazer, Arb.); UAW & TRW Auto. U.S. LLC, No. 54-300-00905-12 (Am. Arb. Ass'n Apr. 18, 2013) (Long, Arb.); UAW & Kelsey-Hayes Co., No. 54-300-00540-12 (Am. Arb. Ass'n Jan. 18, 2013) (Glendon, Arb.); Burcicki & Newcor, Inc., No. 54-300-L-00534-10 (Am. Arb. Ass'n Dec. 8, 2010) (St. Antoine, Arb.).

40. *See Moore*, 690 F.3d 444; *Bender*, 681 F.3d 253; Rose v. Volvo Constr. Equip. N. Am., Inc., 331 F. App'x 388 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 1731 (2010); Yolton v. El Paso Tenn. Pipeline Co., 435 F.3d 571 (6th Cir.), *cert. denied*, 549 U.S. 1019 (2006); CNH Am. LLC v. Yolton, 127 S. Ct. 554 (2006); UAW v. BVR Liquidating, Inc., 190 F.3d 768 (6th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000); Golden v. Kelsey-Hayes Co., 73 F.3d 648 (6th Cir.), *cert. denied*, 519 U.S. 807 (1996); Policy v. Powell Pressed Steel Co., 770 F.2d 609 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017 (1986); UAW v. Yard-Man, Inc., 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984).

41. 404 U.S. 157 (1971).

42. *Id.* at 181 n.20.

43. *Yard-Man*, 716 F.2d at 1482 n.8 (emphasis added).

44. UAW v. Loral Corp., 107 F.3d 11 (6th Cir. 1997) (unpublished table decision), Nos. 95-3710, 94-3711, 1997 WL 49077 (6th Cir. Feb. 3, 1997).

modifications to vested benefits.[45] Vested benefits "remain at the same level for the lifetime of the beneficiary"; while parties may allow "flexibility" to address "future vicissitudes," "such an arrangement must be agreed to in the contract. It cannot be imposed unilaterally by the employer or the courts."[46] *Maurer* held, "If benefits have vested, then retirees must agree before the benefits can be modified, even by a subsequent CBA between the employer and active employees."[47] *Yolton v. El Paso Tennessee Pipeline Corp.*, a companion case to *Reese*, held that "[i]f a welfare benefit has vested, the employer's unilateral modification or reduction of those benefits constitutes a LMRA violation" and that "someone already retired under a particular CBA continues to receive the benefits provided therein despite the expiration of the agreement itself."[48] *Yolton* observed that this is where the *Yard-Man* inference makes the most sense:

> Retirees, who have left the bargaining unit, and can no longer rely on their union to maintain their benefits, are not likely to leave their benefits alterable based on the changing whims and relative bargaining power of their former union and employer.[49]

III. THEN CAME *REESE*

The legal battle over healthcare for hourly retirees of Case Corporation, an iconic manufacturer of tractors and construction equipment, has been prolonged and complex. It began in 2002 when El Paso Tennessee Pipeline began charging pre-IPO Case retirees monthly premiums to maintain their healthcare.[50] Gladys Yolton, the surviving

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45. *Id.* at *3.

46. *Id.*

47. Maurer v. Joy Techs., Inc., 212 F.3d 907, 918 (6th Cir. 2000).

48. Yolton v. El Paso Tenn. Pipeline Co., 435 F.3d 571, 581 (6th Cir. 2006); *see* Prater v. Ohio Educ. Ass'n, 505 F.3d 437, 443 (6th Cir. 2007) (citations omitted) (stating that "an existing contract cannot be unilaterally modified"; it "cannot be changed without the consent or subsequent agreement of the parties"; and unilateral modification "would defeat the essential purpose of reaching an agreement in the first place—to bind the parties prospectively"); Moore v. Menasha Corp., 690 F.3d 444, 449, 459 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 1643 (2013) (citation omitted) (stating that "by agreeing that the CBAs could only be modified on the signed, mutual consent of the parties, [Menasha] waived its ability to unilaterally alter or terminate" retirees' "vested healthcare coverage," and "[a]n employer that contractually obligates itself to provide vested healthcare benefits renders that promise 'forever unalterable'").

49. *Yolton*, 435 F.3d at 581 n.6. *See supra* text accompanying notes 15-22.

50. Tenneco Corporation owned Case Corporation (known before 1990 as J.I. Case Company) until the July 1, 1994 initial public offering (IPO). Yolton v. El Paso Tenn.

spouse of a Case retiree, and several hourly retirees filed a class action against both El Paso and Case.[51] In 2003, Judge Patrick Duggan issued a preliminary injunction requiring the company to make full premium payments for most of the class.[52] Six weeks after the *Yolton* preliminary injunction protecting pre-IPO retirees, CNH America[53] filed a declaratory judgment action against the UAW in Wisconsin, asserting that post-IPO retirees' healthcare was not vested.[54] In response, post-IPO retirees filed a class action in Michigan. The Wisconsin case was dismissed.[55] The Michigan case—*Reese v. CNH America*—is still being litigated.[56]

There have been three published Sixth Circuit opinions in *Reese*: (1) the unanimous panel opinion in 2009, *Reese I*;[57] (2) the rehearing denial with a concurrence in 2009, *Reese I*;[58] and (3) the two-judge majority opinion accompanied by a dissent in 2012, *Reese II*.[59] Judge Jeffrey Sutton wrote *Reese I*, the rehearing denial concurrence, and the *Reese II* majority opinion. Judge Bernice Bouie Donald, not a member of the *Reese I* panel, wrote the *Reese II* dissent. Both *Reese I* and *Reese II* reversed summary judgment for the retiree class and remanded to the district court for further proceedings.

A. Reese I - *The First Appeal*

Reese I, relying on *Yolton*—in which the operative CBA language was essentially identical—held that the post-IPO retirees in *Reese*, like the pre-IPO retirees in *Yolton*, had vested healthcare.[60] *Reese I* did not

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Pipeline Co., No. 02-75164, 2008 WL 2566860, at *2-3 (E.D. Mich. Mar. 7, 2008). After the IPO, Tenneco retained the obligation for existing hourly retirees. *Id.* The newly independent Case Corporation had the obligation for post-IPO retirees. *Id.* Thereafter, part of Tenneco was merged into and became El Paso Tennessee Pipeline Company. *Id.*

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

52. *Id.*

53. CNH stands for Case New Holland. CNH America LLC was formed as the result of a 1999 merger of Case Corporation into New Holland N.V., both manufacturers of tractors and agricultural implements. Reese v. CNH Global N.V., No. 04-70592, 2007 WL 2484988, at *2 (E.D. Mich. Aug. 29, 2007).

54. CNH Am. LLC v. UAW, No. 04-C-0148, 2004 WL 5627648 (E.D. Wis. Aug. 3, 2004), *leave to amend denied*, No. 04-c-0148, 2004 WL 5626999 (E.D. Wis. Oct. 25, 2004).

55. *Id.*

56. *See infra* notes 57-59.

57. Reese v. CNH Am. LLC, 574 F.3d 315 (6th Cir. 2009).

58. Reese v. CNH Am. LLC, 583 F.3d 955 (6th Cir. 2009).

59. Reese v. CNH Am. LLC, 694 F.3d 681 (6th Cir. 2012).

60. *Reese I*, 574 F.3d at 322-23.

stop there. Instead, the panel focused on "an historical feature of this case that, as best as we and the parties can tell, has no parallel in *Yolton*."[61] That "feature" was the 1998 CBA in which the union and the employer agreed to a managed care plan to replace the existing indemnity plan for active employees *and* existing retirees. *Reese I* characterized this as agreement to "material alterations to the health benefits" of the post-IPO retirees who "left the company during the 1990 and 1995 CBAs."[62] *Reese I* then addressed the "related, more difficult question—what does vesting mean in this setting?"[63]

The panel invoked law review articles opining that managed care limited participant choice and, in some cases, benefit levels.[64] Citing certain evidentiary "clues," the panel concluded that retiree benefits under the 1990 and 1995 CBAs were subject to future change because the plan was changed by the 1998 CBA.[65] This "historical feature"—"a plan that permits the substitution of managed care providers is one that envisions making tradeoffs in the future that may negatively impact some retirees"—was the rationale for the panel's view that "the CBA—unless it says otherwise—should be construed to permit modifications to the benefits plans that are 'reasonably commensurate' with the benefits provided in the 1998 CBA, 'reasonable in light of changes in health care' and roughly consistent with the kinds of benefits provided to current employees."[66] The panel concluded, "With this guidance, we leave it to the district court to decide how and in what circumstances CNH may alter such benefits—and to decide whether it is a matter amenable to judgment as a matter of law or not."[67]

B. Reese I - *The Rehearing Denial Concurrence*

The retirees disputed the panel's factual and legal conclusions—and noted that CNH never raised the issue of "what vesting means" at the district court or on appeal—and asked for rehearing. The panel denied rehearing, but Judge Sutton published his concurrence. He wrote that *Reese I* rejected the parties' "stark" positions.[68] He wrote that the retirees

61. *Id.* at 323.
62. *Id.*
63. *Id.* at 323-24.
64. *Id.* at 325.
65. *Id.*
66. *Reese I*, 574 F.3d at 325-26 (citations omitted). The panel adopted this standard from *Zielinski v. Pabst Brewing Co.*, 463 F.3d 615, 619 (7th Cir. 2006). *See infra* notes 77, 86.
67. *Reese I*, 574 F.3d at 327.
68. *Reese I*, 583 F.3d 955, 955-56 (6th Cir. 2009) (denying rehearing).

overlooked "the posture of the case—summary judgment—in which the inferences run in favor of the party that lost below: CNH."[69] Responding to the retirees' protest about the panel's "assessment of the factual record," Judge Sutton concluded,

> On remand, the parties are free to develop evidence on this point. That evidence may show that plaintiffs should win as a matter of law because the prior retirees either approved the changes or they did not diminish the nature of the benefits package that existed upon retirement. Or it may show that CNH should be allowed to make reasonable modifications to the health-care benefits of retirees, consistent with the way the parties have interpreted and implemented prior CBAs containing similar language.[70]

C. Reese I - *On Remand*

On remand, the retirees followed the template set in Judge Sutton's rehearing concurrence. They presented evidence that the 1998 CBA *improved* retiree healthcare and that the union *never* agreed to diminish benefits.[71] The evidence included employer bulletins to retirees presenting the negotiated 1998 changes as "important improvements to your health care" with the assurance that your "union negotiators and Case management have worked [hard] to advance your health care benefits."[72] The retirees moved for summary judgment based on the evidence and the standards set by Judge Sutton's concurrence. CNH argued that Judge Sutton's concurrence was merely a "rumination."[73] CNH also argued that *Reese I* foreclosed factual inquiry into the 1998 negotiations; established the "facts"; and, as a matter of law, permitted unilateral changes.[74] In its own motion, CNH asked the district court to approve as "reasonable" additional changes that included premium contributions, higher deductibles, and co-insurance payments for all retirees and, for Medicare-eligible retirees, elimination of prescription

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69. *Id.*

70. *Id.* at 956.

71. Reese v. CNH Global N.V., No. 04–70592, 2011 WL 824585, at *8 (E.D. Mich. Mar. 3, 2011).

72. Principal Brief of Plaintiffs, Reese v. CNH Am. LLC, 649 F.3d 681 (6th Cir. 2012) (Nos. 11-1857, 11-1969), 2011 WL 4732124, at *12.

73. *Reese*, 2011 WL 824585, at *8.

74. *id.* at *8-9.

drug benefits. These were changes the union rejected when CNH proposed them for existing retirees at 2004 bargaining.[75]

The district court again granted summary judgment for the retirees.[76] Although noting the broad language of *Reese I*, Judge Duggan observed that fact-finding was the province of district courts.[77] He concluded that Judge Sutton's concurrence removed any doubt about the meaning of *Reese I*. Judge Duggan then made the fact-findings contemplated in the concurrence. Viewing the evidence most favorably to CNH, Judge Duggan found that the 1998 managed care agreement did not diminish benefits.[78] He held that the union never agreed to benefit reductions for existing retirees, and even if it had in 1998, that CNH would need union agreement to any *further* changes sought by CNH.[79]

D. Reese II - *The Second Appeal*

Reese II reviewed Judge Duggan's post-remand decision. Judge Sutton wrote for the majority but did not mention his concurrence or its "retiree-approval" and "did not diminish" standards.[80] Instead, he chastised the retirees for "relitigat[ing] several questions our court had already decided."[81] He wrote that the retirees *and* the district court "misread the panel opinion." He wrote that vested retirement is "an evolving, not a fixed benefit," and that this is what retirees "want."[82] He wrote that when *Reese I* stated that CNH "may reasonably alter" the retirees' benefits, it meant that "CNH could alter them *on its own*, not as part of a new collective-bargaining process."[83] The majority again

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75. *Id.* at *10.

76. *Id.* at *11.

77. Judge Duggan questioned the application of the *Zielinski* "reasonableness" standard—*see supra* note 66—to the *Reese* circumstances:

> In . . . *Zielinski*, the specific details of the retiree health insurance benefits could not be discerned. Thus, the Seventh Circuit developed those factors . . . for determining what would be reasonable. In the present case, however, the parties and this Court know the precise details of the retirees' health insurance benefits, as they are set forth in black and white in the 1998 Group Benefit Plan.

Reese, 2011 WL 824585, at *7 n.9. *See infra* note 86.

78. *Reese*, 2011 WL 824585, at *10.

79. *Id.*

80. *Id.*

81. *Reese II*, 694 F.3d 681, 685 (6th Cir. 2012).

82. *Id.* at 683.

83. *Id.* at 685.

remanded, directing the district court to decide whether CNH's proposed changes were "reasonable."[84]

The *Reese II* majority instructed the district court to take evidence on the following questions and "others it considers relevant to the reasonableness question:"

- What is the average annual total out-of-pocket cost to retirees for their healthcare under the old plan (the 1998 Group Benefit Plan)? What is the equivalent figure for the new plan (the 2005 Group Benefit Plan)?

- What is the average per-beneficiary cost to CNH under the old plan? What is the equivalent figure for the new plan?

- What premiums, deductibles and copayments must retirees pay under the old plan? What about under the new plan?

- How fast are the retirees' out-of-pocket costs likely to grow under the old plan? What about under the new plan? How fast are CNH's per-beneficiary costs likely to grow under each?

- What difference (if any) is there between the quality of care available under the old and new plans?

- What difference (if any) is there between the new plan and the plans CNH makes available to current employees and people retiring today?

- How does the new plan compare to plans available to retirees and workers at companies similar to CNH and with demographically similar employees?[85]

In dissent, Judge Donald opined that *Reese I* was wrong as a matter of law and fact. She wrote that *Reese I* was contrary to *Pittsburgh Plate Glass* and the governing Sixth Circuit precedent and, based on the district court fact-findings on remand, that the premise of *Reese I*—i.e., that the 1998 CBA diminished retiree healthcare—was untenable.[86]

84. *Id.*

85. *Id.* at 685-86.

86. Judge Donald found that the *Zielinski* "reasonableness" standard—*see supra* notes 66, 77—was not applicable for two reasons: first, the law, which informs Sixth Circuit

Judge Sutton did not address Judge Donald's merits points or the district court's fact-findings. Instead, he wrote that the dissent suggested going "back to square one" but that the "law-of-the-case" doctrine posed a "serious impediment to this approach."[87]

Neither the majority nor Judge Donald addressed Judge Sutton's *Reese I* concurrence, which contemplated fact-finding and a possible retiree victory "as a matter of law."[88] Neither mentioned that the "retiree-approval" and "did not diminish" standards set by the concurrence were the precise premises of the retirees' post-remand evidence and summary judgment motion and informed Judge Duggan's fact-findings and decision. The case is now back in the district court, where, as directed, the parties are addressing the "reasonableness" of CNH's plan to diminish retiree healthcare.

IV. "PAST IS PROLOGUE"[89] AND THE "CONTEXT" OF VESTED HEALTHCARE

The *Reese* decisions did not come out of the blue. The first indication that Judge Sutton had a different view of "vesting" came in *Prater v. Ohio Educational Ass'n.*[90] The issue there was whether an employer's SPD containing an ROR clause superseded the CBA. Before addressing that issue, Judge Sutton posed these questions:

> What is required to establish an employer's commitment to provide lifetime benefits to retirees? What exactly are lifetime *healthcare* benefits? Does a promise of lifetime benefits mean that they cannot be reduced over the life of a retiree? What if the employer reduces health benefits for active employees or increases the cost of those benefits to active employees? What if the employer increases some health benefits for active employees but reduces others? Must the retiree take the bitter with the sweet? Or is it a ratchet—with only the improvements

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precedent, prohibits employers from unilaterally modifying vested retiree benefits; and second, *Zielinski* was filling gaps in the governing CBA because the insurance contract providing the details of the prescription drug plan could not be found. *Reese II*, 694 F.3d at 687, 689. By contrast, "we know exactly what the parties agreed to in 1998." *Id.* at 689. Judge Donald pointed out that the 1998 CBA contained more than forty-one pages describing the types and levels of collectively bargained health benefits. *Id.*

87. *Id.* at 686-91.

88. *Id.* at 685. See *supra* text accompanying notes 68-79.

89. The phrase "past is prologue," used in *Reese I*, 574 F.3d 315, 322 (6th Cir. 2009), comes from Shakespeare's *The Tempest*, Act 2, Scene I.

90. 505 F.3d 437 (6th Cir. 2007).

> in health benefits available to the retiree but with no compulsion to take any reduction?[91]

Judge Sutton then wrote, "Happily for us, this case sidesteps these questions—at least for now."[92] He then turned to the merits, concluding that the SPD did not trump the CBA. He quoted contract law—"'an existing contract cannot be unilaterally modified'"—and wrote that this principle "applies with equal force to collective-bargaining agreements."[93]

Six months after *Prater*, Judge Sutton dissented in *Noe v. PolyOne*.[94] There the majority held that retiree healthcare was vested.[95] After stating record-specific reasons for dissenting, Judge Sutton wrote, "Even if I were to ignore all of this, I still do not know what has vested as a matter of law. Is it *all* retiree health benefits or just certain stated benefits?"[96] Judge Sutton quoted his *dicta* in *Prater* and posed more questions:

> What happens if the medical insurance provider no longer offers the same medical benefits it offered for the term of the prior collective bargaining agreement? And what if the company's business takes a turn for the worse? Must it continue paying the same benefits to retirees that they received at retirement, even if the cost of those benefits means laying off current workers (and eliminating *their* health benefits) and means potentially weakening the income stream that pays for retiree benefits? How long must this continue? Until all of the values that a company brings to a community but one—irreversible retiree health benefits—are gone?[97]

In high school English class, this was called "foreshadowing." Fifteen months later, Judge Sutton authored *Reese I*, concluding that the "facts" relating to the 1998 negotiations and the resulting CBA were grist for the mill of appellate observations on the question of "what does vesting mean in this context."[98]

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91. *Id.* at 441.
92. *Id.* at 441.
93. *Id.* at 443 (citations omitted).
94. 520 F.3d 548 (6th Cir. 2008).
95. *Id.* at 564.
96. *Id.* at 566-67.
97. *Id.* at 567.
98. As we discuss ahead, the questions posed in Judge Sutton's pre-*Reese* opinions can and should be resolved, just as *Yard-Man* prescribes, by the "traditional rules for contractual interpretation." UAW v. Yardman, Inc., 716 F.2d 1476, 1481 n.2 (6th Cir.

V. IS *REESE* LIMITED TO ITS CONTEXT?

In *Reese I*, the "context" was the 1998 managed care agreement, a "historical feature" with "no parallel in *Yolton*."[99] In his concurrence, Judge Sutton identified the "key premise" of CNH's argument both in the district court and on appeal: the 1998 agreement to replace the existing indemnity plan with the managed care plan.[100] He wrote that the court "could not ignore the reality that there was something different about this case—something that implicated the distinct question of what 'vesting' means in this context."[101] He wrote that "it blinked reality to say that the 'vested' benefits were forever unchangeable, given that the parties had allowed them to change, even in some ways that did not favor

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1983). Judge Sutton's "what if the company's business takes a turn for the worse" question, for example, commonly arises, and the answer is *not* to permit one party to unilaterally abrogate contract obligations. Rather, as Judge McKeague wrote in *Noe*, 520 F.3d at 564, despite the economic burden of keeping contractual promises, "in the absence of impossibility of performance, it is not the prerogative of the judiciary to rewrite contracts in order to rescue parties from 'their improvident commitments.'" Indeed, Judge Sutton's questions address "the company's" business interests rather than its CBA obligations. *Id.* Only the latter are the proper subject of contract breach litigation. Under contract law, "if the company's business takes a turn for the worse," the company still must satisfy its contract obligations to pay the construction company that built its addition, the manufacturer that supplied its equipment, the office supplier that delivered its paperclips, the vendor that filled its soda pop machines, the bank that extends its line of credit, the retirees who worked 30-plus years to earn retirement benefits, and the lawyers to whom the company laments the "improvident commitments" made to those retirees.

Judge Sutton asked in *Prater* whether "an employer's commitment to provide lifetime benefits to retirees" is a "ratchet," permitting only "improvements in health benefits available to the retiree" but providing "no compulsion to take any reduction." Prater v. Ohio Educ. Ass'n, 505 F.3d 437, 441 (6th Cir. 2007). The answer is in *Moore v. Menasha Corp.*, 690 F.3d 444, 450, 458 (6th Cir. 2012) (citations omitted): "If any employer chooses to vest benefits, it renders those benefits 'forever unalterable.'" Indeed, vested retirees may get "improvements" in benefits negotiated for them by their former union—retiree benefits are permissive collective bargaining subjects as discussed in *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971)—but those retirees are under "no compulsion to take any reduction." *See Prater*, 505 F.3d at 441. *Reese II*, however, does away with the "unalterable" nature of vested benefits. Under *Reese II*, the CNH retirees have no ability to require their former employer to "ratchet" their health benefits upward, but they are subject to their former employer's "right" to unilaterally "ratchet" those benefits downward. *See Reese II*, 694 F.3d 681, 683-86 (6th Cir. 2012). Vesting "in this context," the *Reese II* majority seems to say, means there is a one-way "ratchet" which serves only CNH and not the retirees. *See id.* As we discuss ahead, a broad application of this view would mean the beginning of the end of contract law as we know it, at least for vested retirees.

99. *Reese I*, 574 F.3d 315, 323 (6th Cir. 2009).

100. Reese v. CNH Am. LLC, 583 F.3d 955 (6th Cir. 2009).

101. *Id.* at 955.

prior retirees."[102] *Reese II* again referred to this particularized "context," that is, the "parties' practice under the 1998 CBA of altering healthcare benefits" and the 1998 creation of the managed care plan.[103] This "context" led to the *Reese I* conclusion, the *Reese II* majority explained, that although retiree healthcare benefits were vested, still "CNH could make 'reasonable' changes to the healthcare plan covering eligible retirees."[104]

Is *Reese* limited to its distinct "facts" and "context?" Or does *Reese* signal a new era of contract jurisprudence, in which judges become chancellors-in-equity who "reform" CBAs based on "evolving" social and economic policies? Because the Sixth Circuit denied *en banc* rehearing of *Reese II*, confusion about its meaning and scope will engender continuing litigation.

Employers argue that *Reese* establishes a universal rule, permitting them to unilaterally change vested healthcare as long as the changes are "reasonable."[105] Since *Reese I*, and after *Reese II*, however, without directly addressing the broader implications, if any, of *Reese*, the Sixth Circuit has reaffirmed traditional contract principles and that vested benefits are "unalterable."[106]

If *Reese* has broad implications—if *Reese* is read to permit unilaterally-imposed employer reductions in promised retiree healthcare based on "evolving" events—bad things will happen. Retiree healthcare lawsuits will be never-ending battles waged by lawyers and, worse, by "experts": healthcare specialists, actuaries, demographers, labor economists, and financial prognosticators. Each "expert" will vie to convince judges that his or her "expertise" provides the true measure of what healthcare retirees *ought to get* in the "reality" of any given year. This will happen as often as employers decide to "modernize"—that is, to reduce employer healthcare costs. Retirees economically, emotionally, and physically able to undertake the legal fight—and those of their former unions willing to join the legal fight—will be forced into

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102. *Id.* at 955-56.

103. *Reese II*, 694 F.3d at 683-84.

104. *Id.*

105. Employers now, in the alternative, try to find "something different" about the "context" of their particular situations to justify their requests for judicial approval of diminished retiree benefits. See Zino v. Whirlpool Corp., No. 5:011CV01676, 2013 WL 4544518 (N.D. Ohio Aug. 27, 2013), discussed *infra* note 198, which, post-*Reese*, rejected the employer's panoply of arguments and recognized that *Reese* "is not a case of general application."

106. *See* Moore v. Menasha Corp., 690 F.3d 444, 450, 458 (6th Cir. 2012). *But see* Tackett v. M&G Polymers USA LLC, 733 F.3d 589 (6th Cir. 2013). See also the discussion *infra* Part IX and, in particular, *infra* note 198.

recurring litigation battles for so long as the retirees are retirees, that is, for life. Those retirees unable to engage the powerful forces set against them will have to live with whatever diminished healthcare their former employer "on its own" deems "reasonable." This is *not* what any contracting party intended or bargained, and this disregards the law of contracts. We discuss this in more detail, next.

VI. *REESE*'S PIECES VERSUS THE LAW OF CONTRACTS[107]

Reese is either *sui generis*—limited to its "context" and "facts"—or it represents the end of contract law as we know it.

A. Courts Ascertain and Enforce Contracting Parties' Intent

Judges interpret contracts to ascertain and enforce the contracting parties' intent.[108] Courts have no authority to fashion terms different than those agreed to by the contracting parties,[109] or to add terms that one party wishes it negotiated but did not.[110] It is "neither reasonable nor just" for courts to enforce one party's unilateral preferences.[111]

Reese II held that the benefits vested under the 1990 and 1995 CBAs can be changed by CNH "on its own" because the union and CNH

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107. We owe this pun to Judge Arthur Tarnow, who used it to describe the advocates' viewpoints during the discussion of *Reese* in the oral argument that culminated in the decision reported as Hargrove v. EaglePicher Corp., 852 F. Supp. 2d 851 (E.D. Mich. 2012).

108. *See* KSR Int'l Co. v. Delphi Auto. Sys., LLC, 523 F. App'x 357, 362 (6th Cir. 2013); Wonderland Shopping Ctr. Venture Ltd. P'ship v. CDC Mortg. Capital, Inc., 274 F.3d 1085, 1092 (6th Cir. 2001). *Accord* Am. Eagle Outfitters v. Lyle & Scott Ltd., 584 F.3d 575, 587 (3d Cir. 2009) (stating that the "paramount goal" of contract interpretation is to determine contracting parties' intent); Browning v. Navarro, 743 F.2d 1069, 1081 (5th Cir. 1984) (stating that the "polestar for courts" in contract interpretation is to ascertain the intent of parties to contract); Swift & Co. v. Elias Farms, Inc., 539 F.3d 849, 851 (8th Cir. 2008) (applying Minnesota law and stating that the "primary goal" of contract interpretation is to determine and enforce parties' intent); Skilstaf, Inc. v. CVS Caremark Corp., 669 F.3d 1005, 1014-15 (9th Cir. 2012) (applying California law and stating that the "fundamental goal" of contract interpretation is to give effect to "the mutual intent of parties as it existed at time of contracting"); Otis Elevator Co. v. Midland Red Oak Realty, Inc., 483 F.3d 1095, 1101 (10th Cir. 2007) (applying Oklahoma law and stating that the "cardinal rule" of contract interpretation is to determine and effectuate intent of parties). *See also* 4 WILLISTON ON CONTRACTS § 600 (3d ed. 1961 & Supp. 1984); 3 CORBIN ON CONTRACTS § 542 (1951).

109. *Wonderland Shopping Ctr.*, 274 F.3d at 1095.

110. Cleveland v. Am. Nat'l Can Co., No. 96-4090, 1998 U.S. App. LEXIS 640 (6th Cir. Jan. 14, 1998) (citing Ohio law).

111. *Delphi Auto. Sys.*, 523 F. App'x at 362.

agreed to changes in 1998.[112] The panel wrote in *Reese I* that "[w]e know that the contracting parties viewed the 1995 CBA's benefits as subject to some changes because they changed them."[113] But there is no logical nexus between the 1998 managed care agreement—whether it diminished or improved healthcare for existing retirees—and the *Reese II* majority's conclusion that CNH may thereafter make *other changes* "on its own."[114] At most, the bilateral 1998 managed care agreement suggests that the parties implicitly intended that vested benefits be subject to changes *later bargained*; it does not, as a matter of law or logic, show any contractual intent to permit CNH to *unilaterally* change benefits.[115]

The *Reese II* majority opines that the "reality" is that "vesting in the context of healthcare benefits provides an evolving, not a fixed, benefit" and this is what retirees "want."[116] The "reality" that is supposed to count under contract law, however, is what the parties agreed upon and intended when they reached agreement.[117] Unions *never* bargain what the *Reese II* majority seems to view as the norm: ephemeral and "evolving" unilaterally-mutable "commitments" that indulge employer *fiat*, entail perpetual uncertainty, and always result in changes that go only the employer's way.

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112. *Reese II*, 694 F.3d 681, 685 (6th Cir. 2012).

113. *Reese I*, 574 F.3d 315, 326 (6th Cir. 2009).

114. *Reese II*, 694 F.3d at 685.

115. As shown, later agreements cannot alter the intent manifested by, or the obligations created by, the parties' 1990 and 1995 CBAs. Employees retiring under those CBAs vested at retirement could have demanded reinstatement of the benefits in place at the time of retirement (i.e., the indemnity plan). That appears to be what Judge Duggan required in his initial decision: "vested lifetime retiree health care benefits as provided for in the labor agreements in effect at the time of their deceased spouses' retirement." Reese v. CNH Global N.V., No. 04-70592, 2007 WL 2484989, at *10 (E.D. Mich. Aug. 29, 2007). Or the 1998 agreement to replace the indemnity plan with managed care could have several other, related legal meanings: (1) that, as Judge Duggan concluded in his remand decision, benefits were *improved* in the 1998 CBA, so retirees had no reason to complain, *see Reese I*, 574 F.3d at 325 and Reese v. CNH Am. LLC, 583 F.3d 955, 956 (6th Cir. 2009) (*Reese* concurrence); (2) that the retirees tolerated the 1998 changes but were still entitled to challenge later changes, *see* Cole v. ArvinMeritor, Inc., 515 F. Supp. 2d 791, 804 (E.D. Mich. 2006) (citing cases); or (3) that the 1998 changes were accepted by the pre-1998 retirees as substitute performance for CNH's obligations under the plan in effect at the time of retirement, an "accord and satisfaction." Under these legal scenarios, the parties' original intent and CNH's contractual obligations remain paramount. Under none of those scenarios would CNH be entitled to make future changes "on its own."

116. *Reese II*, 694 F.3d at 683.

117. This principle is captured in the legal maxim *contemporanea exposito est optima et fortissima in lege*, meaning that contemporaneous exposition is best and most powerful in law, applied to interpretation of statutes and contracts. *See supra* note 108 and *infra* text accompanying note 122.

Unions *never* bargain—and retirees do *not* want—CBA clauses embodying the *Reese II* majority premises, like this clause:

> The company shall pay the full premium for the hospital, surgical, medical, hearing aid, prescription drug, dental, vision, and substance abuse coverages effective at retirement, with 100% in-network coverage with no deductibles and $5 prescriptions,
>
> UNLESS AND UNTIL at some future point the company unilaterally decides to impose premium contributions, co-insurance, and deductibles on retirees, to shift company costs and risks to retirees, to raise retiree prescription costs, and to otherwise modify, or even terminate, coverages, so long as the company imposes these changes within the boundaries of "reasonableness,"
>
> PROVIDED THAT "reasonableness" will be an evolving standard—depending on, maybe or maybe not, factors like average out-of-pocket annual retiree costs, per-beneficiary company costs, healthcare quality comparisons, medical technology developments, and comparison with healthcare available to "demographically similar employees" at other companies, etc.—as that evolving "reasonableness" standard may someday be applied by a district court with suitable § 301/ERISA jurisdiction, as many times and as often as may be necessary, in perpetuity, if and when the retirees are able to sue to enforce company obligations under this CBA or imposed by ERISA.

The foundational principle of American contract law is captured in the aphorism imparted in kindergarten and Contracts I: "a promise is a promise." Contract law permits flexibility in carefully circumscribed circumstances—to accommodate impossibility, to allow for the exigencies of war, to correct mistakes in reducing an agreement to writing, and to remedy fraud or duress, for example—but promisor's remorse has *never* been a defense to breach. If you promise to pay on your mortgage, or on your car loan, or on your student loan, or on your obligations to compensate retirees for a lifetime of labor, you are supposed to keep your promise, even in hard times. This is so even if the housing market tanks, your rear bumper falls off, your Spanish literature degree equips you only to work at Taco Bell, and healthcare inflation exceeds the CPI.

The *Reese* result—permitting CNH to litigate over the "reasonableness" of unilateral reductions based on standards that have nothing to do with the bargain made by the parties—cannot be derived from any plausible CBA construction. If the *Reese* result were to be given universal application independent of "facts" and "context," the intent of the contracting parties in *every* case will be subservient to the "evolving" will of the judiciary, contrary to "the traditional rules for contractual interpretation."[118]

B. Legal Principles, Not Social and Economic Policies, Govern Contract Enforcement

The *Reese II* majority disregards what the CBA says and what the evidence proves about the parties' intent—as Judge Donald's dissent points out—in an effort "to resolve the case equitably."[119] But, as Judge Donald points out, the court "is one of law and not equity."[120] She observes that the majority offers "thoughtful analysis of the policy issues" when "it is the law that should determine the outcome of this case."[121] As a matter of law, one contracting party cannot escape its obligations because those obligations unexpectedly become more onerous due to "evolving" events. As the Sixth Circuit stated over a hundred years ago,

> The reasonableness of a contract, its fairness and justice, are to be determined as of the time when the parties entered into it, and so of the intentions involved in the construction of their agreements, and none of these are to be influenced by the force of subsequent changes in events or circumstances.[122]

Judge McKeague made this point about retiree healthcare in *Noe v. PolyOne*:

> We are cognizant of the overall climate in which this case reaches the court; rising healthcare costs and foreign competition have certainly placed corporations such as PolyOne in a difficult economic position. However, in the absence of impossibility of

118. See *supra* Part II.A.
119. *Reese II*, 694 F.3d at 687.
120. *Id.* at 686-87.
121. *Id.*
122. Ruggles v. Buckley, 158 F. 950, 956 (6th Cir. 1908). *See supra* notes 108-111, 117 and accompanying text.

> performance, it is not the prerogative of the judiciary to rewrite contracts in order to rescue parties from "their improvident commitments."[123]

There is, in any event, no "equity" in letting CNH break its promises because of post-CBA medical inflation. Medical inflation was a fact of life long before the 1998 negotiations.[124] Every employer negotiating retiree healthcare in 1998 was well aware that medical costs would increase, new medical procedures would be introduced, and new drugs would be patented.

In *Mamula v. Satralloy, Inc.*,[125] a 1983 retiree healthcare case decided two days before *Yard-Man*, Judge John David Holschuh discussed the "unfortunate but true fact of life today that health care costs have skyrocketed to the point where health care insurance is virtually a necessity for persons of modest incomes if needed medical attention is to be obtained."[126] Judge Holschuh also noted the importance to retirees of CBA provisions requiring the employer to pay their insurance premiums as well as the resulting "ever larger financial burden" imposed on employers who agree to such provisions.[127] He granted the retirees' motion for a preliminary injunction, concluding that "concern about defendant's insolvency . . . cannot be used by defendant to evade its [contractual] responsibilities."[128]

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123. Noe v. PolyOne Corp., 520 F.3d 548, 564 (6th Cir. 2008) (citation omitted).

124. In fact, CNH and the union anticipated medical inflation long before the 1998 negotiations *and* explicitly addressed medical inflation in 1998. In 1993, as part of an Extension Agreement, CNH and the union agreed to a FAS 106 "cap" letter. Reese v. CNH Global N.V., No. 04-70592, 2007 WL 2484989, at *2 (E.D. Mich. Aug. 29, 2007). The letter set future (post-CBA) limitations on the "average per capita annual cost to the Company of providing medical and related benefits . . . to retired employees and surviving spouses of deceased employees." *Id.* In the 1998 negotiations, after El Paso announced it intended to implement the "caps" for pre-IPO (*Yolton*) retirees, the union demanded—and CNH agreed—to *eliminate* the "cap" letter. *Id.* at *3. In other words, in the 1998 negotiations, CNH agreed that it, not the retirees, would bear *all* the cost of future medical inflation. *See id.* This undisputed, uncontested evidence of CNH's actual intent was ignored by the *Reese I* panel and by the *Reese II* majority. On remand from *Reese II*, CNH proposed a plan for Medicare-eligible retirees that CNH projects will cost CNH *less per individual* in 2032 than CNH would have been responsible to pay under the FAS 106 "cap" letter that CNH agreed to eliminate during the 1998 negotiations.

125. 578 F. Supp. 563 (S.D. Ohio 1983).

126. *Id.* at 577.

127. *Id.*

128. *Id.* at 578-79. Judge Holschuh was also a member of the *Yard-Man* panel, sitting by designation. He concurred in part I of the majority opinion but dissented from part II. He expressed concern about creating "a troublesome precedent that could encourage an

In *Loral* in 1997, the Sixth Circuit informed employers that if they wanted flexibility to address "future vicissitudes," that flexibility "must be agreed to in the contract."[129] *Noe* cited *Bidlack v. Wheelabrator Corp.*[130] from 1993, in which the Seventh Circuit wrote that employers should not expect to be bailed out by courts when they made lifetime healthcare promises "not anticipating the recent rise in health costs."[131] The untenable premise of the broad reading of *Reese* is that an employer can unilaterally modify retiree healthcare to accommodate economic "realities" even when the contracting parties made an agreement that *did not* insulate the employer from those "realities." If *Reese* is read broadly—if it is not limited to its "context" and "facts"—we are witnessing the demise of foundational tenets of American contract law.

C. Vested Contract Rights Cannot Be Altered Without Retiree Consent

The *Reese II* majority departs from *Pittsburgh Plate Glass*, *Yard-Man*, and 30 years of Sixth Circuit precedent. Under *Pittsburgh Plate Glass*, "vested retirement rights may not be altered without the pensioner's consent."[132] Under *Yard-Man*, benefits "once vested upon the employee's retirement, are interminable."[133] *Maurer* said, "If benefits have vested, then retirees must agree before the benefits can be modified, even by a subsequent CBA between the employer and active employees."[134] As *Loral* suggests, a CBA may address "future vicissitudes" by allowing the employer to change vested benefits on "mutual agreement" or with union "consent," but "such an arrangement" must be "agreed to" in the CBA *before* vesting; changes in vested

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employer who desires to change retirement benefits to ignore the union that won those benefits in the collective bargaining process and to deal directly with the unorganized and economically vulnerable retirees." UAW v. Yard-Man, Inc., 716 F.2d 1476, 1488 (6th Cir. 1983). The *Reese II* majority gives cause for greater concern, giving CNH license "to ignore the union" and, "on its own," alter vested benefits, using the words of *Pittsburgh Plate Glass*, "without the pensioner's consent." *See Reese II*, 694 F.3d 681, 685; Allied Chem. Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 181 n.20 (1971).

129. UAW v. Loral Corp., 107 F.3d 11 (6th Cir. 1997) (unpublished table decision), Nos. 95-3710, 94-3711, 1997 WL 49077, at *3 (6th Cir. Feb. 3, 1997).

130. Bidlack v. Wheelabrator Corp., 993 F.2d 603 (7th Cir. 1993).

131. Noe v. PolyOne Corp., 520 F.3d 548, 564 (6th Cir. 2008) (citing *Bidlack*, 993 F.2d at 609).

132. *Pittsburgh Plate Glass*, 404 U.S. at 181 n.20.

133. *Yard-Man*, 716 F.2d at 1482 n.8.

134. Maurer v. Joy Techs., Inc., 212 F.3d 907, 918 (6th Cir. 2000).

benefits "cannot be imposed unilaterally by the employer or by the courts."[135]

When post-IPO (*Reese*) retirees retired under the 1990 and 1995 CBAs, their rights vested in exactly the same manner as the rights of the pre-IPO (*Yolton*) retirees. Those vested rights, whatever they were, could not be altered without consent of the individual retirees, even by a subsequent agreement of the active employees and CNH, and certainly not by CNH "on its own."

D. Bilateral Contracts Are Subject Only To Bilateral Modification

Once mutually agreed upon by contracting parties, mutual agreement is required to modify a bilateral contract. In *Prater*, Judge Sutton recited the traditional rule that "an existing contract cannot be unilaterally modified."[136] He wrote that this rule applies "with equal force to collective-bargaining agreements."[137] In *Prater*, Judge Sutton applied this general contract rule in the context of collectively bargained retiree healthcare. *Reese II* did not refer to this rule and rejected the district court holding that further benefit changes required union agreement.[138] Instead, *Reese II* held that CNH could modify the bilateral CBA "on its own," without the consent of the union.

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135. *See Loral*, 1997 WL 49077, at *3; *see also infra* text accompanying notes 148-164; Amos v. PPG Indus., Inc., 699 F.3d 448, 453 (6th Cir. 2012) (stating that the issue preclusion doctrine does not bar a retiree class action to enforce collectively bargained healthcare although an earlier action against the retirees' former employer brought by the retirees' former union; held that the retirees' benefits were not vested; and holding that without the retirees' "assent," "a union may not represent retirees in litigation that could bind them," so the retirees were not precluded from litigating for themselves the question of whether their health benefits had vested); USW v. Cooper Tire & Rubber Co., 474 F.3d 271, 282-83 (6th Cir. 2007); Cleveland Elec. Illuminating Co. v. Util. Workers, 440 F.3d 809, 817 (6th Cir. 2006) (stating that retiree consent is necessary to permit the retirees' former union to represent and bind them in an arbitration addressing breaches of their former employers' collectively bargained retirement healthcare obligations). These cases are informed by the core principle that once benefits vest, they cannot be changed unilaterally by the employer, or by agreement between the union and the employer unless such an "arrangement" was in the CBA in force at the time of vesting, or by the courts. The only way to reconcile *Reese II* with these principles is to conclude that it found the parties to have limited vested benefits by allowing for later changes *if mutually-agreed upon by CNH and the union*. In short, if *Reese II* has any force, it must be limited to the narrow "context" and "facts" that distinguish it from *Pittsburgh Plate Glass*, *Yard-Man*, and thirty years of Sixth Circuit precedent. *See also supra* text accompanying notes 99-106 and discussion *infra* Part IX.

136. Prater v. Ohio Educ. Ass'n, 505 F.3d 437, 443 (6th Cir. 2007).

137. *Id.* at 443 (quoting Baptist Physician Hosp. Org., Inc. v. Humana Military Healthcare Servs., Inc., 481 F.3d 337, 350 (6th Cir. 2007)).

138. *Reese II*, 694 F.3d 681, 685 (6th Cir. 2012).

This is a departure from the principles that sustain confidence that contracts will be evenhandedly enforced. Lawrence H. Summers condemned the $165 million in promised AIG executive bonuses as "outrageous" but defended AIG's decision to pay them. He observed, "We're not a country where contracts just get abrogated willy-nilly. And if we were to start doing that, there would be potentially very destabilizing consequences."[139] Indeed, stability requires contract enforcement in an impartial judicial process, for the powerless as well as the powerful, even if the breaching party suffers promisor's remorse. Bilateral contracts cannot be changed "willy-nilly" by one party, with or without judicial approval. Promises are enforceable regardless of "evolving" policy notions and without regard to how onerous promised obligations may seem in hindsight. If *Reese* has application beyond its narrow "facts" and "context," contract law will cease to provide the stability, predictability, and fairness central to—no irony intended—the American Way.

VII. WHAT EMPLOYERS AND RETIREES WANT

The *Reese II* majority opined about what retirees and employers "want" and "do not want" rather than giving effect to what the union and CNH negotiated in their CBAs.[140] The majority opined,

> Retirees, quite understandably, do not want lifetime eligibility for the medical-insurance plan in place on the day of retirement, even if that means they would pay no premiums for it. They want eligibility for up-to-date medical-insurance plans, all with access to up-to-date medical procedures and drugs. Whatever else vesting in the healthcare context means, all appear to agree that it does not mean that beneficiaries receive a bundle of services fixed once and for all. Companies want the freedom to change health-insurance plans.[141]

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139. Summers, then director of the White House National Economic Council, expressed these views on *Face the Nation* on March 15, 2009 in a CBS Television broadcast, available at http://www.cbsnews.com/htdocs/pdf/FTN_031509.pdf. AIG received $170 billion from the United States government to prevent the firm's collapse before paying the $165 million bonuses that Summers called "outrageous." At the same time, Summers counseled that "you can't govern out of anger" and that "willy-nilly" abrogation of "binding contracts" is something that may produce "destabilizing consequences" and is not something that is done in this country. *Id.*

140. *Reese II*, 694 F.3d at 683.

141. *Id.* at 683-84.

The last proposition seems correct. Employers often "want" to change, or even terminate, vested retirement healthcare at will, in their self-interest. In the words of Miles Davis, "so what."[142] Many employers have imposed unilateral reductions only to be told by the Sixth Circuit that doing what they want, not what they promised, violated the CBA and ERISA.[143] The legal question is what employers contracted to do, *not* what they "wanted" (but did not get into the CBA), and *not* what they "want" now, long after the fact, informed by hindsight.

The *Reese II* majority broadly observed that healthcare costs "have not been remotely static in modern memory."[144] This, the majority opined, "has little to do with traditional causes of inflation" and "more to do" with "the remarkable growth in modern life-saving and comfort-improving medical procedures, devices and drugs."[145] This was true long before CNH and the union negotiated in 1998.[146] It is precisely because the union and CNH negotiated comprehensive coverages—not dollar amounts or "caps"—that the 1998 plan—15 years later—covers the newest life-saving and comfort-improving medical procedures, devices, and drugs.

Retirees want the security of the coverages they retired with, for life. This is why unions typically bargain comprehensive coverages that are not subject to after-the-fact diminution. That is why unions do not bargain employer escape clauses triggered by the employer's promisor's remorse. When unions and employers bargain limits, as they do in some circumstances, they typically express them as specific-dollar "caps" or as precise cost-increase-sharing-percentages. A CBA might provide, for example, that retirees will pay 50% of the premium increases over a benchmark, with the employer paying the other 50% of the increased amount, dividing the risk of medical inflation. Retirees cannot get courts to bail them out when medical inflation makes their share of increased premiums onerous, or even unaffordable. Indeed, where retirees seek to avoid the unexpectedly onerous impact of CBA terms, courts reject their pleas for "equity."[147] This highlights why "equity" is misused in *Reese*.

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142. MILES DAVIS SEXTET, *So What*, on KIND OF BLUE (Columbia Records 1959). The track "So What" was a studio recording made on March 2, 1959.

143. *See, e.g.*, cases cited *supra* note 40.

144. *Reese II*, 694 F.3d at 683.

145. *Id.*

146. *See supra* notes 119-131 and the accompanying text.

147. *See* Curtis v. Alcoa, Inc., No. 12-5801, 2013 WL 1908913 (6th Cir. May 9, 2013) (rejecting retiree argument that negotiated caps on employer healthcare obligations in place at retirement were not intended to limit vested benefits, affirming the district court finding that "under the cap agreements" retirees "are entitled to lifetime, capped healthcare benefits"). *See also* Harps v. TRW Auto. U.S., LLC, 351 F. App'x 52, 57-58

There is no "equity" when an employer may diminish benefits "on its own," but retirees may *never* enhance benefits absent employer agreement.

This is why unions bargain promises that retirement healthcare coverages will be the same as those in effect at retirement, for life, undiminished. This is why unions negotiate promises precluding unilateral reduction: the employer "shall pay the full premium"; the employer will "continue" the benefits in effect "at the time of retirement"; the employer will provide 100% coverage, with no deductibles, $5 prescriptions, and comprehensive "hospital, surgical, medical, hearing aid, prescription drug, dental, vision, and substance abuse" coverages. Retirees want employers to provide what was bargained, not some diluted substitute imposed by the employer "on its own."

VIII. WHAT RETIREES DO NOT WANT

Although the *Reese II* majority presumes to describe "what retirees want," the impact of its holding is entirely one-sided. CNH now can reduce vested benefits "on its own," but retirees cannot improve their benefits "on their own." As *Pittsburgh Plate Glass* teaches, the retirees are out of the collective bargaining loop.[148] As the Sixth Circuit wrote in *Loral*,

> [A] retired worker has only one recourse against an ex-employer who breaches its promise to provide benefits: litigation. This litigation takes money and time—and retirees may have little of either. A self-interested employer may discover that a good deal of money can be saved by illegally withholding an amount of

(6th Cir. 2009) (rejecting retiree healthcare claims when the CBA "unambiguously disclaimed TRW's obligation to provide retiree medical benefits beyond the CBA's term").

148. Allied Chem. Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971). See also Judge Holschuh's dissent from part II of *Yard-Man*, recognizing the potential for harm to "economically vulnerable retirees," no longer represented by their union, no longer protected by the National Labor Relations Act, and subjected to "modification" of their "vested benefits" by their former employer, imposed "without the approval of the union that negotiated those benefits and without the *express* approval of the retirees themselves." UAW v. Yard-Man, Inc., 716 F.2d 1476, 1488-99 (6th Cir. 1983) (Holschun, J., dissenting).

> benefits just below the amount that would prompt its retirees, either out of outrage or fiscal interest, to sue.[149]

Retirees do not want—and cannot afford—to sue whenever their former employer decides to "modernize" healthcare benefits "on its own." Retirees do not want perpetually-recurring legal contests where only the employer can win, and where the retirees either will lose or, at best, preserve the *status quo* until the next time the employer seeks to change benefits at the retirees' expense.

IX. THE FUTURE OF *REESE*

Employers argue that *Reese II* means that *every* CBA must be interpreted as if it had a healthcare clause like that set out in Part VI. But such clauses are as common as peppermint-striped unicorns who can recite the Rule in Shelley's Case in Latin.

It remains to be seen whether courts will side with employers who argue that *Reese II* means that an employer *always* may unilaterally reduce retirement healthcare so long as it "reasonably" does so.[150]

If *Reese II* is read as a generally applicable prescription for case-by-case and year-by-year "reasonableness"-testing based on judicial notions of what in hindsight is "sensible," then *Reese II* negates the sanctity of contract. If read as a mandate to apply "evolving" standards, *Reese II* would require every judicial CBA interpretation to entail "that was then, this is now" assessment. If read as a manifesto for judicially-imposed "equity" rather than CBA interpretation, *Reese II* would nullify 30 years of Sixth Circuit precedent—and hundreds of years of contract jurisprudence. Cornell University's Legal Information Institute defines "sanctity of contract" as the "general idea that once parties duly enter

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149. UAW v. Loral Corp., 107 F.3d 11 (6th Cir. 1997) (unpublished table decision), Nos. 95-3710, 94-3711, 1997 WL 49077, at *3 (6th Cir. Feb. 3, 1997).

150. *See supra* Parts V-VI. *Harps*, 351 F. App'x at 56, noted that *Reese I* was apparently a departure from existing law, contrasting *Reese I*, 574 F.3d 315, 318, 327 (6th Cir. 2009) ("[T]he parties contemplated reasonable modifications . . . ."), with *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 578 (6th Cir. 2006) (stating that the "employer's unilateral modification or reduction" of vested health benefits "constitutes a LMRA violation"), and *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998) ("To vest [welfare] benefits is to render them forever unalterable."). *Zino v. Whirlpool Corp.*, No. 5:11CV01676, 2013 WL 4544518, at *27 (N.D. Ohio Aug. 27, 2013), discussed *infra* notes 198 and 206, found that *Reese* is "wedded to the facts of that case" and "is not a case of general application."

into a contract, they must honor their obligations under that contract."[151] Just so. A promise is a promise, even if it is not convenient to keep.

*A. Post-*Reese *Decisions*

Some post-*Reese I* courts seem disinclined to read *Reese* as opening the floodgates of "reasonableness"-assessment absent *proof* that the contracting parties *actually intended* retiree healthcare to be forever alterable by the employer "on its own," limited only by what some court later finds "reasonable" and "sensible."

Bender v. Newell Window Furnishings, Inc.,[152] decided nearly three years after *Reese I*, affirmed that retirees had vested benefits at retirement levels and determined the contracting parties' intent without reference to "evolving" post-CBA "reasonableness."

Moore v. Menasha Corp.[153] also was decided three years after *Reese I*. Menasha's *en banc* rehearing petition was denied after *Reese II* and Menasha's *cert* petition was denied months later in 2013.[154] *Moore* acknowledged that healthcare is a "'welfare benefit' that is not entitled to the same level of protection under ERISA as are pension benefits." *Moore* recognized, however, that this truism is superfluous to CBA interpretation because "employers are free to waive their power to alter or terminate welfare benefits," which Menasha "clearly did."[155] The Sixth Circuit held,

> By offering vested healthcare coverage to the retired employees and their spouses, and by agreeing that the CBAs could only be modified on the signed, mutual consent of the parties, [Menasha] waived its ability to unilaterally alter or terminate Plaintiffs' healthcare coverage.[156]

Moore continued,

151. *Sanctity of Contract*, CORNELL U. L. SCH. LEGAL INFO. INST., http://www.law.cornell.edu/wex/sanctity_of_contract (last visited Mar. 2, 2014).

152. *Bender*, 681 F.3d 253 (6th Cir.), *cert. denied*, 133 S. Ct. 436 (2012).

153. *Moore*, 690 F.3d 444 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 1643 (2013).

154. Menasha Corp. v. Moore, 133 S. Ct. 1643 (2013).

155. *Moore*, 690 F.3d at 444, 459.

156. *Id.*

> Our finding does not wholly foreclose Defendant from adjusting coverage; rather, it simply underscores the procedure Defendant must follow in order to do so.[157]

That procedure, *Moore* held, permits changes only "by mutual agreement of the parties."[158] Absent "mutual agreement" to changes, the Sixth Circuit held, vested retirement benefits are "forever unalterable."[159]

In *Hargrove v. EaglePicher Corp.*,[160] the CBAs provided that "current benefits" at retirement were not to be "terminated, modified, etc. without union consent."[161] The employer's unilateral changes—grounded on the employer's "mistaken reliance on a supposed 'reasonableness' standard derived from" *Reese I*—violated ERISA and the CBAs.[162]

Likewise, *USW v. Kelsey-Hayes* held that the employer's unilateral changes violated ERISA and the CBAs.[163] *Kelsey-Hayes* factually distinguished *Reese II*—"the CBAs in *Reese* contained no mutual consent restrictions"—finding that the Kelsey-Hayes CBAs, like the CBAs in *Moore*, "mandate mutual agreement as opposed to the unilateral modification" and that the employer's ostensibly "reasonable" changes were wrongfully imposed without the retirees' consent and without union agreement.[164]

B. Then Came Tackett

More recently, however, *Tackett v. M&G Polymers USA, LLC* broadly applied what it called the *Reese I* "reasonableness requirement."[165] Following *Yard-Man* and *Yolton*, *Tackett* affirmed the district court's holding that employer-paid retiree health benefits vested under the CBA. *Tackett* rejected the employer's argument that a later

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157. *Id.*

158. *Id.*

159. *Id.* at 450, 458-59 (citations omitted).

160. 852 F. Supp. 2d. 851 (E.D. Mich. 2012).

161. *Id.* at 855 (internal quotation marks omitted).

162. *Id.* at 855-56.

163. USW v. Kelsey-Hayes Co., 943 F. Supp. 2d 747, 756-59 (E.D. Mich. 2013) (granting summary judgment and permanent injunction). *See also* USW v. Kelsey-Hayes Co., No. 11-15497, 2013 WL 2435079 (E.D. Mich. June 5, 2013) (granting more-detailed permanent injunction).

164. *Kelsey-Hayes*, 943 F. Supp. 2d at 756-59. *See also Kelsey-Hayes Co.*, 2013 WL 2435079 (granting more-detailed permanent injunction). In addition, see *Zino v. Whirlpool Corp.*, No. 5:11CV01676, 2013 WL 4544518, at *27 (N.D. Ohio Aug. 27, 2013), discussed *supra* notes 198 and 206 ("[*Reese*] is not a case of general application.").

165. Tackett v. M&G Polymers USA, LLC, 733 F.3d 589, 601 (6th Cir. 2013).

agreement between the employer and the union requiring retiree premium contributions could adversely impact persons already retired.[166] *Tackett* cited *Pittsburgh Plate Glass* for the proposition that "if benefits are vested, then subsequent concessions by the union *cannot* modify them without retirees' permission."[167] Immediately thereafter, however, *Tackett* cited *Reese I* for the proposition that the employer can modify retiree benefits without retiree permission if the modifications satisfy "our reasonableness requirement."[168] *Tackett* did not mention that *Reese I's* "reasonableness requirement" was predicated on its unique "historical feature": the 1998 negotiations that, according to *Reese I*, resulted in agreed-upon "material alterations" to retiree benefits, indicating that the union and CNH contemplated future changes to retiree benefits.[169] *Tackett* did not have any such "historical feature"; its rationale for permitting unilateral changes subject to the *Reese* "reasonableness requirement" was solely that "the CBA did not contain any statements to the contrary."[170]

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166. *Id.* at 600.

167. *See id.* at 600 (emphasis added).

168. *Id.* at 601.

169. *Reese I*, 574 F.3d 315, 323-25 (6th Cir. 2009). In *Tackett*, there was no "material alteration" in the benefits before the 2007 changes that led to the litigation. The district court mentioned, but did not identify, changes that occurred over the years, not all of which, according to the court, were "upgrades." Tackett v. M&G Polymers USA, LLC, 853 F. Supp. 2d. 697, 722 (S.D. Ohio 2012). Even if there was evidentiary support in the record for this "finding," however, it would not support the implicit holding that minor contractual violations by an employer over time that go unchallenged provide justification for later reductions that retirees immediately challenge. *See* Cole v. ArvinMeritor, Inc., 515 F. Supp. 2d 791, 804 (E.D. Mich. 2006) (collecting cases holding that tolerating some changes does not bar retirees from challenging further changes).

Indeed, *Tackett* seems to give judicial sanction to a disreputable corporate strategy revealed by a Varity benefit manager's secret memo discussed in ELLEN E. SCHULTZ, RETIREMENT HEIST—HOW COMPANIES PLUNDER AND PROFIT FROM THE NEST EGGS OF AMERICAN WORKERS 150 (2011). The memo described "Creeping Take Aways," a company scenario to "progressively introduce minor reductions and usage controls rules into the medical benefits plan." These unilateral changes were "designed to be insufficient to warrant retirees incurring the legal cost and trouble to have the benefits reinstated." When the employer later made major benefit cuts, prompting a lawsuit, the employer would argue that, because the union and retirees had not objected to the earlier cuts, they tacitly agreed that the employer was entitled to cut benefits unilaterally. *Loral* observed that a "self-interested employer may discover that a good deal of money can be saved by illegally withholding an amount of benefits just below the amount that would prompt its retirees, either out of outrage or fiscal interest, to sue." UAW v. Loral Corp., 107 F.3d 11 (6th Cir. 1997) (unpublished table decision), Nos. 95-3710, 94-3711, 1997 WL 49077, at *3 (6th Cir. Feb. 3, 1997). In short, what *Retirement Heist* and *Loral* treat as a "dirty trick" now seems to be endorsed by *Tackett*.

170. *Tackett*, 733 F.3d at 601. The "statements to the contrary" qualification in *Tackett* appears to be an implicit reference to the statement in *Reese I* that "a CBA—unless it

The *Tackett* plaintiffs argued that the employer promises of fully-paid comprehensive healthcare would be illusory if benefits could be whittled away by unilateral increases in co-pays and deductibles. *Tackett* answered that "our reasonableness requirement does not permit such an extreme 'whittling.'"[171] Still, *Tackett* approved of the following "whittling": (1) a 250% increase in drug co-pays, from $4.00 to $10.00 per prescription; (2) a $75 increase in the annual per-person deductible, from $175 to $250; and (3) an 800% increase in the annual out-of-pocket maximum, from $500 to $4,000 per family. According to *Tackett*, these unilateral changes were "not so large that the district court clearly erred in finding [them] to be 'reasonable in light of changes in health care.'"[172]

C. Tackett *and* Yolton

By failing to limit *Reese I* to situations where there was "something different" from the ordinary *Yard-Man* context, *Tackett* seemingly authorizes employers to unilaterally "whittle" vested benefits unless the CBA contains "statements to the contrary," subject only to the after-the-fact application of the "extreme 'whittling'" standard. *Tackett* seems unaware that *Yolton* involved the same CBA language and, in particular,

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says otherwise—should be construed to permit modifications to benefit plans" so long as they satisfy the "reasonableness" standard derived from *Zielinski*. *See supra* notes 66, 77, 86 and accompanying text. This broad pronouncement in *Reese I*, however, came immediately after analysis of the "historical feature" peculiar to *Reese I*, not present in *Tackett*, that is, the 1998 negotiations that, supposedly, demonstrated the contracting parties' intent to permit agreed-upon future changes and, somehow, future changes unilaterally imposed by the employer. *Reese I*, 574 F.3d at 326. Other decisions recognize that "mutual agreement," "consent," "zipper," and similar clauses in CBAs demonstrate that contracting parties did *not* contemplate *unilateral* changes to retirement healthcare. *See, e.g.*, Moore v. Menasha Corp., 690 F.3d at 444, 459 (6th Cir. 2012) (stating that CBA modifications require "mutual agreement of the parties," and "mutual consent" is required to impose premiums on retirees); Hargrove v. EaglePicher Corp., 852 F. Supp. 2d 851, 855-56 (E.D. Mich. 2012) (stating that "union consent" is required before retiree healthcare can be "modified" or "terminated"); USW v. Kelsey-Hayes Co., 943 F. Supp. 2d 747, 758-59 (E.D. Mich. 2013) (stating that "mutual agreement" is required to modify retiree healthcare).

171. *Tackett*, 733 F.3d at 601.

172. *Id. Tackett* invites the following question: in what universe is an annual out-of-pocket increase from $500 to $4,000 for an hourly retiree living on a fixed income "reasonable"?! *See infra* note 199 and accompanying text. *See also* Winnett v. Caterpillar Inc., 703 F. Supp. 2d 745, 762 (M.D. Tenn. 2010) (stating that charging retirees "significant monthly premiums (often well in excess of $100 per month) . . . cannot be viewed as a 'reasonable' or 'ancillary' change"); Schalk v. Teledyne, Inc., 751 F. Supp. 1262, 1267 (W.D. Mich. 1990), *aff'd*, 948 F.2d 1290 (6th Cir. 1991) (unpublished table decision) (stating that "additional yearly expense of possibly as much as $1,900, or even as low as $592," imposed on retirees would create "financial hardship").

the same 1990 CBA that *Reese* addressed. *Tackett* also seems unaware that the presence or absence of "mutual consent" restrictions—i.e., CBA "statements to the contrary" restricting unilateral employer action—was not a factor in *Yolton* and was *not* the predicate of *Reese I*.[173] Again, the rationale for *Reese I* was the "historical feature of this case that, as best we and the parties can tell, has no parallel in *Yolton*."[174] That "historical feature" was the 1998 CNH negotiations that, according to *Reese I*, resulted in a "material alteration" in the benefits of existing retirees. That "feature" was the predicate in *Reese* for articulating and applying its "reasonableness" standard.[175] There was no remotely similar "historical feature" in *Tackett* and nothing to distinguish *Tackett* from *Yolton* or other post-*Yard-Man* decisions—at least nothing that can be discerned from *Tackett*'s limited discussion of the facts and the law on this point.

Yolton was a reaffirmation of the concept of vesting as it has been historically viewed. "If a welfare benefit has vested, the employer's unilateral modification or reduction of those benefits constitutes a LMRA violation."[176] "[S]omeone already retired under a particular CBA continues to receive the benefits provided therein despite the expiration of the agreement itself."[177] "Retirees, who . . . can no longer rely on their union to maintain their benefits, are not likely to leave their benefits alterable based on the changing whims and relative bargaining power of their former union and employer."[178]

D. Tackett *and* Loral

That there may be an unacknowledged—and, perhaps unintended—seismic shift in Sixth Circuit law is illustrated, as well, by comparing *Tackett* to *UAW v. Loral Corp. Loral* defined "vesting" to mean that retiree health benefits would "remain at the same level for the lifetime of the beneficiary."[179] *Loral* rejected the argument that *Yard-Man* should be limited to situations in which benefits are *terminated* and that employer

173. *Reese I*, 574 F.3d at 315.

174. *Id.* at 323. Indeed, it was this "historical feature" distinction, not the presence or absence of a "mutual consent" clause, that moved the "what does vesting mean in this context" question from the dissent in *Noe* to the majority opinion in *Reese I*.

175. *Reese I*, 574 F.3d at 323-24.

176. Yolton v. El Paso Tenn. Pipeline Co., 435 F.3d 571, 578 (6th Cir. 2006).

177. *Id.* at 581.

178. *Id.* at 581 n.6.

179. UAW v. Loral Corp., 107 F.3d 11 (6th Cir. 1997) (unpublished table decision), Nos. 95-3710, 94-3711, 1997 WL 49077, at *2 (6th Cir. Feb. 3, 1997).

modifications should be permitted.[180] This concept, *Loral* held, "cannot be reconciled with our prior case law." *Loral* continued,

> [I]f the employer retained discretion to cut benefits somewhat, there is nothing to give us a standard by which to distinguish a 1% cut from a 99% cut that would be virtually equivalent to a complete revocation.[181]

Under *Loral*, any procedure for post-retirement changes to retiree health benefits "must be agreed to in the contract. It cannot be imposed unilaterally by the employer or the courts."[182]

According to *Tackett*, however, employers now may unilaterally "cut benefits somewhat" so long as a court later decides that the cuts are not "extreme 'whittling.'"[183] *Tackett* held that the unilateral changes imposed by M&G on retirees are "not so large that the district court clearly erred in finding [the changes] to be 'reasonable in light of changes in health care' never specified by the court."[184] The "extreme 'whittling'"/"reasonableness requirement" ostensibly derived from *Reese* and employed in *Tackett* seems to be precisely what *Loral* warned against: a standardless concept that "cannot be reconciled with our prior case law."[185]

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180. *Id.*

181. *Id.*

182. *Loral*, decided in 1997, is in harmony with *Moore*, decided in 2013. *Moore* held that absent "mutual agreement" to "adjusting coverage," vested retiree health benefits are "forever unalterable." Moore v. Menasha Corp., 690 F.3d 444, 450, 458-59 (6th Cir. 2012). *See supra* text accompanying notes 41-48, 152-164. This principle, too, is in harmony with what *Tackett* says—e.g., vested benefits cannot be modified without the retirees' permission under *Pittsburgh Plate Glass* and cannot be unilaterally modified if the CBA includes "statements to the contrary"—as opposed to what *Tackett* does—i.e., upholding unilateral modifications of vested benefits because the modifications are not, by some unspecified measure, "severe" and "extreme." *See supra* text accompanying notes 173-178.

183. Tackett v. M&G Polymers USA, LLC, 733 F.3d 589, 596-601 (6th Cir. 2013).

184. *Id.*

185. *Loral*, 1997 WL 49077, at *3. The unpredictability—and untenability—of the "reasonableness" standard is illustrated by the *Tackett* district court's "example," which instructs that the "reasonableness" of the retirees' per-prescription co-payment falls at some unspecified point between $1.00 and $10,000. Tackett v. M&G Polymers USA, LLC, 853 F. Supp. 2d 697, 722 n.4 (S.D. Ohio 2012). *Cf. Loral*, 1997 WL 49077, at *2 ("[I]f the employer retained discretion to cut benefits somewhat, there is nothing to give us a standard by which to distinguish a 1% cut from a 99% cut that would be virtually equivalent to a complete revocation."). *See also* Yolton v. El Paso Tenn. Pipeline Co., 435 F.3d 571, 581 n.6 (6th Cir. 2006) (recognizing that retirees "are not likely to leave their benefits alterable based on the changing whims and relative bargaining power of

E. A Seismic Shift?

Before *Reese*, under *Yolton*, "[i]f a welfare benefit has vested, the employer's unilateral modification or reduction of those benefits constitutes a LMRA violation."[186] Under *Tackett*, absent "statements to the contrary," vested benefits may be unilaterally reduced by an employer, subject only to "our reasonableness requirement."[187] Before *Reese*, under *Loral*, "vesting" meant that retiree health benefits would "remain at the same level for the lifetime of the beneficiary" and even a 1% unilateral reduction in benefits "cannot be reconciled with our prior case law."[188] In *Tackett*, the court approved a unilateral 800% increase in a retiree's annual out-of-pocket medical expenses as falling within the range of "reasonableness" left to district court discretion.[189]

This seismic shift in the concept of what vesting means is remarkable, more so given the fact that Judge Martin and Judge Cole were on the panels of both *Yolton* and *Tackett* and Judge Martin and Judge Keith were on the panels of both *Loral* and *Tackett*. After *Tackett*, retirees litigating in the Sixth Circuit may have legitimate concern about judicial predictability.

F. Tackett *and the Brackets*

Close review of *Tackett* may provide particular cause for concern. *Tackett* rejected the plaintiffs' argument that the CBA promised specific benefit levels,[190] but it omitted operative CBA language. *Tackett* quoted the operative language from the 2000 CBA as follows: "Employees who retire on or after January 1, 1996...will receive a full Company contribution toward the cost of [health care] benefits...."[191] The court inserted the bracketed term "health care" in place of the actual CBA language. The actual CBA language—including what was left out by the bracket and the second ellipsis in the *Tackett* opinion—is as follows (emphasis added): "Employees who retire on or after January 1, 1996...will receive a full Company contribution towards the cost of ***the*** benefits ***described in this Exhibit B-1***." "[T]he benefits described in this Exhibit B-1" include the $4.00 drug co-pay, the $175 annual deductible,

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their former union and employer."). Nor are unions and retirees likely to leave their benefits alterable based on the "changing whims" of the courts.

186. *Yolton*, 435 F.3d at 578.

187. *Tackett*, 733 F.3d at 601.

188. *Loral*, 1997 WL 49077, at *2-3.

189. *Tackett*, 733 F.3d at 601.

190. *Id.* at 600.

191. *Id.* at 594.

and the precise dollar amounts of the individual and family annual out-of-pocket maximums that were unilaterally increased by M&G.[192]

No one would know from reading *Tackett*, but the CBA promise to provide "the benefits described in this Exhibit B-1" is as unambiguous as the CBA promise recognized by *Tackett* as creating a vested, lifetime, unalterable, enforceable company obligation to pay the "full" health insurance premium.[193] The obligation to pay the "full" premium is inextricably connected with—and defined by—the contractual benefit levels. The CBA requires the employer to pay the full premium for "the" benefits "described in Exhibit B-1," that is, to pay for the full cost of that specific negotiated plan of benefits.[194] The brackets and the second ellipsis obscure and distort the negotiated language and provide an untenable justification for authorizing the employer to unilaterally diminish the contract bargain. As there is a vested right to "full" company-paid premiums, as *Tackett* holds is *promised* in the CBA, there must be a vested right to "the" Exhibit B-1 benefits *promised* in the same CBA.

The unambiguous intent of the parties to the CBAs was that M&G would pay the full contribution for "the benefits described in this Exhibit B-1." In substituting the nebulous "reasonableness requirement" for the specific negotiated benefits levels, *Tackett* lost track of the paramount judicial function in contract cases: to determine and enforce the intent of the contracting parties.

G. After Tackett

Before *Reese* (and now *Tackett*), vested benefits were "forever unalterable";[195] vested benefits "remain[ed] at the same level for the lifetime of the beneficiary";[196] and vested retirement benefits could "not be altered without the pensioner's consent."[197] After *Reese* (and now *Tackett*), any particular Sixth Circuit panel may ignore contemporaneous CBA terms and "prior case law" and, years or decades later, merely apply the "clear error" standard to district court determinations of what is and what is not "extreme 'whittling,'" restricted only by ever-evolving

192. *See id.* at 601. *See supra* note 172.

193. *Tackett*, 733 F.3d at 594 n.2, 596.

194. *Id.*

195. Sprague v. Gen. Motors Corp., 133 F.3d 388, 400 (6th Cir. 1998); Moore v. Menasha Corp., 690 F.3d 444, 450, 458 (6th Cir. 2012) (citations omitted).

196. UAW v. Loral Corp., 107 F.3d 11 (6th Cir. 1997) (unpublished table decision), Nos. 95-3710, 94-3711, 1997 WL 49077, at *2 (6th Cir. Feb. 3, 1997).

197. Allied Chemical Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 181 n.20 (1971).

subjective notions of "reasonableness."[198] This is wrong; the function of courts is to enforce contracts according to the parties' contemporaneous intent, not to remake them for the benefit of one contracting party, to the detriment and "irreparable harm" of others.[199]

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198. Two district courts, like *Tackett*, also applied *Reese I* as if it has general applicability. *See* Cheatham v. R.C.A. Rubber Co. of America, No. 1:11-00006, 2012 WL 1745524, at *13 (M.D. Tenn. May 16, 2012) (finding that the "class members have a vested right to receive health care benefits for life," but "[i]n accordance with the teaching of *Reese[I]*," the court "will consider the evidence presented at trial to determine whether, and to what extent, Defendants may be allowed to alter the retiree health benefits"); Winnett v. Caterpillar, Inc., 703 F. Supp. 2d 745, 762 (M.D. Tenn. 2010) (finding that "plainly" *Reese I* "dictates that a retiree's vested right to health coverage from his employer is subject to reasonable changes to 'ancillary' aspects of the plan," but finding, too, that charging retirees "significant monthly premiums (often well in excess of $100 per month) . . . cannot be viewed as a 'reasonable' or 'ancillary' change"). Compare *Harps v. TRW Automotive U.S., LLC*, 351 F. App'x 52, 56 (6th Cir. 2009), which contrasts *Reese I*, 574 F.3d 315, 318, 327 (6th Cir. 2009) ("[T]he parties contemplated reasonable modifications . . . ."), with *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 578 (6th Cir. 2006) (stating that the "employer's unilateral modification or reduction" of vested health benefits "constitutes a LMRA violation"), and *Sprague*, 133 F.3d at 400 ("To vest [welfare] benefits is to render them forever unalterable."). And see *Zino v. Whirlpool Corp.*, No. 5:11CV01676, 2013 WL 4544518, at *27 (N.D. Ohio Aug. 27, 2013), which recognized that *Reese* "is not a case of general application." *Zino* noted that central to *Reese* was "[c]ompelling evidence" that "the parties did not perceive the relevant CBAs as establishing fixed, unalterable benefits," reflected in negotiation of the "material alteration"—"the imposition of a 'managed care' program upon all retirees, past and future." *Id. Zino* noted, too, that *Reese* "did not mention the existence of any CBA provision"—like the one in *Zino*—"requiring changes to be made with the mutual assent of both parties." *Id. Zino* reiterated, "*Reese* is, therefore, wedded to the facts of that case." *Id.*

199. The "reasonableness requirement" is a one-way street, permitting employers to diminish retiree healthcare unilaterally, but never permitting retirees to enhance their healthcare absent employer largesse. Before *Reese* (and now *Tackett*), however, the Sixth Circuit and its district courts held that increased healthcare costs imposed on fixed-income retirees, even costs less onerous than the costs imposed by the unilateral reductions authorized by *Tackett*, threatened hardship and *irreparable harm. See, e.g.*, Wood v. Detroit Diesel Corp., 213 F. App'x 463, 472 (6th Cir. 2006) ("[H]ardship, financial and emotional, that a new monthly expense of $260 to $834 would pose for most working class retirees hardly requires substantiation."); Schalk v. Teledyne, Inc., 751 F. Supp. 262, 267 (W.D. Mich. 1990) ("[A]dditional yearly expense of possibly $1,900, or even as low as $592 . . . would impose a financial hardship . . . ."), *aff'd*, 948 F.2d 1290 (6th Cir. 1991) (unpublished table decision). *See also* Cole v. ArvinMeritor, Inc., 516 F. Supp. 2d 850, 876-878 (E.D. Mich. 2005), *aff'd*, 549 F.3d 1064 (6th Cir. 2008) (collecting cases: "Alteration and elimination of retiree health benefits causes retirees and dependents health risk, uncertainty, anxiety, financial hardship, and other irreparable harm."). *Cole* quoted *USWA v. Textron, Inc.*, 836 F.2d 6, 8 (1st Cir. 1987) (citations omitted), which relied on "general facts that either are commonly believed or which courts have specifically held sufficient to show irreparable harm":

H. The Tangled Path from Reese *to* Tackett[200]

Reese I reversed summary judgment for the retirees on the basis of an issue the employer never raised—"what does vesting mean" in the context of the 1998 negotiations. After acknowledging the posture of the appeal and its limited role as a reviewing court—to draw all factual inferences in favor of CNH[201]—*Reese I* concluded that the 1998 negotiations constituted a "historical feature" that distinguished *Reese* from *Yolton* and other post-*Yard-Man* cases. This "historical feature" permitted it to ask questions that had been confined to the dissent in *Noe* and to *dicta* in *Prater*. To address this "historical feature," *Reese I*

> (1) most retired union members are not rich, (2) most live on fixed incomes, (3) many will get sick and need medical care, (4) medical care is expensive, (5) medical insurance is, therefore, a necessity and (6) some retired workers may find it difficult to obtain insurance on their own while others can pay for it only out of money that they need for other necessities of life. . . . We should then conclude that retired workers would likely suffer emotional distress, concern about potential financial disaster, and possibly deprivation of life's necessities (in order to keep up in insurance payments).

See also Golden v. Kelsey-Hayes Co., 73 F.3d 648, 657 (6th Cir. 1996) (affirming a preliminary injunction, noting that the district court relied on decisions, including *Textron*, holding that "retirees, primarily because of their fixed income, are unable to absorb *even relatively small increases in their expenses* without *extreme hardship*" (emphasis added)), *cert. denied*, 519 U.S. 807 (1996); Fox v. Varity Corp., 91 F.3d 143 (6th Cir. 1996) (unpublished table decision), No. 95-1730, 1996 WL 382272, at *2 (6th Cir. July 5, 1996) (recognizing the "unique position of retirees," citing *Golden* and *Textron* as finding that "retired union workers are particularly sensitive to *even small increases in the cost of insurance coverage*" (emphasis added)).

If even "relatively small increases" in retirees' healthcare costs imposed unilaterally by former employers immediately create "extreme hardship," financially and emotionally, and threaten retirees with "irreparable harm," similar or more significant unilaterally-imposed, permanent increases in those costs can hardly be "reasonable" or "sensible."

200. In *Reese II*, the majority stated that "[t]he dissent proposes a different path—that we reconsider our decision in *Reese I*." 694 F.3d 686, 686 (6th Cir. 2012). The dissent proposed that the court apply *Yard-Man* precedent holding that vested benefits are unalterable and cannot be reduced without the retirees' consent. *Id.* at 687-88 (Donald, J., dissenting). Both the majority and the dissent viewed the "reasonableness requirement" of *Reese I* as the "law of the case." *See id.* But, the "reasonableness requirement" could only be "law of the case" if, on appeal, *Reese I* made conclusive findings of fact about the 1998 negotiations, something Judge Sutton had disavowed in his earlier concurrence. *See Reese I*, 583 F.3d 956 (6th Cir. 2009). *See also* Pullman-Standard v. Swint, 456 U.S. 273, 291-92 (1982) ("[F]actfinding is the basic responsibility of district courts, rather than appellate courts . . . ." (internal quotation marks omitted)).

201. *Reese I*, 574 F.3d 315, 321 (6th Cir. 2009).

adopted a "standard" from the Seventh Circuit that was designed for an entirely different purpose: to fill gaps caused by missing CBA terms.[202]

In their rehearing motion, plaintiffs protested that *Reese I* made findings of fact on appeal. Judge Sutton responded that plaintiffs "misunderstood" *Reese I*. He wrote that the court was simply viewing the facts most favorably toward CNH and that plaintiffs "should win as a matter of law" if they prove in the district court that the 1998 negotiations "did not diminish the nature of the benefits package that existed upon retirement."[203]

The plaintiffs proved just that on remand.[204] The *Reese II* majority, however, without contesting the district court's fact findings, stated that both the plaintiffs and the district court "misread" *Reese I*. Without

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202. In *Zielinski*, the Seventh Circuit decision from which *Reese* derived the "reasonableness" standard applied in *Tackett*, the "only evidence of the plan's terms" was an "old Blue Cross-Blue Shield brochure"—indicating that "the plan provides reimbursement for 'covered drugs'"—but, "being just a brochure, it does not spell out which drugs are covered or the criteria for determining coverage of future drugs and future (different, or better understood, or more treatable) medical conditions." Zielinski v. Pabst Brewing Co., Inc., 463 F.3d 615, 619 (7th Cir. 2006). The Seventh Circuit observed,

> Maybe "the contract" to which the brochure alludes, whose "coverage, exclusions, amendments and other provisions" qualify the brochure's statements, would answer these questions. But neither party has produced or invoked the contract, suggesting that it has been lost.
>
> So the drug provision in the shutdown agreement contains gaps. Filling gaps is a standard activity of courts in contract cases.

Id. at 619-20. The "gaps" were to be filled by reference to the "old" brochure and arithmetic on remand to the district court for application of the Seventh Circuit's "reasonably commensurate" guidelines. *Id.* at 619-621.

Judge Duggan, on remand from *Reese I*, observed that in *Zielinski*, "the specific details of the retiree health insurance benefits agreed to could not be discerned," while in *Reese*, in contrast, "the parties and this Court know the precise details of the retirees' health insurance benefits as they are set forth in black and white in the 1998 Group Benefit Plan." *Reese I*, No. 04-70592, 2011 WL 824585, at *7 n.9 (E.D. Mich. Mar. 3, 2011). Similarly, in *Yolton*, Judge Duggan, quoted *Zielinski* on the "sheer impossibility of determining" the former employer's retiree healthcare obligation from the "old" brochure. Judge Duggan cited *Loral* in support of his conclusion that when "specific levels and types of coverage have been negotiated and agreed (i.e., contracted for)"—as in *Yolton* and *Reese*—"this court does not believe that changes to those levels and/or types of benefits can be imposed unilaterally by [the employer] or the Courts." Yolton v. El Paso Tenn. Pipeline Co., No. 02-75164, 2008 WL 2566896, at *5 (E.D. Mich. Mar. 7, 2008).

203. Neither of the other *Reese I* judges commented on Judge Sutton's concurrence. If they disagreed with Judge Sutton, they would surely have said so rather than sentencing the district court and the parties to a year of litigating the issues identified by Judge Sutton. *See supra* notes 76-79 and accompanying text.

204. *See Reese I*, 2011 WL 824585; *see also supra* notes 76-79 and accompanying text.

acknowledging that the plaintiffs litigated and the district court decided the very issues Judge Sutton identified in his concurrence, the *Reese II* majority held that *Reese I* was the "law of the case" and stood for the proposition that CNH could modify benefits "on its own."[205]

Now *Tackett* has applied "*our* reasonableness requirement" derived from *Reese* but divorced it from the factual predicates on which *Reese* justified application of that "requirement," *and* divorced it from the factual predicates—the contractual "gaps"—which spawned that requirement in the Seventh Circuit. *Tackett* applied this "reasonableness requirement" without first deciding that there is "something different" in *Tackett* that would justify inquiry into "what does vesting mean in this context," putting *Tackett* at odds with longstanding principles defining vested retiree benefits, at odds with the *Reese* and Seventh Circuit rationales, and at odds with *Loral* and *Yolton*, earlier decisions in which all of the *Tackett* judges participated (Judges Martin and Keith in *Loral* and Judges Martin and Cole in *Yolton*)—decisions that upheld those longstanding vesting principles.[206]

Whatever the reasons underlying *Tackett,* its apparent departure from longstanding Sixth Circuit vesting principles is contrary to how the rule of law is supposed to work. "Stare decisis is more than a principle in the Sixth Circuit, it is the rule."[207] Sixth Circuit panels are not free to disregard existing precedent.[208] If vesting is to no longer mean that retiree benefits are unalterable absent retiree consent, and is to mean instead that an employer can reduce vested benefits "on its own" subject only to "our reasonableness requirement," that change in the law—starkly reflected by comparing *Loral* and *Yolton* with *Tackett*—should only be made by the Sixth Circuit *en banc*. But this change has apparently been made *sub rosa*, without acknowledgement and perhaps without intent, through the extension of *Reese I* by *Tackett* without *en banc* review. The present situation is a prescription for uncertainty and

205. *Reese II*, 694 F.3d at 685.

206. Zino v. Whirlpool Corp., No. 5:11CV01676, 2013 WL 4544518, at *27 (N.D. Ohio Aug. 27, 2013), discussed *supra* note 198, recognized what *Tackett* does not: that *Reese* "is not a case of general application"; that central to *Reese* was "[c]ompelling evidence" that "the parties did not perceive the relevant CBAs as establishing fixed, unalterable benefits" as ostensibly reflected in the "material alteration," i.e., the *negotiated* agreement to a managed care plan in place of the traditional indemnity plan; and that *Reese* "is wedded to the facts of that case." *See also supra* note 48.

207. *See* Kerman v. Comm'r, 713 F.3d 849, 866 (6th Cir. 2013).

208. *See* Salmi v. Sec. of Health and Human Servs., 774 F.2d 685, 689 (6th Cir. 1985) ("A panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.").

confusion, and for recurring lawsuits in which the parties and their experts—at least when retirees can muster the resources to challenge unilaterally-imposed healthcare reductions—will require the courts to confront the never-ending and objectively unanswerable question, which *Reese II* called "vexing": which unilateral employer reductions in vested benefits are "reasonable."[209]

I. A Clear Path Ahead?

The better path is the one that, before *Reese I,* the Sixth Circuit followed since *Yard-Man.* Post-*Reese I* decisions, including *Bender, Moore, Hargrove, Kelsey-Hayes,* and *Zino,* unlike *Tackett,* continue to apply the law defined by *Yard-Man.* They enforce CBA healthcare promises, giving effect to the contracting parties' intent at the time the promises were made. They bar unilateral changes to vested benefits. They do so without regard to whether the employer, or one of Plato's philosopher-kings, or some chancellor-in-equity, or a Sixth Circuit majority might, long after-the-fact, consider breach of those promises somehow to be "sensible" or "reasonable" or not too "extreme" and "severe." These cases, to coin a phrase, continue the Golden Thread of *Yard-Man* justice and the best traditions of contract law. They decline to negate promises in service to employers suffering promisor's remorse.

209. Before *Reese,* litigation over whether retiree healthcare was vested typically meant that a party risked losing all, starkly identifying the consequences of not settling. After *Reese,* and now *Tackett,* settlement will be more difficult if not impossible because neither the retirees nor the employer know the extent of the employer's obligation, even if it is clear that benefits vested. Under *Reese,* the employer's obligation is never fixed but may continually diminish because of evolving "changes in health care"—whatever that phrase means. An employer, irrespective of vesting and CBA terms, can impose draconian reductions year after year and "roll the dice" until it happens on reductions that a district court finds, at that particular time, not too "extreme" and "severe." Under *Tackett,* M&G might reduce benefits repeatedly, justifying future cuts as not too "severe" or "extreme" in light of ever-evolving "changes in health care." This is an anomalous result, given that *Reese I* justified its holding on the basis of the 1998 CBA, which, it stated, evidenced that the parties "envision[ed] making tradeoffs in the future that may negatively impact some retirees, if not all retirees." *Reese I,* 574 F.3d 315, 326 (6th Cir. 2009). At least as *Tackett* applies it, the *Reese* "reasonableness requirement" will all but eliminate the possibility of negotiated "tradeoffs" by destroying whatever bargaining power retirees or their former unions might otherwise muster. Whether or not intended, *Reese* and *Tackett* seem to write a prescription for never-ending litigation over periodic changes unilaterally imposed, all to the former employer's benefit and the retirees' detriment. For their part, retirees must perpetually litigate, if they can persuade their former unions to support expensive litigation, or suffer reductions imposed by their former employer "on its own," experiencing the fate proverbially called "the death of a thousand cuts."

They show that *Reese*—and now *Tackett*—departs from the distinguished history of enforcement of CBA retiree healthcare promises that began with *Yard-Man* and continued for three decades.

X. CONCLUSION

How should *Reese II* be read? When the parties to a CBA *actually agreed* to unilateral employer changes in vested healthcare (a "context" that is rare, if not non-existent), courts can determine the "reasonableness" of proposed changes to protect retirees from "nugatory" and "illusory" promises. But when the CBA promises vested benefits, the courts must enforce that promise, even if "evolving" healthcare costs now make corporate accountants queasy or lead "modern" management to view CBAs as "improvident commitments."

Retirement healthcare benefits "are typically understood as a form of delayed compensation or reward for past services," and it is "unlikely" that "such benefits" would be "left to the contingencies of future negotiations."[210] More than unlikely, it is *impossible to imagine* that a union would *agree* to leave the scope of "such benefits" to employer *fiat*. It is *impossible to imagine*, too, that a union would *agree* to leave the scope of retiree healthcare to judicial assessment of what is "reasonable" and "sensible" years or decades after that healthcare was (1) *earned* by 30-plus years of labor, (2) *promised* in CBAs, and (3) *vested* at retirement. To borrow from Judge McKeague in *Noe*, courts may be "cognizant" of the "overall climate" affecting healthcare costs, but "in the absence of impossibility of performance, it is not the prerogative of the judiciary to rewrite contracts in order to rescue parties from 'their improvident commitments.'"[211] To borrow from Judge Clay in *Moore*, "if an employer chooses to vest benefits, it renders those benefits 'forever unalterable.'"[212] To reiterate what every judge, every lawyer, every retiree, and every kindergartner knows, a promise is a promise.

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210. UAW v. Yardman, Inc., 716 F.2d 1476, 1482 (6th Cir. 1983). *See supra* note 22 and accompanying text.

211. Noe v. PolyOne Corp., 520 F.3d 548, 564 (6th Cir. 2008).

212. Moore v. Menasha Corp., 690 F.3d 444, 458 (6th Cir. 2012) (citations omitted), *cert. denied*, 133 S. Ct. 1643 (2013).