No. 07-5068

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JULIUS NOE, RAY REYNOLDS, ANNA MAE WILDER, RUSSELL BOWMAN, NANCY HOOD, and WILLIAM DUNCAN,

Plaintiffs-Appellants-Respondents,

v.

POLYONE CORPORATION,

Defendant-Appellee-Petitioner.

Appeal from the United States District Court
for the Western District of Kentucky
Case No. 3:06-CV-00170-JGH
The Honorable John G. Heyburn, II, Chief District Judge

BRIEF FOR *AMICI CURIAE* THE COUNCIL ON LABOR LAW EQUALITY, THE HR POLICY ASSOCIATION, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE OHIO MANAGEMENT LAWYERS ASSOCIATION, AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT SUPPORTING PETITION FOR REHEARING *EN BANC*

Of Counsel:

Harold P. Coxson
Council on Labor Law Equality
500 Fifth Avenue
New York, NY 10110
(212) 719-3400

Phillip A. Kilgore
Brian D. Black
OGLETREE, DEAKINS, NASH
SMOAK & STEWART, P.C.
300 North Main Street, 5th Floor
Greenville, South Carolina 29601
(864) 271-1300
Attorneys for Amici Curiae

Of Counsel:
Jan S. Amundson
Senior Vice President
& General Counsel
Quentin Riegel
Vice President, Litigation
& Deputy General Counsel
National Association of Manufacturers
1331 Pennsylvania Avenue, NW
Washington, DC 20004-1790
(202) 637-3000

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 26.1

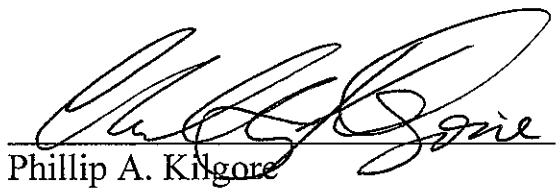
Pursuant to 6th Cir. R. 26.1, *Amici Curiae* the Council on Labor Law Equality, the HR Policy Association, The National Association of Manufacturers, the Ohio Management Lawyers Association, and the Society for Human Resource Management make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   The Council on Labor Law Equality, the HR Policy Association, The National Association of Manufacturers, the Ohio Management Lawyers Association, and the Society for Human Resource Management are not subsidiaries or affiliates of a publicly owned corporation.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

   Except as disclosed by the parties in this case, the Council on Labor Law Equality, the HR Policy Association, The National Association of Manufacturers, the Ohio Management Lawyers Association, and the Society for Human Resource Management are not aware of any publicly owned corporation not a party to the appeal that has a financial interest in the outcome of the litigation.



Phillip A. Kilgore
Brian D. Black
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
300 North Main Street, 5th Floor
Greenville, South Carolina 29601
(864) 271-1300
Attorneys for Amici Curiae

TABLE OF CONTENTS

ADDENDUM

Moore v. Rohm & Haas Co., Case No. 5:03cv1342,
Order, Doc. 116 (N.D. Ohio April 27, 2007)

Noe v. PolyOne Corp.,
No. 07-5068 (6th Cir. March 19, 2008)

Wotus v. GenCorp, Inc., Case No. 5:00cv2604,
Memorandum of Opinion and Order,
Doc. No. 126 (N.D. Ohio, Dec. 3, 2003)

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTERESTS OF THE *AMICI CURIAE*

The Council on Labor Law Equality ("COLLE") is a national association of senior labor relations executives and in-house legal counsel dedicated to maintaining a fair and balanced national labor policy. COLLE monitors judicial and administrative activities relating to labor relations and collective bargaining. For over 25 years, COLLE has participated as *amicus curiae* in important cases affecting labor law and national labor policy before the National Labor Relations Board and federal courts, including the U.S. Supreme Court.

The HR Policy Association brings together the chief human resource officers of more than 250 of the largest corporations in the United States. Representing nearly every major industry sector, its members have a combined market capitalization of more than $7.5 trillion and employ more than 18 million employees world wide. Its member companies have collective bargaining relationships in Ohio and other states throughout the country. Key among the critical collective bargaining issues facing HR Policy Association members is retiree health benefits.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory

environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

The Ohio Management Lawyers Association ("OMLA") is an Ohio non-profit corporation, whose purpose is provide a forum for the promotion of justice with respect to laws affecting the workplace. OMLA monitors legislative, judicial, and administrative activities relating to labor policy in Ohio, including decisions of this Circuit and the district courts therein. OMLA participates as *amicus curiae* in important state and federal cases affecting labor law and labor policy.

The Society for Human Resource Management ("SHRM") is the world's largest professional association devoted to human resource management. Founded in 1948, SHRM represents more than 225,000 individual members in over 125 countries, and has a network of more than 575 affiliated chapters in the United States. Its members are vitally interested in health care policy, including retiree health benefits.

Amici offer this brief in support of the Petition for Rehearing *En Banc* ("Petition") of Appellee-Petitioner PolyOne Corporation, to address the significant adverse impact on federal labor and employee benefits policy caused by the conflict between holdings of this Circuit those of its sister circuits regarding retiree health benefits.

ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 35(b)(1)(B), this case should be reheard for several reasons. First, an *en banc* decision is necessary to secure uniformity of the decisions of this Court and district courts in this Circuit. Fed R. App. P. 35(a)(1). Second, this case involves a conflict between a panel decision of this Court and the authoritative decisions of other Courts of Appeals. Fed. R. App. P. 35(b)(1)(B). Third, this case presents an issue of exceptional importance; the jurisprudence of other Circuits and the Supreme Court suggest that both the holdings of this Court in *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983) ("*Yard-Man*") and its progeny should be explained, modified, or reversed. *Id.*

I. *En Banc* Review Is Necessary to Secure Uniformity of Decisions of This Court.

Yard-Man is the seminal case in this Circuit regarding vesting of retiree health benefits. In *Yard-Man*, this Court held that (at least in the collective bargaining context) "retiree benefits are in a sense 'status' benefits which, as such, carry with them an inference that they continue so long as the prerequisite status is maintained." *Id.* at 1482. Regarding retiree health claims **not** involving collective bargaining, however, this Court held (following *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995)) that intent to vest welfare plan benefits,

including retiree health benefits, is not "to be inferred lightly." *Sprague* v. *GMC,* 133 F.3d 388, 400 (6th Cir.), *cert. denied,* 524 U.S. 923 (1998).

Panels of this Court are faced with two irreconcilable presumptions: the Supreme Court's—that health benefits do not vest absent the clear intent to do so; and *Yard-Man's*—that collectively bargained retiree benefits vest upon retirement absent an expression not to do so. *Amici* respectfully submit that collective bargaining alone is not a reasonable basis for applying a different presumption with respect to vesting of retiree health benefits. *Amici* encourage this Court to rehear this case *en banc*, to establish a clear, workable, and consistent standard for determining whether retiree health benefits have vested.

II. The Panel Decision Conflicts with Supreme Court Precedent and Authoritative Decisions of Other Courts of Appeals.

While the panel decision in this case may be consistent with *Yard-Man,* both conflict with Supreme Court precedent, and as well as authoritative decisions of other Circuits considering this issue.

A. *Yard-Man* Conflicts with Supreme Court Precedent.

The *Yard-Man* inference, that retiree health benefits vests upon retirement, was (at least implicitly) rejected by the Supreme Court's recognition in *Schoonejongen* that nothing in the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.* establishes "any minimum participation, vesting, or funding requirements for welfare plans. . . ." 514 U.S. at 78 (citation

omitted). One panel of this Court sought to distinguish *Schoonejongen* on the basis that it did not involve collective bargaining. In *Golden v. Kelsey-Hayes Co. (In re Golden)*, 73 F.3d 648, 655 (6th Cir. 1996). *Amici* respectfully submit that this distinction is not a reasonable basis for ignoring the Supreme Court's presumption that welfare benefits do not vest—at retirement or any other time—absent a clear manifestation of the employer's intent to do so. *En banc* review is necessary to reconcile this Court's holdings with Supreme Court precedent.

B. The *Yard-Man* Inference Conflicts with Other Circuits.

As PolyOne's Petition notes, no court of appeals has adopted the *Yard-Man* inference that retiree health benefits vest. *See, e.g., UAW v. Skinner Engine Co.*, 188 F.3d 130, 139 (3d Cir. 1999) (rejecting *Yard-Man* presumption); and *United Paperworkers Int'l Union v. Champion Int'l Corp.*, 908 F.2d 1252, 1261 n.12 (5th Cir. 1990) (criticizing *Yard-Man*). Thus, the panel decision, applying *Yard-Man*, is inconsistent with other courts of appeal on this issue. In this regard, however, *Amici* note that the other courts of appeals addressing the issue have considered the "status-benefit" issue in light of more than twenty years of developments since *Yard-Man* was decided. Those courts have acknowledged that nothing in ERISA requires that employer-provided health insurance benefits vest upon retirement—or at any other time. *See Schoonejongen,* 514 U.S. at 78; *Skinner Engine Co.*, 188 F.3d at 137-38. Given developments in the law over the last 20-plus years, *Yard-*

Man's "status benefit" inference is no longer tenable. This Court should rehear this case *en banc* to reconsider the issue of vesting of retiree health benefits.

C. The Resulting Split Conflicts with Federal Labor Policy.

Conflicts between circuits regarding the applicable law give rise to a host of potential problems. A circuit split with respect to interpretation of collective bargaining agreements, however, is especially problematic. Congress enacted the National Labor Relations Act (NLRA), 29 U.S.C. § 151, *et seq.*, to "create a national, uniform body of labor law and policy [and] to protect the stability of the collective bargaining process . . . ." *United States v. Palumbo Bros.*, 145 F.3d 850, 861 (7th Cir.), *cert. denied*, 525 U.S. 949 (1998). Congress intended to prevent vagaries of state law from impeding the ability of employers and employee representatives to define their obligations. The preemptive scope of Section 301 of the LMRA was to ensure that federal labor law would govern, rather than "inconsistent local rules." *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962).

The same federal labor policy that underlies preemption of state law mandates that collective bargaining agreements be subject to uniform interpretation under **federal** law as well. Indeed, the *Lucas Flour* Court foresaw precisely the problem presented here. The Court's description of the potential conflict is no less applicable to a split among the circuits.

> Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an

> agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. . . . [T]he possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes . . . .

Id., at 103-104 (footnote and internal citation omitted). As it stands today, the law among the circuits is anything but uniform. The *Yard-Man* inference causes this Court to interpret collective bargaining agreements in a substantively different manner than other circuits. And this lack of uniformity is likely to cause – and likely has caused – collective bargaining agreements to be interpreted in a manner the parties likely never intended.

D. The Resulting Split Encourages Forum Shopping.

Another odious consequence of the split among the circuits is the fact that this Circuit's district courts have become the fora of choice for retirees to dispute changes to their health benefits. *Yard-Man*'s vesting inference provides plaintiffs with an enormous incentive to bring suit in this Circuit, even if the collective bargaining agreement was negotiated elsewhere and even if the subject work was performed in another jurisdiction. One author predicted this result more than a decade ago.

> There is a stark conflict in the federal circuit courts as to the proper test for deciding whether plan documents are ambiguous . . . Nevertheless, it is far from certain that the

> Supreme Court will agree to resolve the dispute any time soon . . . Until the Supreme Court speaks on this question, the outcome of important cases will frequently depend on the circuit in which the case is heard, and forum shopping will inevitably motivate some litigants.

William T. Payne, *Lawsuits Challenging the Termination or Modification of Retiree Welfare Benefits: A Plaintiff's Perspective*, 10 Labor Lawyer 91, 118-19 (1994). This prediction has come to full fruition. More than one district court has noted as much, with one suggesting that a case had been filed "in a none-too-transparent effort to enjoy the benefits of" the Sixth Circuit's *Yard-Man* case. *Moore, et al. v. Rohm & Haas Co.*, Case No. 5:03cv1342, Doc. No. 116, p. 1 (N.D. Ohio April 27, 2007) (citation omitted). *See also Wotus v. GenCorp, Inc.*, Case No. 5:00cv2604, Doc. No. 126, pp. 21-24 (N.D. Ohio December 3, 2003) (denying certification of nationwide class seeking application of *Yard-Man*).

By continuing to apply the *Yard-Man* inference, this Court ensures that retirees who dispute any change to their health benefits will invoke the jurisdiction of the district courts in this circuit – however tenuous their basis for venue may be. Courts should discourage plaintiffs from "forum shopping." *See U.S. Electrical Motors, Div. of Emerson Electric Co. v. NLRB*, 722 F.2d 315, 320 (6th Cir. 1983), *cert. denied*, 467 U.S. 1216 (1984). Accordingly, this Court should rehear this case *en banc*.

III. This Case Presents a Question of Exceptional Importance.

This Court should also grant *en banc* review because this proceeding involves a question of exceptional importance: vesting of retiree health benefits. Both the majority and the dissent raised concerns about the panel decision with respect to this issue. *See* Slip Op. at 13, 17. Whether couched as in inference or a presumption, decisions applying *Yard-Man* treat retiree health benefits as a vested right. *See, e.g., Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 613 (6th Cir. 1985) ("[T]his court [has] recognized that normally retiree benefits are vested"); and *Williams v. WCI Steel Co.*, 170 F.3d 598, 605 (6th Cir. 1999). As discussed in *Amici's* motion for leave to file this brief, however, there is no support in ERISA's history for treating medical coverage as a "status benefit."

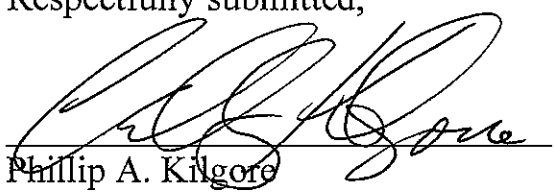
Because retiree health benefits are not treated as "status benefits" outside collective bargaining, there is no reason to infer that the bargaining parties treated them as such. The *Yard-Man* inference requires a reviewing court to assume that the bargaining parties deviated from the commonly understood law regarding vesting of welfare benefits unless they express a contrary intent. Such a position is simply untenable.

CONCLUSION

This Court should grant the Petition for Rehearing *En Banc* of Defendant-Appellee-Petitioner PolyOne Corporation.

Dated: April 9, 2008.

Respectfully submitted,



Phillip A. Kilgore
Brian D. Black
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
300 North Main Street, 5th Floor
Greenville, South Carolina 29601
(864) 271-1300
Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

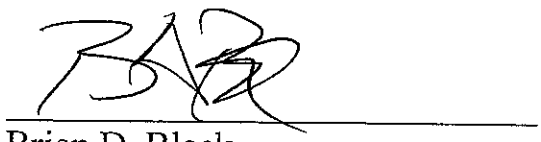
The undersigned certifies that on April 9, 2008, the original and twenty-five copies of the foregoing Brief for *Amici Curiae* the Council on Labor Law Equality, the HR Policy Association, The National Association of Manufacturers, the Ohio Management Lawyers Association, and the Society for Human Resource Management Supporting Petition for Rehearing *En Banc* were filed by sending them via Federal Express, to:

Clerk of the Sixth Circuit Court of Appeals
100 E. Fifth Street
Suite 540, Potter Stewart Courthouse
Cincinnati, OH 45202

The undersigned further certifies that on April 9, 2008, two copies of the foregoing Brief were sent, via Federal Express to:

Jack F. Fuchs, Esq. Stephen Richey, Esq. Eric S. Clark, Esq. Diane M. Goderre, Esq. THOMPSON HINE, LLP 312 Walnut Street, Suite 1400 Cincinnati, Ohio 45202	Alton D. Priddy, Esq. PRIDDY, CUTLER, MILLER & MEADE, PLLC 800 Republic Building 429 West Muhammad Ali Blvd. Louisville, Kentucky 40202

I declare that the statements above are true to the best of my information, knowledge and belief.



Brian D. Black

Dated: April 9, 2008

ADDENDUM

Moore v. Rohm & Haas Co., Case No. 5:03cv1342,
Order, Doc. 116 (N.D. Ohio April 27, 2007)

Noe v. PolyOne Corp.,
No. 07-5068 (6th Cir. March 19, 2008)

Wotus v. GenCorp, Inc., Case No. 5:00cv2604,
Memorandum of Opinion and Order,
Doc. No. 126 (N.D. Ohio, Dec. 3, 2003)

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Moses Moore, etc.,	)	
	)	CASE NO. 5:03 CV 1342
Plaintiff(s),	)	
	)	
v.	)	ORDER
	)	
Rohm & Haas Co., et al.,	)	
	)	
Defendant(s).	)	
	)	

On April 27, 2007, the Court conducted a status conference with counsel for all parties in attendance.

This case has a long procedural history. It was filed on July 9, 2003. From the outset, this Court has been very concerned that the case is a conglomerate of separate cases from several states all rolled into one in a none-too-transparent effort to enjoy the benefits of Sixth Circuit case law, particularly, International Union, United Automobile, Aerospace, & Agricultural Implement Workers of America (UAW) v. Yard-Man, Inc., ("Yard-Man"), 716 F.2d 1476 (6th Cir. 1983).[1]

In a Memorandum Opinion and Order issued on March 1, 2005, this Court explained:

> The original complaint identifies nine different Morton Salt plants, only two of which were in Ohio. Four of the thirteen plaintiffs were employed by these Ohio plants. The other seven plants were in Kansas (employing two

[1] The Sixth Circuit adopted what has been called the "Yard-Man inference," under which courts presume the parties intended retiree welfare benefits to continue for life, even after the collective bargaining agreement creating the benefits has expired. 716 F.2d at 1482-83.

> plaintiffs), Michigan (two plants, employing one plaintiff each), New York (one plaintiff), Texas (two plaintiffs), Louisiana (two plaintiffs), and New Jersey (no plaintiffs). An amended complaint (Doc. No. 64) has also added a tenth plant, in Illinois, but has identified no representative plaintiff. [footnote omitted]. There are at least three national unions and ten local unions involved in the factual scenario underlying this case and a sizeable number of individually-negotiated collective bargaining agreements ("CBA").

(Doc. No. 77, at 4). The Court concluded: "that it should retain jurisdiction only over those plaintiffs who reside in Ohio and/or worked at Morton Salt plants in Ohio. However, because the claims of the thirteen plaintiffs are so intertwined in the [ ] complaint, there is no way to segregate claims on a state-by-state or plant-by-plant basis so as to transfer claims to other districts under 28 U.S.C. § 1404." (Id. at 8). Therefore, the Court dismissed the entire case without prejudice to its refiling in the appropriate districts.

Rather than follow that route, plaintiffs appealed to the Sixth Circuit which, inexplicably reviewed jurisdictional issues that this Court had not addressed and "express[ed] no opinion" on the primary issue this Court had addressed, other than to note in its conclusion as follows: "On this record, we are unable to ascertain whether the conduct alleged by the plaintiffs 'aris[es] out of the same . . . series of transactions or occurrences,' as required by Federal Rule of Civil Procedure 20(a) or, if not, whether the division and the possible transfer pursuant to § 1404(a) of the respective cases would be more appropriate." Moore v. Rohm & Haas Co., 446 F.3d 643, 647 (6th Cir. 2006). As a result, this Court finds itself right back where it started, only more than two years later!

The Court intends to try once more to *sua sponte* address "whether the division and the possible transfer pursuant to § 1404(a) of the respective cases would be more appropriate." Id.

Accordingly, the parties shall file their briefs on this question by May 21, 2007. These briefs shall include a discussion of whether, if this Court were to keep the entire case, Sixth Circuit case law would apply across the board even to plaintiffs and Morton plants that are not located in the Sixth Circuit and would not, if filed elsewhere, enjoy the Yard-man inference.

One week after the Court rules on the § 1404 venue issue, plaintiffs shall file their motion for class certification.[2] The defendants will have two weeks to file their response to the class certification motion.

One month after the Court rules on any motion for class certification, summary judgment motions, if any, will be due.

Finally, in the event any party makes a written request for a status conference, the Court will schedule one.

IT IS SO ORDERED.

April 27, 2007
Date

s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

[2] Whether or not the Court keeps the whole case, there will be a need to address class certification. Between now and May 21st, plaintiffs' counsel should make sure that there are appropriate representative plaintiffs to cover all the possible class and sub-class scenarios and, if need be, amend the Third Amended Complaint by interlineation to add necessary plaintiffs.

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 08a0115p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JULIUS NOE; RAY REYNOLDS; ANNA MAE WILDER; RUSSELL BOWMAN; NANCY HOOD; WILLIAM DUNCAN,

Plaintiffs-Appellants,

v.

POLYONE CORPORATION,

Defendant-Appellee.

No. 07-5068

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
No. 06-00170—John G. Heyburn II, Chief District Judge.

Argued: September 13, 2007

Decided and Filed: March 19, 2008

Before: SUTTON and McKEAGUE, Circuit Judges; FORESTER, District Judge.*

COUNSEL

ARGUED: Thomas J. Schulz, PRIDDY, CUTLER, MILLER & MEADE, Louisville, Kentucky, for Appellants. Jack F. Fuchs, THOMPSON HINE, Cincinnati, Ohio, for Appellee. **ON BRIEF:** Thomas J. Schulz, Alton D. Priddy, PRIDDY, CUTLER, MILLER & MEADE, Louisville, Kentucky, for Appellants. Jack F. Fuchs, Eric S. Clark, Stephen L. Richey, THOMPSON HINE, Cincinnati, Ohio, for Appellee.

McKEAGUE, J., delivered the opinion of the court, in which FORESTER, D. J., joined. SUTTON, J. (pp. 15-18), delivered a separate opinion concurring in part and dissenting in part.

OPINION

McKEAGUE, Circuit Judge. This is a retiree health benefits case, in which the court is asked to determine whether the parties to various labor agreements intended for retiree health benefits to vest such that any termination of those benefits constitutes a violation of § 301 of the

---

*The Honorable Karl S. Forester, Senior United States District Judge for the Eastern District of Kentucky, sitting by designation.

Labor Management Relations Act ("LMRA"). The district court granted summary judgment for defendant-employer PolyOne Corp. after concluding that the labor agreements in question were unambiguous and established no intent to vest retiree health benefits. Having conducted a thorough review of the record and the applicable law, we arrive at a different conclusion and **VACATE** the district court's judgment.

I. BACKGROUND

Russell Bowman, William Duncan, Nancy Hood, Julius Noe, Ray Reynolds, and Anna May Wilder, ("Plaintiffs") are all retirees or the surviving spouse of a retiree from B.F. Goodrich Co.'s Geon Vinyl Division ("BFG"), which through a series of transactions became PolyOne Corp., the defendant in this case ("PolyOne"). Plaintiffs or their deceased spouses all retired between 1979 and 1990 from BFG's Louisville, Kentucky, facility. While employed with BFG, Plaintiffs were represented in the collective bargaining process primarily by the Distillery, Rectifying, Wine and Allied Workers' International Union of America, Local No. 72 ("Union"). During this time period, the Union and BFG entered into various collective bargaining agreements, none of which specifically addressed the issue of health benefits. Also during this period, BFG negotiated a series of agreements with other unions that represented employees working at facilities outside of Kentucky. These other agreements, which were entitled "Agreements on Employee Benefit Programs" ("EBAs"), provided employee and retiree health benefits to the applicable group of employees. Per the terms of the EBAs, retirees were not required to contribute to their health insurance premiums, they were reimbursed for Medicare Part B, and they paid $1.00 for each prescription medication.

Plaintiffs maintain that the health benefits provided by the EBAs were extended to them via a Memorandum of Agreement ("MOA") entered into by Plaintiffs' union and BFG. Effective in 1988, BFG replaced the EBAs with a Flexible Benefit Program ("Flex Program"). The Flex Program slightly changed the health care coverage available for active employees and those who retired after August 1988. It is undisputed that Plaintiffs received the health benefits described in the EBAs or the Flex Program until March 2006, when PolyOne ceased reimbursing Plaintiffs' Medicare Part B premiums, began requiring Plaintiffs to contribute towards their insurance premiums, and instituted much higher prescription drug co-pays. Believing that PolyOne's conduct violated the EBAs and the Flex Program, Plaintiffs filed the instant action under § 301 of the LMRA. Finding that the EBAs and the Flex Program did not manifest an intent to vest retiree health benefits, the district court granted summary judgment for PolyOne. Plaintiffs timely appealed.

II. ANALYSIS

A. Standard of Review and Applicable Law

This court reviews a district court's grant of summary judgment de novo. *Nichols v. Moore*, 477 F.3d 396, 398 (6th Cir. 2007). Likewise, de novo review applies to questions of contract interpretation. *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 577 (6th Cir.), *cert. denied*, 127 S.Ct. 554, *and*, 127 S.Ct. 555 (2006).

There are two types of employee benefit plans: pension plans and welfare benefit plans. *Id.* at 578. While pension plans are subject to mandatory vesting, welfare benefit plans are not. *Maurer v. Joy Technologies., Inc.*, 212 F.3d 907, 914 (6th Cir. 2000). Retiree health benefit plans, such as those involved here, are welfare benefit plans; thus, vesting only occurs if the parties so intended when they executed the applicable labor agreements. *Id.* A court may find vested rights "under a CBA even if the intent to vest has not been explicitly set out in the agreement." *Id.* at 915. If the rights to health coverage have vested, then the unilateral termination of the coverage violates § 301

of the LMRA. *Yolton*, 435 F.3d at 578. On the other hand, an employer is free to terminate any unvested welfare benefits upon the expiration of the relevant CBA. *Id.*

The seminal case for determining whether the parties to a CBA intended benefits to vest is *UAW v. Yard-Man*, 716 F.2d 1476, 1479 (6th Cir. 1983). Under *Yard-Man*, basic rules of contract interpretation apply, meaning that courts must first examine the CBA language for clear manifestations of an intent to vest. *Id.* Furthermore, each provision of the CBA is to be construed consistently with the entire CBA and "the relative positions and purposes of the parties." *Id.* The terms of the CBA should be interpreted so as to avoid illusory promises and superfluous provisions. *Id.* at 1480. Our decision in *Yard-Man* also explained that "retiree benefits are in a sense 'status' benefits which, as such, carry with them an inference . . . that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree." *Id.* at 1482. With regard to the "*Yard-Man* inference," later decisions of this court have clarified that *Yard-Man* does not create a legal presumption that retiree benefits are interminable. *Yolton*, 435 F.3d at 579. Rather, *Yard-Man* is properly understood as creating an inference only if the context and other available evidence indicate an intent to vest. *Id.*

When an ambiguity exists in the provisions of the CBA, then resort to extrinsic evidence may be had to ascertain whether the parties intended for the benefits to vest. *Int'l Union, United Auto. Aerospace & Agric. Implement Workers of Am. v. BVR Liquidating, Inc.*, 190 F.3d 768, 774 (6th Cir. 1999). If an examination of the available extrinsic evidence fails to conclusively resolve the issue and a question of intent remains, then summary judgment is improper. *Int'l Union, United Mine Workers of Am. v. Apogee Coal Co.*, 330 F.3d 740, 744 (6th Cir. 2003). Having provided the broad analytical framework, we now turn to the task of parsing the language of the various agreements involved in this case.

With the exception of Plaintiff Hood, all of the retirees involved in this case received the health benefits provided by the various EBAs. Although Plaintiffs retired under several different EBAs, we refer to the EBAs collectively because each agreement contains the same language regarding the issues involved in this appeal. As for Plaintiff Hood, the merits of her claim will be discussed separately because the Flex Program governs her retiree health benefits.

B. Incorporation of the EBAs by the MOA

As a threshold matter, it is necessary to determine if the MOA incorporates the health benefits provisions of the EBAs to Plaintiffs. In the absence of incorporation, Plaintiffs' claim fails because the collective bargaining agreements negotiated between Plaintiffs and BFG are silent as to health benefits. The MOA states in pertinent part:

> The following Article is hereby included in the current Collective Bargaining Agreement:
>
> > The Pension Plan, including the requirement for compulsory retirement at age seventy, the Hospitalization, Surgical and Medical Expense Insurance Program . . ., and the Prescription Drug Program presently in effect for the majority of The BFGoodrich Company's production and maintenance employees shall be in effect for the life of this Agreement.

JA at 646. According to the district court, while "the MOA is far from clear, the parties appear to have intended that this general reference incorporate the EBA health benefit provisions." *Noe v. PolyOne Corp.*, No. 3:06-CV-170H, 2006 WL 3759601, at *3 (W.D. Ky. Dec. 19, 2006). Disagreeing with the district court's determination on this issue, PolyOne argues that Plaintiffs have failed to offer any evidence—aside from anecdotes and hearsay—showing that the MOA incorporated the EBAs to Plaintiffs. In response, Plaintiffs argue that the parties' course of conduct

illustrates that they intended for the MOA to provide employees and retirees of BFG's Louisville facility with the health benefits found in the EBAs.

Based on our review of the MOA and the conduct of the parties, the district court correctly held that the MOA incorporated the EBAs to Plaintiffs. Because the MOA itself is unclear on this issue, the district court properly looked to extrinsic evidence and the course of performance between the parties in determining that the MOA incorporated the EBAs. As the district court recognized, the most telling of this extrinsic evidence is the fact that "[e]veryone agrees that [Plaintiffs] actually received the benefits described in the EBAs and continued to receive them after retirement." *Id.* at *2. Although the terms of the MOA undoubtedly could have been more precise, the evidence establishes that it was intended by the parties to apply the EBAs to Plaintiffs. Therefore, we proceed to analyze the EBA provisions themselves to determine whether the district court properly found that Plaintiffs' retiree health benefits have not vested.

C. The Vesting Determination

The district court held that the retiree health benefits provisions in the EBAs clearly and unambiguously established that the parties did not intend for Plaintiffs' health benefits to vest. Having examined the language of the MOA and the EBAs, this court finds that the district court improperly granted summary judgment in favor of PolyOne for numerous reasons. First, PolyOne's argument that the MOA's language indicates that Plaintiffs' health benefits were not intended to vest fails. Second, the durational provisions relied on by PolyOne and the district court are general in nature and do not preclude a finding that the parties intended Plaintiffs' benefits to vest. Third, provisions in the EBAs expressly tie eligibility for retiree health benefits to eligibility for a pension, which we have repeatedly held evinces an intent to vest. Fourth, adopting the interpretation urged by PolyOne and accepted by the district court would render several promises made in the EBAs illusory, a result in violation of our precedent. Fifth, the presence of specific vesting language in the pension benefits portion of the EBAs does not lead to the conclusion that Plaintiffs' health benefits have not vested.

1. The MOA Language does not Preclude a Finding that Plaintiffs' Health Benefits were Intended to Vest

PolyOne argues that the MOA itself establishes that the parties never intended for Plaintiffs' health benefits to vest. PolyOne believes that the MOA negates any intent to vest because it limits benefits to the duration of the agreement and provides that the agreement may be changed by subsequent negotiations.

The MOA states in pertinent part:

> The Pension Plan, including the requirement for compulsory retirement at age seventy, the Hospitalization, Surgical and Medical Expense Insurance Program . . ., and the Prescription Drug Program presently in effect for the majority of The BFGoodrich Company's production and maintenance employees *shall be in effect for the life of this Agreement; provided that if during the term of this Agreement the Plan or Programs are changed for such majority, such changes shall be made effective on the same date they are made effective for the majority* of The BFGoodrich production and maintenance employees and remain in effect for the life of this Agreement.

JA at 646 (emphasis added). PolyOne first asserts that the italicized phrase "shall be in effect for the life of this Agreement" is a specific durational clause that precludes a finding that Plaintiffs' health benefits have vested. Plaintiffs counter by arguing that the provision is a general durational

clause and is insufficient to demonstrate that retiree health benefits have not vested. With regard to this issue, the district court agreed with Plaintiffs that the MOA's durational clause was general in nature. *See Noe*, 2006 WL 3759601, at *3 n.7.

As explained in *Yolton*, "[a]bsent specific durational language referring to retiree benefits themselves, courts have held that the general durational language says nothing about those retiree benefits." *Yolton*, 435 F.3d at 581. In *Yolton*, the court concluded that a provision stating that the "group insurance plan will . . . run concurrently with this Agreement" was a general durational clause and did not preclude a finding that retiree health benefits had vested. *Id.* Like the agreement in *Yolton*, there is no language in the MOA specifically stating that retiree health benefits expire upon the termination of the agreement. It speaks generically of all benefits for all employees; language that does not constitute a specific durational clause under our precedent. *See id.*; *see also Maurer*, 212 F.3d at 917-18 (finding that a CBA termination clause was not a specific durational clause because it did not specifically reference retiree benefits).

PolyOne's reliance on *Linville v. Teamsters Misc. & Indus. Workers Union, Local 284*, 206 F.3d 648, 650 (6th Cir. 2000), for the proposition that the MOA language is a specific durational clause is misplaced. In *Linville*, the clause at issue expressly stated that health insurance under the company's plan "ceases when the individual reaches age sixty-five." *Linville*, 206 F.3d at 649. No such language is present in this case, and there is no discussion in *Linville* regarding whether a clause such as that contained in the MOA is a general or specific durational provision. *Linville* is also distinguishable because the agreement there stated that no individuals were to receive health benefits after attaining age sixty-five. *Id.* Instead, as in *Yard-Man* and *Maurer*, the opposite is true in this case; the EBAs actually contain language indicating that certain health benefits *start* at age sixty-five and last until death. *See* § 12.15(h), JA at 185. Because the MOA language is analogous to that used in *Yolton*, and *Linville* does not apply, we reject PolyOne's argument and find that the MOA provision is a general durational clause that does not preclude a finding that Plaintiffs' health benefits have vested.

PolyOne next argues that the MOA's statement that "if during the term of this Agreement the Plan or Programs are changed for such majority, such changes shall be made effective on the same date they are made effective for the majority" of BFGoodrich employees at other facilities, precludes a finding that Plaintiffs' health benefits have vested. According to PolyOne, this language authorizes it to alter Plaintiffs' health benefits at any time; therefore, such benefits have not vested.

While construing the MOA in this manner has some merit on the surface, a close examination of the entirety of the MOA highlights the error in such an interpretation. The MOA provision at issue begins with the words "[t]he *Pension Plan*, including . . . the Hospitalization, Surgical and Medical Expense Insurance Program . . ., and the Prescription Drug Program." JA at 646 (emphasis added). Looking to the specific language relied on by PolyOne, the MOA states "provided that if during the term of this Agreement the *Plan* or *Programs* are changed for such majority, such changes shall be made effective" for Plaintiffs. It is apparent that the use of the word "Plan" in the latter sentence refers back to the phrase "Pension Plan" in the former sentence, while the word "Program" in the latter sentence refers back to the former phrase "Hospitalization, Surgical and Medical Expense Insurance Program . . . and the Prescription Drug Program." Adopting PolyOne's construction that by permitting the company to make changes to the agreements, the MOA language negates any intent to vest retiree health benefits, would necessarily lead to the conclusion that the benefits provided by the pension plan are subject to change and not vested.

According to *Yolton*, such an argument fails "because the same language was used regarding pensions and health benefits . . . [g]iven the defendant's logic, because its pension plan was incorporated into the collective bargaining agreement, its obligation to provide pensions ended with the expiration of the agreement." *Yolton*, 435 F.3d at 581 n. 7 (quoting to the district court's opinion

in *Golden*). As *Yolton* seems to have implicitly recognized, such a result is forbidden by ERISA, which requires that pension benefits automatically vest. *See Yolton*, 435 F.3d at 580-81; *see also Maurer*, 212 F.3d at 914 (stating that pension plans are subject to mandatory vesting under ERISA). Given that pension benefit plans cannot be changed in the manner PolyOne's interpretation would suggest, it follows that the MOA language at issue does not establish that Plaintiffs' health benefits under the "Program" were not intended to vest.

2. Sections 12.1 and 16.4 of the EBAs are General Durational Clauses

Similar to its MOA arguments, PolyOne's primary assertion as it relates to the EBAs is that language found in § 12.1 and § 16.4 of the EBAs specifically limits the availability of retiree health benefits to the duration of the EBAs. Unlike the district court—which adopted this line of reasoning—we are not persuaded. As previously explained with regard to the MOA durational clause, "[a]bsent specific durational language referring to retiree benefits themselves" a general durational clause says nothing about the vesting of retiree benefits. *Yolton*, 435 F.3d at 581. According to our opinion in *Yolton*, such general

> durational language only affects *future* retirees-that is, someone who retired after the expiration of a particular CBA would not be entitled to the previous benefits, but is rather entitled only to those benefits newly negotiated under a new CBA. Thus, the retirement package available to someone contemplating retirement will change with the expiration and adoption of CBAs, but someone already retired under a particular CBA continues to receive the benefits provided therein despite the expiration of the agreement itself.

Id. at 581; *see also Maurer*, 212 F.3d at 917-18 (explaining that "general durational provisions . . . are not clearly meant to include retiree benefits").

In an unpublished case involving language virtually identical to that found in § 12.1 of the EBAs, we concluded that the provision was general in nature and did not preclude a finding that retiree benefits had vested. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Loral Corp.*, 107 F.3d 11, 1997 WL 49077, at *3 (6th Cir. 1997) (unpublished table decision). The CBA at issue in *Loral* contained an introductory clause in the benefits portion of the agreement, which stated: "Effective August 12, 1988, and for the duration of this Agreement thereafter, the Employer will provide the following Program of hospital benefits, hospital-medical benefits, surgical benefits and prescription drug benefits." *Id.* There, as here, the employer argued that the introductory clause limited its obligation to provide retiree benefits to the duration of the CBA. *Id.* And there, as here, we were not persuaded. According to the *Loral* court, the introductory clause was a general durational provision that did not limit retiree health benefits to the duration of the CBA. *See id.* at *3.

Similarly, in *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669, 675-76 (6th Cir. 1985), this court analyzed a durational provision stating that "this Agreement and all terms and conditions hereof shall terminate as of the end of the term." The *Weimer* court held that the quoted language constituted a "general termination clause [that] does not support a finding that retiree benefits ended when the agreements expired." *Id.* at 676; *see also BVR Liquidating, Inc.*, 190 F.3d at 774 (finding that retiree health benefits vested notwithstanding an introductory clause stating that benefits would be provided "at no cost to the Employees or retirees for the term of this Agreement").

In this case, § 12.1 of the EBAs states: "Effective as of April 21, 1979 and for the duration of this Agreement, the Company will provide the following plan of hospital expense benefits, hospital-medical benefits, surgical benefits, prescription drug benefits, dental benefits and major medical benefits . . . ." JA at 172. According to PolyOne, this language "specifically limit[s] the

duration of retiree health benefits to the term of the EBAs." PolyOne's argument fails, however, because § 12.1's language is indistinguishable from the language we held to be a general durational provision in *Loral* and is analogous to that involved in *Weimer*. As with the durational clauses held to be general in *Yolton*, *Loral*, *BVR*, and *Weimer*, the language in § 12.1 does not specifically refer to retiree benefits; rather, it refers generically to the benefits available for all employees as well as retirees. Hence, the district court incorrectly held that § 12.1 indicates an intent not to vest retiree health benefits.

Aside from the language found in § 12.1, PolyOne also asserts that the introductory statement in Article 2 and the durational language in § 16.4 foreclose Plaintiffs' claim. For largely the same reasons as those set forth above, we disagree. Section 16.4 states in pertinent part: "Upon termination, this Agreement shall terminate in all respects except that the benefits provided by it shall be extended for ninety (90) days following such termination." JA at 186. As with § 12.1, nothing in § 16.4 specifically refers to retiree benefits; instead—like the clauses held to be general in the cases previously cited—it refers to all benefits available for all employees, active and retired. Given the lack of any specific reference to "retiree benefits themselves," *Yolton*, 435 F.3d at 581, § 16.4 is a general durational clause and does not support the district court's finding in favor of PolyOne.[1] *See Maurer*, 212 F.3d at 917-18 (finding a CBA clause providing that benefits shall remain in effect until midnight on the CBA's expiration date to be a general durational provision because it was "not clearly meant to include retiree benefits."); *see also United Rubber, Cork, Linoleum & Plastic Workers of Am., AFL-CIO v. Pirelli Armstrong Tire Corp.*, 873 F. Supp. 1093, 1100-01 (M.D. Tenn. 1994) (holding that a clause identical in all respects to § 16.4 was a general durational provision and did not establish that retiree health benefits terminate ninety-days after the expiration of the CBA.)

Looking to the introductory language of Article 2, it is also a general durational clause. Article 2 states in pertinent part: "This Agreement constitutes a settlement for the duration of this Agreement of all retirement, pension, insurance, survivor income benefits, supplemental workers' compensation, drugs and severance pay demands . . . ." JA at 495. This language from Article 2 refers to *all* benefits; it does not specifically limit the duration of retiree health benefits as required by *Yolton* and its progeny. PolyOne's argument that this general language indicates that Plaintiffs' health benefits were not intended to vest fails.

The dissent erroneously suggests that by deeming the durational provisions to be general in nature, we have in some way turned the *Yard-Man* inference into a presumption of vesting that may only be overcome by a "clear statement" that retiree benefits were not intended to vest. Dis. Op. at 15. Such is not the case. The dissent also fails to recognize that requiring specific language

---

[1]Furthermore, a close reading of § 16.4 suggests that the purpose of the clause was not to limit the duration of retiree health benefits; rather, it was to provide active employees with health benefits for a ninety-day period in the event that the company and the union could not agree to an extension of the agreement. Essentially, § 16.4 continues benefits for active employees on a temporary basis in the event of a strike or a situation where employees continued to work without a contract. *See United Steel Workers of Am., AFL-CIO v. Titan Tire Corp.*, 359 F. Supp.2d 819, 822 (S.D. Iowa 2005). In *Titan*—pursuant to the same language found in § 16.4—benefits were provided to striking employees for the specified ninety-day period. *Id.* at 822. Contrary to the reasoning set forth in the dissent, such a context is clearly the one in which § 16.4 was meant to apply instead of situations like that involved here. Simply because § 16.4 uses the word "benefits"—albeit in the most generic sense of the word and in a completely different context—the dissent latches on to it as support for the proposition that this is a specific durational provision. Dis. Op. at 2. To say that this provision, which *never* mentions the word "retirement" or "retiree," and is not found in the portion of the EBAs addressing retiree benefits, constitutes a *specific* durational clause is a stretch of the sort that we are unwilling and unable—as a panel—to make under our precedent. *See Weimer*, 773 F.2d at 676 (finding a durational clause that stated "all terms and conditions" of the agreement expired on the expiration of the CBA to be general because it failed "to specify that retiree insurance benefits" terminated with the CBA). For an example of a true specific durational clause, see *Senn v. United Dominion Indus., Inc.*, 951 F.2d 806, 815 (7th Cir. 1992), where the durational clause in question "explicitly provided that retiree insurance coverage would terminate" upon the expiration of the CBA.

referring to retiree health benefits in order for a durational clause to be characterized as "specific" is not the same thing as requiring specific anti-vesting language in a CBA; rather, it simply means that the entire case cannot be resolved on the basis of a durational clause that fails to reference retiree health benefits as is required by our case law. *See Yolton* 435 F.3d at 581. As this court has held time and time again when confronted with similar provisions, general durational clauses of the sort found in the EBAs do not resolve the vesting issue, and it is necessary to determine if any provisions in the agreements shed light on whether the parties intended for Plaintiffs' health benefits to vest. *See, e.g.,M aurer*, 212 F.3d at 917-18; *Weimer*, 783 F.2d at 676; *Loral*, 1997 WL 49077, at *3. It is to that question that we now turn our attention.

3. The EBAs Indicate an Intent to Vest Plaintiffs' Health Benefits

Because the durational clauses relied on by PolyOne do not preclude a finding that Plaintiffs' health benefits have vested, we look to other provisions of the EBAs to determine whether the parties intended Plaintiffs' health benefits to vest. Contrary to the district court's holding, several provisions in the EBAs and decisions of this court support Plaintiffs' argument that their health benefits have vested.

a. Tying Eligibility for Retiree Health Benefits to Eligibility for a Pension

According to this court, language in an agreement that ties eligibility for retiree health benefits to eligibility for a pension indicates an intent to vest the health benefits. *See McCoy v. Meridian Auto. Sys., Inc.*, 390 F.3d 417, 422 (6th Cir. 2004); *see also Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 656 (6th Cir. 1996).[2] In *McCoy*, the agreement between the parties stated: "The Company shall contribute the full premium or subscription charge for Health Care . . . for (i) a retired employee (including any eligible dependents) provided such retired employee is eligible for benefits under Article II of the Company's Hourly-Rate Employees Pension Plan." *McCoy*, 390 F.3d at 419. After outlining the applicable law under *Yard-Man* and its progeny, the *McCoy* court held that because the CBA provision "ties eligibility for retirement-health benefits to eligibility for a pension . . . there is little room for debate that retirees' health benefits vested upon retirement." *Id.* at 390. Likewise, the *Golden* court found an intent to vest retiree health benefits because there were "provisions in each of the CBAs . . . which tie retiree and surviving spouse eligibility for health insurance coverage to eligibility for vested pension benefits." *Golden*, 73 F.3d at 656; *see also Yolton*, 435 F.3d at 580 (citing *Golden* for the proposition that tying eligibility for retiree health benefits to eligibility for pension benefits indicates an intent to vest).

Applying the teaching of *McCoy* and *Golden* in the present case leads inescapably to the conclusion that the district court erred in granting summary judgment for PolyOne. Looking to the EBAs, several provisions tie eligibility for retiree health benefits directly to eligibility for pension benefits by using language that is indistinguishable from that involved in *McCoy*. Section 12.14 of the EBAs provides in pertinent part: "Employees who retire *and who are eligible under the 1979 Employee Benefit Agreement for a Pension* (other than a Deferred Vested Pension), shall receive the benefits described in this Article." JA at 184 (emphasis added). Another section of the EBAs also ties eligibility for retiree health benefits to eligibility for a pension. In § 12.7(k), the EBAs state:

---

[2]The dissent is correct that in both *Golden* and *McCoy* this court was reviewing a district court's preliminary injunction decision under the abuse of discretion standard. However, given the unequivocal nature of those decisions—especially *McCoy*—such a distinction is one without a difference. Undoubtedly, when the *McCoy* court stated that by tying "eligibility for retirement-health benefits to eligibility for a pension . . . [the parties left] little room for debate that the retiree's health benefits vested upon retirement," 390 F.3d at 422, it made a broad pronouncement of law. A pronouncement that we believe applies regardless of whether this type of case reaches us on appeal from a preliminary injunction decision or from the grant of summary judgment. It is somewhat difficult to see why such tying language would leave "little room for debate" that retiree benefits were intended to vest in *McCoy*, yet suddenly be the source of much debate here simply because we are reviewing a district court's summary judgment decision.

"Employees who retire *and who are eligible under this Agreement for a pension* (other than a Deferred Vested Pension), shall receive the Major Medical Benefits described in this Paragraph 12.7. . . . " JA at 181 (emphasis added). Lending even more support to the argument that the EBAs tie retiree health benefits to pension benefits is the fact that a key retiree health provision refers to retirees covered by the provision as "Pensioners." *See* § 12.5(h), JA at 185.

Without citing any authority, the district court disregarded the significance of this tying language because it "focuses upon an employee's eligibility for benefits rather than upon the duration of those benefits." *Noe*, 2006 WL 3759601, at *4. Such a statement contradicts *McCoy* and *Golden*, both of which found vesting based on provisions that used the word "eligibility." *See McCoy*, 390 F.3d at 422 (explaining that there was evidence of an intent to vest "[b]ecause the Supplemental Agreement ties *eligibility* for retirement-health benefits to *eligibility* for a pension.") (emphasis added); *see also Golden*, 73 F.3d at 656 (explaining that "provisions in each of the CBAs at issue . . . tie retiree and surviving spouse *eligibility* for health insurance cover to *eligibility* for vested pension benefits.") (emphasis added). It is evident that the district court failed to appreciate that by tying the eligibility for retiree health benefits to the eligibility for a pension, the EBAs were actually speaking to the duration of the benefits. As we explained in *Golden*, "[s]ince retirees are eligible to receive pension benefits for life," the act of tying retiree health benefits to pension eligibility indicates "that the parties intended that the company provide lifetime health benefits as well." *Golden*, 73 F.3d at 656 (explaining why the district court in *Golden* correctly focused on the presence of tying language). Here, the EBAs undoubtedly tie eligibility for retiree health coverage to eligiblity for a pension, which is evidence of an intent to vest.

b. The EBAs' Promise of a Lifetime Special Medicare Benefit

Aside from tying eligibility for retiree health benefits to eligibility for a pension, which in and of itself suggests an intent to vest, there are other provisions in the EBAs that indicate under our case law that Plaintiffs' health benefits were intended to vest. Section 12.15(h) of the EBA states:

> Subject to the provisions of this Paragraph 12.15(h), a Special Medicare Benefit will be paid to . . . (ii) a Pensioner who retires on or after April 21, 1979, or (iii) such Pensioner's or Employee's surviving spouse, if such Employee, Pensioner or surviving spouse is covered for Medical Benefits under this Article 12.
>
> > (1) The Special Medicare Benefit will be equal to the standard monthly premium for Part B of Medicare . . .
> > (2) The Special Medicare Benefit will be payable *when an individual attains age sixty-five (65)* or, for an individual less than age sixty-five (65), when he enrolls for Part B of Medicare . . .
> > (3) Payment shall commence on the first day of the month following (i) the month during which the individual attains age sixty-five (65) . . . The payment of such Benefit shall *continue until the individual's death* . . .
> > (5) Upon *the death of a Pensioner* or Employee, the Special Medicare Benefit will be paid to his surviving spouse if such spouse is eligible to receive Medical Benefits under this Article 12. Such surviving spouse shall continue to receive the Special Medicare Benefit *until such spouse remarries, dies* or is no longer eligible for Part B of Medicare.

JA at 185 (emphasis added). As the italicized language makes clear, § 12.15(h) promises that once a retiree reaches age sixty-five he or she will receive the Special Medicare Benefit until death. And upon death, the retiree's surviving spouse will continue to receive the Special Medicare Benefit until his or her death or remarriage.

When confronted with similar language in the past, we have held that it establishes an intent to vest retiree health benefits. *See Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 615 (6th Cir. 1985).[3] In *Policy*, the CBA provided: "When said Pensioner reaches age 65, the Company will provide such Pensioner, at the Company's expense, supplemental medicare and major medical benefits. The Company will continue to provide at its expense, supplemental medicare and major medical benefits for Pensioners aged 65 and over." *Id.* Reversing the district court's conclusion that the retirees' benefits were not vested, *Policy* explained that the language of the supplemental medicare provision "unambiguously confers the stated health insurance benefits for the duration of the retiree's life." *Id.* (emphasis added). The *Policy* court's determination finds support in the Seventh Circuit's decision in *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 608 (7th Cir. 1993) (en banc), where Judge Posner, writing for the en banc court, explained that a similar provision could reasonably "be thought a promise to retired employees that they and their spouses will be covered for the rest of their lives. For the provision does not say 'when they die or the collective bargaining agreement expires, whichever occurs first,' but simply when they die."

As with the provision involved in *Policy*, § 12.15(h)(3) promises to provide a Special Medicare Benefit from age sixty-five "until the individual's death." We are in agreement with *Policy*, that promising to provide a benefit until a person dies undoubtedly means that the benefit lasts for the person's life. It is likewise clear to us that § 12.15(h)(5)'s promise to provide the surviving spouse of a retiree with a Medicare supplement until he or she remarries or "dies" is a promise that the spouse of a retiree is entitled to lifetime benefits unless he or she remarries. *See generally Loral*, 1997 WL 49077, at *3 (concluding that language providing the spouse of a deceased retiree with benefits "until death or remarriage" indicates that such benefits have vested).

Furthermore, adopting PolyOne's argument that Plaintiffs' retiree benefits have not vested would render portions of § 12.15(h) nugatory, and the promises contained therein illusory, in violation of *Yard-Man* and its progeny. *See Yard-Man*, 716 F.2d at 1480 (explaining that courts must construe CBA provisions "so as to render none nugatory and avoid illusory promises"). With regard to the analogous provision in *Policy*, this court explained that to interpret such a benefits provision as terminating at the end of the relevant CBA would create an illusory promise to those retirees who would not reach age sixty-five before the CBA's expiration. *Policy*, 770 F.2d at 615. According to *Policy*, the promise would be illusory because:

> if a sixty-two year old employee with twenty years service retired on January 1, 1982, eight months before the collective bargaining agreement expired, and if the Company were correct in contending that the retiree's health insurance benefits ceased with the August 31, 1982, expiration of such agreement, then the Company's promise to provide supplemental Medicare . . . to the retiree when he reached age sixty-five would be of no value.

Id.; *see also Bailey v. AK Steel Corp.*, No. 1:06cv468, 2006 WL 2727732, at *6 (S.D. Ohio Sept. 22, 2006) (examining a similar Medicare supplement provision for retirees and concluding that the promise establishes an intent to vest because otherwise it would be illusory for many individuals who retired as young as age fifty-five). The same conclusion was reached in *Yard-Man*, where the

---

[3]PolyOne repeatedly cites *Policy v. Powell Pressed Steel Corp.*, 1984 U.S. Dist. LEXIS 18650 (N.D. Ohio March 14, 1984), in its brief as support for its argument that Plaintiffs' health benefits have not vested. *See* Appellee's Br. at 39, 41, 42. However, PolyOne neglects to ever mention that the district court's decision on which it relies so heavily was actually vacated and remanded by this court on appeal. *See Policy*, 770 F.2d at 618. Our decision in *Policy* specifically rejected the language that PolyOne quotes in bold print at page 42 of its brief as support for the argument that the provisions in the EBAs promising certain benefits until a deceased retiree's death or remarriage did not evince an intent to vest retiree health benefits. *See id.* at 615 (finding that to construe a provision conferring health insurance benefits for the duration of the retiree's life as not providing vested benefits would render the promise "in substantial part nugatory and illusory").

CBA promised to provide certain benefits to retirees when they reached age sixty-five. *Yard-Man*, 716 F.2d at 1481 (explaining that if retiree benefits expired at the end of the CBA then the promise to provide certain benefits at age sixty-five "is completely illusory for many early retirees under age 62"); *see also Maurer*, 212 F.3d at 918 (explaining that, "[b]ecause the CBAs permit retirement at age 55 and promise insurance at age 65, the promise is meaningless if it could be terminated in three years").

Similar to the provisions in *Policy*, *Yard-Man*, and *Maurer*, § 12.15(h) promises that upon the attainment of age sixty-five the company will begin to provide the Special Medicare Benefit to retirees. However, as in *Maurer*, employees of BFG could retire as early as age fifty-five under the company's early retirement plan. *See* § 4.2, JA at 194. For such early retirees, the promise of the Special Medicare Benefit is rendered illusory under the interpretation urged by PolyOne. *See* JA at 194, § 4.2. Likewise, § 12.15(h)'s promise to provide the spouse of a deceased retiree with the Special Medicare Benefit until his or her death or remarriage would be rendered illusory were this court to agree with the district court and PolyOne. Under PolyOne's interpretation, the spouse of an individual who retired early at age fifty-five and passed away at age fifty-seven would never receive the promised Special Medicare Benefit even though he or she remained alive and never remarried.

Looking to another provision of the EBAs, § 12.14 also promises health benefits to the surviving spouse of a retiree until the spouse's death or remarriage. According to § 12.14:

> The surviving spouse of an Employee who is retired by the Company on or after the effective date of this Agreement *shall continue to be eligible to receive such benefits to the earlier of the date of death or remarriage*, provided such spouse, as of the date of death of such retired former Employee, was covered for these benefits as an eligible dependent . . . .

JA at 184 (emphasis added). Accepting PolyOne's interpretation would require this court to rewrite § 12.14 to say that the spouse of a deceased retiree "shall continue to be eligible to receive such benefits to the earlier of the date of death or remarriage, *or the expiration of this agreement*." No such limiting language is found in § 12.14, and courts should not add words to a contract under the guise of construing it. *See* Richard A. Lord, Williston on Contracts § 31:5 (4th ed. 2007); *see also Bidlack*, 993 F.2d at 608 (explaining that such a provision does not say retiree benefits will be provided to surviving spouses "'when they die or the collective bargaining agreement expires, whichever occurs first' but simply when they die"). As with the promises made in § 12.15(h), holding that Plaintiffs' health benefits have not vested would render § 12.14's promise of health benefits until death or remarriage illusory for the spouses of deceased retirees in violation of precedent.

4. Presence of Specific Vesting Language in Pension Provision

Next, PolyOne argues that the fact that the EBAs used explicit vesting language with regard to pension benefits leads to the conclusion that the absence of such explicit vesting language in the retiree health benefits provisions indicates that they have not vested. The district court was persuaded by this argument, noting that Article 6 of the EBA "contains strong language stating that pension payments shall be payable monthly 'during the life of such Employee, the last payment thereof being payable for the month in which he dies.'" *Noe*, 2006 WL 3759601, at *4 (quoting § 6.1(a) of the EBA, JA at 197). According to the district court, the absence of such language in the retiree health benefits portion of the EBAs suggests that the parties did not intend for them to vest.

However, the district court neglected to notice the similarity between § 6.1(a)'s language and that found in § 12.15(h), which provides that the Special Medicare Benefit will commence when the

retiree reaches age sixty-five and "[t]he payment of such Benefit shall continue until the individual's death." JA at 185. In our opinion, § 6.1(a)'s promise to pay a monthly pension "during the life of such employee" is indistinguishable from § 12.15(h)'s promise to pay the Special Medicare Benefit "until the individual's death." It is axiomatic that promising to provide a benefit for an individual's life (§ 6.1(a)) is the functional equivalent of promising to provide a benefit until an individual's death (§ 12.15(h)). Any argument to the contrary is mere semantics and defies common sense.

In the same vein, PolyOne asserts that the presence in § 8.5 of language specifically indicating that pension benefits survive the expiration of the EBAs, and the absence of such language with regard to retiree health benefits demonstrates that Plaintiffs' health benefits have not vested. Section 8.5 states: "No Pension or other benefit granted prior to the time of such termination shall be reduced, suspended or discontinued except as specifically provided in this Pension Plan." JA at 201. The force of this argument is blunted first by the provisions discussed above that under our precedent do indicate an intent to vest, and second by the existence of various provisions in the EBAs that have specific termination language, whereas the retiree health benefits provisions have none.

The presence of specific durational language in other provisions and its absence in the retiree health benefits provisions suggests an intent to vest under our case law. *See Yard-Man*, 716 F.2d at 1481-82. Here, there are several provisions that contain the specific durational provisions referred to by *Yard-Man*. First, § 12.9 explains that in the event of a layoff an employee shall receive health coverage for three months following the date of lay-off. JA at 220-21. Second, § 12.10 specifies that an employee who is terminated because of a plant closure is entitled to medical benefits under the EBAs for a twenty-four month period. *Id.* Third, § 12.11 states that an employee on an authorized leave of absence shall receive health coverage for "a period not to exceed three (3) months." *Id.* The inclusion of specific durational language "in other provisions of the current collective bargaining agreement suggests that retiree benefits, not so specifically limited, were intended to survive the expiration of successive agreements." *Yard-Man*, 716 F.2d at 1481-82; *see also Yolton*, 435 F.3d at 582 (discussing, with approval, the district court's citation of specific durational provisions in the CBAs for laid-off employees and those on maternity leave as evidence that retiree benefits vested under *Yard-Man*).

Thus, these arguments, essentially predicated on the *expressio unius est exclusio alterius* canon of interpretation, work to the benefit and detriment of each party. Accordingly, the language in § 8.5 offers little support for PolyOne's argument that Plaintiffs' health benefits were not intended to vest. This is especially true given the various provisions discussed above that indicate an intent to vest Plaintiffs' health benefits.[4]

---

[4]Given our conclusion that the plain language of the EBAs indicates an intent to vest retiree health benefits, the consideration of extrinsic evidence is unnecessary. However, we pause to note that our interpretation of the EBAs finds considerable support in the available extrinsic evidence. *See, e.g.*, Affidavit of Anna May Wilder, JA at 104-05 ("When I began receiving the BFGoodrich health insurance benefits after my husband's death, I was told that it would be paid 'like it is' for my life by the woman who helped me. That person was a representative of BF Goodrich Company."); Affidavit of William Duncan, Jr., JA at 113-14 ("When I retired I spoke with Karen Hicks. She told me at that time that the only loss I would have by retiring would be a partial loss of my life insurance."); Deposition of Kimberly K. Reilly, JA at 595 (indicating that while employed in BFG's human resources department she instructed retirees consistent with her training that their health benefits would be provided for the rest of their life). This type of extrinsic evidence was held to be evidence of vesting in *Yolton*. *See Yolton*, 435 F.3d at 583. Looking to the extrinsic evidence relied on by PolyOne, we are unconvinced that the letter of Ms. Allison Beck, Assistant General Counsel to the Machinist's Union, casts any doubt on our conclusion that the EBAs indicate an intent to vest. As Plaintiffs point out, the letter contains a general statement of law that, unlike pension benefits, retiree health benefits may be altered upon the expiration of the applicable CBA. The letter indicates that Ms. Beck was speaking in generic terms and not on the basis of the contractual language of the EBAs involved in this case. Ms. Beck is correct that nothing in ERISA prevents an employer from terminating retiree health benefits at the end of a CBA; however, under our case law termination of health benefits is forbidden when—as here—the language of the agreements themselves indicates an intent to provide

As the foregoing analysis makes clear, there is nothing earth-shattering about our holding in this case; it is merely the straightforward application of this circuit's case law.[5] The dissent's contention that we have turned *Yard-Man* into some sort of a presumption in favor of vesting is premised on a misreading of the court's opinion. One can search this opinion in vain for any indication—or even a suggestion—that we presume retiree health benefits were intended to vest absent a clear statement to the contrary. All we have done today is follow the instructions of *Yard-Man* and its progeny by examining the provisions of the EBAs and applying traditional principles of contract interpretation to ascertain whether the parties intended to vest retiree health benefits. *See Yard-Man*, 716 F.2d at 1479-80. While the dissent is correct that—beginning with *Yard-Man*—this court has approached the vesting issue differently than have many of our sister circuits, this panel is not at liberty to cast aside nearly twenty-four years of precedent in order to charter a new course, no matter how desirable that new course may be.

Having addressed the EBAs and explained why the district court erred in granting summary judgment for PolyOne, we proceed now to analyze whether Plaintiff Hood's health benefits under the Flex Program have vested.

D. The Flex Program

Unlike the other Plaintiffs, Plaintiff Hood's health benefits are governed by the Flex Program because her now-deceased husband retired from BFG in 1990, two years after the Flex Program replaced the EBAs. Although it is clear from our review of the record that the provisions of the Flex Program differ from those in the EBAs, the district court's opinion failed to address whether Plaintiff Hood's benefits have vested under the Flex Program. In all likelihood, the district court's failure to address this issue resulted from the parties' failure to explain to the court how Plaintiff Hood's claim differed from that of the other Plaintiffs. Similarly—aside from PolyOne's brief mention of a reservation of rights clause found in the Flex Program's Summary Plan Description—neither party has provided this court with any analysis of the Flex Program's language or argument as to whether it evinces an intent to vest retiree benefits. Accordingly, whether Plaintiff Hood's benefits have vested under the Flex Program is an issue that the district court must consider on remand.

III. CONCLUSION

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 performance, it is not the prerogative of the judiciary to rewrite contracts in order to rescue parties from "their improvident commitments." *Bidlack*, 993 F.2d at 609. Because the district court erred in concluding that the EBAs do not indicate an intent to vest Plaintiffs' health benefits, we **VACATE** the district court's decision granting summary judgment for PolyOne and **REMAND** the matter for further proceedings consistent with this opinion.

---

such benefits beyond the term of a particular agreement.

[5]Illustrative of this point is the fact that, of the eleven most pertinent Sixth Circuit cases addressing whether retiree health benefits have vested, this court found evidence of vesting in ten. *See Yard-Man*, 716 F.2d at 1478; *Policy*, 770 F.2d at 611; *ABS Indus., Inc.*, 890 F.2d at 846; *Weimer*, 773 F.2d at 676; *Loral*, 1997 WL 49077, at *3; *Golden*, 73 F.3d at 657; *McCoy*, 390 F.3d at 422; *Maurer*, 773 F.3d at 917-18; *BVR Liquidating, Inc.*, 190 F.3d at 775; *Yolton*, 435 F.3d at 581-85.

CONCURRING IN PART, DISSENTING IN PART

SUTTON, Circuit Judge, concurring in part and dissenting in part. Applying the *Yard-Man* line of cases to these agreements, the district court concluded as a matter of law that the claimants' healthcare benefits do not vest upon retirement. Applying the same cases to these agreements, the majority concludes as a matter of law that the claimants' healthcare benefits do vest upon retirement. They are both partly right, which is why I would not rule as a matter of law for either party and which is why I respectfully concur in part and dissent in part.

My first objection to the majority's approach is its treatment of the claimants as if the employee-benefit agreements covered them directly. That is not the case. The agreements bear on this case only because a separate memorandum of understanding incorporates them. And that memorandum independently limits any expectations claimants otherwise might have about their future healthcare benefits. As agreed to by the claimants, the memorandum says that, if certain other unions representing other BFGoodrich workers change their members' retiree health benefits—in negotiations not involving the claimants' union, no less—those changes immediately will alter the benefits of the soon-to-be retirees of the claimants' union. *See* JA 646 ("[I]f during the term of this Agreement the Plan or Programs are changed for [the] majority [of BFGoodrich's other production and maintenance employees], such changes shall be made effective on the same date they are made effective for [that] majority . . . and remain in effect for the life of this Agreement."). That means that, if these other unions and BFGoodrich amend their plans and eliminate (or curtail) retiree health benefits, the soon-to-be-retirees of the claimants' union, even someone who planned to retire the next day and anticipated receiving health benefits for life, will be stuck with the change—at least until the next round of negotiations. That is not the kind of provision that naturally inspires a worker to believe his benefits are fixed for life.

The durational language in § 16.4 of the employee-benefit agreements likewise undercuts the claimants' argument that their benefits are immutable for life as a matter of law. It says that, "[u]pon termination, this Agreement shall terminate in all respects except that the benefits provided by it shall be extended for ninety (90) days following such termination." On its face, the agreement undermines any expectation that the healthcare benefits a worker happens to receive at retirement are the benefits he will receive throughout retirement.

Our cases, it is true, appear not to give any weight to "general" durational clauses in collective bargaining agreements when those clauses do "not specifically refer to the duration of benefits." *UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1482 (6th Cir. 1983). In *Yard-Man*, we gave no weight to a durational clause providing that the CBA should remain in effect until a particular date because the clause did not "specifically refer to the duration of benefits." *Id.* Similarly, in *Maurer v. Joy Technologies, Inc.*, 212 F.3d 907 (6th Cir. 2000), we concluded that provisions indicating that the CBA and certain other agreements shall terminate on a particular date were "general in nature" because they "only refer[red] to agreements between the parties, *not to benefits* created by the agreements." *Id.* at 918 (emphasis added). But § 16.4 of the agreement does "specifically refer to the duration of benefits." Indeed, this language satisfies even the suggestion in *Yolton* that the durational clause must refer to the "retiree benefits themselves." *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 581 (6th Cir. 2006). Surely one type of benefits to which the clause could be referring is retiree benefits. If the majority means to say that a durational clause means nothing unless it says that "retiree health benefits" terminate (or may be terminated) at a given point, then it must be saying what our cases (including *Yolton* itself) have long disclaimed saying—that the *Yard-Man* inference creates a presumption in favor of vesting that may be countered only by a clear statement. *See id.* at 579. More on that later.

Nor do I believe that the tying language in § 12.7(k) of the agreement—which says that "[e]mployees who retire and who are eligible under this Agreement for a pension . . . shall receive the Major Medical Benefits described in this Paragraph 12.7"—compels the view that claimants have unalterable benefits for life. *McCoy* and *Golden* are not the holy grails claimants say they are because those cases (like *Yolton*) reviewed preliminary injunctions granted by the district court, not a district court's resolution of summary-judgment motions. *See McCoy v. Meridian Auto. Sys., Inc.*, 390 F.3d 417, 419 (6th Cir. 2004); *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 651 (6th Cir. 1996). At issue there was the abuse-of-discretion question whether the district court properly assessed plaintiffs' likelihood of success and the balancing of equities caused by an immediate termination of healthcare benefits, not the de-novo question whether the plaintiffs should prevail as a matter of law. Nor do those cases indicate whether the agreements contained benefits-specific durational language, as in this case, or whether a memorandum of understanding between the union and company limited any expectations otherwise created by the agreements. While I agree with the majority that the district court should not have disregarded the tying language, I respectfully disagree with the majority that this language "leads inescapably to the conclusion that the district court erred in granting summary judgment for PolyOne." No case, to my knowledge, holds that tying language alone suffices to permit retirees to fend off summary judgment—much less to mandate that the benefits vested as a matter of law.

That is particularly so here in view of the conspicuous inclusion of vesting language in the pension benefits section of the agreement and its conspicuous omission in the healthcare benefits section of the agreement. The pension section of the agreement says: "No Pension or other benefit granted prior to the time of [the] termination [of the Pension Plan] shall be reduced, suspended or discontinued except as specifically provided in this Pension Plan. In the event of termination or partial termination of this Pension Plan, the rights of the Employees to benefits accrued to the date of such termination, to the extent then funded, shall be nonforfeitable . . . ." Now *that* is vesting language. Yet nothing like it appears in the healthcare benefits section of the agreement. If our cases are going to rely on similarities between pension benefits and healthcare benefits (such as similar eligibility dates) in determining what has vested, they should not ignore marked differences (such as different language about vesting) in making the same inquiry. Either they both are relevant to the vesting question, or neither is.

Although §§ 12.15(h) and 12.14 of the agreement provide some support for the retirees' claim, they too do not establish unalterable benefits for life. Section 12.15(h), as the retirees emphasize, says that "a Special Medicare Benefit" will be paid to certain employees, pensioners and surviving spouses. But the retirees overlook the first sentence of that provision, which adds that those individuals will be provided with "a Special Medicare Benefit" only "*if such Employee, Pensioner or surviving spouse is covered for Medical Benefits under this Article 12.*" (emphasis added). Read together with the introductory language to Article 12—which says that the company will provide the benefits discussed in Article 12 "for the duration of this Agreement"—this provision does not unambiguously vest the retirees' health benefits. The claimants' reliance on § 12.14 suffers from a similar problem.

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? *See Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 615 (6th Cir. 1985) ("The court finds that this section unambiguously confers the *stated* health insurance benefits for the duration of the retiree's life.") (emphasis added). And if it is all retiree benefits, are there any limitations? "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 in health benefits available to the retiree but with no compulsion to take any reduction?" *Prater v. Ohio Educ. Ass'n*, 505 F.3d 437, 441 (6th Cir. 2007). 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?

While there is no reason to think the company is heading in this direction, I fail to see how we can hold that benefits have vested as a matter of law when we do not know what has vested and on what terms. In a case like this one—where the memorandum of understanding and durational language point in the company's direction, the tying language (at least some of it) and §§ 12.14 and 12.15(h) point in the retirees' direction and the extrinsic evidence points in both directions—I would prefer to leave these contractual ambiguities for resolution in the forum in which they belong: a jury.

One last point. The majority's conclusion to the contrary suggests that the *Yard-Man* inference has become a rebuttable presumption—one that may be overcome only by a clear-statement reservation of rights. "[A]bsent specific durational language referring to retiree benefits themselves," as the majority puts it, healthcare benefits vest as a matter of law.

The majority disclaims doing any such thing. "*Yard-Man*," it says, "does not create a legal presumption that retiree benefits are interminable" but rather "is properly understood as creating an inference only if the context and other available evidence indicate an intent to vest." We have said the same thing before. *See, e.g.*, *Yolton*, 435 F.3d at 580 ("[U]nder *Yard-Man*, there is no legal presumption that benefits vest and . . . the burden of proof rests on plaintiffs. This Court has never inferred an intent to vest benefits in the absence of either explicit contractual language or extrinsic evidence indicating such an intent.") (internal quotation marks, citations and alterations omitted).

But other circuits and observers, looking at what we have said *and* done in applying the *Yard-Man* inference have called it a presumption. *See, e.g.*, *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 543 (7th Cir. 2000) ("One case [*i.e.*, *Yard-Man*] holds that benefits are *presumed* to vest if they are conferred by a collective bargaining agreement . . . .") (emphasis added); *UAW v. Skinner Engine Co.*, 188 F.3d 130, 140 (3d Cir. 1999) ("We cannot agree with *Yard-Man* and its progeny that there exists a *presumption* of lifetime benefits in the context of employee welfare benefits.") (emphasis added); *Am. Fed'n of Grain Millers v. Int'l Multifoods Corp.*, 116 F.3d 976, 980 n.3 (2d Cir. 1997) (citing *Yard-Man* as a case that "apparently *presum[ed]* that retiree benefits are vested") (emphasis added); Roger C. Siske et al., What's New in Employee Benefits (ALI-ABA Course of Study, July 1–5, 2002), WL SH011 ALI-ABA 59, 322 ("The Sixth Circuit *presumes* vesting and requires a clear statement of termination to prove otherwise.") (emphasis added).

I see their point. What started out as a potential inference became an omnipresent presumption and now appears to have become a clear-statement rule. Unless a company can point to explicit language in the relevant agreement stating that "retiree benefits" terminate at a particular date or do not vest, the benefits seem to vest as a matter of law. What we continually disclaim presuming we continually seem to presume.

In the majority's defense, perhaps the problem is the ineffable nature of the inference. If we were writing on a clean slate, I could imagine three straightforward approaches to the problem. One: adopt the position of several circuits and create a presumption against vesting because a company's unchangeable promise to pay healthcare benefits for life is a significant and unusual one—particularly when it arises from a three-year contract. *See Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 606–07 (7th Cir. 1993) ("No doubt a court should cast a cold eye on contentions that a contract with a fixed term actually created a perpetual obligation, and should, therefore, . . . presume

that a collective bargaining agreement ceases to obligate the employer when the agreement's term (invariably three years) is up."); *see also Skinner*, 188 F.3d at 139 ("[I]t must be remembered that to vest benefits is to render them forever unalterable. Because vesting of welfare plan benefits constitutes an extra-ERISA commitment, an employer's commitment to vest such benefits is not to be inferred lightly and must be stated in clear and express language."); *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 855 (4th Cir. 1994) (same); *cf. Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1517 (8th Cir. 1988) ("disagree[ing] with *Yard-Man* to the extent that it recognizes an inference of an intent to vest" and suggesting that "there must be a specific, if not written, expression of the employer's intent to be bound") (internal quotation marks omitted).

Two: adopt the position no circuit has yet taken that there should be a presumption in favor of vesting because retirees who lose benefits often are not in a position either to return to work or to require their union to negotiate new benefits.

Three: do not adopt any presumption because these contracts should be interpreted no differently from other collectively bargained contracts. *See generally Senior v. NSTAR Elec. & Gas Corp.*, 449 F.3d 206, 218 (1st Cir. 2006) (applying the "traditional principles of labor contract interpretation" because, among other reasons, using a presumption or requiring "certain customary words" might "interfere with the correct interpretation . . . of the understanding reached by the parties" and "Congress could easily have created interpretive presumptions by statute" but chose not to).

Yard-Man contemplates an in-between inference—not quite a presumption in favor of vesting but not quite a straight interpretive question either. Yet I wonder whether that slices things so finely that it places the rule beyond predictable and fair application—a little like adopting a standard of review between intermediate and strict scrutiny or a level of deference between *Chevron* and *Skidmore*.

Making this particularly puzzling is that we have adopted the opposite rule—a presumption *against* vesting—in the context of employment agreements that are *not* collectively bargained. *See Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998) (en banc) ("To vest benefits is to render them forever unalterable. Because vesting of welfare plan benefits is not required by law, an employer's commitment to vest such benefits is not to be inferred lightly; the intent to vest must be found in the plan documents and must be stated in clear and express language.") (internal quotation marks omitted). One might have thought that we would apply the same rule in both settings or, if we were to put a thumb on just one of the scales, we would do so only where the employee *did not* have the benefit of a union negotiating the contract.

The salient point is that the inference, as this case well shows, has become a presumption. And we should either say that is what we are doing—and spare future panels, the district courts and litigants the confusion the inference has created—or abandon the inference altogether.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

STANLEY WOTUS, et al.,	)	**CASE NO. 5:00 CV 2604**
	)	
Plaintiffs,	)	**JUDGE DAN AARON POLSTER**
	)	
vs.	)	**MEMORANDUM OF OPINION AND ORDER**
	)	
GENCORP, INC. (formerly General Tire & Rubber Co.), GENCORP INSURANCE PROGRAM, OMNOVA SOLUTIONS, INC., and OMNOVA INSURANCE PROGRAM	)	
	)	
Defendants.	)	

Before the Court is Plaintiffs' Stanley Wotus, John Van Dyke, Edward Peksa, Frank Polumbo, Joseph Adams, Kenneth Bottolfs, Robert Berger, George Nugen, and Steve Varonka's ("Plaintiffs") Motion for Class Certification, **ECF No. 101,** and Brief in Support, ECF No. 102. Defendants OMNOVA ("OMNOVA") and GenCorp ("GenCorp") filed Responses in Opposition. ECF Nos. 108 and 109. Plaintiffs filed a Reply brief, ECF No. 118, and GenCorp and OMNOVA filed Surreply briefs, respectively ECF Nos. 120 and 121.

For the following reasons, the Court concludes that Plaintiffs have met their burden of establishing that all four prerequisites for class certification under Rule 23(a) have been satisfied.

However, Plaintiffs have failed to establish that certification is appropriate under either Rule 23(b)(2) or (b)(3). Accordingly, Plaintiffs' Motion for Class Certification is **DENIED**.

I. Background

The above-referenced case is a proposed class action brought by retired hourly employees of GenCorp and its spin-off corporation OMNOVA concerning a reduction in their medical benefits. All nine named Plaintiffs receive medical benefits pursuant to Pension and Insurance Agreements ("PIAs") and Memoranda of Agreement ("MOA") negotiated by the International Union of Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC ("URW") and the particular plant at which they were employed. Although Plaintiffs received medical benefits at no cost for a number of years, in January 2000, GenCorp and OMNOVA began requiring Plaintiffs to pay a monthly premium for their benefits. Plaintiffs, on behalf of the participants at the twelve plants, brought this lawsuit under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), and under Section 502(a)(1)(B) and (a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1132 (a)(1)(B) and (a)(3).

II. Law

Under Federal Rule of Civil Procedure 23(a) one or more members of a class may sue as representative parties on behalf of all only if all four requirements to maintaining a class action are met: numerosity, commonality, typicality, and adequacy of representation. The party seeking class certification bears the burden of proving each of these requirements. *In re American Medical Systems, Inc.*, ("*American Med. Sys.*") 75 F.3d 1069, 1079 (6th Cir. 1996) (citations omitted). "Once those conditions are satisfied, the party seeking certification must also demonstrate that it falls

within at least *one* of the subcategories of Rule 23(b)." *Id.* (emphasis in original).

The Supreme Court has held that when questions of Article III jurisdiction and class certification are presented, the class certification issues "should be treated first because class certification issues are 'logically antecedent' to Article III concerns." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (citing, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612 (1997)). In deciding whether to certify a class, a court should not consider the merits of the case. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). OMNOVA challenges the proposed class certification based on the theory that Plaintiffs lack standing to assert a claim against OMNOVA. *ECF No. 108* at 13 n.14. OMNOVA contends that under the terms of the spinoff from GenCorp under which it was created, OMNOVA assumed no liability for retiree benefits. According to GenCorp, however, on October 1999, OMNOVA took responsibility for the medical benefits of all retirees from the Jeannette (PA), Newcomerstown (OH), and Logansport (IN) plants. *See ECF No. 109*, Defendant GenCorp's Opposition Brief, at 1 n.1. The Court finds that whether or not OMNOVA assumed responsibility for the medical benefits of these retirees at the time of the spin-off goes to the merits of the case. This issue is not appropriate for the Court to consider when deciding class certification. *See Eisen*, 417 U.S. at 178.

"A court must accept as true the factual allegations contained in the complaint." *In re Revco Securities Litigation*, 142 F.R.D. 659, 662 (N.D. Ohio 1992) (citing *Shelter Realty Corp. v. Allied Maintenance Corp.*, 574 F.2d 656, 661 n.15 (2d Cir. 1978)). However, in order to resolve the question of class certification the court may "probe behind the pleadings before coming to rest on the certification question." *General Telephone Co. of Southwest v. Falcon*, ("*Falcon*") 457 U.S. 147,

160 (1982). "In ruling on a class action a judge may consider reasonable inferences drawn from facts before him at that stage of the proceedings." *Senter v. General Motors Corp.*, 532 F.2d 511, 523 (6th Cir. 1976). Even after certification, the district court may decertify a class if there is a subsequent showing that the grounds for granting certification no longer exist or never existed. *Falcon*, 457 U.S. at 160.

III. Rule 23(a) Analysis

Here, Plaintiffs ask the Court to certify the class consisting of:

> A. All Retired Former Hourly Employees ("Hourly Retirees"):
> (1) who were participating as of December 31, 1999, in the GenCorp Hourly Retiree Medical and Prescription Drug Plan or OMNOVA Hourly Retiree Medical and Prescription Drug Plan (collectively the "Plan");
>
> (2) who retired during the period listed below for his or her applicable workplace:
>
> > Akron, OH: retired prior to December 1, 1984
> > Bryan, OH: retired prior to December 1, 1984
> > Charlotte, NC: retired prior to December 1, 1984
> > Columbus, MS: retired prior to May 15, 1995
> > Evansville, IN: retired prior to July 1, 1995
> > Jeannette, PA: retired prior to July 1, 1996
> > Logansport, IN: retired prior to July 18, 1983 and retired prior to February 14, 1996
> > Marion, IN: retired prior to August 1, 1996
> > Mayfield, KY: retired prior to December 1, 1984
> > Newcomerstown, OH: retired prior to Oct[ober] 6, 1994
> > Odessa, TX: retired prior to December 1, 1984
> > Waco, TX: retired prior to December 1, 1984
>
> (3) as to whom the United Steelworkers of America and its locals, or formerly the United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO-CLC and its locals (the "union") had been the

collective bargaining representative at the time of their retirement; and

(4) who, prior to enrolling in the Plan in (1) above, had received retiree medical benefits pursuant to collectively-bargained Pension and Insurance Agreements ("PIAs") between GenCorp and the Union at the plants listed in A(2) above.

B. All Spouses of Hourly Retirees who were participating as of December 31, 1999, in the Plan;

C. All Surviving Spouses of either (1) Hourly Retirees meeting the conditions listed in A(2)-A(4) above or (2) former GenCorp hourly employees (represented by the Union) who died while still working but eligible for retirement. To be included in the class, Surviving Spouses must have been participating in the Plan as of December 31, 1999, and continuing class membership is contingent on Surviving Spouses maintaining their status as "surviving spouses" defined by the Plan; and

D. All Dependents of (1) Hourly Retirees meeting the conditions listed in A(2)0A(4) above or (2) former GenCorp hourly employees (represented by the Union) who died while still working but eligible for retirement. To be included in the class, Dependents must have been participating in the Plan as of December 31, 1999, and continuing class membership is contingent on Dependants maintaining their status as "dependents" defined by the Plan.

E. Notwithstanding the foregoing, Plaintiffs seek to exclude from the definition of the class any participants or classes of participants who have or had their own separate lawsuits on this issue, such as the lawsuit in the case of *Divine, et al., v. GenCorp, Inc.*, Civil No. 3:96CV0296AS, which covered only retirees from the Wabash, Indiana, plant, and which ended in a class action settlement approved by court order of December 22, 1997.

ECF No. 102, Plaintiffs' Brief in Support of Motion for Class Certification, at 9-11. Defendants do not challenge the definition of this proposed class.

A. Numerosity

Federal Rule of Civil Procedure Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." The Sixth Circuit has explained that "[t]here is no strict numerical test for determining impracticability of joinder." *American Med. Sys.*, 75 F.3d at 1079 (citing *Senter*, 532 F.2d at 523 n.24). "When class size reaches substantial proportions, however, the impracticability requirement is usually satisfied by the numbers alone." *Id.* (citing Herbert B. Newberg & Alba Conte, Newberg on Class Actions, § 3.05 at 3-26 (3d ed. 1992)). In the instant case, Plaintiffs have alleged that the proposed class consists of approximately 2063 retirees. Defendants do not dispute that the numerosity requirement of Rule 23(a)(1) is satisfied, and the Court concludes that Plaintiffs have sufficiently met the numerosity factor.

B. Commonality

Rule 23(a)(2) requires for certification that "there are questions of law or fact common to the class." Fed.R.Civ.P. 23(a)(2). "The commonality test 'is qualitative rather than quantitative, that is, there need be only a single issue common to all members of the class.'" *American Med. Sys.*, 75 F.3d at 1080 (citing 1 Newberg, *supra*, § 3-10 at 3-50). Plaintiffs have asserted the following common questions:

> (1) whether the reductions in retiree medical benefits are actionable under Section 301 of the LMRA, 29 U.S.C. § 185(a), on the grounds that class members' retiree medical benefits were covered by virtually identical labor agreements between GenCorp and the Union, and that defendants GenCorp and OMNOVA breached obligations under these agreements; and
>
> (2) whether the reductions in retiree medical benefits are actionable under Section 502(a)(1)(B) and (a)(3) of ERISA, 29 U.S.C. §§

> 1132(a)(1)(B) and (a)(3), since the labor agreements are governing Plan documents, the terms of which GenCorp and OMNOVA have violated.

ECF No. 102 at 16.

As support for commonality, Plaintiffs cite several cases. *Bittinger v. Tecumseh Products Co.*, 123 F.3d 877 (6th Cir. 1997) is the one most analogous to the instant case. In *Bittinger*, the plaintiff retirees brought an action under the LMRA and ERISA alleging that they were guaranteed fully-funded medical insurance benefits for their lifetime pursuant to a collective bargaining agreement. 123 F.3d at 879. The plaintiffs had fully-funded medical benefits until 1991 when the defendant notified the retirees that the defendant would only partially fund their medical benefits. *Id.* In order to participate in the new medical benefit plan, the plaintiffs were required to sign releases of claims against the defendant. *Id.* On appeal to the Sixth Circuit, the defendant contended that there were no common questions of law or fact common to the proposed class. *Id.* at 884. The Sixth Circuit explained that, in a retiree benefit case, the fact that "each class member claims that the original collective bargaining agreement guaranteed them lifetime, fully-funded benefits" satisfied the commonality requirement. *Id.* The court held that this common question is all that is required under Rule 23(a)(2). *Id.*

To counter Plaintiffs' argument, GenCorp cites *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998). A careful review of the *Sprague* case reveals that GenCorp's reliance is misplaced. The *Sprague* early and general retirees claimed that their health care benefits were guaranteed for their lifetime under ERISA. 133 F.3d at 392. The Sixth Circuit noted that when the lawsuit began the early and general retirees did share common issues. *Id.* at 397. At issue was the proper interpretation of the welfare plan that governed all retirees along with the significance of a

common summary plan. *Id.* However, by the time the district court ruled on the class certification, these common issues were resolved. *Id.* at 397-98. The district court did not certify the class until after it ruled "(a) that the plan unambiguously reserved [defendant] GM's right to amend or terminate the plan, and (b) that the summaries did not change the reservation of this right." *Id.* at 398.

The Sixth Circuit held that the remaining issues, bilateral contract and estoppel, were not common issues appropriate for class certification. *Sprague*, 133 F.3d at 398. Specifically, the court held that the bilateral contract was not a common issue because GM made individual "side deals" with each early retiree. *Id.* Additionally, the court held that the plaintiffs' estoppel theory required proof of what was said, how the person interpreted those statements, and whether the person justifiably relied on the statements. *Id.* Therefore, the estoppel claim was also not appropriate for class certification. *Id.* In the instant case, Plaintiffs never asserted a bilateral contract claim, and they dropped their estoppel claims in the Second Amended Complaint.

GenCorp argues that Plaintiffs lack commonality because the Court must examine the oral presentations and promises made to the retirees in regard to the Enrollment Form. "[T]he commonality requirement is not satisfied where the Court must examine alleged oral and other individualized promises to determine whether plaintiffs have a claim." *Walther v. Pension Plan for Salaried Employees*, 880 F.Supp. 1170, 1178 (S.D. Ohio 1994). However, this quote is taken out of context. In *Walther*, the plaintiffs were not part of a collective bargaining unit. *Id.* The plaintiffs alleged that no plan and/or summary plan description of the defendants' Insurance Plan ever existed. 880 F.Supp. at 1178. The court, accepting as true the plaintiffs' allegations, held that "[i]n the absence of at least one common written document distributed to all members of the class, in which an objective determination as to its

misleading nature could be made, there is no means of handling the Insurance Plan Plaintiffs' claim in a class action." *Id.*

Here Plaintiffs' claim is that the collective bargaining agreements, not the Enrollment Form as GenCorp argues, vested Plaintiffs with rights to lifetime, fully-funded medical benefits. As noted, *supra,* a court is prohibited from considering the merits of the case when ruling on class certification, and must accept as true the factual allegations contained in the complaint. The Court must therefore accept as true Plaintiffs' allegations that 1) the retiree medical benefits of all Plaintiffs and proposed class members were described in and provided through successive labor agreements; 2) GenCorp negotiated these agreements with the International Union of the United Rubber, Cork, Linoleum and Plastic Workers of American, AFL-CIO-CLC ("Union"); 3) these labor agreements were negotiated as part of "pattern bargaining" between employers in the U.S. rubber industry and the Union; and 4) similar language from all of the agreements promised lifetime retiree medical benefits for retirees and surviving spouses. *ECF No. 98* at ¶¶ 17-20.

Since Plaintiffs allege that each retiree was guaranteed lifetime, fully-funded benefits under a collective bargaining agreement, each member received the same plan or summary, and each seek the same relief,[1] Plaintiffs have satisfied Rule 23(a)'s commonality requirement.

C. Typicality

The typicality requirement of Rule 23(a) is intended to assure that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed.R.Civ.P. 23(a)(3).

---

[1] Plaintiffs seek injunctive and declaratory relief as well as reimbursement of past premium fees which were allegedly unlawfully charged by Defendants.

Factual differences will not render a claim atypical if the claim "arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *In re Telectronics Pacing Sys., Inc.*, 168 F.R.D. 203, 214 (S.D.Ohio 1996) (quoting *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983)). The Sixth Circuit has explained that "a representative's claims need not always involve the same facts or law provided there is a common element of fact or law [which unites the claims of the representatives and the class]." *Senter*, 532 F.2d at 525 n.31. The typicality requirement is intended to assure that the named plaintiffs' interests are aligned with those of the absent class members so that the named plaintiffs will advance the interests of the class members. *American Med. Sys.*, 75 F.3d at 1083 (citation omitted).

In the instant case, Plaintiffs contend that Defendants originally planned to provide lifetime, fully-funded medical benefits to retirees. GenCorp argues that the required typicality of claims is not met because the circumstances surrounding each Plaintiff's signing of the Enrollment Forms has resulted in a multitude of different understandings of the purpose, scope, and impact of the Forms. *See ECF No. 109*, GenCorp's Opposition Brief, at 10-15. In a very similar case, however, the Sixth Circuit has held that "if the evidence varies from plaintiff to plaintiff it would not affect this basic claim." *Bittinger*, 123 F.3d at 884 (a class was certified despite defendants' contention some class members retired before retiree benefits were mandatory subjects of bargaining, and some class members signed a release.) *See American Med. Sys*, 75 F.3d at 1083 (holding that a claim is typical if it arises from the same course of conduct).

The named Plaintiffs are retired employees who were originally granted fully-funded medical

health coverage, and then eventually were required to pay a monthly premium for their benefits. There has been a showing that all members of the proposed class have been similarly affected by the same employment practices. Here, Plaintiffs' claims arise from a single course of conduct by Defendants. If Plaintiffs' claims fail on the merits, so too would the claims of all members of the proposed class. Accordingly, The Court concludes that Plaintiffs claims meet the Rule 23(a)(3) typicality requirement.

D. Adequacy of Representation

The final prerequisite to class certification requires that "the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). In *Senter*, the Sixth Circuit identified two criteria for determining whether the representation of the class will be adequate: "1) [t]he representative must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." 532 F.2d at 524-25 (citing *Gonzales v. Cassidy*, 474 F.2d 67, 73 (5th Cir. 1973)). In *Cross v. National Trust Life Insurance Co.*, 553 F.2d 1026, 1031 (6th Cir. 1977), the Sixth Circuit held: "[i]n making the determination of adequacy of representation the district court should consider the experience and ability of counsel for the plaintiffs and whether there is any antagonism between the interests of the plaintiffs and other members of the class they seek to represent." This requirement overlaps with the typicality requirement. *American Med. Sys.*, 75 F.3d at 1083.

For the reasons stated in the discussion of typicality, *supra*, the Court finds the Plaintiffs have a common interest with the unnamed plaintiffs, and the Court agrees with Plaintiffs that their counsel can

adequately prosecute this case.[2] However, the Court finds that Mr. Wotus, Mr. Polumbo, and Mr. Peksa are not suitable to serve as class representatives. To serve as a class representative, a plaintiff must "vigorously prosecute the interests of the class." *American Med. Sys.*, 75 F.3d at 1083. In the instant case, both Mr. Wotus and Mr. Polumbo were too ill to be deposed. *See ECF No. 109*, Exh. R, Deposition of Edward Peksa, at 11-12.[3] In 1996, a district court held that the named plaintiff was not an appropriate representative because he did not know that he was a class representative and was not healthy enough to travel outside Oregon. *In re Telectronics*, 168 F.R.D. at 218. Likewise, in *Roundtree v. Cincinnati Bell, Inc.*, 90 F.R.D. 7,10 (S.D. Ohio 1979), the court held that plaintiff would be an inadequate representative because he lacked the necessary knowledge and his physical and mental conditions would make it "unlikely that he could vigorously pursue a class action." *See also American Med. Sys.*, 75 F.3d at 1069 (court found class representative was questionable because of psychological problems). The Court finds that because for health reasons it is unlikely that Mr. Wotus

---

2 Defendants do not contest that Plaintiffs' counsel is qualified.

3 In Defendants' response to the motion for class certification they allege that Mr. Wotus and Mr. Polumbo were too ill to be adequate representatives based on the following exchange that occurred during Mr. Peksa's deposition:

> Mr. Hoffman: By the way, Mr. Wotus and Mr. Palumbo were to be deposed, and I think you said, Mr. Stember, if and when either one is available. We just go from there. My understanding is Mr. Palumbo is more ill relative to Mr. Wotus, but you will let me know?
> Mr. Stember: That is correct.
> Mr. Hoffman: And we will work something out.
> Mr. Stember: And we will let you know, yes.

Since Plaintiffs did not address this allegation in their reply brief, the Court assumes they have conceded that Mr. Wotus and Mr. Polumbo are too ill to be adequate representatives. *See ECF NO. 118*.

and Mr. Polumbo could vigorously pursue this action, they are unsuitable to represent the members of the proposed class.

Defendants conducted depositions of the remaining named Plaintiffs. Six Plaintiffs testified that they read, understood, and signed the Enrollment Form.[4] However, in the case of Peksa, he did not read or fill out the Enrollment Form, but signed it after being instructed to do so by his wife. *ECF No. 109*, Exh. R, at 19-21. Mr. Peksa's claim is therefore not typical of the other proposed class representatives, nor presumably of the proposed class members. He therefore is not a suitable representative.

GenCorp contends that Plaintiffs' interests are antagonistic to the proposed class members because 1) Plaintiffs represent only five out of the twelve plants;[5] and some proposed class members have no objection to paying something for medical benefits because they are now receiving substantially greater coverage then before. *See ECF No. 109* at 19-20. GenCorp has cited no case law supporting it's theory that all plants must be represented in a class action. The express language of Rule 23 permits even a single representative to represent a class: "one or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (4) the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a). As one court noted, this refers to "quality of the representation," not quantity. *Cicero v. Olgiati*, 410 F.Supp. 1080, 1098 (S.D.N.Y.

---

4 *See ECF No. 109*, Exhs. N, at 16; 26; O, at 15-16; P, at 32-33; Q, at 21; 32; R, at 19-21; S, at 16; 27; and T, at 16, 18, and 33-34.

5 The following plants do not have a named plaintiff: Charlotte, North Carolina;, Columbus, Mississippi; Odessa, Texas; Bryan, Ohio; Evansville, Indiana; Logansport, Indiana; and Marion, Indiana.

1976) (citation omitted).

The Court is required to make certain that Plaintiffs' "interests are aligned with the proposed class and the they will take care to protect their interests." *Rumpke v. Rumpke Container Service, Inc.*, 205 F.R.D. 204, 210 (S.D.Ohio 2001). In *Thonen v. McNeil-Akron, Inc.*, 661 F.Supp. 1271,1272 (N.D.Ohio 1986), a rule 23(b)(3) class of retirees was certified in an action brought by four retirees who alleged ERISA and LMRA (breach of contract) claims. The defendants made the same argument as GenCorp makes in this case, namely that many retirees would prefer the current medical insurance benefit plan instead of the plan guaranteed under the collective bargaining agreement, rendering the plaintiffs' claims antagonistic to the interests of the class members. *Thonen*, 661 F.Supp at 1275. In support of this contention, the defendants presented an affidavit of an unnamed plaintiff who did not want to participate in the suit. *Id.* The district court held that this was insufficient to established antagonism or that the named plaintiffs could not adequately represent the class. *Id.* On the other hand, in *Rumpke*, the court held that the named plaintiff was not an appropriate class representative because defendants produced affidavits from almost every other class member stating that he/she did not want to be part of the lawsuit. 205 F.R.D. at 210-11.

In the instant case, there is no evidence that the remainder of the proposed class members do not wish to participate in this lawsuit or that antagonism between the named Plaintiffs and absent class members has emerged. After reviewing Plaintiffs' affidavits, the Court finds that the six remaining Plaintiffs[6] are capable and willing to proceed as class representatives and will vigorously prosecute the

---

[6] The six remaining named Plaintiffs are: John Van Dyke, Joseph Adams, Kenneth Bottolfs, Robert Berger, George Nugen, and Steve Varonka.

interests of the class through qualified counsel.

IV. Rule 23(b) Analysis

In addition to meeting the four requirements of Rule 23(a), Plaintiffs must also demonstrate that the certification falls within at least one of the subcategories of Rule 23(b). Rule 23(b) provides:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed.R.Civ.P. 23(b). Here, Plaintiffs move for certification under Rule 23(b)(2) or (b)(3); and GenCorp argues that Plaintiffs have failed to satisfy any of the requirements of either provision.[7]

---

[7] The Complaint seeks class certification under 23(b)(2) and (b)(3). In their motion for certification, Plaintiffs for the first time argue that certification is also appropriate under (b)(1). They appear to have abandoned this argument in their reply memorandum.

A. Rule 23(b)(3)

Federal Rule of Civil Procedure 23(b)(3) requires that "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Rule 23(b)(3), has two requirements: 1) common issues must "predominate" over individual issues, and 2) class treatment must be "superior" to other methods of adjudication. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 615 (1997). This predominance inquiry is "far more demanding" than Rule 23(a)'s commonality requirement and "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* at 623-24.

Predominance

Defendants assert that Plaintiffs' individual issues predominate over the common issues for the following reasons: 1) Plaintiffs, by signing an Enrollment Form, executed a release waiving all claims against Defendants; 2) some of Plaintiffs' claims may be barred by the statute of limitations, and 3) Plaintiffs' and the proposed class members' claims are subject to a different legal framework. *ECF No. 109* at 28-41; 53-55.

1) Enrollment Forms

Plaintiffs received medical benefits at no cost for a number of years following their retirement. In January 2000, GenCorp began requiring Plaintiffs to pay a monthly premium for their benefits. Plaintiffs contend that Defendants made oral representations that contradict the Enrollment Forms, that they were tricked into signing the Enrollment Forms, and that there was no or inadequate consideration for the relinquishment of their prior rights. Defendants contend they made numerous oral presentations

at locations around the country, provided a summary of the Option Plan to each attendee, and that Plaintiffs signed the Enrollment Forms agreeing to the changes. If the Enrollment Form[8] is construed to be a waiver, the jury will be required to determine whether each Plaintiff knowingly and voluntarily waived his rights to the contractually-provided medical benefits. This is an individualized, fact specific inquiry. Each claim depends on each individual's particular interactions with Defendants and the circumstances surrounding the signing of the Enrollment Forms. The Court has analyzed the depositions of the six remaining Plaintiffs and has found the following divergent:

> Adams did not attend any of the GenCorp meetings that were held to explain the Enrollment Forms because he never received an invitation. Adams testified that he was upset when he read the form because it was totally different from what he was told when he retired and then he stated "I didn't understand the impact of it at that time."[9]
>
> Berger attended a meeting in Newcomerstown and did not recall anybody saying that his medical benefits would continue for life at no cost to him and signed the form adding the statement, "I am signing this

---

8 The Enrollment Form language directly above each Plaintiffs' signature states:

> I have read the brochure which explains my retiree medical benefit options under the GenCorp plan, and I am electing to enroll in the coverages stated on this form. I agree to pay any contributions, deductibles, and copayments required under the plan, and I authorize release of information on all claims submitted for payment. I understand that I may change coverages only under limited circumstances. I acknowledge that I have choices available, and that I am choosing the benefits selected on this form to replace my medical benefits available under any prior GenCorp URW retiree medical plans.

ECF No. 109, Exh. B-5.

9 *See ECF No. 109*, Exh. N, at 16; 26; 41.

under protest."[10]

Bottolfs read, understood and signed the form at the Waco meeting and believed that the deductible would be slight.[11]

Nugen attended a meeting in Newcomerstown and understood the form but signed it "under protest," and did not recall anybody saying that his medical benefits would continue for life at no cost to him.[12]

Peksa did not read the form, his wife filled out the form, handed it to him, and he then signed it.[13]

Van Dyke attended the Jeannette meeting. He understood the form and that he would be required to pay a fixed $10 for his benefits.[14]

Varonka attended a meeting at the Jeannette plant and understood the Enrollment Form and that the co-payment of $10 could change over time. He also testified that no one from GenCorp ever told him that he would receive free lifetime benefits[15]

A review of this deposition testimony compels the conclusion that individual questions will predominate over common questions as this litigation unfolds.

2) Statute of Limitations

In assessing the propriety of class certification, "a district court must consider how variations in

---

10 *Id.*, Exh. O, at 14-16; 34; 37-38.

11 *Id.*, Exh. P, at 32-33; 41-42.

12 *Id.*, Exh. Q, at 21; 32.

13 *Id.*, Exh. R, at 19-21; 44-46.

14 *Id.*, Exh. S, at 15-16; 24; 27.

15 *Id.*, Exh. T, at 16; 18; 32-34; 42.

law affect predominance and superiority." *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996) (citation omitted). That is because "in a multi-state class action, variations in state law may swamp any common issues and defeat predominance." *Id.* (citations omitted). *See also American Med. Sys.*, 75 F.3d at 1085 (the court is required to determine whether variations in state law defeat predominance).

It is axiomatic that a plaintiff must bring a claim before the applicable statute of limitations expires. Neither ERISA § 502(a)(1)(B) and (a)(3), nor LMRA § 301, contain a statute of limitations provision. GenCorp correctly points out that the Court "must apply the most analogous limitations period of the appropriate state's law." *ECF No. 109* at 33. *See also Meade v. Pension Appeals & Review Comm.*, 966 F.2d 190, 194-95 (6th Cir. 1992); *Biros v. Spalding-Evenflo Co.,Inc.*, 934 F.2d 740, 742-43 (6th Cir. 1991). GenCorp argues that the Court needs to apply the specific statute of limitations from each of the seven states in which the proposed class members' plants are located.[16] Plaintiffs urge the Court to apply Ohio's fifteen-year statute of limitations to all claims. *ECF No. 118* at 23-24. The parties have cited case law to support their arguments, but the Court has not found these cases helpful, particularly as to the issue of class certification.[17]

---

16 The different plants are located in: Indiana, Kentucky, Ohio, Pennsylvania, Mississippi, North Carolina, and Texas.

17 Plaintiffs cite to *Meade v. Pension Appeals and Review Committee*, 966 F.2d 190, 195, n.4 (6th Cir. 1992) and *Apponi v. Sunshine Biscuits, Inc.*, 809 F.2d 1210 (6th Cir. 1987) as support for their contentions. The instant case is distinguishable from *Meade*, as *Meade* did not involve class certification. 966 F.2d 190. In *Meade*, one Ohio plaintiff asserted an ERISA breach of fiduciary duty claim with a federal three-year statute of limitations and an ERISA claim for benefits under the employer's benefit plan without a federal statute of limitations period. *Id.* at 193-94. The Sixth Circuit held that under Ohio law, the fifteen-year statute of limitations for breach of contract was most analogous to the plaintiff's ERISA claim for benefits. *Id.* at 195.

The Court finds, unfortunately, very little authority on this issue. Courts have, however, found the application of divergent state law problematic when undertaking the predominance analysis.

In *American Medical Systems*, the Sixth Circuit concluded that a district court in certifying a nationwide class for a negligence action against a penile implant manufacturer improperly failed to consider "how the law of negligence differed from jurisdiction to jurisdiction." 75 F.3d at 1085. The Sixth Circuit observed that class certification would not be appropriate because "the district judge would face an impossible task of instructing a jury on the relevant law," if more than a few laws of the fifty states differ. *Id. See also Butler v. Sterling, Inc.* 210 F.3d 371, 2000 WL 353502 at *6 (6th Cir. March 31, 2000) (first proposed class included nationwide customers and involved different consumer protection statutes from all 50 states; the Sixth Circuit held that the district court acted within its

---

The *Apponi* plaintiffs were all from Ohio, and the case did not involve certification of a class. *Apponi*, 809 F.2d at 1210. The defendants argued that the plaintiffs' claims under § 301 were barred by the six-month statute of limitations established by the Supreme Court in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). *Id.* at 1216. The Sixth Circuit held that since the LMRA does not have a statute of limitations, Ohio's fifteen-year period for breach of contract is most analogous to the LMRA claim. *Id.*

In support of the argument that this Court should apply the specific statute of limitations from each of the seven states, GenCorp cites *Medical Mutual of Ohio v. deSoto*, 245 F.3d 561 (6th Cir. 2001) and *Miller v. State Farm Mutual Automobile Insurance Co.*, 87 F.3d 822 (6th Cir. 1996). *Medical Mutual of Ohio v. deSoto* did not involved certification of a class. 245 F.3d 561. Medical Mutual brought an action under ERISA against the defendants-participants to recoup funds it had paid for the participants' medical expenses. *Id.* at 564-65. The district court applied Ohio law to the dispute; however, the Sixth Circuit applied California law and reversed the district court's grant of summary judgment to Medical Mutual. *Id.* at 571-74. Likewise, *Miller v. State Farm Mutual Automobile Insurance Co.* did not address the issue of class certification. 87 F.3d 822. The *Miller* plaintiff was the executrix of the estate of a Pennsylvania insured who was killed in an automobile accident in Ohio. *Id.* at 823-24. The Sixth Circuit affirmed the district court's application of Pennsylvania law, the state where the policy was issued, and not Ohio law, where the accident occurred. *Id.* at 827.

discretion in refusing to certify this class). In the instant case, the Court is presented with Plaintiffs from seven states that have statutes of limitations periods ranging from three (3) years to fifteen (15) years.[18] There is no clear authority supporting the application of Ohio's statute of limitations to this nationwide class, and it would be unmanageable to apply four different statutes of limitations.

3) Inter-circuit Split over *Yard-Man*

A further complication present in the instant case is that the Court is faced with an inter-circuit split on a critical legal issue. In *International Union, United Automobile, Aerospace, & Agricultural Implement Workers of America (UAW) v. Yard-Man, Inc.* ("*Yard-Man*"), 716 F.2d 1476 (6th Cir. 1983), the Sixth Circuit adopted what has become commonly known as the "*Yard-Man* inference." Under the *Yard-Man* inference, courts presume the parties intended retiree welfare benefits to continue for life, notwithstanding the expiration of a collective bargaining agreement. *Id.* at 1482-83. The Sixth Circuit determined that when there is an indication of lifetime benefits, a general durational limitation clause is insufficient to defeat vesting. *Id.* at 1482-83.

Plaintiffs' proposed class contains plants in five different circuits: the Third Circuit (Pennsylvania plant), the Fourth Circuit (North Carolina plant), the Fifth Circuit (Mississippi and Texas plants), the Sixth circuit (Ohio and Kentucky plants), and the Seventh Circuit (Indiana plants). There is a split

---

18 Retirees from the North Carolina and Mississippi plants have a 3-year statute of limitations. *See* N.C. Gen. Stat. § 1-52 (2003); Miss. Code Ann. § 15-1-49 (2003). Retirees from the Pennsylvania and Texas plants have a 4-year limitations period. *See* Pa. Stat. 42 Pa. Cons. Stat. Ann. § 5525 (8) (West 2003); Tex. Civ. Prac. & Rem. Code Ann. § 16.004 (Vernon 2003). Retirees from Indiana have a 10-year limitations period. *See* Ind. Code Ann. § 34-11-2-11 (West 2003). Retirees from Kentucky and Ohio have a 15-year period. *See* Ky. Rev. Stat. Ann. § 413.090 (Baldwin 2003); Ohio Rev. Code Ann. § 2305.06 (Baldwin 2003).

among these circuits regarding the *Yard-Man* inference. The Third,[19] Fifth,[20] and Seventh[21] Circuits have rejected the *Yard-Man* inference, while the Fourth[22] and Sixth Circuits have adopted the inference. According to the parties' briefs and the Court's own research, there is no controlling federal authority addressing the choice of law issue in a case such as this.

Plaintiffs assert that the Court should apply the law of the Circuit where it sits to a nationwide class certification such as the one sought by Plaintiffs. *ECF No. 118* at 23-24. By analogy, Plaintiffs point to multiple individual lawsuits handled by the Judicial Panel on Multi-District Litigation where the issue becomes which law applies - the law of the transferee court or of the transferor court. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171 (D.C. Cir. 1987). Under this circumstance, the law of the circuit of the transferee MDL court applies rather than the law of the circuits covering the districts in which the case was first filed.[23] *Id.* at 1172-76. The Court finds Plaintiffs' argument unpersuasive. In multi-district litigation, the determination of whether cases should be consolidated for coordinated or pretrial proceedings is based upon "one or more common questions

---

19 *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) v. Skinner Engine Co.*, 188 F.3d 130 (3d Cir. 1999).

20 *United Paperworkers International Union AFL-CIO, CLC v. Champion International Corp.*, 908 F.2d 1252 (5th Cir. 1990).

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

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

23 Plaintiffs make a similar argument in regards to lawsuits that are transferred under 28 U.S.C. §§ 1407 or 1404. *See E.E.O.C. v. Northwest Airlines, Inc.*, 188 F.3d 695 (6th Cir. 1999); *Menowitz v. Brown*, 991 F.2d 36 (2d Cir. 1993); *Newton v. Thomason*, 22 F.3d 1455 (9th Cir. 1994); and *Center Cadillac, Inc. v. Bank Leumi Trust Co. of New York*, 808 F.Supp. 213 (S.D.N.Y. 1992).

of fact" and upon a determination that "transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." *See* 28 U.S.C. § 1407(a). Also, when and if the cases are tried, they go back to their original districts, and the law of the respective Circuit controls.

GenCorp asserts that the Court should look to bankruptcy law for guidance. In actions filed in bankruptcy court, courts have frequently held that an inter-circuit split creates a variation in the law that precludes class certification. *See Henry v. Associates Home Equity Services, Inc.*, 272 B.R. 266 (C.D.Cal. 2002), *aff'd*, 69 Fed. Appx. 394, 2003 WL 21518747 (9th Cir. 2003) and *In re Walls*, 262 B.R. 519 (Bankr. E.D.Cal. 2001). These cases involve collection activity which would be illegal in the "ride through" circuits and legal in other circuits.[24] These courts held that individual issues would predominate, and that the inter-circuit split defeated commonality, typicality and/or predominance. *Henry*, 272 B.R. at 276-77 and *In re Walls*, 262 B.R. at 528. Just as the existence of the "ride through" option in some circuits means that questions of law are different among the members of a class, the inter-circuit split regarding the *Yard-Man* inference means that class members residing in different circuits operate under differing rules of law.[25]

---

24 Circuits are evenly split with regard to issue of whether debtors must reaffirm their debts in order to retain the collateral that secured the debts, or whether debtors could "ride through" and retain their collateral without having to reaffirm their obligations. *In re Walls*, 262 B.R. at 525.

25 In fact, retirees from the Wabash plant, located in Indiana, filed a similar suit against GenCorp. *See Divine v. GenCorp, Inc.*, No. 3:06 CV 296 (N.D. Ind. November 25, 1996) (Sharp, J.). Based on Seventh Circuit law, the court granted GenCorp summary judgment on all claims including the contractual right to modify, estoppel, breach of fiduciary duty, procedural violations, and state law claims. *Id.* This case was appealed; however, the parties settled before the Seventh Circuit rendered a decision. In Plaintiffs' proposed class there are retirees from three plants located in Indiana. It would

Based on the differing circumstances surrounding Plaintiffs' signing of the Enrollment Forms, the variation of state statutes of limitations, and the inter-circuit split over *Yard-Man*, the Court finds that Plaintiffs have failed to meet their burden of demonstrating predominance of common issues.

B. Rule 23(b)(2)

Subsection (b)(2) class actions, unlike those of other Rule 23(b) categories, are limited to those class actions seeking primarily injunctive or declaratory relief. Fed.R.Civ.P. 23(b)(2). As of December 1, 2003, "[f]or any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class." Fed.R.Civ.P. 23. However, this subsection does not allow for an opt out procedure and all members of the class are bound by the court's judgment.

GenCorp argues this is the type of case where the proposed class members must have the right to opt out. *ECF No. 109* at 49. GenCorp bases its argument on the possibility that some of the proposed class members would prefer to keep the level of medical benefits currently provided under the Option Plan, rather than to return to the level of benefits provided under the long-expired PIAs. *ECF No. 109* at 42-45. In *Thonen v. McNeil-Akron, Inc.*, *supra*, the defendants made the same argument, and another judge of this court, concluded that the retirees who preferred the new benefit plan should be permitted to withdraw from the litigation. 661 F.Supp at 1275. The court certified the class under 23(b)(3), not (b)(2). *Id.*

"Rule 23(b)(2) operates under the presumption that the interests of the class members are cohesive and homogeneous such that the case will not depend on adjudication of facts particular to any

---

be unfair for the Court to now analyze the claims of retirees from these plants under Sixth Circuit law.

subset of the class nor require a remedy that differentiates materially among class members." *Bacon v. Honda of America Mfg., Inc.*, 205 F.R.D. 466, 484 (S.D.Ohio 2001). *See also Coleman v. General Motors Acceptance Corporation*, 296 F.3d 443, 448 (6th Cir. 2002). "To ensure such cohesiveness," courts have "the discretion to deny certification in Rule 23(b)(2) cases in the presence of 'disparate factual circumstances.'" *Barnes v. American Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998).

In *In re Unisys Corporation Rretiree Medical Benefits Litigation*, the plaintiffs brought a class action under ERISA against their former employer for implementing a new medical benefit plan requiring the retirees to pay the full cost of their premiums. 2003 WL 252106, *1 (E.D.Pa. Feb. 4, 2003). In a Rule 23(b)(2) class action, "the court must ensure that significant individual issues do not pervade the entire action because it would be unjust to bind absent class members to a negative decision where the class representatives's claims present different individual issues than the claims of the absent members . . . . *Unisys*, 2003 WL 252106 at *3 n.8 (citation omitted). The court found that the class lacked cohesiveness where plaintiffs contended that the company misinformed them that their retirement health benefits would not change during their retirement. *Id.* at *4-5. The court held that it would need to individually examine each plaintiff to determine whether the alleged misrepresentation was material and if they detrimentally relied on the misrepresentation. *Id.* at *5. For the reasons discussed above in the 23(b)(3) analysis, the Court finds this case lacks the cohesiveness required by Rule 23(b)(2) because of the differing circumstances surrounding Plaintiffs' signing of the Enrollment Forms.

In Plaintiffs' Second Amended Complaint, they seek "monetary damages to restore all affected

class members to the position in which they would have been but for GenCorp's and OMNOVA's contractual and statutory violations." *ECF No. 98* ¶ 14. The Sixth Circuit has not addressed the question of whether monetary damages are recoverable under Rule 23(b)(2). *Coleman*, 296 F.3d at 446. However, the Sixth Circuit has explained that "close scrutiny is necessary if money damages are to be included in any mandatory class in order to protect the individual interests at stake and ensure that the underlying assumption of homogeneity is not undermined." *Id.* at 448. Likewise, the Supreme Court has expressed concern over the constitutionality of certifying a 23(b)(2) class which includes money damages. *See Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) (in *dicta*, the Supreme Court stated that it is "at least a substantial possibility" that class actions seeking money damages can only be certified under Rule 23(b)(3) in light of the constitutional considerations implicated); *In re Telectronics Pacing Sys., Inc.*, 221 F.3d 870, 881 (6th Cir. 2000) (stating that the Supreme Court has stressed in interpreting Rule 23 that "principles of sound judicial management and constitutional considerations of due process and the right to jury trial all lead to the conclusion that in an action for money damages class members are entitled to personal notice and an opportunity to opt out."). Other federal circuit courts have held that money damages are recoverable in a Rule 23(b)(2) class if the injunctive and/or declaratory relief sought on behalf of the class "predominate[s]" relative to any incidental monetary damages requested.[26] In analyzing whether the injunctive relief

---

26 *See, e.g.*, *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001); *Lemon v. Int'l Union of Operating Eng'rs.*, 216 F.3d 577, 580-81 (7th Cir. 2000); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 410-11 (5th Cir. 1998); *Eubanks v. Billington*, 110 F.3d 87, 92 (D.C.Cir. 1997); *Boughton v. Cotter Corp.*, 65 F.3d 823, 827 (10th Cir. 1995); *Zimmerman v. Bell*, 800 F.2d 386, 389-90 (4th Cir. 1986); *In re School Asbestos Litigation*, 789 F.2d 996, 1008 (3d Cir. 1986); *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 564 (2d Cir. 1968).

predominates in this case, the Court will follow the guidance of the Sixth Circuit that "one critical factor is whether the compensatory relief requested requires individualized damages determination or is susceptible to calculation on a classwide basis." *Coleman*, 296 F.3d at 448.

According to Plaintiffs "[t]he amount of restitution to which each class member is entitled can be determined by a simple formula: monthly premiums times the total number of months premiums have been paid." *ECF No. 118* at 39. However, the Court finds that the calculation involves much more then a simple formula. The Court would need to ascertain under which PIA agreement the member retired, how much the retiree co-payments and deductibles would have been, determine the maximum coverage of benefits, and calculate what the retiree paid for those benefits under the Option Plan. This calculation is further complicated because arguably payment received for any claims that would not have been covered under the PIA should be offset.

Accordingly, the Court concludes that Plaintiffs have failed to establish that certification is appropriate under 23(b)(2).

IV. Conclusion

While Plaintiffs have satisfied the four prerequisites to a class action mandated by Rule 23(a), the Court finds that Plaintiffs have not demonstrated that the certification falls within at least one of the subcategories of Rule 23(b). Accordingly, Plaintiffs' Motion for Class Certification **ECF No. 101** is **DENIED**.

IT IS SO ORDERED.

/s/Dan Aaron Polster 12/2/03
Dan Aaron Polster
United States District Judge