Nos. 17-3851, 17-3860

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOSEPH ZINO, JR., et al.,
Plaintiffs-Appellees,

v.

WHIRLPOOL CORPORATION and WHIRLPOOL CORPORATION GROUP BENEFIT PLAN FOR RETIREES,
Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Ohio
No. 5:11-cv-01676
The Honorable District Judge Benita Y. Pearson

AMICI CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN BENEFITS COUNCIL, THE BUSINESS ROUNDTABLE, AND THE OHIO MANUFACTURERS' ASSOCIATION IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, disclosure is hereby made by amici curiae National Association of Manufacturers, the Chamber of Commerce of the United States of America, American Benefits Council, the Business Roundtable, and the Ohio Manufacturers' Association of the following corporate interests:

a. Parent companies of the corporation/association:

None.

b. Any publicly held company that owns ten percent (10%) or more of the corporation/association:

None.

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INTEREST OF AMICI CURIAE

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all fifty states. Manufacturing employs more than twelve million men and women, contributes $2.7 trillion annually to the American economy, has the largest economic impact of any major sector, and accounts for three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The NAM regularly files *amicus* briefs in cases that raise issues important to manufacturers.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An

important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

American Benefits Council (the "Council") is a national nonprofit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's approximately 400 members are primarily large multistate U.S. employers that provide employee benefits to active and retired workers and their families. The Council's membership also includes organizations that provide employee benefit services to employers of all sizes. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering virtually all Americans who participate in employer-sponsored benefit programs.

The Business Roundtable is an association of chief executive officers who collectively manage more than 16 million employees and $7 trillion in annual revenues. The association was founded on the belief that businesses should play an active and effective role in the formation

of public policy. It participates in litigation as *amicus curiae* in a variety of contexts where important business interests are at stake.

Based in the third largest manufacturing state, the Ohio Manufacturers' Association (OMA) is a statewide advocacy organization comprised of over 1300 member manufacturing companies. The OMA's mission is to protect and grow Ohio manufacturing.

Amici have a strong interest in the outcome of this case. *Amici*'s members have experience with both collectively bargained and non-collectively bargained benefit plans across different industries, locations, and time periods. Retiree healthcare benefits are an important part of those plans and are often a major expense to the employer. The decision below exemplifies the untenable confusion regarding the status and duration of retiree healthcare benefits that has resurfaced in this Circuit as a result of this Court's decisions in *UAW v. Kelsey-Hayes Co.*, 854 F.3d 862 (6th Cir. 2017), and *Reese v. CNH America LLC*, 854 F.3d 877 (6th Cir. 2017). This confusion makes it difficult for employers to rely on express plan terms in planning for their businesses and providing benefits to their retired employees. It is

of the utmost importance to *amici*'s members that this Court clarify the governing law and enforce plan terms as written.[1]

INTRODUCTION

This case implicates an issue of extraordinary importance to the nation's business community and workforce: retiree health benefits. In *M&G Polymers USA LLC v. Tackett*, 135 S. Ct. 926 (2015), the Supreme Court attempted to bring much-needed clarity and uniformity to the interpretation of retiree health-benefit plans by unanimously rejecting this Court's *Yard-Man* rule, which had improperly "plac[ed] a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements." *Id.* at 935 (discussing *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983)). Just two years after the Supreme Court issued *Tackett*, a pair of decisions by this Court—*UAW v. Kelsey-Hayes Co.*, 854 F.3d 862 (6th Cir. 2017), and *Reese v. CNH America LLC*, 854

[1] This brief is submitted pursuant to Rule 29(a). All parties have consented to its filing. No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except amici curiae, their members, or their counsel contributed money intended to fund the preparation or submission of this brief.

F.3d 877 (6th Cir. 2017)—have threatened to undo what *Tackett* accomplished and, once again, have given rise to uncertainty and unpredictability within this Circuit and a split across circuits.

The decision below reflects the sort of uncertainty and unpredictability once again faced by district courts and employers in this Circuit. The district court here found a promise to provide unaltered health benefits for life in the absence of contractual language to that effect. That result—unfortunately—was unsurprising: The district court labored under the confusion created by *Kelsey-Hayes* and *Reese* and was put in the unenviable position of having to untangle these decisions along with this Court's other post-*Tackett* jurisprudence.

Employers and employees cannot meaningfully bargain or reliably plan for the future if clear terms in collective bargaining agreements and benefit plans are not enforced. The massive unexpected costs and unpredictable benefits packages that will result (and, indeed, have already resulted) from rulings like this one will also hurt employers and retirees alike. Flexible benefits packages are, more and more, an

attractive option for both sides, as they allow leeway to accommodate changing regulatory regimes and medical technology. But this Court's decisions in *Kelsey-Hayes* and *Reese*—to which the district court attempted to adhere—make it difficult for parties to reliably achieve the flexibility they intend. This Court's outlier decisions, moreover, will undoubtedly result in forum shopping.

The Court should adhere to *Tackett* and protect the interest of employers and employees in the predictable interpretation of benefit plans. *Kelsey-Hayes* and *Reese* should be limited to their facts, and the decision below should be reversed.

ARGUMENT

I. THE DECISION BELOW EXEMPLIFIES THE CONFUSION THIS COURT HAS INJECTED INTO THE LAW OF RETIREE HEALTH BENEFITS.

Tackett held that ordinary principles of contract interpretation govern the question whether collective bargaining agreements and associated benefit plans provide for vested, lifetime benefits. *See* 135 S. Ct. at 930. That ruling reinforced the status quo in all circuits save this one, which had previously applied an interpretive methodology specific

to retiree health benefits—the "*Yard-Man* presumption"—according to which vesting of benefits was presumed absent express indications to the contrary. *Id.* at 935. "A contract [that] is silent as to the duration of retiree benefits," the Supreme Court explained, cannot be construed as promising vested benefits for life. *Id.* at 937. Moreover, the Court made clear that the use of the future tense in referring to benefits, without more, does not indicate an intent to confer a vested right to those benefits for life. *See id.* And the Supreme Court specifically rejected the notion "that the tying of eligibility for health care benefits to receipt of pension benefits suggested an intent to vest health care benefits." *Id.*

This Court applied those principles faithfully in *Gallo v. Moen, Inc.*, 813 F.3d 265 (6th Cir. 2016), *Cole v. Meritor, Inc.*, 855 F.3d 695 (6th Cir. 2017), *Serafino v. City of Hamtramck*, 2017 WL 3833206 (6th Cir. 2017), and *Watkins v. Honeywell Int'l Inc.*, 2017 WL 5163221 (6th Cir. 2017). But in two other decisions—*UAW v. Kelsey-Hayes Co.*, 854 F.3d 862 (6th Cir. 2017), and *Reese v. CNH America LLC*, 854 F.3d 877 (6th Cir. 2017)—this Court created confusion by seeming to jettison ordinary principles of contract interpretation in favor of an *ad hoc*

approach that is specific to retiree health benefit agreements. As the dissenting opinion stated in *Reese*, the Court thereby "abrad[ed] an inter-circuit split (and an intra-circuit split) that the Supreme Court [had] just sutured shut." 854 F.3d at 890 (Sutton, J., dissenting).

The decision below reflects this confusion created by *Kelsey-Hayes* and *Reese*. The district court found ambiguity as to vesting in the face of contractual language making clear that the benefits conferred had *not* been vested for life. In particular, the court found ambiguity notwithstanding the existence of an unambiguous general durational clause, express vesting language for other benefits, and a reservation of rights to "cancel" healthcare coverage. The court relied extensively on *Kelsey-Hayes* and *Reese* in reaching that result—a result that is both inconsistent with *Tackett* and symptomatic of the confusion those decisions have engendered.

II. THIS CONFUSION WILL HURT EMPLOYERS AND RETIREES ALIKE.

That confusion will hurt employers and retirees alike. Actual, reliable implementation of a collective bargaining agreement and associated benefit plans is workable only when courts consistently

enforce the terms of these agreements. *See Tackett*, 135 S. Ct. at 933 (holding that courts have an obligation to respect the terms of contracts that provide for retiree healthcare benefits). That is true regardless of whether employers and employees agree to flexibility regarding retiree healthcare benefits or whether they prefer to fix those benefits over a retiree's lifetime. Consistent enforcement is effectively impossible when the legal standards applicable to interpreting collective bargaining agreements and benefit plans are contradictory and unclear. The only certain result under an uncertain legal regime is that both sides to the agreement ultimately suffer.

On the employers' side, interpreting a collective bargaining agreement or benefits plan to provide for vested, lifetime benefits when the parties did not actually agree to that result imposes a massive and unanticipated financial burden. The costs—for which employers neither bargained nor would rationally have prepared—can easily exceed hundreds of millions of dollars. *See, e.g., Wood v. Detroit Diesel Corp.*, 607 F.3d 427, 429 (6th Cir. 2010) (CEO testified that vested retiree health liabilities "could have bankrupted the company by

rendering it unable to obtain capital"). Those numbers will only continue to rise as the population of retirees grows and the costs of healthcare increase.[2]

These costs affect not only companies' cashflow, but also their balance sheets. Employers, after all, are required to "reflect on their balance sheets the present value of the estimated future costs for retirees' medical benefits." *Wise v. El Paso Nat. Gas Co.*, 986 F.2d 929, 932 (5th Cir. 1993). Merely calculating such liability with any degree of certainty will be extraordinarily difficult in light of the current state of the Sixth Circuit's muddled jurisprudence. Moreover, if companies must assume that benefits never intended to vest will be deemed

[2] *See* 2010 Census Briefs, *The Older Population: 2010*, https://www.census.gov/prod/cen2010/briefs/c2010br-09.pdf (finding that "more people were 65 years and over in 2010 than in any previous census" and that "the population 65 years and over [has] increased at a faster rate (15.1 percent) than the total U.S. population (9.7 percent)"); PricewaterhouseCoopers, *Medical Cost Trend: Behind the Numbers 2018*, https://www.pwc.com/us/en/health-industries/health-research-institute/behind-the-numbers/reports/hri-behind-the-numbers-2018.pdf (highlighting long-term trend of rising healthcare costs and explaining that "growth in employer premiums is still outpacing wage growth, making benefit costs unsustainable in the long run").

unalterable for life, the consequences to their books could be massive. *See, e.g., UAW v. Gen. Motors Corp.*, No. 05-CV-73991-DT, 2006 WL 891151, at *3 (E.D. Mich. Mar. 31, 2006) (noting that, in 2004, General Motors reported $77 billion of "Accumulated Projected Benefit Obligations," of which $61 billion was attributable to union retirees).

Those numbers matter. In particular, booking significant retiree health insurance liability hurts companies' credit and market value. *See, e.g., Int'l Union, UAW v. Chrysler LLC*, No. 07-CV-14310, 2008 WL 2980046, at *5-*6 (E.D. Mich. July 31, 2008) (finding that Chrysler's obligations to pay retiree health benefits "adversely affect[ed] [its] creditworthiness" and "limit[ed] the company's access to unsecured capital resources, substantially contributing to [its] precarious financial condition").

The confusion created by this Court's recent, post-*Tackett* jurisprudence threatens significant harm to employees as well. Retirees, for their part, stand to lose all or most of their benefits if unanticipated retiree healthcare costs force their former employers out

of business. *See Wood*, 607 F.3d at 429 (citing testimony that deeming retiree health benefits to be vested for life could be bankrupting).

Current employees, in the short term, may face lowered wages, lost hours, or even termination, as companies are forced to cut costs to pay for unanticipated healthcare costs. *See* U.S. Social Security Administration, *The Unsustainable Cost of Health Care*, p. 9 (September 2009), http://purl.access.gpo.gov/GPO/LPS118647 ("In the long run, most of the impact of rising health care costs on employers can be shifted to their workers by reducing wage growth, hiring fewer workers, or hiring more part-time workers who are typically not eligible for health insurance coverage."). In the long term, current employees may not even be offered retiree health benefits, as employers will be less willing—and, in many cases, unable—to provide such benefits if the governing contract terms can be judicially expanded. *Cf. Moore v. Metro. Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988) ("Predictability as to the extent of future obligations would be lost, and, consequently, substantial disincentives for even offering such plans would be created."). That result would undermine one of ERISA's primary

purposes—*i.e.*, to "induc[e] employers to offer benefits by assuring a *predictable* set of liabilities." *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002) (emphasis added).

Companies like Whirlpool that operate across multiple jurisdictions, and employees and retirees of these companies, will be hit the hardest. That is because this Court's divergence from its sister circuits could yield "a patchwork of different interpretations of a [single] plan"—with benefits deemed vested for life in one jurisdiction and subject to modification in others. *Conkright v. Frommert*, 559 U.S. 506, 517 (2010). Such inconsistent plan interpretation "would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them." *Id.*

III. FLEXIBILITY IN RETIREE HEALTH BENEFITS SERVES BOTH COMPANIES AND EMPLOYEES.

Decisions like *Kelsey-Hayes* and *Reese*—as the decision below demonstrates—are making it more difficult for companies and employees to choose flexible health-benefit plans that, very often, maximize utility for all involved.

It perhaps goes without saying that healthcare and health insurance are subject to a complex and ever-changing regulatory regime. The Patient Protection and Affordable Care Act, 124 Stat. 119, for example, radically reshaped the health insurance market after "a long history of failed health insurance reform." *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015). Further regulatory evolution, in one form or another, appears all but inevitable. *See, e.g.,* Shelby Livingston, *Insurers Won't Commit to 2018 Exchanges Until They Know ACA's Future*, Modern Healthcare, *available at* http://www.modernhealthcare.com/article/20170203/NEWS/170209984 (Feb. 3, 2017) (noting that even health insurers lack "an inkling of what the future holds for the health insurance landscape").

At the same time, there continues to be "remarkable growth in modern life-saving and comfort-improving medical procedures, devices and drugs." *Reese v. CNH Am. LLC*, 694 F.3d 681, 683 (6th Cir. 2012).

But these advancements often come at a cost, with new and improved treatment options offered at higher prices than old ones.[3]

The combination of these factors—complex regulatory change and scientific advancement—means that decades-old benefits packages may be ill-suited to employers' or retirees' needs. Companies, on the one hand, "want the freedom to change health-insurance plans" to account for new regulatory strictures and coverage options, as well as changed cost considerations. *Reese*, 694 F.3d at 684. Retirees, for their part, "want coverage to account for new and better, yet likely more expensive, procedures and medications than the ones in existence at retirement." *Id.*

[3] *See* Institute of Medicine and National Research Council, Medical Innovation in the Changing Healthcare Marketplace 15 (2002), *available at* https://www.nap.edu/read/10358/chapter/5 (finding that "technological change has been the largest single driver of growth in health care spending over the past 50 years"); Merrill Goozner, *High-Tech Medicine Contributes to High-Cost Health Care*, Kaiser Health News, https://khn.org/news/ft-health-care-high-tech-costs (Feb. 15, 2010) ("The U.S. leads the world in creating state-of-the-art diagnostic and therapeutic treatments with the potential to work miracles in millions of patients. But the miracles come at a stiff price.").

Employers and retirees have interests that are *aligned* in this context, and the unsurprising result of that alignment of interests has been a nationwide trend away from vested, "one size fits all" benefit plans and toward more individualized and flexible retiree health coverage—including through plans offered through private exchanges. *See, e.g.*, Frank McArdle et al., *Retiree Health Benefits at the Crossroads*, http://goo.gl/HXZt5z (Apr. 14, 2014). These kinds of individualized and flexible arrangements can maximize utility for both sides, allowing the parties to account both for changing regulatory environments and for changing health technology.

But parties who agree to such flexibility will be thwarted if district courts, laboring under the confusion created by *Kelsey-Hayes* and *Reese*, look past clear contractual language and impose a rigid benefits regime on parties who thought they had agreed to a more flexible one. Endorsing that result in this case will lead to further disruption and prevent parties from realizing the significant benefits of the flexible regime to which they agreed.

IV. AFFIRMING THE DECISION BELOW WOULD EXACERBATE THE RISK OF FORUM SHOPPING.

If all of that were not bad enough, *Kelsey-Hayes* and *Reese* will, unless confined, rekindle improper incentives for retirees and unions nationwide to bring their claims to the Sixth Circuit and avoid every other Circuit.

As the Supreme Court has repeatedly recognized, forum shopping is a serious threat to the rule of law. *See, e.g., Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1672 (2015) (rejecting a judicial recusal rule "that would enable transparent forum shopping"); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1969 (2014) ("The federal limitations prescription governing copyright suits serves . . . to prevent the forum shopping . . . ."); *Atl. Marine Constr. Co. v. U.S. Dist. Ct.*, 134 S. Ct. 568, 583 (2013) (explaining that federal venue statute "should not create or multiply opportunities for forum shopping"); *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (characterizing "discouragement of forum-shopping" as one of "the twin aims of the Erie rule"). And forum shopping is especially problematic in this context, as liberal venue provisions afford retirees and unions significant flexibility to seek out

favorable forums in disputes about retiree health benefits. *See* LMRA § 301(a), 29 U.S.C. § 185(a) (granting venue "in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties"); ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2) (granting venue "in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found").

That flexibility made this circuit a magnet for retiree-health-benefit litigation during the *Yard-Man* era. *Cf., e.g.,* Jeffrey S. Klein & Nicholas J. Pappas, *Recent Developments in Retiree Health Benefits Litigation*, N.Y.L.J., June 5, 2006, at 3 (noting that, during the *Yard-Man* period, vesting cases were dependent not only on the facts of the case "but also on the governing judicial precedent in the jurisdiction where the case [was] filed"); Michael S. Melbinger & Marianne W. Culver, *The Battle of the Rust Belt: Employers' Rights to Modify the Medical Benefits of Retirees*, 5 DEPAUL BUS. L.J. 139, 161 (1993) (highlighting possibility of races to the courthouse across different jurisdictions). The reason is not difficult to surmise: counsel for retirees

preferred the Sixth Circuit's "thumb on the scale" approach to the neutral, contract-based approach applied in other circuits.

In *Tackett*, the Supreme Court attempted to put an end to this unseemly forum shopping by restoring a single, predictable rule of law for retiree health benefits. But affirming the judgment in this case, which would not stand in any other circuit, would send a clear message to retirees across the country that the Sixth Circuit is, once again, the "venue of choice" for retirees and unions seeking the benefit of a more favorable bargain than the one they actually struck.

CONCLUSION

For these reasons, as well as those given in Appellants' Brief, *amici* therefore respectfully submit that the Court should reverse the decision below.

Dated: January 12, 2018

Respectfully submitted,

/s/ Glen D. Nager

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations contained in Federal Rule of Appellate Procedure 29(a)(5) because, excluding the portions exempted by Rule 32(f), the brief contains 3,121 words.

Dated: January 12, 2018 */s/ Glen D. Nager*

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CERTIFICATE OF SERVICE

I certify that on January 12, 2018, I electronically filed the foregoing brief with the United States Court of Appeals for the Sixth Circuit using the ECF system. All parties have consented to receive electronic service and will be served by the ECF system.

Dated: January 12, 2018

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