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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. briefing paper	Medical Information (6 pages)	7/16/96	P6/b(6)

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Chris Jennings (Subject File)
OA/Box Number: 23746 Box 7

FOLDER TITLE:

Coverage for Americans Facing Unique Barriers [5]

gf12

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Cong Klezcka
(Pabst retiree)

Will intro h.co bill

- 1) reqs 180 notice of intent to term
- 2) allow early retirees to come COBRA & stay on to 10 yrs
- 3) over 65, 66011 & C B - GAP w/out penalty

on 1/2/02 dot it

3000 reviewing

~~2002~~ 17

ellen sideman

pres. expressed interest in moving on gabriel health

DUP



DATE: 9/9

TO: Chns

AGENCY: _____

TELEPHONE NUMBER: _____ FAX: _____

FROM: **MEREDITH A. MILLER**
*Deputy Assistant Secretary for Policy
Pension and Welfare Benefits Administration
U. S. Department of Labor
200 Constitution Avenue, NW, Room S-2524
Washington, DC 20210*

COMMENTS:

Chns- please call me or Dan
or Kelly ASAP re: any previous
Admin positions in this

NUMBER OF PAGES INCLUDING COVER SHEET 11

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(202) 219-8233.

JERRY KLECZKA

4TH DISTRICT, WISCONSIN

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**SUMMARY OF THE HEALTH CARE ASSURANCE FOR RETIRED EMPLOYEES (CARE)
ACT OF 1996**

Background

The bill addresses a situation affecting retirees at the Pabst Brewing Company in Milwaukee as well as thousands of workers nationwide whose retiree health benefit plans have been eliminated due to employer cost-cutting. Pabst retirees on August 1 were notified that their health benefits package would be terminated on September 1. Retirees had counted upon these benefits as part of their compensation packages.

Summary

The legislation will provide group health insurance portability for two sets of retirees: those under 65 who are not yet eligible for Medicare and those over 65 who did not enroll in Medicare Part B or Medigap supplemental policies because they were already covered under their retirement plan. Under the legislation, those under 65 would be allowed to purchase group health insurance under the company's existing employee health plan. Those over 65 could enroll in Medicare Part B and Medigap policies without late enrollment penalties.

The legislation also would require companies to be certified by the Department of Labor that they have given a six month notice to retirees when benefits will be eliminated, and imposes a \$100 per participant, per day, penalty on companies that do not comply with the law. Similar to existing law, it allows retirees to sue for damages if the six-month notice is not complied with.

JERRY KLECZKA
4TH DISTRICT, WISCONSIN

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SECTION-BY-SECTION

Health Care Assurance for Retired Employees (CARE) Act of 1996

Section I: Short Title: Health Care Assurance for Retired Employees (CARE) Act of 1996

Section II: Advance Notice of Material Reductions in Covered Services Under Group Health Plans. Under current law, employer-sponsored health plans must disclose to participants any reduction or elimination of health benefits within 270 days after the end of the plan year in which those benefits were changed or eliminated. Under the health insurance reform law recently signed by the President, this period is six months after the change has occurred, effective 1997.

The CARE Act would require companies to be certified by the Department of Labor that they have notified retirees six months (180 days) prior to reducing or eliminating their benefits. This section is a minimum standard that can be overridden by individually-negotiated collective bargaining agreements. Section II of the CARE Act broadens existing legal remedies, including 29 USC 1132, which makes the plan liable to participants at \$100/day for violations. The CARE Act would add an additional penalty under the tax code: unless the Department of Labor certifies that a plan has met the 6 month notification requirement, the employer would be subject to an excise tax of \$100 per participant per day.

Section III: Continuation of Coverage for Persons 55 and Older Until Eligible for Medicare. Under current law, current retirees whose health benefits are eliminated cannot be covered under COBRA. Those who retire after coverage is eliminated are eligible for up to 18 months of COBRA coverage, and their children and spouses for up to 36 months.

The Care Act allows retirees to continue COBRA coverage until they reach age 65 or are eligible for Medicare, whichever occurs first. Such coverage would end if the retiree chose to elect coverage under a plan if he or she began a new job.

Section IV: Protections Under the Medicare Program for Retired Workers who Lose Retiree Health Benefits. The section would waive the current 10% per-year penalty on Part B late enrollees and ensure a six-month open enrollment period in Medigap supplementary insurance plans.

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ELC.

104TH CONGRESS
2D SESSION

H.R. _____

IN THE HOUSE OF REPRESENTATIVES

for
(on behalf of) Mr. Stark

Mr. KLEOZKA introduced the following bill; which was referred to the
Committee on _____

A BILL

To amend the Internal Revenue Code of 1986 to assure continued health insurance coverage of retired workers.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Health Care Assurance
5 for Retired Employees Act of 1996".

6 **SEC. 2. ADVANCE NOTICE OF MATERIAL REDUCTIONS IN**
7 **COVERED SERVICES UNDER GROUP HEALTH**
8 **PLANS.**

9 (a) **ADVANCE NOTICE.—**

SENT BY:53437

: 9- 9-96 : 2:48PM : LEGISLATIVE COUNSEL-

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H.L.C.

1 (1) IN GENERAL.—Section 104(b)(1) of the
2 Employee Retirement Income Security Act of 1974
3 (as amended by section 101(c)(1)(B) of the Health
4 Insurance Portability and Accountability Act of
5 1996 (Public Law 104-191)) is amended—

6 (A) by redesignating subparagraphs (A)
7 and (B) as clauses (i) and (ii), respectively;

8 (B) by striking “(1) The administrator”
9 and inserting “(1)(A) The administrator”;

10 (C) by striking “The administrator” the
11 second place it appears and inserting the follow-
12 ing:

13 “(B) The administrator”;

14 (D) by striking “If there is a modification”
15 and inserting the following:

16 “(C) If there is a modification”;

17 (E) by striking “60 days after the date of
18 the adoption of the modification or change” and
19 inserting “180 days before the effective date of
20 the modification or change”; and

21 (F) by striking “In the alternative, the
22 plan sponsors may provide such description at
23 regular intervals of not more than 90 days.”
24 and inserting “In any case in which an individ-
25 ual first becomes a participant under a group

SENT BY:53487

: 9- 9-96 : 2:48PM : LEGISLATIVE COUNSEL-

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H.L.C.

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1 health plan during any such 180-day period
2 with respect to such a modification or change
3 or (in the case of any other beneficiary under
4 the plan) first receives benefits under the plan
5 during such 180-day period, the requirements
6 of the preceding sentence may be met by pro-
7 viding the summary description of such modi-
8 fication or change not later than the date on
9 which such individual first becomes a partici-
10 pant or such other beneficiary first receives
11 benefits under the plan.”

12 (2) CIVIL PENALTY.—Section 502(c)(1) of such
13 Act (29 U.S.C. 1192(c)(1)) is amended by striking
14 “or section 101(e)(1)” and inserting “, section
15 101(e)(1), or section 104(b)(1)(C)”.

16 (b) ENFORCEMENT.—

17 (1) REQUIREMENTS.—Section 4980B of the In-
18 ternal Revenue Code of 1986 is amended by redesignig-
19 nating subsection (g) as subsection (h) and by in-
20 sserting after subsection (f) the following new sub-
21 section:

22 “(g) NOTICE OF CHANGE OR MODIFICATION IN
23 HEALTH BENEFITS.—

24 “(1) IN GENERAL.—A group health plan meets
25 the requirements of this subsection if the plan spon-

SENT BY:53457

: 9- 9-96 : 2:48PM : LEGISLATIVE COUNSEL-

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H.I.C.

1 sor complies with section 104(b)(1)(C) of the Em-
 2 ployee Retirement Income Security Act of 1974 (re-
 3 lating to providing advance notice of modification or
 4 change in benefits provided under a group health
 5 plan). A plan sponsor shall be treated as failing to
 6 meet such requirements only during the period there
 7 is in effect a determination by the Secretary of
 8 Labor, made in his sole discretion, that such re-
 9 quirements are not met.

10 “(2) NONCOMPLIANCE PERIOD.—For the pur-
 11 poses of subsection (b), the noncompliance period
 12 with respect to this subsection shall be determined
 13 without regard to paragraph (2)(B)(ii) of subsection
 14 (b).”.

15 (2) CONFORMING AMENDMENTS.—

16 (A) Subsection (a) of section 4980B of
 17 such Code is amended by striking “subsection
 18 (f)” and inserting “subsections (f) and (g)”.

19 (B) Subclause II of subsection
 20 (f)(2)(B)(iv) of such section is amended by
 21 striking “subsection (g)(1)(D)” and inserting
 22 “subsection (h)(1)(D)”.

23 (c) EFFECTIVE DATE.—The amendments made by
 24 this section shall apply with respect to plan years ending
 25 after August 1, 1996.

SENT BY:53437

: 9- 9-96 : 2:50PM ; LEGISLATIVE COUNSEL-

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H.I.C.

1 SEC. 8. CONTINUATION OF COVERAGE FOR PERSONS 55
2 AND OLDER UNTIL ELIGIBLE FOR MEDICARE.

3 (a) IN GENERAL.—Section 4980B(f)(2) of the Inter-
4 nal Revenue Code of 1986 is amended by adding at the
5 end the following:

6 (F) COVERAGE FOR PERSONS 55 AND
7 OLDER 55 UNTIL ELIGIBLE FOR MEDICARE.—In
8 the case of a covered employee who has attained
9 the age of 55 before a qualifying event de-
10 scribed in paragraph (3)(B)—

11 “(i) in no event shall the period of
12 continued coverage under subparagraph
13 (B)(i) with respect to such event end be-
14 fore the applicable date under subpara-
15 graph (B)(iv), and

16 “(ii) the premium requirements for
17 any period of continuation of coverage sole-
18 ly be reason of clause (i) shall be deter-
19 mined by substituting ‘110 percent’ for
20 ‘102 percent’ in subparagraph (C)(i), un-
21 less the last sentence of subparagraph (C)
22 otherwise applies.”

23 (b) EFFECTIVE DATE.—The amendments made by
24 this section shall apply with respect to plan years ending
25 after August 1, 1996.

SENT BY:59437

: 8- 9-96 : 2:51PM : LEGISLATIVE COUNSEL-

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1 **SEC. 4. PROTECTIONS UNDER THE MEDICARE PROGRAM**
2 **FOR RETIRED WORKERS WHOSE LOSE RE-**
3 **TIRE HEALTH BENEFITS.**

4 (a) NO PREMIUM PENALTY FOR LATE ENROLL-
5 MENT.—The second sentence of section 1839(b) of the So-
6 cial Security Act (42 U.S.C. 1395r(b)) is amended by in-
7 serting "and not pursuant to a special enrollment period
8 under section 1837(i)(4)" after "section 1837)".

9 (b) SPECIAL MEDICARE ENROLLMENT PERIOD.—

10 (1) IN GENERAL.—Section 1837(i) of such Act
11 (42 U.S.C. 1395p(i)) is amended by adding at the
12 end the following new paragraph:

13 "(4)(A) In the case of an individual who—

14 "(i) at the time the individual first satisfies
15 paragraph (1) or (2) of section 1836—

16 "(I) is enrolled in a group health plan de-
17 scribed in section 1862(b)(1)(A)(v) by reason of
18 the individual's (or the individual's spouse's)
19 current employment or otherwise, and

20 "(II) has elected not to enroll (or to be
21 deemed enrolled) under this section during the
22 individual's initial enrollment period; and

23 "(ii) whose continuous enrollment under such
24 group health plan is involuntarily terminated [at a
25 time when the enrollment under the plan is not by



fine

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: 9- 9-96 : 2:51PM : LEGISLATIVE COUNSEL-

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1 reason of the individual's (or the individual's
2 spouse's) current employment],
3 there shall be a special enrollment period described in sub-
4 paragraph (B).

5 "(B) The special enrollment period referred to in sub-
6 paragraph (A) is the 6-month period beginning on the date
7 of the enrollment termination described in subparagraph
8 (A)(ii)."

9 (2) COVERAGE PERIOD.—Section 1838(e) of
10 such Act (42 U.S.C. 1395q(e)) is amended—

11 (A) by inserting "or 1837(i)(4)(B)" after
12 "1837(i)(3)" the first place it appears, and

13 (B) by inserting "or specified in section
14 1837(i)(4)(A)(i)" after "1837(i)(3)" the second
15 place it appears".

16 (c) PROVIDING FOR MEDIGAP OPEN ENROLLMENT
17 PERIOD.—Section 1882(s)(2)(A) of such Act (42 U.S.C.
18 1395ss(s)(2)(A)) is amended—

19 (1) by inserting "(i)" after "during", and
20 (2) by inserting before the period at the end the
21 following: "or (ii) in the case of an individual who
22 enrolls in part B pursuant to a special enrollment
23 period provided under section 1837(i)(4), the 6-
24 month period beginning with the first month as of

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: 9- 8-96 : 2:52PM : LEGISLATIVE COUNSEL-

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1 the first day of which the individual is enrolled
2 under part B pursuant to such enrollment".

3 (d) EFFECTIVE DATE.—

4 (1) IN GENERAL.—Subject to paragraph (2),
5 the amendments made by this section shall take ef-
6 fect on the date of the enactment of this Act and
7 apply to involuntary terminations of coverage under
8 a group health plan occurring on or after August 1,
9 1996.

10 (2) TRANSITION.—In the case of an involuntary
11 termination of coverage under a group health plan
12 that occurred during the period beginning on August
13 1, 1996, and ending on the date of the enactment
14 of this Act, the special enrollment period under sec-
15 tion 1837(i)(4)(B) of the Social Security Act (as
16 amended by subsection (b)) is deemed to begin as of
17 the date of the enactment of this Act.

U.S. Department of Labor

Pension and Welfare Benefits Administration
Washington, D.C. 20210



DATE: 10-22-96

TO: Chris Jennings

AGENCY: _____

TELEPHONE NUMBER: _____

FAX: _____

FROM: MEREDITH MILLER
*Office of the Assistant Secretary
Pension and Welfare Benefits Administration
U. S. Department of Labor
200 Constitution Avenue, NW - Room S2524
Washington, DC 20210*

COMMENTS:

*Sorry for the short notice on this.
The Secretary has asked for feedback as to
whether we can announce our intentions to
"fix" the retiree health broken promise
problem through legislation in the next
session. Vince or I will contact you today
for some feedback.*

P.S. What's happening with The Directive?

NUMBER OF PAGES INCLUDING COVER SHEET 12

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RETIREE HEALTH PROPOSALS

Many cases decided in the past 15 years have shaped legal doctrines that make it very difficult for retirees to establish an enforceable promise of lifetime benefits. These doctrines, derived principally from traditional contract law have allowed employers to terminate retiree benefits even where the plan documents or other information provided to retirees contain express promises that the benefits will last for their lifetimes. This paper offers proposals for legislative proposals to address the most serious problems that the case law has posed for retirees who seek to enforce these promises.

- The most important problem is that courts are often unwilling to enforce language within the controlling plan documents that could reasonably lead a retiree to believe that he or she has lifetime benefits. Even where the plan document contains a specific promise of lifetime benefits, employers often terminate them on the basis of "fine print" reserving the right to change any term of the plan. (Problem A)
- In other cases, the plan document does not contain a specific promise of lifetime benefits, but the employer makes the promise in other documents or in oral representations to the employees. Some courts hold that a general reservation of the right to amend the plan overrides other representations by the employer. Even where courts give precedence to the employer's representations, each participant may have to prove detrimental reliance. (Problems B to E)
- Federal class action requirements restrict the ability of retirees to pursue their claims as class actions. (Problem F).

Also included are a few proposals that address problems limiting the general availability of retiree health benefits. (Problem G)

Note on Effective Dates: Unless otherwise specified, the legislative proposals set forth below are intended to be effective both prospectively and retroactively with respect to benefit claims that have not been judicially determined.¹

Note on the Statute of Limitations: The courts generally apply State statutes of limitations for contract claims in these cases, which may not allow many retirees to take advantage of the proposals if they are enacted. Therefore, proposals under Problems A to G should include a statute of limitations of 6 years or the applicable State limit, whichever is longer.

¹Retirees whose benefit claims already have been pursued to a final court decision or court approved settlement would not be helped by these proposals. Although additional research will be conducted on this question, legislation purporting to overturn court decisions raises both practical and constitutional issues.

PROBLEM A: COURTS OFTEN FAIL TO ENFORCE PLAN DOCUMENT LANGUAGE THAT LEADS RETIREES REASONABLY TO BELIEVE THAT THEIR BENEFITS CANNOT BE REDUCED OR TERMINATED.

This problem typically arises in one of the following ways:

(1) The plan document contains a promise of lifetime benefits, but also contains a general reservation to the employer of the right to make amendments to the plan;

(2) The plan document is silent as to both the lifetime nature of the benefits and as to the sponsor's right to amend the plan (this generally occurs only in collectively bargained plans) ; and

(3) The plan document is ambiguous as to the duration of the benefits.

In these situations, the retirees generally believe that the the benefits are provided for their lifetimes. The Courts, however, often give supremacy to the general reservation of the right or amend, or otherwise create a presumption against the lifetime nature of the benefits.

PROPOSAL:

(1) As to Claims That Arise After Enactment: Create an Irrebuttable Presumption that a Promise of Retiree Benefits is a Promise of Lifetime Benefits Unless There is a Reservation of the Right to Amend That Relates Specifically to the Promise of Retiree Benefits.²

(2) As to Pre-Enactment Claims: Create a Rebuttable Presumption that a Promise of Retiree Benefits is a Promise of Lifetime Benefits Unless There is a Reservation of the Right to Amend That Relates Specifically to the Promise of Retiree Benefits.

PROS AND CONS:

- Under this option a specific promise of lifetime retiree health benefits in the plan document could not be defeated solely by the employer's general reservation of the right to amend plan documents. Similarly, a silent or ambiguous plan document would be construed in favor of the retiree.
- Prospectively, a promise of lifetime benefits in a plan document would simply override a general reservation of the right to amend the document.

²A plan document consisting of a terminable insurance contract would be treated the same as a plan document containing only a general reservation of a right to amend.

- A rebuttable presumption, as opposed to one that is irrefutable, would allow the admission of extrinsic evidence to resolve a contradiction between a specific promise of lifetime benefits and a general reservation of the right to amend the plan. Thus, retroactively, this option would place the burden on employers to demonstrate that there was no true promise of lifetime benefits. The parties could use evidence outside the plan documents, (e.g., use oral or written statements to participants) to establish the nature of the employer's promise in situations where the plan document is arguably ambiguous.
- Collectively-bargained plans are often silent as to the terminability of retiree benefits, and do not usually contain general reservations of the right to amend. Retiree benefits are sometimes terminated in such plans based solely on the stated term of the collective bargaining agreement (usually 3 years). This option would prevent such terminations.
- This proposal would clarify the relative legal positions of the parties to retiree health benefit suits and facilitate settlements or persuade some employers not to reduce benefits.
- At least to the extent that it would apply to existing plan documents and SPDs, it would interfere with the settled expectations of some employers and would likely engender strong opposition.

TOUGHER ALTERNATIVE OPTION:

As to All Claims, Create an Irrefutable Presumption That a Promise of Retiree Benefits is a Promise of Lifetime Benefits Unless There is a Reservation of the Right to Amend That Relates Specifically to the Promise of Lifetime Benefits.³

PROS AND CONS:

- This option would treat past and future benefit claims that arise before enactment of the proposal in the same manner as claims that arise after enactment. As such it is more favorable to retirees who have already lost benefits.
- It could engender even stronger employer opposition than the proposal because, based on the case law, employers may have believed that a general reservation of the right to amend the plan was sufficient to protect them.

³A plan document consisting of a terminable insurance contract will be treated the same as a plan document containing a general reservation of a right to amend.

WEAKER ALTERNATIVE OPTION:

As to all Claims, Create a Rebuttable Presumption that a Promise of Retiree Benefits is a Promise of Lifetime Benefits Unless There is a Reservation of the Right to Amend That Relates Specifically to the Promise of Lifetime Benefits.

PROS AND CONS:

- This option would treat past and future benefit claims alike, but it is generally more favorable to employers, because it allows them to overcome the presumption of lifetime benefits with appropriate extrinsic evidence.
- It would, nevertheless, engender strong employer opposition.

PROBLEM B: EVEN IF THE PLAN DOCUMENT CLEARLY RESERVES AN EMPLOYER'S RIGHT TO AMEND OR TERMINATE RETIREE HEALTH BENEFITS, THE SUMMARY PLAN DESCRIPTION LEADS PROSPECTIVE RETIREEES TO BELIEVE THAT THEY WILL RECEIVE LIFETIME RETIREEE BENEFITS.

Problem A addresses ambiguous language in the plan document itself. Most participants, however, do not see the plan document. Instead, they receive a summary plan description (SPD), which under ERISA must be written to be easily understood by them and reasonably apprise them of their rights and obligations under the plan. In some cases, the SPD will promise lifetime benefits, while the document contains contrary language. Some, but not all, the appellate courts have held that language in the SPD overrides language in the plan document.

PROPOSAL:

Require That an SPD Which Promises Lifetime Benefits Supersedes a Formal Plan Document Provision to the Contrary.

PROS AND CONS:

- The general trend in the case law is that language in the summary plan description (SPD), which must be distributed to the participants, takes priority over language in the plan documents. Not all the circuits, however, have addressed this issue.
- Even though current law requires that information regarding the terminability of retiree health benefits to be included in an SPD, this proposal would engender employer opposition because it creates a new remedy for an inadequate SPD.

PROBLEM C: SUPREMACY OF PLAN DOCUMENT OVER ORAL OR WRITTEN MISREPRESENTATIONS BY THE EMPLOYER.

Even if a presumption is established concerning the proper interpretation of the plan documents, as in the proposal under Problem A, participants can still be misled concerning their benefit rights. Employers sometimes issue written or oral statements purporting to explain terms of the plan, including statements regarding the lifetime nature of retiree benefits. Courts have ruled that an employer is not responsible for oral or written misrepresentations regarding the lifetime nature of retiree health benefits if the plan documents and the SPD do not make such a promise.

PROPOSAL:

Allow Written Misrepresentations of Lifetime Benefits (Or a Pattern and Practice of Oral Misrepresentations) to Estop an Employer from Relying on the Plan Document or SPD to Deny Benefits.

PROS AND CONS:

- This proposal would make employers responsible for representations that mislead employees about their retiree benefits, although it could lead to litigation concerning the significance of various oral statements by employer representatives.
- The requirement of a pattern and practice of oral misrepresentations would protect employers from liability as a result of infrequent statements to participants by misinformed or rogue employees
- This proposal would be strongly opposed by the employer community.

PROBLEM D: SOME EMPLOYERS MAINTAIN THAT PLAN DOCUMENT RESERVATIONS OF RIGHT TO TERMINATE RETIREE HEALTH BENEFITS OVERRIDE EARLY RETIREMENT AGREEMENTS WITH INDIVIDUAL PARTICIPANTS.

In the Sprague case, GM argued that it was not bound to provide lifetime health benefits to certain early retirees despite the promise of such benefits in the early retirement agreements. GM relied on language permitting termination of retiree health benefits in the SPD.

PROPOSAL:

Create an Irrebuttable Presumption That a Promise of Lifetime Retiree Health Benefits in a Formal Agreement Between the Employer and a Participant Cannot be Overridden by the Plan Document or SPD.

PROS AND CONS:

- Retirees who have formal agreements promising lifetime benefits have perhaps the strongest expectation that such benefits cannot be terminated.
- Employers who enter into such agreements should not be able to fall back on the general plan document.
- Employer groups will likely oppose this proposal, but they stand on weaker ground regarding their expectations than with respect to other proposals above.

PROBLEM E: EVEN WHERE COURTS RECOGNIZE EQUITABLE ESTOPPEL AS TO MISREPRESENTATIONS BY EMPLOYER, EACH PARTICIPANT MUST SHOW REASONABLE DETRIMENTAL RELIANCE ON MISREPRESENTATION.

Courts have ruled that in suits based on equitable estoppel, each retiree must show that he or she reasonably and detrimentally relied on the employer's misrepresentation regarding the lifetime nature of the retiree health benefits.

PROPOSAL:

For Claims that Arise After Enactment, Create a Rebuttable Presumption That Participants Affected by a Written Misrepresentation (or a Pattern and Practice of Oral Misrepresentations) Regarding the Lifetime Nature of Retiree Benefits Relied on Such Misrepresentation.

PROS AND CONS:

- This proposal would enhance the ability of participants who are subject to misrepresentations to obtain relief and would reduce the cost of such lawsuits.
- This would engender strong employer opposition.

PROBLEM F: FEDERAL CLASS ACTION REQUIREMENTS RESTRICT THE ABILITY OF RETIREE GROUPS TO BRING CLASS SUITS.

Although many retiree cases have been brought as class actions, the law is unsettled as to whether such suits meet Federal requirements for class-actions (particularly actions premised on equitable estoppel). An inability to file such cases as class actions significantly impedes the ability of such claims to be brought against large employers.

PROPOSAL:

Create an Exception to Federal Class-Action Requirements In Order to Facilitate Retiree Benefit Suits.

PROS AND CONS:

- This proposal would encourage capable counsel to represent large groups of retirees.
- Retirees without resources to bring their own suits could benefit from class suits.
- There may be situations where there are conflicts of interest within a class of retirees which argue against bringing the case as a class action.
- This proposal would require a change in Federal civil procedure rules and thus would raise issues of Congressional committee jurisdiction.

PROBLEM G: PROBLEMS RELATED TO THE GENERAL AVAILABILITY OF RETIREE HEALTH BENEFITS.

Problem # 1: Employers may terminate or reduce health care benefits without any advance notice to employees. Under currently effective law, notice must be provided 270 days after the end of the plan year in which the change occurred. Effective 1997, this period will be reduced to 6 months after the change.

PROPOSAL:

Prohibit Terminations or Reductions in Health Care Benefits Without 180 Days Advance Notice Unless Waived in a Collective Bargaining Agreement

PROS AND CONS:

- This proposal would allow participants time to challenge benefit terminations or reductions or to seek alternative coverage.
- Employers would argue that this proposal would add to their costs and limit their ability to manage their businesses.
- This proposal may discourage employers from offering health benefits.

Note: Congressman Kleczka (D-Wis.) has made a similar proposal, which would require the Secretary to certify that the 180 day advance notice was given before the benefits could be reduced or terminated. This certification requirement could unduly burden the Department.

Problem # 2: Retirees whose benefits are terminated after retirement have no COBRA rights. Employees who retire after elimination of coverage can purchase continuation coverage from the employer at group rates for 18 months (36 months for dependents) after loss of benefits.

PROPOSAL:

Permit Retirees Who Received Retiree Health Coverage at the Time of Their Retirement and Whose Coverage Has Been Terminated, to Purchase COBRA Continuation Coverage until they are eligible for Medicare

The premium could be set a more than the actual cost of such coverage (say 110%) to offset increased costs to plan due to adverse selection.

PROS AND CONS:

- This proposal addresses the problem of defeated expectations, although for many the additional cost would be prohibitive.
- It may be difficult to completely offset cost of adverse selection and still have affordable premiums for retirees.
- Also, Medicare provides less than half of elderly's total health care costs.
- Employers would argue that this proposal would add to their costs and limit their ability to manage their businesses.

Note: Congressman Kleczka (D-Wis.) made a similar proposal that would have applied to all retirees whether or not the employer provided retiree health benefits at the time of retirement. This proposal is more expensive and is likely to engender stronger employer opposition.

Congressman Kleczka also proposed to allow Medicare-eligible retirees who lose Employer-sponsored benefits to obtain Medicare and Medigap without paying the penalty for late enrollment. The cost that this would impose on the Medicare system are not known.

Withdrawal/Redaction Marker

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. briefing paper	Medical Information (6 pages)	7/16/96	P6/b(6)

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- P1 National Security Classified Information [(a)(1) of the PRA]
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- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Retiree Health RLG
GM Case

RETIREE HEALTH AND THE GENERAL MOTORS CASE

BACKGROUND

Fewer and fewer workers receive from their employer the security of health care coverage in retirement. The percent of retirees covered by health insurance provided by a former employer dropped from 37 percent in 1988 to 27 percent (4.7 million retirees) in 1994.¹

And of those who have received and relied on their employer's promise of health coverage, thousands of retirees have found that coverage was taken away after their employer decides to terminate the health plan.

To ensure that promises for health care security are kept, the Department of Labor has fought for retirees in important retiree health cases through its *amicus* brief program, including in General Motors v. Sprague. The Sixth Circuit recently agreed with the Department's position (and that of AARP in its *amicus* brief) that GM must honor its promise to 84,000 retirees for health care coverage in retirement. We have argued against legal technicalities used by employers to avoid honoring their commitment to retired workers.

OUR POSITION

American workers deserve a secure retirement. If an employer has promised health coverage to its retirees, that commitment must be honored. After a lifetime of labor, American workers should be able to rely on promises from their employers for health security in retirement.

NEXT STEPS

Two options are on the table. First, the Administration can assure AARP members that the Department of Labor will continue its efforts to protect retirees' promises of health security through the Department's *amicus* brief program.

Second, as you know, we have had discussions on the Secretary of Labor's idea for a Presidential directive to build upon the Department's efforts by using all available Labor Department resources to ensure that employers who have promised to provide health coverage for retirees keep their promises and that the Department will identify additional actions the Administration can take to make sure these promises are honored. A draft of the directive is attached.

¹ According to the August 1988 and September 1994 Health Benefits Supplements to the Current Population Surveys.

THE WHITE HOUSE
Washington, September 10, 1996.

DRAFT

Memorandum of September 11, 1996

Protecting Health Benefits of Retirees

Memorandum for the Secretary of Labor

A substantial number of firms, having promised to provide health benefits for their retirees, later reneged on these promises. Many of these retirees, especially those who are not yet eligible for Medicare, would not have left their jobs without the guarantee of employer-provided health coverage.

I would like to first congratulate you on the success of the Department of Labor's *amicus* brief program in protecting the health benefits of retirees. Thanks in part to friend-of-the-court briefs filed by the Labor Department, courts in three recent cases issued decisions preserving retiree health coverage that employers were attempting to terminate or reduce. One of the rulings protected the health benefits of 84,000 GM retirees; another prevented the Pabst Brewing Company from terminating the benefits of 700 former employees.

I direct you to build upon this effort by using all available Labor Department resources to ensure that employers who have promised to provide health coverage for retirees keep their promises. I further direct you to identify additional actions the Administration can take to make sure these promises are honored.

Protecting retiree health benefits is one part of this Administration's overall effort to ensure that workers, after a lifetime of labor, can enjoy a secure retirement. Honoring pledges of health coverage is the essence of corporate citizenship--taking into account people as well as profits.

You are authorized and directed to publish this memorandum in the *Federal Register*.

Retiree Health File

**HEALTH CARE FOR RETIRED WORKERS
Pabst Brewery, Milwaukee**

ISSUE

On August 29, a federal court granted a temporary restraining order preventing Pabst Brewing Company from eliminating the health care benefits to more than 700 retired workers (who had been covered under the Collective Bargaining Agreement with Brewery Workers Local 9) on September 1. Pabst argued that it had the right to cut off retiree benefits while retirees asserted that Pabst had committed itself to pay retiree benefits for life. The Department of Labor filed an amicus brief that argued that retirees' health benefits should not be eliminated until additional information about the contract is evaluated. A hearing on the Motion for a Preliminary Injunction is scheduled on September 16.

The Milwaukee Journal-Sentinel (8/30/96) reports that Representative Kleczka will encourage the President to make Pabst's now-stalled plan part of the President's Labor Day agenda. The Department of Labor believes that the President's Milwaukee trip would be an excellent opportunity to highlight the Administration's involvement in retiree health protection issues.

MEDIA COVERAGE

Pabst's actions have been widely reported by the local media. Secretary Reich is quoted in the Milwaukee Journal-Sentinel (8/30/96) as saying "from a legal point of view we think Pabst is wrong." He continued, "If Pabst promised lifetime medical benefits to its retirees, it will honor that commitment."

CONGRESSIONAL INVOLVEMENT

Representatives Jerry Kleczka and Tom Barrett have been very involved in this issue on behalf of Pabst retirees and asked the Secretary of Labor to investigate the case and take action if appropriate. Both Congressmen recognized the Department of Labor's efforts in recent press releases (8/29/96).

ADMINISTRATION HISTORY

The Secretary of Labor filed an amicus brief in a similar case to enforce the health benefit promise that General Motors made to its employees. On August 14, 1996, the court ruled in favor of the 84,000 non-union retirees.

SUGGESTED ADMINISTRATION POSITION

The Administration has consistently defended the rights of workers who have been contractually promised long-term or permanent retiree health benefits. However, the extent to which this specific case explicitly meets this criteria is unclear. We would therefore suggest the following talking point:

"If workers are promised retiree health benefits, those commitments should be upheld."



September 13, 1996

MEMORANDUM TO SUSAN KING
LESLEY GOLD
VINCE TRIVELLI
CHRIS JENNINGS
ELLEN SEIDMAN

FROM: MEREDITH MILLER

Attached is a package of press stories on the recent Supreme Court decision related to GM retiree health benefits. Chris Jennings asked for this validation as background for possible Presidential directive to DOL.

Attachment

NOTE TO MEREDITH MILLER

FROM: PAUL RICHMAN *PR*
CC: SETH HARRIS
DATE: SEPTEMBER 12, 1996
RE: RETIREE HEALTH CARE - GM CASE PRESS COVERAGE

Attached is the result of Nexis search for stories concerning the GM retiree health care benefits case. The only recent news article is from the Detroit News and the Michigan Lawyers Weekly. Apparently, the AARP statement was not picked up in any recent news stories..

August 26, 1996 - *Michigan Lawyers Weekly* - "Health Care Benefits for Retirees - Contract and ERISA Claims"

August 16, 1996 - *AARP News* - "Statement by AARP Executive Director Horace B. Deets on Court Ruling Relating to Retiree Health Benefits"

August 15, 1996 - *The Detroit News* - Front Page Story

August 4, 1995 - *Business Dateline; Oakland Press - Pontiac, Michigan* - "Court Hears GM Benefits Dispute"

April 17, 1995 - *The National Law Journal* - "ERISA is Prototype for Pre-Emption"

September 19, 1994 - *Business Week* - "Harsh Medicine for Ailing Pension Plans"

September 1994 - *Employee Benefit Plan Review* - "GM Must Pay Health Care for Early Retirees"

May 1994 - *Personnel Journal* - "GM Unlawfully Cuts Retiree Health Benefits"

April 1994 - *Employee Benefit Plan Review* - "GM Owes Early Retirees Free Lifetime Health Benefits"

February 4, 1994 - *Wall Street Journal* - "What Happens When Patients Arbitrate Rather Than Litigate"

LEVEL 1 - 1 OF 76 STORIES

Copyright 1996 Michigan Lawyers Weekly
Michigan Lawyers Weekly

August 26, 1996

SECTION: THE WEEK'S OPINIONS; U.S. Court of Appeals; 6th Circuit; Pg. 5A

LENGTH: 679 words

HEADLINE: Contract;
Health Care Benefits For Retirees - Contract And ERISA Claims

BYLINE: Summary by MJM

BODY:

Where the district court ruled that defendant was contractually obligated to provide health care benefits to plaintiff-early retirees, the decision was correct. However, the court erred by denying such coverage to plaintiff-general retirees as a matter of law.

Background

Defendant historically provided salaried employees with broad health care coverage during employment and retirement. These health care benefits were offered to the employees by medical providers, and were governed by contractual documents (the "underlying plan documents") between defendant and the providers. The health care benefits were also summarized for the employees in various brochures and booklets. Some of these materials were informal and/or predated the Employee Retirement Income Security Act (ERISA); other materials qualified as formal "summary plan descriptions" (SPDs) under the act.

Plaintiffs are a class of salaried General Motors retirees who either retired early under special early retirement programs (early retirees) or normally after completing the required years of service (general retirees). During an early retirement, the retirees signed special documents terminating their employment. These termination documents often included promises that broad health care coverage would continue for life.

Some of the brochures and booklets given to employees also promised broad life-time health care benefits. However, many of these materials also gave defendant the right to modify or terminate these benefits.

In 1988, defendant modified plaintiffs' health care coverage. It imposed new deductibles and co-payments on retirees using fee-for-service medical providers. Plaintiffs also had to shoulder some of the cost of vision and hearing benefits, and pay extra for other benefits.

Plaintiffs sued defendant. They alleged that the modification violated the ERISA, breached contractual obligations and violated equitable estoppel principles. The district court ultimately dismissed plaintiff-general retirees' claims. After a bench trial on plaintiff-early retirees' claims, the court found that defendant was contractually obliged to provide them with broad health

care coverage.

General Retirees

In dismissing the general retirees' claims, the district court erred by interpreting the health care brochures and booklets provided to the retirees by defendant. Some of this material was informal and of no legal effect. Other post-ERISA material qualified as formal SPDs and was legally binding. We find that these SPDs were the legally operative documents here. They have precedence over any informal material and the underlying plan documents.

On remand, the district court must sort through the material given to plaintiffs and determine which material was SPDs and when they were in effect. Then, the trial court must provide broad coverage when such coverage was promised in an SPD without a reservation of rights by defendant to modify or terminate coverage. If broad coverage was promised along with a reservation of rights, broad coverage may generally be curtailed. If the SPD did not provide broad coverage and the underlying plan documents reduced coverage, broad coverage may be curtailed.

Early Retirees

The district court ruled that early retirement termination documents contractually bound defendant to maintain broad health care coverage for the early retirees. This was correct. As the lower court found, early retirement was a package in which the early retirees gave up valuable employment rights as consideration for other rights like broad lifetime health care coverage.

On the other hand, the district court erred by dismissing equitable estoppel for the general retirees and breach of fiduciary claims for both classes of retirees. These claims must be reinstated on remand.

Sprague, et al. v. General Motors Corp. (Lawyers Weekly No. 25848 - 36 pages) (Martin, J., joined by Daughtrey and Lively, JJ.). On Appeal from the United States District Court for the Eastern District of Michigan.

LANGUAGE: ENGLISH

LOAD-DATE: September 11, 1996

AARP NEWS

For further inquiry, contact American Association of Retired Persons • Communications Division
601 E. Street, N.W. • Washington, D.C. 20049 • (202) 434-2560

STATEMENT BY AARP EXECUTIVE DIRECTOR HORACE B. DEETS ON COURT RULING RELATING TO RETIREE HEALTH BENEFITS

August 16, 1996

The American Association of Retired Persons (AARP) is pleased with the strong message sent this week by the Sixth U.S. Circuit Court of Appeals that companies need to provide health benefits promised to retirees.

The court ruled on Wednesday that the General Motors Corporation must restore full health benefits as promised to 84,000 workers who retired between 1974 and 1988.

Workers who accept early retirement offers often base their decision on the promise of health benefits for them and their spouses. These retirees can be devastated by health care costs if health coverage is suddenly eliminated or withdrawn.

Employers have an obligation to honor the promises they make to workers and retirees concerning health benefits. This ruling should cause employers to think twice before reducing health benefits for retirees.

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For additional information, contact Ted Bobrow at (202) 434-2560.

LEVEL 1 - 3 OF 76 STORIES

Copyright 1996 The Detroit News, Inc.
The Detroit News

August 15, 1996, Thursday

SECTION: Front; Pg. Pg. A1

LENGTH: 267 words

BYLINE: By Daniel Howes / The Detroit News

BODY:

Nearly 50,000 General Motors Corp. white-collar retirees should get full health care coverage from the automaker, a federal appeals court in Cincinnati ruled.

The retirees sued GM seven years ago for allegedly breaking a promise to provide free health insurance for them and their spouses for the rest of their lives.

The 6th U.S. Circuit Court of Appeals ruling Wednesday covers salaried workers who took early retirement between 1974 and 1988. The court said GM's early retirement agreements with nonunion workers amounted to explicit promises to pay lifetime health benefits to retirees and spouses.

The court also said a federal court in Detroit should reconsider allowing GM to change medical coverage for another 34,000 salaried workers who retired under GM's general retirement plan.

A GM spokesman said the automaker "believes ... it has the right to amend, modify, suspend or terminate its benefit plan provisions." He added the company is disappointed with the ruling and is examining options to appeal.

GM has continued to charge retirees \$ 1,500 or more in co-payments and deductibles since the class-action August 1989 lawsuit spearheaded by retirees Leonard Moeller of Flint and Robert Sprague of Swartz Creek. Moeller said his out-of-pocket medical expenses totaled more than \$ 10,000 over the past eight years.

"General Motors had a moral and implied contract," said Moeller, who retired in 1982 as a senior accountant with GM's former Fisher Body division.

"All we want is what we paid in deductibles and co-pays that we never had to pay before in our life."

LOAD-DATE: August 15, 1996

LEVEL 1 - 53 OF 76 STORIES

Copyright 1995 UMI Inc.;
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Business Dateline;
Oakland Press-Pontiac MI

August 4, 1995

SECTION: Sec A; pg 1

LENGTH: 661 words

HEADLINE: Court hears GM benefits dispute

BYLINE: Joseph Szczesny

DATELINE: Cincinnati; OH; US

BODY:

CINCINNATI--General Motors Corp. lawyers continued their campaign Thursday to release the automaker from paying the full load for health care costs to former employees who retired early after being promised free care for life.

But attorney Raymond C. Fay, representing 50,000 GM retirees who retired prior to age 65 from GM between 1974 and 1988, told the U.S. 6th Circuit Court of Appeals GM had no right to unilaterally demand that ex-employees start paying more for health insurance.

The argument before the panel is the latest round in a court fight that began in 1988 and both sides say they are ready to take to the U.S. Supreme Court.

The panel is expected to rule before the end of the year.

GM has appealed the February 1994 decision by Judge John Feikens, of the U.S. District Court in Detroit, who ruled that GM had no right to change the health care benefits for 50,000 salaried employees who accepted the automaker's offer of early retirement.

Fay also argued that an additional 34,000 GM retirees, who retired at 65, also are entitled to GM's promised lifetime health care coverage. Or, Fay said, those employees should be granted a trial to hear their complaints.

Feikens, after a lengthy trial in the summer of 1993, ruled GM had made a promise to the early retirees that the benefits would not be changed.

Fay said the early retirees are paying up to \$ 1,500 apiece annually for their health care coverage while the appeal is pending. Those who retired at 65 and lost in Feikens' court are paying up to \$ 5,000 per year for those expenses, he said.

Stephen Shapiro, the Chicago lawyer who argued for the automaker Thursday, said when federal pension laws were rewritten early 1970s, Congress gave employers such as GM the right to revise the plans they offered employees as

Oakland Press-Pontiac MI, August 4, 1995

economic circumstances changed.

Congress knew the flexibility was important inducement for employers to offer the additional benefits to retirees.

"Descriptive language should not be twisted into some sort of pledge," Shapiro said.

No employer would make such a pledge because the potential cost is unknown, he said.

Fay, however, told the panel the retiree had every reason to believe they would be covered by GM's promise to pay all of their health care costs.

"The only people playing 'gotcha' was GM. They were playing gotcha with the employees who were induced to retire early in return for the health care benefits," Fay said.

Raymond Sprague, the GM retiree from Swartz Creek who is the named plaintiff in the case, reiterated after the hearing he would have never retired had he thought GM would require him to pay a larger share of his health care.

In many cases, employees who accepted early retirement assumed they were trading larger pensions for a promise of lifetime health care benefits, Sprague said.

The three judges hearing the 40-minute hearing are Pierce Lively, appointed to the court by President Nixon, Boyce Martin, appointed by President Carter, and Martha Craig Daugherty, appointed by President Clinton.

Lively asked Shapiro why GM's distribution of specific documents for early retirement created a special contract as Feikens had decided. Shapiro said other documents distributed to all the early retirees contained the reservation.

Martin, who presided over the panel, observed the previous decision in similar cases from around the United States appeared divided. Shapiro, however, maintained earlier decisions by the 6th Circuit clearly favored GM's position.

The U.S. Department of Labor turned in a brief recommending the judges uphold Feikens' original ruling, saying it would discourage employers from unilaterally altering benefit plans.

The U.S. Chamber of Commerce weighed in on GM's side arguing that upholding Feikens' original ruling would place an undue hardship not only on the automaker but other businesses as well.

GM's health care costs increased from \$ 735 million in 1975 to \$ 3.7 billion in 1992.

LANGUAGE: ENGLISH

UMI-ACC-NO: 9583755

LOAD-DATE: October 31, 1995

LEVEL 1 - 58 OF 76 STORIES

Copyright 1995 The New York Law Publishing Company
The National Law Journal

April 17, 1995

SECTION: Pg. A1

LENGTH: 1939 words

HEADLINE: ERISA Is Prototype for Pre-Emption

BYLINE: BY RANDALL SAMBORN, NATIONAL LAW JOURNAL STAFF REPORTER

HIGHLIGHT:

Management lawyers like the coherence; plaintiffs' lawyers say their clients lose out.

BODY:

AT A SENATE hearing last month, employee benefits expert Frank Cummings recalled the "wondrously chaotic" legal landscape that existed before the sweeping federal statute known as ERISA was enacted two decades ago. In the absence of federal law, a patchwork of state laws governed pension plans and other blossoming workplace welfare programs.

He told the Labor and Human Resources Committee -- whose members were considering a House Republican proposal to use the Employee Retirement Income Security Act of 1974 as a framework for limited health care reform -- about a pretrial conference in Detroit in the 1960s. The case involved the termination of a pension plan that accompanied the shutdown of a Studebaker-Packard automobile factory in South Bend, Ind.

The plan trustee and investment manager were based in New York; a Canadian insurance company was involved, as were unions based in Michigan and Indiana, and affected workers were scattered everywhere. Such diversity left the judge wondering, among other things, how to get jurisdiction over all the necessary parties and which state's law applied. It was not a simple question. A bank trust agreement said New York law controlled; the insurer said Ontario law prevailed; the unions claimed federal labor law superseded; and the plan itself said it was governed by Indiana law -- maybe.

"The only certainty was uncertainty," said Mr. Cummings, of the Washington, D.C., office of New York's LeBoeuf, Lamb, Greene & MacRae. "ERISA, in 1974, provided a single federal answer to every one of those questions . . . Surely nobody with memory of the pre-ERISA situation would want to return to it," he advised the senators at the March 15 hearing.

Baby Boomer Crunch

And, reflecting on 20 years of experience with ERISA's Title I requirements -- which establish a cornucopia of administrative and procedural standards for all employee benefits, both pension and health plans included -- Mr. Cummings proclaims that "ERISA Title I has stood the test of time."

Such sentiments have added currency as Congress moves to supplant or augment the patchwork of state common law governing products liability and medical malpractice with uniform federal law.

Mr. Cummings' enthusiasm for ERISA is not shared by lawyers who represent plaintiffs in employee benefits cases.

Ronald Dean, a prominent ERISA plaintiffs' attorney and sole practitioner in Pacific Palisades, Calif., says, "Congress slaughtered 200 years of common law in order to accommodate big corporations so they wouldn't be subject to 50 state laws -- what law they are subject to, we don't know."

But both sides of the ERISA bar do agree on one thing: Amid evidence that ERISA litigation already is booming, the greatest crunch is yet to come as the aging baby boomer population becomes more assertive about receiving its medical and retirement benefits.

The number of cases filed in federal district courts has risen from 6,884 in 1988 to 10,536 in 1993, according to the latest figures from the Administrative Office of the U.S. Courts, and some experts predict that it will grow even faster. Faced with such an expanding caseload, the Long Range Planning Committee of the U.S. Judicial Conference wants to abolish the federal courts' concurrent jurisdiction over routine ERISA benefit claims because such cases don't involve any substantive ERISA provisions.

With public and private plan assets pushing \$ 4 trillion, ERISA litigation is hot because of the nation's demographics and because "it's where the money is," says management-side lawyer Howard Shapiro, of New Orleans' McCalla, Thompson, Pyburn, Hymowitz & Shapiro. "The coverage provisions are enormous, and its attracts a lot of attention because as baby boomers go through their life cycle they are going to be more benefit-aware."

Harder to Maintain?

Although litigators expect their workload to increase, some ERISA transactional lawyers at large firms say their workload is declining because changes in the Tax Code and regulations have made qualified retirement plans more complex and costly for employers to maintain.

Others say that despite the drop, there is still plenty of work. Some 77 million workers participated in 712,000 qualified retirement plans in 1990, according to the most recent data compiled by the Washington, D.C.-based Employee Benefits Research Institute.

The data include both federally insured defined-benefit plans -- in which an employer pays a fixed benefit to retirees based on such factors as years of service, age and compensation -- and uninsured defined-contributions plans, which pay a variable benefit based on contributions to an investment account by the employee, employer or both.

In recent years, defined-contribution plans have become more prevalent than traditional defined-benefit plans, accounting for about half of all retirement plans in 1993, compared with only one-fourth in 1988. Concomitantly,

defined-benefit plans have dropped from 56 percent in 1988 to 38 percent in 1993, and requests for Internal Revenue Service approval of plans has been declining steadily while requests for plan terminations show an upswing.

Heightening concerns over retirement security is the \$ 71 billion underfunding of defined-benefit plans in 1993 -- concentrated primarily in the auto, steel, airline, machinery, and tire and rubber industries, according to the Pension Benefit Guaranty Corp. ERISA amendments that were enacted as part of the General Agreement on Tariffs and Trade last December are expected to cut underfunding by two-thirds over the next 15 years, partly through charging employers higher premiums.

Some Critics

While employers and employment law defense lawyers applaud ERISA's uniform federalization of employee benefits and hail its substantive pension provisions and fiduciary requirements, the statute's uniquely broad pre-emption provisions, denial of jury trials and any damages beyond whatever benefits are owed, and discretionary award of attorney fees are the bane of the employment law plaintiffs' bar.

Under ERISA, insurance companies have little incentive to pay, in good faith, disputed medical or pension benefits, says Associate Dean Jayne Zanglein of Texas Tech University School of Law, a well-known ERISA expert.

The statute's broadly worded threepart pre-emption provision supersedes "any and all State laws" that "relate to" an employee benefits plan. Claimants denied benefits thus may not seek relief under such state causes of action as insurance law, misrepresentation, breach of contract, negligence, emotional distress or bad faith, says Dean Zanglein.

"It really is the combination of the two things -- the broad pre-emption and the lack of remedies -- that makes plan participants worse off now than they were 20 years ago, before ERISA was passed," she says. She and others often invoke a phrase coined by the 5th U.S. Circuit Court of Appeals to describe jilted plan participants as being "betrayed without a remedy." *Degan v. Ford Motor Co.*, 869 F.2d 889 (1989). One of the harshest examples, she adds is *Corcoran v. United HealthCare Inc.*, 965 F.2d 1321 (5th Cir.), cert. denied, 113 S. Ct. 812 (1992).

In *Corcoran*, a pregnant woman's doctor ordered her hospitalized near the end of a "high risk pregnancy." her insurance company, however, authorized only 10 hours per day of home nursing care, and eventually her fetus died. The court said ERISA prevented the woman from suing for wrongful death under state law.

Dean Zanglein says the tide of such harsh results "must be stayed." She has been urging federal courts to fill ERISA's gaps with federal common law, absent relief from Congress.

"There's no upside," says Mr. Dean, who has been handling employee-benefits cases almost exclusively for 24 years. He sends three to four potential clients to bankruptcy court each week, instead of filing a suit, because their health plans refuse to pay a \$ 20,000 hospital bill and the costs are greater than the potential recovery.

"It's the only thing they can do even if they have a good case," he says.

Stepping In

At the Department of Labor, which traditionally has targeted its enforcement efforts at the mismanagement of plan investments and administration, attorneys in the solicitor's office are broadening their focus "to include a comprehensive amicus curiae program . . . designed to clarify and reinforce those participant rights which we believe are protected by the statute," says Associate Solicitor Marc I. Machiz. As examples of the department's stepped-up involvement, Mr. Machiz cites the amicus briefs that his office filed in December in two retiree health benefit cases pending before the 6th Circuit. The department sided with the retirees in trying to preserve or restore lifetime benefits. *Sprague v. General Motors*, 94-1896.

In Congress, U.S. Reps. Harris W. Fawell, R-Ill., and William F. Goodling, R-Pa., have introduced companion health care reform bills -- the ERISA Targeted Health Insurance Reform Act of 1995 (H.R. 995) and the Targeted Health Insurance Reform in the Individual Market Act (H.R. 996) -- that would reform the small group insurance market and expand the use of multiple employer welfare arrangements, in addition to addressing such issues as pre-existing condition exclusions, renewability and portability. Like ERISA, the bills would pre-empt state insurance laws and not mandate any employer benefits, and they would mirror ERISA's requirements regarding participation, vesting and funding.

Mr. Goodling, chairman of the House Economic and Educational Opportunities Committee, and Mr. Fawell, chairman of the Sub-committee on Employer-Employee Relations, want to re-examine the pension and welfare benefits provisions of ERISA, "especially ERISA preemption," says majority staff aide Russell J. Mueller.

"I think [Mr. Goodling] believes that ERISA was perhaps an act ahead of its time. He thinks that it's an appropriate framework -- the ERISA preemption framework, the ERISA regulatory framework -- to move the marketplace into the 21st century," says Mr. Mueller.

Jeffrey Lewis, a plaintiffs' attorney at Sigman, Lewis & Feinberg in Oakland, Calif., agrees that "there needs to be very significant revisions of ERISA," but not the kind that the Republican-controlled Congress has in mind. The courts have expanded the scope of ERISA pre-emption far beyond what Congress intended, he says, noting that Congress was focused at the time on pensions, not health care.

"There's no way that when ERISA was passed it contemplated changes in the health care industry -- utilization review wasn't even invented," he says. "The pre-emption provisions have got to be narrowed to exclude certain categories or the remedies have to be broadened along with the right to sue, and Congress has to step in and do something pro-consumer about regulating the medical benefits area."

Mr. Lewis adds, "There won't be any lessening of ERISA litigation, but the real questions are whether there will be enough lawyers to do all the litigation that should be done and whether individuals who are denied benefits are going to have any significant remedies available."

The National Law Journal, April 17, 1995

His colleague, Mr. Dean, says, "The good thing about being on the plaintiffs' side is representing people who are deserving, but the bad thing is that the law has been made so difficult . . . It's been bleaker for two decades and getting bleaker all the time."

GRAPHIC: Picture 1, A Fan: Frank Cummings likes having uniform federal standards.; Picture 2, Raw Deal? Jayne Zanglein says ERISA is hurting plaintiffs.

LANGUAGE: ENGLISH

LOAD-DATE: April 26, 1995

LEVEL 1 - 76 OF 76 STORIES

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HEADLINE: HARSH MEDICINE FOR AILING PENSION PLANS

BYLINE: Christina Del Valle in Washington

HIGHLIGHT:

Castor oil now, say the Clintonites, may prevent a bailout later

BODY:

General Motors, Warner-Lambert, Northwest Airlines, and Woolworth are in very different lines of business, yet they share one unsettling problem: They are among the top 50 companies singled out by the federal government for grossly underfunding their employee pension plans. The Clinton Administration has a solution that has them, and much of the rest of Corporate America, up in arms.

Labor Secretary Robert B. Reich and Treasury Secretary Lloyd M. Bentsen are pushing a pension reform bill that hikes insurance premiums paid by some 16,000 underfunded corporate plans to the Pension Benefit Guaranty Corp. (PBGC), the agency that makes sure pensioners receive benefits if their employer goes bankrupt. The measure also would force thousands of companies with healthy plans to boost pension contributions. And it would give the PBGC a bigger say in mergers and asset sales affecting pension plans. "We're not going to stand by while people continue to break promises," vows PBGC Executive Director Martin Slate.

Slate has cause for concern. Unfunded pension liabilities doubled, to \$ 53.4 billion, from 1987 to 1992 (chart). If something isn't done now to shore up pension financing and the agency's insurance fund, the agency fears, taxpayers could face a multibillion-dollar financial bailout not unlike the savings and loan debacle. Gary Burtless, a senior fellow at the Brookings Institution, says falling stock and bond prices could mean a huge liability for the government: "Those values can head south very quickly." As Reich warned Congress: "If we wait, the medicine that will be necessary will only be harder to swallow." To business, however, the Reichian remedy tastes like castor oil. Gripes Lisa Sprague, of the U.S. Chamber of Commerce. "Here's one more government agency peering over our shoulder." CLEVER MOVE? But to the PBGC, someone must pressure companies to keep their commitments. It notes, for example, that last May it had to force GM to pony up \$ 4 billion in cash for the carmaker's most underfunded plan. That kind of settlement is rare, though -- which is why the Clintonites want to impose industrywide mandates.

In fact, they're trying to tack the PBGC proposal onto separate legislation

that enjoys broad business support -- congressional approval of the General Agreement on Tariffs & Trade. Since congressional rules for GATT prohibit legislators from amending or even debating changes in the trade bill, it's slated for an up-or-down vote before the end of the year. The Administration also sees another advantage in linking the two measures -- the \$ 800 million in revenues expected from the higher insurance premiums would be used to help offset a drop in budget receipts due to lower tariffs under the trade agreement. Finding sources of revenue to make up for the tariff losses has been a major obstacle to GATT approval.

But the Administration may have been a little too clever by half. For one thing, the legislative gambit has ruffled feathers on Capitol Hill. Members of the Senate Labor & Human Resources Committee are grumbling that they would be deprived of their traditional jurisdiction over the pension measure, since trade bills are handled by the Senate Finance Committee. "It's decent politics," complains one Senate aide. "But it violates the legislative process."

Moreover, GATT passage this year suddenly is looking iffy. Senate Republicans are threatening to delay a vote until next year: Some want to embarrass Clinton, and others fear the proposed World Trade Organization, which would oversee the international accord, might undermine U.S. sovereignty.

Despite questioning its tactics, congressional Democrats and Republicans applaud the Administration for addressing a longstanding concern, one that the Bush Administration failed to tackle. At the core of the problem are cushy defined-benefit plans that unions negotiated with such old-line industries as autos, steel, and airlines. These plans guarantee a specified monthly payment after retirement. In contrast, benefits from 401(k) plans and other defined-contribution programs, which the PBGC does not insure, depend on how the pension plan's investments fare. LAST STRAW. The reforms rile Corporate America because they will mandate stricter rules and potentially higher pension contributions for all companies even though only a tiny fraction of businesses are causing most of the problems. Of the 66,000 PBGC-insured pension plans offered by 8,000 companies, a quarter are considered underfunded. "We've already layered in this enormous complexity" for all companies with defined-benefit plans, grouses Larry Zimpleman, vice-president at Des Moines-based Principal Financial Group, which says it does not have a funding problem. "This is an added straw on top of the camel's back."

The companies cited by PBGC for problems are also upset. They contend that the agency's method of calculating their pension liabilities vastly exaggerates the problem because the \$ 53 billion figure assumes two unlikely events: that all underfunded plans are paid off at once and that the PBGC buys every beneficiary an annuity.

And companies complain that the PBGC uses an unrealistically low annual rate of return on pension fund investments. Northwest Airlines Inc., for example, believes it has set aside more than enough money for its pension plan. But the agency says the company's plan is underfunded by \$ 311 million, based on an assumption that the fund's investments will grow just 6.4% a year. "It's just not true," asserts Northwest Vice-President Elliott M. Seiden. He says that the company assumes a 12% to 14% rate of return, based on a 10-year track record.

Still, despite such objections, one troubling trend can't be easily

dismissed. From 1987 to 1993, the number of plans that the PBGC has taken over rose 34%, to 1,858. The number of workers or retirees owed money by the agency jumped 62%, to 349,000. And benefit payments the PBGC shelled out annually soared 127%, to \$ 723 million.

Although the PBGC's income from premiums and investments is more than adequate to make these payments, its balance sheet, which includes actuarial assumptions about future liabilities, shows a \$ 2.9 billion deficit, up 87% since 1987.

The Administration claims that businesses with strong pension plans should welcome the reforms because they would force the problem companies to pay higher premiums and plan contributions. Currently, premiums paid by those with sound plans effectively subsidize those who underfund their plans. The legislation also would standardize actuarial assumptions that companies use to calculate their pension contributions. For example, although Ford Motor Co. assumes that only 17.2 male workers per thousand will die by age 65, General Motors Corp. assumes that 32.1 die by the same age -- allowing GM to cut its contributions.

The PBGC has tried to mollify business by limiting many of its tough new requirements to the worst offenders. For instance, the agency wants advance notification about acquisitions and divestitures to apply only to companies that are less than 90% funded. But there are limits on how much the PBGC will backpedal. It wants to make sure that taxpayers don't have to underwrite another huge bailout. A little unpleasant castor oil now might do the trick.

GRAPHIC: Photograph: THE HEART OF THE PROBLEM? UNION-NEGOTIATED PENSIONS...
PHOTOGRAPH BY MICHAEL L. ABRAMSON ; Photograph: ...FOR AUTO AND STEEL WORKERS
INCLUDE SPECIFIC PAYMENTS PHOTOGRAPH BY ALEXANDER MARES-MANTON; Illustration:
Chart: Who'll Pay For Pensions? CHARTS BY RAY VELLA/BW

LANGUAGE: ENGLISH

GM Must Pay For Health Care For Early Retirees

General Motors Corporation must keep paying the entire cost of health care coverage for about 45,000 early retirees while it appeals a decision requiring it to provide free lifetime health benefits to the retirees, the U.S. District Court for the Eastern District of Michigan has held in *Sprague v. General Motors Corp.* (No. 90-CV-70010) (see *EBPR*, April 1994, p. 63).

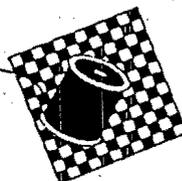
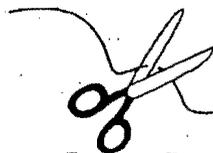
Prior to 1988, GM provided free health coverage to its salaried retirees. In a cost-containment effort in 1988, however, the company began requiring deductibles and copayments on health care benefits. More than 80,000 regular and early retirees filed a lawsuit, alleging that GM was contractually bound to continue the free lifetime health benefits. The district court dismissed the regular retirees' claims, but allowed the early retirees to go to trial.

In February 1994, the court found that GM had made promises of lifetime health cover-

age to the early retirees. The promises were made specifically to encourage early retirement, the court stated. Therefore, the company could not rely on statements made in plan documents that it could amend its health care plan at any time, the court held.

GM has continued to charge the early retirees premiums and increased deductibles despite the district court's February ruling. As a result, the district court issued an injunction to bar the company from charging the retirees \$6 to \$22 a month in insurance premiums and up to \$2,600 in annual out-of-pocket costs while the company appeals the decision.

Following the district court's issuance of the injunction, GM spokesperson James Crellin stated, "We are planning to appeal the original ruling and we are asking the appeals court to stay the injunction." According to Mr. Crellin, GM will contend that continuing to provide for 100% of the retirees' health care will cause "undue hardship" for the company. ♦



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The DOL also found that a contractor could not require an employee or applicant to undergo treatment or an operation before being considered for employment. *OFCCP v. Commonwealth Aluminum*, Case No. 82-OFC-6 (Feb. 10, 1994).

In the second case, the DOL concludes that a blanket refusal to permit "light duty" jobs unlawfully discriminates against handicapped individuals under the Act and finds that Cissell Manufacturing Co. could have accommodated individuals requiring light duty.

Employee Larry Brown suffered injuries to the knees while working as a production welder for Cissell. The injuries triggered a form of arthritis and a company doctor recommended that he avoid excessive bending and lifting.

An orthopedist urged that Brown be given a sit-down job or other accommodation. The employer refused, explaining that any accommodation would create problems with the union because each welder must be available to perform any job.

After using 26 weeks' sick leave and two 90-day leaves without pay, Brown was terminated. He filed a complaint with OFCCP in October 1985.

Adopting the findings of an administrative law judge, the DOL held that Cissell's explanation was speculative because it had made no attempt to consult with union representatives or to accommodate Brown, and that its "no light duty" policy was not mandated by business necessity.

Evidence showed that a union steward had testified that he'd intervene with management on behalf of a handicapped worker to accommodate the employee's need without making it hard on other workers. Thus, the employer was unable to show undue hardship.

The DOL ordered that Cissell eliminate its "no light duty" policy and that it accommodate Brown and grant him back pay. The DOL set a 60-day deadline for compliance, after which Cissell would be debarred from bidding on government contracts and its current federal and federally assisted contracts would be canceled. *OFCCP v. Cissell Manufacturing Co.*, Case No. 87-OFC-26 (1994).

IMPACT: These two decisions reflect renewed enforcement emphasis by OFCCP. Under either the Rehabilitation Act or the Americans With Disabilities Act, employers are required to explore all reasonable available alternatives in an attempt to accommodate employees with disabilities.

GM Unlawfully Cuts Retiree Health Benefits

A U.S. DISTRICT COURT HAS held that General Motors Corp. may not modify the retirement benefits of early retirees by requiring 50,000 of the early-retired, former employees and their spouses to pay for part of their health care coverage. GM had promised the retirees free lifetime health coverage to encourage them to leave the company early.

The court's ruling applies to GM's salaried employees who retired between 1974 and 1988 under a series of early-retirement programs that operated differently from the regular retirement programs. Regular retirement was a matter of right. Early retirement had to be agreed on separately by the employee and the company.

Prior to 1988, GM provided free health care coverage to its salaried employees and retirees. In 1988, GM cut back on retirees' health benefits, requiring annual deductibles and

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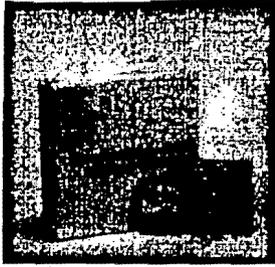
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copayments on most services.

The cutbacks prompted suit by 84,000 regular and early retirees who alleged that GM was bound contractually to provide free, lifetime health benefits and that its attempt to require copayments or other contributions violated the Employee Retirement Income Security Act (ERISA). The district court held that only the early retiree group could proceed to trial on the claims.

At trial, the early retirees presented evidence of numerous oral and written assurances by GM officials of lifetime free health coverage, and that their promises were part of a "special deal" aimed at encouraging them to retire early. These representations included specific statements that early retirees would have lifetime health care at no cost, and that GM would pay retirees' and their spouses' premiums in full for their lifetimes.

The district court rejected GM's contention that the official summary plan description booklets, which contained a prominent "reservation of right" clause that provided that GM could modify benefits at any time, controlled interpretation. Although recognizing that plan documents generally control interpretation of an employee benefit plan, the court held that the plaintiffs were offered a "special deal," "the terms of which go beyond the general retirement plan."

Additionally, the court found that the plaintiffs reasonably believed that the terms of their special early retirement were not controlled by the summary plan description, because GM's distribution of the booklets was not associated with any early retirement offer.

The district court held that, as an early retirement incentive, GM had contracted to pro-

vide the retirees, without cost shifting, with the same level of lifetime care benefits that they'd enjoyed as employees just prior to their retirements.

Hence, GM's attempt to avoid full payment violated ERISA because the "early retirement agreements are enforceable under [ERISA] as independent bilateral contracts, or as modifications of GM's health care benefits plan." *Sprague v. General Motors Corp.* ED Mich, No. 90-CV-70010 (Feb. 2, 1994).

IMPACT: Employers should ensure that their benefit plan summaries explicitly provide that the employer is free to modify or terminate benefits at any time. Additionally, employers are cautioned not to attempt to describe such benefits outside the summary plan descriptions because inaccurate descriptions of benefits in employee handouts and other communications potentially can create additional employer obligations. ■

This column is intended to provide useful information on the topics covered, but should not be construed as legal advice or a legal opinion.

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Wayne E. Barlow is a partner in the Los Angeles law firm of Barlow & Kobata, representing management in areas related to labor, personnel and employment.

D. Diane Hatch is a national personnel consultant based in San Francisco. She has a PhD in social psychology from the University of Michigan.

plan for employees of a plant it operated in Wood-Ridge, N.J. In 1976, the company substituted an ERISA plan, in which it reserved the right to modify or terminate the plan. However, the plan did not include specific procedures for terminating or amending the plan.

In 1983, the company added to its SPD a statement that coverage under the plan would end for retirees if the business operations ceased at the facility from which they retired. In November of that year, the company announced it was closing the Wood-Ridge plant, and that retiree health benefits would cease. The Wood-Ridge retirees brought suit, claiming contract and ERISA violations, alleging that the company had made oral representations that they would have lifetime health benefits.

Court's Rationale

The district court found that the company had reserved the right to amend its plan, but that the plan did not specify amendment procedures as required under ERISA Sec. 402(b)(3). Therefore, the district court held that the company's attempted plan amendment ending the retirees' health benefits was invalid.

The district court's decision was affirmed by the Third Circuit. "A simple reservation of a right to amend is not the same as a 'procedure for amending the plan,'" under ERISA Sec. 402(b)(3), the court wrote. Furthermore, the court stated that a primary purpose of Sec. 402(b)(3) is to ensure that all interested parties know how a plan can be amended, and who can make the amendments.

In this case, the company's reservation of the right to amend the plan did not state who had authority to amend the plan. To allow the company to amend the

plan without meeting the requirements of Sec. 402(b)(3) would frustrate the purpose of that section of ERISA, the court reasoned.

In concluding, the Third Circuit noted that a plan sponsor that reserves a right to amend its plan but does not include a provision specifying its amendment procedures may rectify that situation. An amendment can bring a plan into compliance with ERISA Sec. 402(b)(3), so long as it is formally adopted by "those who possess the sponsor's final management authority."

In this case, the Curtiss-Wright board of directors could adopt such an amendment, but until such time as they do, the company's attempted termination of the retirees' health benefits is invalid, the court stated. □

GM Owes Early Retirees Free Lifetime Health Benefits

The U.S. District Court for the Eastern District of Michigan has ruled that General Motors Corporation must provide free lifetime health care benefits to 50,000 early retirees. The ruling came in *Sprague v. General Motors Corp.* (No. 90-CV-70010).

GM had provided free lifetime health coverage to salaried retirees since 1964. However, in 1988, as part of a cost-cutting effort, GM began requiring retirees to contribute toward the cost of their health coverage. Retirees were required to pay up to \$250 in annual deductibles and a 20% copayment on most services, up to a \$500 annual out-of-pocket maximum.

Following the changes to the health plan, a group of 84,000 salaried retirees

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filed a class action lawsuit against GM, alleging that the company violated ERISA when it reduced the health care benefits.

In a 1991 ruling, the district court observed that medical benefits do not vest automatically under ERISA, but they "may vest by agreement between the parties."

Citing plan language in which GM reserved the right to change health coverage, the court held that the company "did not agree in the general plan documents to provide salaried retirees with vested health care benefits." Accordingly, the court ruled that GM was within its rights when it reduced health coverage for 34,000 retirees who had taken normal retirement.

However, the court went on to conclude in its 1991 ruling that GM may

have entered into separate contracts with retirees who took early retirement to provide them with vested benefits.

Contracts Or Changes

The court noted that some of the early retirement agreements included a promise by GM to furnish early retirees with a particular level of health care coverage in exchange for their promise to release the company from liability for certain causes of action.

According to the court, those agreements "may be enforceable under ERISA as independent bilateral contracts or as modifications of GM's health care benefit plan."

Both parties to the suit appealed the 1991 ruling to the Sixth Circuit U.S. Court of Appeals, and the case was returned to the district court for trial. In arriving at its decision, the district court noted that in some employee handbooks, GM did not clearly state that it reserved the right to change health benefits. Furthermore, the court observed that some internal company memoranda contained assurances that retirees would receive free health benefits for life.

The court went on to hold that the releases signed by early retirees were, in effect, contracts with GM. According to the court, "GM entered into contracts with its early retirees which vested in the retirees and their spouses certain health care benefits for their lifetimes at no cost to them."

The court thus concluded that GM breached those contracts when it imposed health care deductibles and copayments in 1988.

The court's ruling covers 50,000 salaried retirees who took early retirement from 1974 to 1988. □

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Title: LEGAL BEAT: WHAT HAPPENS WHEN PATIENTS ARBITRATE RATHER
THAN LITIGATE
Authors: Edward Felsenthal Staff Reporter of The Wall Street Journal
Source: The Wall Street Journal
Date: Friday Feb 4, 1994 Sec: B p: 1
Length: Long (1513 words) Type: News Illus: Table
Subjects: Arbitration; Health care policy; Health maintenance
organizations; HMOs
Companies: Kaiser Permanente

Abstract: Increasingly, HMOs like Kaiser Permanente have been
requiring their members to take any medical malpractice
claims to arbitration, with no right of appeal. While this
has worried some experts, arbitration generally cuts HMO
costs and offers a faster, cost-effective resolution to
problems. One of the subjects that is under discussion as
part of the health-care debate is the use of arbitration.

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Article Text:

Robin Lorey didn't even know what arbitration was when she agreed to
waive her right to a jury trial as a member of the Kaiser Permanente
health maintenance organization.

But like more than five million others who belong to the country's
biggest HMO, Ms. Lorey had no choice. Kaiser requires all of its members
in California, Colorado, Hawaii and Massachusetts to agree to arbitrate
medical malpractice claims and other disputes rather than take them to
court.

So when Ms. Lorey claimed that a spinal procedure done during the
delivery of her third child in 1991 caused back problems, she had to take
her case against Kaiser not to a judge and jury, but to three private
arbitrators seated in a small conference room. And when the arbitrators
last month ruled against Ms. Lorey, a 33-year-old nurse from Sun City,
Calif., she had no right to appeal.

As Congress considers a variety of medical malpractice reforms,
Kaiser's track record -- and the experience of people such as Ms. Lorey --
are certain to come under scrutiny. That record suggests that, like almost
every other issue in the health-care debate, arbitration involves some
difficult trade-offs. Kaiser has asked patients to forfeit some of their
rights. But in so doing, it has managed both to cut its legal costs and to
compensate a significant percentage of injured people.

More than a dozen states already have passed laws making it easier for
health plans to use arbitration -- a method that is common in a variety of
securities, construction and contract disputes. Congress...

plan proposes more use of mediation and arbitration in medical malpractice suits but would guarantee court appeals of the results. So far, only a proposal by Sen. Pete Domenici (R., N.M.) would mandate that most Americans submit to the kind of binding arbitration that Kaiser requires.

The Kaiser approach certainly deserves praise for speedy resolutions: The cases the HMO arbitrates are typically resolved in about 19 months, compared with an average of 33 months for malpractice lawsuits handled by the court system, according to a 1992 U.S. General Accounting Office report based on information provided by Kaiser. Arbitration 'reduces the cost of litigation pretty substantially, and therefore we're able to offer our members a better deal in terms of the cost of care overall,' says Trisha O'Hanlon, senior counsel for Kaiser's Southern California region.

Kaiser also credits arbitration with compensating a larger percentage of injured patients than juries do, though usually in more modest amounts. The HMO estimates that plaintiffs win about half its arbitrations, compared with about a third of all malpractice cases in the court system. And with arbitration, 'you don't have \$100 million verdicts on a bad-baby case,' says Ms. O'Hanlon. Kaiser declined, however, to provide data on the size of the average arbitration award.

'It's typically faster than a trial because it's less formalized,' says Paul Weiler, a Harvard Law School malpractice specialist. 'There is an expert who's making the decision, which will give you more predictable and more rational results.'

But many patients, such as Ms. Lorey, haven't read all the fine print in their employer-provided health plans, including the provision about arbitration. Ms. Lorey says she didn't learn about the arbitration agreement until the day she was admitted to the hospital for the delivery of her child.

Ms. Lorey's case was heard in a conference room near San Diego, where the plaintiff sat surrounded by six lawyers and arbitrators in the case. 'It's such a closed setting,' Ms. Lorey says. 'I felt pretty ganged up on, pretty intimidated.'

Kaiser dropped its arbitration requirement in 1991 in Oregon and Washington, partly because it was under pressure from companies there that thought their employees might object to the provision.

But in general Kaiser defends the arbitration process, saying one benefit is its lack of formality. It is 'difficult to believe that someone would find it more intimidating to sit in a room with . . . people sitting around a table than to go into a courtroom with a box full of people that you don't know and a judge sitting up in a throne-like seat,' says Ms. O'Hanlon, the Kaiser lawyer. She also says Kaiser is trying to 'make patients more aware' of the arbitration requirement in publications sent to members.

In a Kaiser hearing, the patient and the HMO each select one arbitrator -- typically a lawyer or a retired judge -- and a third is chosen with the consent of both sides to serve as a neutral tie-breaker. Each party has its own legal representation and pays its own arbitrator an hourly fee. The two sides split the neutral arbitrator's bill, which can run as high as \$350 an hour. Evidence, such as that provided by medical experts, is presented much the way it would be in a courtroom.

The need for a neutral arbitrator in every case has raised another practical problem for Kaiser: finding enough of them who don't have conflicts of interest. That was the issue highlighted in the case of the late Freya Neaman, whose family sued Kaiser for allegedly failing to promptly diagnose her lung cancer.

Ms. Neaman's family lost the arbitration. But last year they got the California Supreme Court to throw out the ruling because the neutral arbitrator, a retired judge, hadn't disclosed that he had served as Kaiser's own arbitrator in five previous cases. (The ban on appealing arbitrations generally can be lifted if there is evidence of bias or fraud.) The judge's 'relationship with Kaiser was a substantial business relationship and should have been fully disclosed,' the court said.

Kaiser says it is making more efforts to ensure that neutral arbitrators are truly unbiased. But with a limited pool of experienced

It's bad enough that I lost my mother,' says Blythe Leiderman, Ms. Neaman's daughter, who is now trying to get a court hearing for the case. 'Then to find out that the person who was supposed to be objective and neutral really wasn't. That really hurts.'

Medical Malpractice

Arbitration vs. lawsuits in medical malpractice cases

	KAISER ARBITRATION	MALPRACTICE LAWSUITS
Resolution time	19 months	33 months
Typical hearing length	2-4 days	Several weeks
Cases settled prior to a hearing	89%	90%
Judgments for plaintiff	52%	33%
Judgments for defense	48%	67%

Sources: Medical Malpractice -- Alternative to Litigation, U.S. General Accounting Office 1992; interviews with malpractice lawyers

Victory for GM Retirees

A federal court ruling that would force General Motors Corp. to reinstate full health-care benefits for 50,000 early retirees could cost GM tens of millions of dollars.

U.S. District Judge John Feikens of Detroit ruled Wednesday that GM broke a contract with early retirees by imposing health-care deductibles and copayments, beginning in 1988. The 119-page ruling covers GM employees who took early retirements from 1974 to 1988. 'I find that . . . GM entered into contracts with its early retirees which vested in the retirees and their spouses certain health-care benefits for their lifetimes at no cost to them,' Judge Feikens wrote.

The ruling may push the limits of what retirees in other companies can demand under employee-benefits law, though the fact that this was a lower-court ruling lessens the immediate impact of the decision beyond the facts of the case. GM is considering an appeal.

GM said it was 'premature to speculate' how much money it might have to pay as a result of the ruling or whether GM would require a charge to cover it.

Until 1988, GM retirees had enjoyed almost free health-care benefits. But in that year, as part of a cost-cutting move, GM told families they would be responsible for as much as \$750 a year in out-of-pocket medical expenses if they remained in traditional insurance plans. The class-action lawsuit, initiated by GM retirees in the Flint, Mich., area, was filed shortly afterward by 84,000 retirees.

In 1991, Judge Feikens ruled that GM had acted within its rights in slashing benefits for 34,000 retirees who had taken normal retirement. His ruling Wednesday applies to the 50,000 GM salaried workers who retired under various early-retirement plans before 1988. The ruling doesn't affect GM's retired hourly employees, who still enjoy full medical benefits.

In some employee handbooks, the judge concluded in the latest ruling, GM didn't clearly state that it might cut off the benefits. And some internal GM memos assured retirees that they would have health benefits for life. In addition, the judge said, some employees didn't believe the handbooks applied to them, and some thought that language permitting GM to change health benefits meant only that benefits might be upgraded.

Judge Feikens also said releases that employees signed when they retired were, in effect, contracts with GM.

Neal Templin and Junda Woo contributed to this article.