

Nos. 94-1896, 94-1897, 94-1898, and 94-1937

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

ROBERT D. SPRAGUE, et al.,
Plaintiffs-Appellants/Cross-Appellees,

v.

GENERAL MOTORS CORPORATION,
Defendant-Appellee/Cross-Appellant.

On Appeal From the United States District Court
For the Eastern District of Michigan

**OPENING BRIEF OF DEFENDANT-APPELLEE/CROSS-APPELLANT
GENERAL MOTORS CORPORATION**

ROBERT F. WALKER
ELLIOT K. GORDON
PAUL, HASTINGS, JANOFSKY
& WALKER
1299 Ocean Ave.
Santa Monica, CA 90401
(310) 319-3300

STEPHEN M. SHAPIRO
KENNETH S. GELLER
CHARLES ROTHFELD
JAMES D. HOLZHAUER
MAYER, BROWN & PLATT
190 South LaSalle Street
Chicago, IL 60603
(312) 701-7327

RODERICK D. GILLUM
ALICE M. OSBURN
DANIEL G. GALANT
GENERAL MOTORS CORP.
New Center One Building
3031 West Grand Blvd.
P.O. Box 33122
Detroit, MI 48232
(313) 974-1608

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
APPELLATE JURISDICTION OVER THE CROSS-APPEAL	1
ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF FACTS	1
SUMMARY OF ARGUMENT AND STANDARD OF REVIEW	10
ARGUMENT	13
I. THE CLAIMS OF BOTH THE GENERAL AND THE EARLY RETIREES ARE DEFECTIVE AS A MATTER OF LAW BECAUSE GM NEVER SURRENDERED ITS STATUTORY RIGHT TO AMEND ITS HEALTH CARE PLAN	13
A. A Vested Right To Health Benefits Must Be Based On Unambiguous Statements In The Plan Documents	13
B. The District Court Properly Granted GM Summary Judgment On The Claims Of The General Retirees	17
C. Extra-Plan Statements Do Not Vest The Benefits Of The Early Retirees	31
II. PLAINTIFFS ARE NOT ENTITLED TO VESTED, LIFETIME HEALTH BENEFITS ON AN ESTOPPEL THEORY	39
III. THE DISTRICT COURT ERRED IN CERTIFYING THIS CASE AS A CLASS ACTION	44
CONCLUSION	50

TABLE OF AUTHORITIES

Cases	Pages
<u>Adams v. Avondale Industries, Inc.</u> , 905 F.2d 943 (6th Cir.), cert. denied, 498 U.S. 984 (1990)	13-16, 20
<u>Adcox v. Teledyne, Inc.</u> , 21 F.3d 1381 (6th Cir.), cert. denied, 115 S. Ct. 193 (1994)	39, 41
<u>Alday v. Container Corp.</u> , 906 F.2d 660 (11th Cir. 1990), cert. denied, 498 U.S. 1026 (1991)	33-35
<u>Alexander v. Primerica Holdings, Inc.</u> , 967 F.2d 90 (3d Cir. 1992)	28, 29
<u>Anderson v. Alpha Portland Industries, Inc.</u> , 836 F.2d 1512 (8th Cir. 1988), cert. denied, 489 U.S. 1051 (1989)	16, 28
<u>Armistead v. Vernitron Corp.</u> , 944 F.2d 1287 (6th Cir. 1991)	41
<u>Averhart v. US West Management Pension Plan</u> , 1994 WL 588622 (10th Cir. Oct. 28, 1994)	41
<u>Bair v. General Motors Corp.</u> , 895 F.2d 1094 (6th Cir. 1990)	31
<u>Basic, Inc. v. Levinson</u> , 485 U.S. 224 (1988)	49
<u>Berlin v. Michigan Bell Tel. Co.</u> , 858 F.2d 1154 (6th Cir. 1988)	42
<u>Borst v. Chevron Corp.</u> , 36 F.3d 1308 (5th Cir. 1994)	34, 38
<u>Boyer v. Douglas Components Corp.</u> , 986 F.2d 999 (6th Cir. 1993)	16, 18, 33, 38
<u>Brown v. Ampco-Pittsburgh Corp.</u> , 876 F.2d 546 (6th Cir. 1989)	20
<u>Califano v. Yamasaki</u> , 442 U.S. 682 (1979)	44
<u>Cattin v. General Motors Corp.</u> , 955 F.2d 416 (6th Cir. 1992)	27, 41
<u>Cohn v. American Appraisal Associates, Inc.</u> , 628 F.2d 994 (7th Cir. 1980)	49

TABLE OF AUTHORITIES -- (Continued)

	Pages
<u>Coleman v. Nationwide Life Ins. Co.</u> , 969 F.2d 54 (4th Cir. 1992). cert. denied, 113 S. Ct. 1051 (1993) . . .	41
<u>Crews v. Central States Pension Fund</u> , 788 F.2d 332 (6th Cir. 1986)	31
<u>Daniel v. Eaton Corp.</u> , 839 F.2d 263 (6th Cir.), cert. denied, 488 U.S. 826 (1988)	31
<u>DeCoe v. General Motors Corp.</u> , 32 F.3d 212 (6th Cir. 1994)	14
<u>Degan v. Ford Motor Co.</u> , 869 F.2d 889 (5th Cir. 1989)	33, 40
<u>DeGeare v. Alpha Portland Industries, Inc.</u> , 837 F.2d 812 (8th Cir. 1988), vacated and remanded, 489 U.S. 1049 (1989)	15, 29, 30
<u>Delk v. Durham Life Insurance Co.</u> , 959 F.2d 104 (8th Cir. 1992)	29
<u>Donovan v. Dillingham</u> , 688 F.2d 1367 (11th Cir. 1982)	19
<u>Drennan v. General Motors Corp.</u> , 977 F.2d 246 (6th Cir. 1992), cert. denied, 113 S. Ct. 2416 (1993) . . .	42
<u>Edwards v. State Farm Mutual Automobile Insurance Co.</u> , 851 F.2d 134 (6th Cir. 1988)	35
<u>Flacche v. Sun Life Assurance Co. of Canada</u> , 958 F.2d 730 (6th Cir. 1992)	35
<u>Gable v. Sweetheart Cup Co., Inc.</u> , 35 F.3d 851 (4th Cir. 1994)	<u>passim</u>
<u>General Tel. Co. v. Falcon</u> , 457 U.S. 147 (1982)	12, 44
<u>Gill v. Moco Thermal Industries, Inc.</u> , 981 F.2d 858 (6th Cir. 1992)	14, 17, 39
<u>Gordon v. Barnes Pumps, Inc.</u> , 999 F.2d 133 (6th Cir. 1993)	11, 13-16, 27, 40, 41
<u>Greany v. Western Farm Bureau Life Insurance Co.</u> , 973 F.2d 812 (9th Cir. 1992)	33, 41

TABLE OF AUTHORITIES -- (Continued)

	Pages
<u>Griffin v. Dugger</u> , 823 F.2d 1476 (11th Cir. 1987), cert. denied, 486 U.S. 1005 (1988)	50
<u>Grimo v. Blue Cross/Blue Shield, of Vermont</u> , 34 F.3d 148 (2d Cir. 1994)	19
<u>Hamilton v. Air Jamaica, Ltd.</u> , 945 F.2d 74 (3d Cir. 1991)	38
<u>Hicks v. Fleming Cos., Inc.</u> , 961 F.2d 537 (5th Cir. 1992)	36
<u>Huart v. Fifth Third Bank of Toledo</u> , No. 90-4040, 1991 U.S. App. LEXIS 12114 (6th Cir. June 4, 1991)	23-24
<u>In re White Farm Equipment Co.</u> , 788 F.2d 1186 (6th Cir. 1986)	14
<u>Jensen v. SIPCO, Inc.</u> , 38 F.3d 945 (8th Cir. 1994)	28, 40, 48
<u>Lewandowski v. Occidental Chemical Corp.</u> , 986 F.2d 1006 (6th Cir. 1993)	20
<u>Lordmann Enterprises, Inc. v. Equicor, Inc.</u> , 32 F.3d 1529 (11th Cir. 1994)	40
<u>Massachusetts Mut. Life Ins. Co. v. Russell</u> , 473 U.S. 134 (1985)	41
<u>Moore v. Metropolitan Life Insurance Co.</u> , 856 F.2d 488 (2d Cir. 1988)	<u>passim</u>
<u>Musto v. American General Corp.</u> , 861 F.2d 897 (6th Cir. 1988), cert. denied, 490 U.S. 1020 (1989)	<u>passim</u>
<u>Peckham v. Gem State Mutual of Utah</u> , 964 F.2d 1043 (10th Cir. 1992)	38
<u>Pierce v. Security Trust Life Ins. Co.</u> , 979 F.2d 23 (4th Cir. 1992)	35, 40
<u>Policy v. Powell Pressed Steel Co.</u> , 770 F.2d 609 (6th Cir. 1985), cert. denied, 475 U.S. 1017 (1986)	15, 24
<u>Pope v. Central States Southern & Western Areas Health & Welfare Fund</u> , 27 F.3d 211 (6th Cir. 1994)	13, 15

TABLE OF AUTHORITIES -- (Continued)

	Pages
<u>Retired Chicago Police Ass'n v. City of Chicago</u> , 7 F.3d 584 (7th Cir. 1993)	49
<u>Richards v. General Motors Corp.</u> , 850 F. Supp. 1325 (E.D. Mich. 1994)	41
<u>Schoonejongen v. Curtiss-Wright Corp.</u> , 18 F.3d 1034 (3d Cir. 1994), cert. granted, 115 S. Ct. 42 (1994)	20, 27
<u>Scott v. University of Delaware</u> , 601 F.2d 76 (3d Cir. 1979), cert. denied, 444 U.S. 931 (1979)	50
<u>Slice v. Sons of Norway</u> , 34 F.3d 630 (8th Cir. 1994)	41
<u>Smith v. ABS Industries, Inc.</u> , 890 F.2d 841 (6th Cir. 1989)	15, 24
<u>Sprague v. General Motors Corp.</u> , 768 F. Supp. 605 (E.D. Mich. 1991)	<u>passim</u>
<u>Sprague v. General Motors Corp.</u> , 843 F. Supp. 266 (E.D. Mich. 1994)	<u>passim</u>
<u>Sprague v. General Motors Corp.</u> , 857 F. Supp. 1182 (E.D. Mich. 1994)	<u>passim</u>
<u>Stott v. Broyhill</u> , 916 F.2d 134 (4th Cir. 1990)	49
<u>Straub v. Western Union Telegraph Co.</u> , 851 F.2d 1262 (10th Cir. 1988)	33, 40
<u>Sutter v. BASF Corp.</u> , 964 F.2d 556 (6th Cir. 1992)	40
<u>Tassinare v. American Nat'l Ins. Co.</u> , 32 F.3d 220 (6th Cir. 1994)	41
<u>Thomason v. Aetna Life Insurance Co.</u> , 9 F.3d 645 (7th Cir. 1993)	40
<u>Thompson v. County of Medina, Ohio</u> , 29 F.3d 238 (6th Cir. 1994)	44
<u>Tregoning v. American Community Mutual Insurance Co.</u> , 12 F.3d 79 (6th Cir. 1993), cert. denied, 114 S. Ct. 1832 (1994)	40, 41

TABLE OF AUTHORITIES -- (Continued)

	Pages
<u>UAW v. Yard-Man, Inc.</u> , 716 F.2d 1476 (6th Cir. 1983), cert. denied, 465 U.S. 1007 (1984)	15, 24
<u>United Paperworkers Int'l v. Champion Int'l Corp.</u> , 908 F.2d 1252 (5th Cir. 1990)	28
<u>Watkins v. Westinghouse Hanford Co.</u> , 12 F.3d 1517 (9th Cir. 1994)	40
<u>Wise v. El Paso Natural Gas Co.</u> , 986 F.2d 929 (5th Cir. 1993), cert. denied, 114 S. Ct. 196 (1994)	<u>passim</u>
<u>Wulf v. Quantum Chemical Corp.</u> , 26 F.3d 1368 (6th Cir.), cert. denied, 63 U.S.L.W. 3460 (1994)	29, 30
<u>Zimmerman v. Bell</u> , 800 F.2d 386 (4th Cir. 1986)	49

Statutes and Rule

28 U.S.C. § 1291	1
28 U.S.C. § 1292(a)(1)	1
29 U.S.C. § 1022	35
Fed. R. Civ. P. 23	12, 44

Miscellaneous

Bodenheimer, <u>Underinsurance in America</u> , 327 N.E.J. Med. 274 (July 1992)	43
Congressional Budget Office, <u>Economic Implications of Rising Health Care Costs</u> 8 (Oct. 1992)	43
3 Arthur L. Corbin, <u>Corbin on Contracts</u> (1960)	47
<u>Economic Report of the President</u> (Feb. 1994)	42
1 E. Allan Farnsworth, <u>Farnsworth on Contracts</u> (1990)	47
Gabel, <u>Employer-Sponsored Health Insurance, 1989</u> , 9 Health Aff. 161 (Fall 1990)	43

TABLE OF AUTHORITIES -- (Continued)

	Pages
H. Rep. No. 807, 93d Cong., 2d Sess. (1974)	13
Reinhardt, <u>Reorganizing the Financial Flows in American Health Care</u> , 12 Health Aff. 172 (Supp. 1993)	43
<u>Restatement (Second) of Contracts</u> 214 (1981)	48
Rice, <u>Containing Health Care Costs in the United States</u> , 49 Med. Care Rev. 19 (Spr. 1992)	42
S. Rep. No. 383, 93d Cong., 2d Sess. (1974)	13

APPELLATE JURISDICTION OVER THE CROSS-APPEAL

The final judgment in this case was rendered on August 3, 1994, and filed on August 4, 1994. GM filed a timely notice of appeal on August 17, 1994. This Court has jurisdiction over GM's cross-appeal pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1).

ISSUES PRESENTED FOR REVIEW

GM's cross-appeal presents the following issues:

1. Whether the district court erred in holding that salaried early retirees received a vested right to unalterable medical benefits from informal oral and written benefits summaries provided by GM.
2. Whether the district court erred in holding that principles of estoppel vest the early retirees' medical benefits.
3. Whether the district court erred by certifying a class of early retirees.

STATEMENT OF FACTS

Introduction. Both before and after the 1988 ERISA plan amendments at issue in this litigation, General Motors Corporation ("GM") has maintained a medical welfare plan of undisputed quality. At trial, members of the plaintiff class "conceded that, even after the 1988 changes, they continue to enjoy a good health care program." Sprague v. General Motors Corp., 843 F. Supp. 266, 271 (E.D. Mich. 1994) ("Sprague II"). When faced with exploding health care costs, GM did not terminate or drastically scale back its plan; instead, it continued to underwrite most of the medical expenses incurred by plan participants, while also creating incentives for the rational use of limited health care resources.

Plaintiffs nonetheless contend that GM surrendered its right under ERISA to make these necessary and beneficial changes. They assert that -- unlike hundreds of thousands of other GM employees, and unlike tens of thousands of other GM retirees -- they alone have an entitlement to unreduced medical benefits for the rest of their lives, and that none

of the cost of those benefits may be charged to them. Plaintiffs are demonstrably incorrect: GM repeatedly reaffirmed its right to make changes to its medical plan in formal plan documents widely distributed to employees. In these circumstances, plaintiffs have not even come close to sustaining their burden of proving that GM waived its statutory right to change its welfare plan.

The plan documents. From the inception of the GM medical program, virtually all of the plan documents describing health benefits have expressly stated that the health plan was subject to change. Prior to becoming self-insured in 1985, GM provided basic health care for active employees and retirees through arrangements with Metropolitan Life Insurance Co. ("Metropolitan") and numerous Blue Cross and/or Blue Shield ("Blue Cross") plans. The group policy issued by Metropolitan in effect between 1964 and 1985 expressly provided that "all insurance hereunder shall automatically cease immediately upon the discontinuance of this Policy" (TX 509, at 2194-2197 (R 433, 435)); the policy could be terminated upon GM's written notice. TX 509, at 2194, 2214 (R 433, 435). Certificates of insurance issued by Metropolitan over the years pursuant to the policy also stated that coverage would cease automatically upon the discontinuance of the particular GM benefit plan or policy and that there was no "paid up" insurance. TX 510, at 2520, 2540; TX 512, at 2474, 2488; TX 514, at 2436, 2452; TX 515, at 2411, 2422-2423; TX 516, at 2396, 2407-2408; TX 518, at 2550, 2564; TX 519, at 2574, 2588 (R 433, 435). While Blue Cross issued no master insurance policy, Blue Cross certificates set out the benefits in detail and provided that coverages could be terminated altogether. TX 529, at 2709; TX 531, at 2769-2770 (R 433, 435). See also TX 523, at 2654-2655; TX 527, at 2674-2675; TX 528, at 2685-2686 (R 433, 435).

When GM became fully self-insured in 1985, it stated the terms of the basic health care coverages in a document entitled "General Motors

Health Care Insurance Program for Salaried Employees." This document provided that any "terms and conditions of the Program may be changed at any time by the Corporation." TX 451, at 786-787 (R 433, 435). These statements make it abundantly clear that GM did not intend to waive or relinquish the right that Congress gave all employers under ERISA to amend or alter an employee welfare plan.

The summary plan descriptions. Over the years GM distributed 11 booklets to its salaried employees describing its benefit plans, variously titled "Your Benefits in Retirement" (issued in 1985, 1980, and 1977), "Your GM Benefits" (issued in 1985, 1980, 1977, 1974, and 1966), and "The GM Insurance Program" (issued in 1971, 1968, and 1965); the booklets issued since 1977 have qualified as summary plan descriptions (familiarily known as "SPDs") under ERISA. These booklets, which described the terms of the existing medical plan, nowhere stated that GM would not amend the plan in the future. To the contrary, most of the booklets expressly stated, often repeatedly or in highlighted text, that GM reserved the statutory right to change its health plan.

For example, both booklets issued in 1985, as well as those distributed in 1971, 1968, and 1965, stated that "General Motors Corporation reserves the right to amend, change or terminate the Plans and Programs described in this booklet." TX 31, at 413, 478; TX 507, at 205, 246; TX 500, at 696; TX 502, at 662; TX 503, at 646 (R 433, 435). Similarly, the versions of "Your Benefits in Retirement" issued in 1977 and 1980 warned that "GM health care coverages have been changed from time to time through the years and are subject to change in the future." TX 505, at 308; TX 506, at 266 (R 433, 435).^{1/} This

^{1/} While these formal reservations did not appear in the versions of "Your GM Benefits" published in 1980, 1977 and 1974, those booklets did expressly state that each program had "its own terms and conditions which in all respects control the benefits provided," and that in the case of health care the "detailed provisions of your hospital-medical coverages" were contained in insurance certificates. TX 504, at 588, 597. See TX 27, at 539, 548; TX 29, at 485, 493 (R 433, 435). As

language establishes, as the district court expressly and repeatedly found, that "GM unambiguously reserved its right to change the plan." Sprague v. General Motors Corp., 768 F. Supp. 605, 610 (E.D. Mich. 1991) ("Sprague I"). See id. at 611 ("I find that GM unambiguously reserved the right to change the plan"); ibid. ("GM expressly reserved its right to change the plan"); id. at 612 ("GM's general plan documents unambiguously set forth GM's right to modify health care coverages").

GM distributed these documents widely to its employees. It is undisputed that all plaintiffs who retired prior to the end of 1974 (the 1974 SPD was prepared in November of that year) or after mid-1985 received -- before retirement -- SPDs or pre-ERISA summaries that expressly reserved GM's right to change the terms of the health plan. As for plaintiffs who retired between the end of 1974 and mid-1985, the district court found in Sprague I that "GM employees were generally put on notice of GM's right to modify its health care plan" (768 F. Supp. at 611 n.7) and that the reservation provisions "effectively informed plaintiffs that GM's present policy was to pay the full cost of basic health care coverage during plaintiffs' retirement, but that GM reserved the right to change that policy." 768 F. Supp. at 611. That conclusion is confirmed by undisputed testimony and documentary evidence establishing that GM generally distributed copies of "Your Benefits in Retirement," which contained an express reservation of GM's right to amend the plan, to active employees who were planning to retire. See Tr. V(B), at 9-12, 16-17; Tr. VI(A), at 18-20; Tr. XIII(A), at 81; Tr. XIII(B), at 57; Tr. XV(A), at 31, 32; TX 784, at 754, 1099; TX 785, at 405, 2340; TX 786, at 21, 1179. Plaintiffs (at Br. 6, 23) and the Department of Labor ("DOL") (at Br. 5) flatly con-

noted above, those certificates expressly reserved GM's right to modify or terminate the plan.

tradict the record when they contend that no active employees received an SPD containing GM's reservation of a right to amend during this period.

GM's continuous amendment of the plan. GM's practice over the years reflected its reservation of the right to amend its medical plan. Employees knew that GM changed the plan on many occasions, often expanding health coverage but sometimes reducing benefits or adding charges. Beginning in 1964, GM paid the full cost of premiums for retirees' basic health care coverage, although the program required beneficiaries to pay deductibles and make co-payments for certain services (including X-rays, electrocardiograms, and specified cancer treatments). Sprague I, 768 F. Supp. at 608. In 1969 GM added prescription drug coverage for active employees to its basic health care program, extending that coverage to retirees in 1971; beneficiaries were required to co-pay a specified amount for each prescription, an amount that was raised twice prior to the plan changes challenged in this suit. Sprague II, 843 F. Supp. at 274. GM offered dental coverage to its active salaried employees in 1974 and to its salaried retirees in 1977, with co-payments ranging from 15% to 50%. Ibid. GM made hearing aid coverage available to both groups in 1977. It provided vision coverage to active employees beginning in that year and to retirees in 1980; that coverage has required co-payments, the size of which has been increased over time. Ibid. And beginning in 1985, when GM became fully self-insured, beneficiaries who sought traditional fee-for-service medical treatment -- but not those who used preferred provider organizations ("PPOs") or health maintenance organizations ("HMOs") -- had to seek advance approval for certain ser-

vices. Individuals who failed to obtain approval paid both a deductible and a co-payment. TX 31, at 424-425 (R 433, 435).2/

In response to dramatically increasing health care costs, which nearly tripled between 1975 and 1985 (TX 766 (R 433)), GM in 1987 announced a further modification of the health care program, which was to be implemented in 1988. The change required beneficiaries who sought fee-for-service treatment -- but, again, not those who obtained care from PPOs or HMOs -- to pay an annual deductible of \$200 per individual or \$250 per family for surgical, medical, and hospital coverage. Once the annual deductible was satisfied, participants were responsible for a 20% co-payment for most covered services, until the annual out-of-pocket expense reached \$500; after that, GM would pay 100% of the usual, customary, and reasonable expenses incurred by beneficiaries. Sprague II, 843 F. Supp. at 274. At the same time that these charges were imposed, however, GM expanded coverage in several respects: hospice care was added, maximum benefits for both dental care and outpatient mental health care were increased, and coverage was enlarged for prescription drugs, durable medical equipment, and prosthetic and orthotic appliances. Id. at 274 n.6. In addition, GM voluntarily increased retirement income benefits for salaried retirees, alleviating some of the costs associated with the changes to the health care program. Ibid. The 1988 changes did not terminate the plan; to the contrary, the plan remains a comprehensive medical program whose quality was not disputed in this litigation. See id. at 271. The

2/ Some expenses, such as those for visits to doctors' offices, always have been excluded from GM's basic health care coverage. GM accordingly has offered supplemental coverage, initially called the Comprehensive Medical Expense Insurance Program ("CMEIP"). Employees who selected CMEIP coverage always have been required to pay premiums, as well as deductibles and co-payments. The amount of the required contributions has been adjusted upward and downward over time. CMEIP was relabeled "CMEP" in 1987 after GM became self-insured. Sprague II, 843 F. Supp. at 273-274.

changes did, however, create incentives for all plan participants to make rational and economical use of limited health care resources.^{3/}

The general and early retirees. With the exception of certain provisions favoring active employees, GM's salaried retirees historically participated in the GM health care program on the same terms as active employees. In explaining that participation in the program would continue after retirement and would not later terminate at a particular age (like retiree life insurance), GM's pre-ERISA summaries and SPDs contained statements such as "[y]ou may keep your basic hospital, surgical and medical coverages in effect. * * * GM will pay the full monthly premium or subscription for such coverages," or, in a later version of the same statement, "[y]our basic health care coverages will be provided at GM expense for your lifetime."^{4/}

For present purposes, two categories of salaried retirees are relevant. The first are "general" retirees, who were entitled, under the terms of GM's retirement program, to retire without GM's consent (either at age 65 or after 30 years' service with the company). The second category consists of "early" retirees, who participated in one of the many special early retirement programs that GM offered between 1974 and 1988 to employees age 53 and older. While these early retirement programs differed from one another in certain particulars, all required that both GM and the employee consent to the retirement; none provided for any changes in the health care program. Most employees manifested their consent to early retirement by signing

^{3/} GM has since further modified the program, increasing co-payments and deductibles as of 1993, and offering several plan options, including one with no monthly premium contributions but somewhat higher co-payments, and one requiring premium contributions but lower co-payments.

^{4/} See TX 31, at 457; TX 507, at 215; TX 29, at 504; TX 506, at 266; TX 505, at 308; TX 27, at 557; TX 504, at 613. See also TX 503, at 644; TX 502, at 661; TX 501, at 670; TX 500, at 695.

"statements of acceptance," which contained declarations to the effect that the employee has "evaluated the benefits applicable to me under the provisions of the [GM Retirement] Program [for Salaried Employees] and [is] agreeable to accepting Special Early Retirement." Sprague II, 843 F. Supp. at 300.

Although the statements of acceptance referred only to retirement (that is, pension) benefits, prospective early retirees sometimes received information about other benefits provided by GM, such as those available under the GM health care, life insurance, savings-stock purchase, employee stock ownership, and product discount programs. These statements of benefits generally were brief and informal; some retirees received no statements, many retirees received only oral descriptions of benefits, and the statements (both written and oral) differed substantially in content from retiree to retiree. Most important for present purposes, retirees were not told that GM relinquished its reserved right to modify its health care program; to the contrary, many were expressly told that GM did retain the right to change the program.^{5/} See note 25, infra. Nor did plaintiffs offer any evidence that GM ever intended to depart from its historical

^{5/} Some prospective retirees, for example, received summaries stating that GM reserved the right to "amend, change, or terminate the Programs described" (Sprague II, 843 F. Supp. at 281, 299), or that "your actual benefit entitlement may be affected by future plan amendments" (id. at 290); others were told orally that the speaker "could only attest to what was currently in effect, that as the next contract was approved, benefits were subject to change." Id. at 289. The descriptions of benefits currently provided by the plan also varied widely from employee to employee: various plaintiffs were told, for example, that "GM pays the premium for you and your covered dependents for your lifetime" (id. at 308); "[u]pon retirement all health care coverages will be continued at Corporation expense" (id. at 310); "[c]overage after retirement will be continued at no cost to employe[e]" (id. at 311); "[y]our company-paid medical insurance coverages remain the same after retirement that you have as an active employee" (ibid.); "Blue Cross/Blue Shield and dental expense are paid for by corporation for life" (id. at 312); "[y]our present coverage will be continued on a Corporation paid basis" (id. at 314); and "[f]ull basic health care coverages for the retiree and eligible dependents are continued for life at no cost to the retiree." Id. at 279.

approach of maintaining a single, uniform health program for all salaried employees, active and retired.

The decisions below. Plaintiffs commenced this action in 1989. Purporting to represent a class of some 84,000 general and early salaried retirees, plaintiffs contended that GM had promised to provide them with free lifetime health care and that the company accordingly should not be permitted to implement the 1988 changes to its health care program. Plaintiffs relied on various provisions of ERISA, on the federal common law of contracts, and on the common law doctrines of promissory and equitable estoppel.

In Sprague I, the district court granted GM partial summary judgment, rejecting the contract and certain ERISA claims of the general retirees. The court held that "[b]ecause GM's general [health] plan documents unambiguously set forth GM's right to modify health care coverages, * * * these documents do not establish GM's agreement or 'private design' to vest any particular level of health care benefits upon retirement." 768 F. Supp. at 612 (footnote omitted).

The district court subsequently certified a class of approximately 40,000 early retirees. In Sprague II, the court ruled in favor of the class, holding that "GM entered into contracts with its early retirees" assuring them (and their surviving spouses) "the same level of health care benefits for their lifetimes, without cost shifting, that they enjoyed as employees prior to retirement." 843 F. Supp. at 299. Although the court recognized that the oral and written benefits descriptions given to retirees took "various formulations" (id. at 317) and that many of those descriptions expressly set forth GM's right to amend the plan, it nevertheless concluded that GM had promised to provide medical coverage to early retirees "for life" and at "no cost" (ibid.) -- a commitment that the court found to be inconsistent with the limited plan changes implemented in 1988.

Finally, the district court's most recent order, Sprague v. General Motors Corp., 857 F. Supp. 1182 (E.D. Mich. 1994) ("Sprague III"), resolved the retirees' estoppel claims. The court dismissed the general retirees' claims, explaining once again that, in light of the plaintiffs' awareness of the SPDs' "express[]" reservation of GM's right to change the health care plan, GM did not promise that health care coverage would continue unchanged. Id. at 1189. But even though the early retirees had received precisely the same unambiguous SPDs, and were on notice of the continuous changes in the GM health care plan, the court upheld their estoppel claims. Id. at 1190-1192.

The consequences of the decision in favor of the early retirees will be profound. The district court's holding shatters what had been GM's uniform health care program for salaried employees, freezes health care at retirement for a favored class, and creates numerous subgroups of beneficiaries who are entitled to differing levels of benefits. In so ruling, the court precluded GM from making measured and reasonable responses to changes in the provision of health care, while requiring active employees (and general retirees) to fund the early retirees' unconstrained use of health care resources. This result will impose enormous economic and administrative costs upon GM and its workforce.

SUMMARY OF ARGUMENT AND STANDARD OF REVIEW

To avoid discouraging employers from establishing medical welfare benefit plans, Congress provided in ERISA that sponsors may freely amend such plans to take account of changing economic conditions and changes in health care services. This is an immensely valuable statutory right. Thus, "courts may not lightly infer the existence of an agreement to vest employee welfare benefits * * *. [Such an agreement] must be found in the plan documents and stated in clear and express language." Gable v. Sweetheart Cup Co., Inc., 35 F.3d 851, 855 (4th Cir. 1994) (citation omitted). This Court accordingly has made

clear that in ERISA litigation it "must avoid any rule that would have the effect of undermining Congress' considered decision that welfare benefit plans should not be subject to a vesting requirement." Gordon v. Barnes Pumps, Inc., 999 F.2d 133, 136 (6th Cir. 1993) (internal quotation marks and citation omitted). The claims asserted by plaintiffs cannot be reconciled with these settled legal principles.

As the district court correctly ruled, there is no reasonable ground for difference of opinion as to the proper application of the law to the claims of the general retirees. Statements in GM's summary plan descriptions that medical benefits would continue after retirement at company expense correctly described the status of the plan at the time, but contained no commitment that GM would refrain from future plan amendments. Quite the opposite, these documents, distributed to the GM work force over a period of 20 years, repeatedly and unambiguously reserved the company's statutory right to make future plan changes.

The claims of the early retirees fail for precisely the same reason. The SPDs and informal statements made to these employees accurately described the current status of the GM medical plan. Plaintiffs were not told that GM had waived its statutory right to make future changes in the plan, such as the modest co-payment, deductible and premium charges at issue in this litigation. And none of them overrode GM's explicit reservation of its right to amend the plan, as repeatedly stated in the formal plan documents. This Court's decision in Musto v. American General Corp., 861 F.2d 897, 909-910 (6th Cir. 1988) -- which held that indistinguishable statements regarding the continuation of medical benefits for retirees at company expense did not create vested rights -- squarely forecloses these claims.

The doctrine of estoppel adds nothing to the contract claims of the early retirees. GM never promised to freeze its medical welfare

plan. Indeed, given the company's express reservation of its right to amend the plan and its repeated exercise of that right over two decades -- by, for example, increasing co-payments -- no employee could reasonably rely on a contrary understanding. Moreover, as the district court correctly found in the case of the general retirees, any claim of causation or detrimental reliance would be entirely speculative.

GM asks this Court to reverse the district court's ruling in favor of the early retirees based on settled principles of law. This case presents no substantial dispute as to the relevant facts. The standard of review is de novo. See Musto, 861 F.2d at 906.

Finally, GM submits that the district court clearly erred when it certified the claims of the early retirees as a class action. These claimants retired at different times and in different locations; they received widely divergent information from local plant personnel at the time of retirement; many of them admitted receiving specific information concerning GM's right to amend; and varying financial and personal considerations influenced their retirement decisions. Thus, the claims asserted by the handful of class representatives were not "typical" of the tens of thousands of other retirees, as required by Fed. R. Civ. P. 23. Although an abuse of discretion standard applies to class action rulings, appellate courts must determine "after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." General Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982). The class action ruling in this case does not satisfy that standard.

ARGUMENT

I. THE CLAIMS OF BOTH THE GENERAL AND THE EARLY RETIREES ARE DEFECTIVE AS A MATTER OF LAW BECAUSE GM NEVER SURRENDERED ITS STATUTORY RIGHT TO AMEND ITS HEALTH CARE PLAN

A. A Vested Right To Health Benefits Must Be Based On Unambiguous Statements In The Plan Documents

Because plaintiffs and DOL largely disregard the controlling law, it is useful to begin with the principles that must determine the disposition of this case. In devising the rules that govern welfare plans, Congress was concerned that requiring the vesting of welfare benefits "would seriously complicate the administration and increase the cost of plans." H. Rep. No. 807, 93d Cong., 2d Sess. 60 (1974). See S. Rep. No. 383, 93d Cong., 2d Sess. 18 (1974). Congress further recognized that if employers responded to these increased costs "by decreasing benefits under existing plans or slowing the rate of formation of new plans, little if anything would be gained from the standpoint of securing broader use of employee pension and related plans." *Id.* at 15. See Adams v. Avondale Industries, Inc., 905 F.2d 943, 948 (6th Cir. 1990).

These congressional concerns have led to this Court's repeated recognition that "[a]lthough Congress considered imposing vesting requirements on welfare benefits, it decided to limit vesting to pension plans in order to 'keep[] costs within reasonable limits.' * * * Congress chose not to impose vesting requirements on welfare benefit plans for fear that placing such a burden on employers would inhibit the establishment of such plans." Adams, 905 F.2d at 947, quoting S. Rep. No. 383, supra, at 18. See Gordon, 999 F.2d at 136; Pope v. Central States Southern & Western Areas Health & Welfare Fund, 27 F.3d 211, 213 (6th Cir. 1994). As explained in Musto, 861 F.2d at 912, this worry is in no sense fanciful.

[A] prudent employer, mindful of the possibility that medical costs might skyrocket, could well have decided, if given the slightest reason to suppose that future amendments to the medical

insurance coverage could be invalidated under ERISA, not to provide such coverage at all, or to impose the most stringent limits on any coverage provided.

These considerations underlie the constellation of related rules that govern cases such as this one. First, although plaintiffs contend otherwise (Pl. Br. 33-34), "[i]t is well-established" that "a plan participant's interest in welfare benefits is not automatically vested, and employers have a statutory right to 'amend the terms of the plan or terminate it entirely.'" Gable, 35 F.3d at 855 (citation omitted). This Court accordingly has made clear that "[a]n employer may change [welfare] benefits without violating ERISA." Adams, 905 F.2d at 948. See also, e.g., Gill v. Moco Thermal Industries, Inc., 981 F.2d 858, 860 (6th Cir. 1992); Wise v. El Paso Natural Gas Co., 986 F.2d 929, 934 (5th Cir. 1993). This is so even when the welfare plan does not explicitly reserve the employer's right to change the plan. See, e.g., Adams, 905 F.2d at 949.

Second, while this Court has suggested in dicta that the parties may themselves "set out in plan documents" an "agreement or * * * private design" to vest retiree welfare benefits (In re White Farm Equipment Co., 788 F.2d 1186, 1193 (6th Cir. 1986) (emphasis added)),^{6/} plaintiffs are wrong in contending that vested rights may be cobbled together from isolated snatches of plan language they characterize as "ambiguous." Instead, as Judge Wilkinson wrote for the Fourth Circuit in a recent synthesis of the law in this area:

Because such an obligation constitutes an extra-ERISA commitment, * * * courts may not lightly infer the existence of an agreement to vest employee welfare benefits. * * * Rather, * * * any participant's right to a fixed level of lifetime benefits must be

^{6/} This Court itself recently characterized as "dicta" White Farm's statement that welfare benefits may vest by agreement or private design. Gordon, 999 F.2d at 136 n.2. Indeed, the Court very recently observed that "[t]his circuit has not yet formally embraced an ERISA cause of action under federal common law." DeCoe v. General Motors Corp., 32 F.3d 212, 225 (6th Cir. 1994). And outside of the collective bargaining context, which is discussed infra at note 7, we are not aware of any case in which this Court has held welfare benefits vested.

"found in the plan documents and must be stated in clear and express language." * * * Moreover, plaintiffs bear the burden of proving that their employer's ERISA plan contains a promise to provide vested benefits.

Gable, 35 F.3d at 855 (emphasis added) (citation omitted).

Thus, "[c]ontractual vesting is a narrow doctrine. To prevail, Plaintiffs must assert strong prohibitory or granting language; mere silence is not of itself abrogation" of the employer's statutory right to amend the plan. Wise, 986 F.2d at 938 (emphasis added). See DeGeare v. Alpha Portland Industries, Inc., 837 F.2d 812, 815 (8th Cir. 1988) ("the burden is on plaintiffs to prove that they are entitled to lifetime benefits"). The Sixth Circuit has plainly embraced this principle, stating repeatedly "that it 'must avoid any rule that would have the effect of undermining Congress' considered decision that welfare benefit plans should not be subject to a vesting requirement.'" Gordon, 999 F.2d at 136, quoting Adams, 905 F.2d at 947. See also, e.g., Pope, 27 F.3d at 213.7/

7/ DOL takes issue with this principle, suggesting that UAW v. Yard-Man, Inc., 716 F.2d 1476 (6th Cir. 1983), and its progeny stand for the proposition that "courts should apply an inference that retiree benefits were intended to vest for life." DOL Br. 25 n.24. See id. at 22 n.20, 27-28. In fact, the Yard-Man line of cases is concerned only with the interpretation of collective bargaining agreements. As the Court has explained, the holding in Yard-Man "emphasized two factors weighing in favor of finding that retiree benefits survive expiration of the collective bargaining agreement." Policy v. Powell Pressed Steel Co., 770 F.2d 609, 613 (6th Cir. 1985). The first is that, were such rights not vested, unions would have an incentive to bargain away the interests of retirees, who are "unprotected in the collective bargaining process." Ibid. The second is that "'when the parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree.'" Id. at 613-614, quoting Yard-Man, 716 F.2d at 1482 (emphasis omitted). See Smith v. ABS Industries, Inc., 890 F.2d 841, 845 (6th Cir. 1989) (characterizing Yard-Man as discussing "some of the factors to be taken into account when attempting to discern the intent of the parties in the collective bargaining context"). Neither of these considerations has any bearing here. Obviously, protections designed to safeguard the integrity of the collective bargaining process are beside the point in a case involving non-represented salaried employees. And presumptions regarding the intent of parties to a negotiation are irrelevant to the interpretation of a document that was not the product of bargaining. As a consequence, this Court never has applied the Yard-Man approach in a case that did not involve a collective bargaining agreement, and DOL

Third, it is plain that vested rights may not be created by communications other than plan documents or formal SPDs. This Court has flatly rejected the proposition that oral statements ever may suffice to vest welfare benefits, explaining that "we are quite certain that Congress, in passing ERISA, did not intend that participants in employee benefit plans should be left to the uncertainties of oral communications in finding out precisely what rights they were given under their plan." Musto, 861 F.2d at 909-910. And while the Court in Musto had no occasion to rule that written extra-plan statements could never give rise to vested contractual rights (see id. at 907), it cited with approval a leading decision of the Second Circuit reaching precisely that conclusion. Id. at 908 n.6, citing Moore v. Metropolitan Life Insurance Co., 856 F.2d 488 (2d Cir. 1988). More recent decisions uniformly have agreed. See, e.g., Gable, 35 F.3d at 857. See generally Gordon, 999 F.2d at 137 ("It is well-established that the written terms of a plan may not be modified or superseded by oral assurances or other extrinsic evidence."); Boyer v. Douglas Components Corp., 986 F.2d 999, 1005 (6th Cir. 1993).

It bears emphasis that these principles -- which together require that the vesting of welfare benefits be declared unambiguously in the ERISA plan documents or SPDs -- are not technical and certainly are "not accidental" (Wise, 986 F.2d at 935); instead, they are central to conscious choices made by Congress in the regulation of welfare plans. As a consequence, this Court has cautioned that the interpretation of welfare plans must take care not to "upset[] ERISA's delicate balance in this area." Adams, 905 F.2d at 947. With that consideration in

has not purported to offer one. To the contrary, the cases cited in the text have flatly rejected any presumption in favor of vesting. See generally Anderson v. Alpha Portland Industries, Inc., 836 F.2d 1512, 1517 (8th Cir. 1988).

mind, we proceed to address, in turn, plaintiffs' claims to vested lifetime health benefits for the general and early retirees.

B. The District Court Properly Granted GM Summary Judgment On The Claims Of The General Retirees

1. **The Underlying Plan Documents.** In determining whether welfare benefits have vested, the Court must begin with "the language of the 'written instrument' establishing the welfare benefit plan." Gill, 981 F.2d at 860. See Musto, 861 F.2d at 900. Here, the underlying plan documents consist of an insurance policy and certificates of insurance issued by Metropolitan, insurance certificates issued by Blue Cross, and GM's own Health Care Insurance Program for Salaried Employees. See Sprague I, 768 F. Supp. at 608. Plaintiffs and DOL do not contend that any of these documents actually vest plan benefits. Instead, they purport to find the plan documents ambiguous regarding GM's right to make amendments.

Even if plaintiffs and DOL were correct in their reading of the plan documents, it would not support their claim because plaintiffs bear the burden of proving that GM unambiguously waived the right to amend its welfare plan. But plaintiffs and DOL are in fact demonstrably incorrect: not a word in the documents guarantees vested health benefits, whereas each of the documents expressly and unambiguously reserves GM's right to modify the health plan -- or to terminate it altogether.

a. So far as Blue Cross is concerned, plaintiffs themselves acknowledge that the certificates "contain no representations regarding the duration or cost of benefits from the standpoint of participants or their surviving spouses." Br. 11. These documents therefore necessarily do not create vested rights to any given level of coverage at any particular cost. To the contrary, the certificates in effect during most of the relevant period unequivocally stated that GM may terminate

coverage on 30 days' notice. See page 2, supra.^{8/} This Court has read an identical provision as "unambiguously reserv[ing] the employer's right to terminate the plan" (Boyer, 986 F.2d at 1005), and plaintiffs offer no reason to doubt the effectiveness of this reservation. Similarly, plaintiffs do not contend that the 1985 GM "Health Care" document creates vested rights, and they cannot deny that the document expressly permits the "terms and conditions of the Program [to] be changed at any time by the Corporation." TX 451, at 786-787 (R 433, 435).^{9/}

b. As for Metropolitan, plaintiffs and DOL assert that the policy and certificates purported to extend lifetime, no-cost insurance coverage to retirees and their spouses and that this provision, when combined with the policy's express termination clause, rendered the plan ambiguous. In making this argument, DOL and plaintiffs recognize that the documents do not actually say anything about the vesting of coverage for retirees. See DOL Br. 7 n.6; Pl. Br. 9-10. They insist, however, that the policy "provided coverage through the life of the surviving spouse" (Pl. Br. 9) and reason that "the only logical interpretation of this language is that retirees will receive benefits until their death and their surviving spouses also get lifetime

^{8/} Benefits summaries accompanying the certificates also contained the statement, prominently displayed within a black border, that GM reserved "the right to modify, revoke, suspend, terminate, or change the Program in whole or in part, at any time," within the constraints of applicable law and collective bargaining agreements. TX 525, at 2646; TX 526, at 2634 (emphasis added). Perhaps because the certificates so strongly support GM, plaintiffs complain that all certificates were not produced. Br. 11. They do not deny, however, that GM produced all the certificates that it could locate in response to a request made years after the certificates' distribution, and that there is no evidence that different certificates ever existed.

^{9/} Plaintiffs (Br. 13) and DOL (Br. 9-10) suggest that the 1985 program document is not actually a plan document. But plaintiffs and DOL do not -- and could not -- deny that the 1985 "Health Care" document accurately describes the actual terms and conditions of the basic health plan.

benefits." DOL Br. 7 n.6. In fact, this argument is the purest sophistry. The provisions identified by plaintiffs and DOL state that surviving spouses "will be eligible for insurance" for defined periods, with certain spouses remaining eligible "for life." See TX 509, at 2225, 2233. This language plainly means only that spouses remain "eligible" to participate in GM's health plan and need not make additional contributions to do so; it does not remotely guarantee that all spouses -- let alone all retirees -- will remain unaffected by future changes in that plan.^{10/}

Again, what the Metropolitan documents unambiguously do contain are reservations of GM's right to amend or terminate the plan. Both the policy and the certificates expressly state that GM may terminate the program upon written notice. See page 2, supra. Needless to say, a program that is terminable at will hardly may be understood to create vested, paid-up benefits.

c. Plaintiffs' related assertion (Br. 29-32) that GM violated 29 U.S.C. § 1102(a) by not maintaining its retiree health care plan "pursuant to a written instrument" reflects their mistaken belief that an ERISA benefit plan must be contained in a single, master document. But there is no such requirement in ERISA. See, e.g., Grimo v. Blue Cross/Blue Shield, of Vermont, 34 F.3d 148, 151 (2d Cir. 1994); Donovan v. Dillingham, 688 F.2d 1367, 1372 (11th Cir. 1982)(en banc). Here, as

^{10/} Plaintiffs suggest that benefits summaries appended to some of the certificates guaranteed that GM would pay the full cost of coverage throughout retirement. Pl. Br. 10-11. In fact, the summaries by their plain terms described only the existing program, stating that "[t]he full cost of coverage under this Plan" is paid by GM. TX 518, at 2544 (emphasis added). See TX 512, at 2473; TX 514, at 2435. Under the heading "CONTINUATION OF COVERAGE WHILE NOT AT WORK," the summaries added the indefinite proviso that "you may be eligible" for benefits in retirement (TX 518, at 2548), which does not confer an entitlement at all. The summaries also contained the statement, prominently set off within a black border, that GM reserved "the right to modify, revoke, suspend, terminate, or change the Program, in whole or in part, at any time," within the constraints of applicable law and collective bargaining agreements. Id. at 2549 (emphasis added).

the district court pointed out, the writings that constitute the plan were identified by plaintiffs' own complaint, which recites at length from numerous written plan documents. Sprague I, 768 F. Supp. at 610. Plaintiffs' claim is particularly untenable in this Circuit, which has held that even if an employer "never had a written benefits plan," the "unwritten" plan may be freely amended. See Adams, 905 F.2d at 949-950.

Of course, even if plaintiffs' argument had merit, they still would not be entitled to massive monetary relief and an injunction forbidding any changes in GM's health plan. Except in the most extreme circumstances, "[t]he failure to comply with ERISA's procedural requirements is not ordinarily a basis for substantive relief." Brown v. Ampco-Pittsburgh Corp., 876 F.2d 546, 550 (6th Cir. 1989). See Lewandowski v. Occidental Chemical Corp., 986 F.2d 1006, 1009 (6th Cir. 1993).^{11/}

2. **The SPDs.** Given the weakness of their contentions regarding the underlying plan documents, plaintiffs are forced instead to focus principally on the SPDs. Their central contention is that a single sentence in certain of the SPDs -- "[y]our basic Health Care coverages * * * will be provided at GM expense for your lifetime" -- vested plaintiffs' health benefits at retirement. This claim is insubstantial: the district court observed, correctly, that there is no room

^{11/} Plaintiffs seek to take advantage (Br. 36-37) of Schoonejongen v. Curtiss-Wright Corp., 18 F.3d 1034 (3d Cir.), cert. granted, 115 S. Ct. 42 (1994), to support their claim that GM never properly amended the plan to include the challenged changes. But in Adams, this Court expressly rejected the Third Circuit's reasoning: "We do not believe, however, that Congress intended that any plan failing to comply with section 1102(b) would, for that reason alone, become unamendable." 905 F.2d at 949. If plan documents do not satisfy the standards of Section 1102(b), the proper remedy is a suit under 29 U.S.C. § 1132 to require adoption of a proper amendment procedure.

even for "a substantial difference of opinion" on the point. Sprague I, 768 F. Supp. at 607.^{12/}

a. The SPDs described the plan as it then existed. Read in context, the SPD language quoted by plaintiffs did nothing more than accurately describe the health plan as it existed at the time of the SPDs' distribution. The first sentence of the health plan descriptions in the 1977 and 1980 versions of "Your GM Benefits," upon which plaintiffs principally rely, stated that "[t]he Insurance Program provides protection for you and your eligible dependents against a wide range of Health Care expenses while you are an active employe[e] and after your retirement." TX 29, at 487; TX 27, at 542. That section of the SPD proceeded to describe the health benefits then available both to active employees and to retirees; there can be no suggestion that this discussion promised either group that those benefits would not be changed in the future. The sentence that plaintiffs focus on appeared in the subsequent portion of the SPD dealing with retirement under the subhead "Other Benefit Program Coverages -- After Retirement." TX 29, at 503; TX 27, at 556; TX 504, at 613. This section described the effect of retirement on a worker's participation in all of GM's welfare and pension programs (which included, in addition to the health care plan, the savings-stock purchase program, the employee stock ownership plan, and the life and personal accident insurance plans). In this context, the sentence seized upon by plaintiffs obviously meant only that retirement would not terminate entitlement to plan benefits.

^{12/} The district court held in Sprague II, 843 F. Supp. at 319, that the early retirees had a vested right to participate in the supplemental CMEP program (described in note 2, supra). Plaintiffs (at Br. 12) and DOL (at Br. 8) refer to the insurance documents governing CMEP, but they (and the district court) do not even attempt to identify language in those documents creating vested rights. The SPD language that is the focus of plaintiffs' argument also does not vest CMEP benefits under any reading; it refers only to "basic Health Care coverages."

Nothing in the SPDs, in contrast, promised retirees that their health coverage became vested and unalterable on the date of retirement. The documents did not promise "that all of an employee's medical insurance premiums would be fully and permanently 'paid up' upon retirement, regardless of how the medical insurance policy might be amended thereafter." Musto, 861 F.2d at 907. They did not state that the terms of the basic health care coverages would remain unchanged. And they did not guarantee that retirees would be unaffected by changes in the health program that were applicable to active workers.

With this in mind, plaintiffs' assertion that the descriptive language of the SPDs is enough to vest welfare benefits would work a radical change in the application of ERISA. After all, any accurate description of a welfare program whose benefits continue into retirement will have to make statements comparable to those in GM's SPDs, indicating that employer-paid coverage will not terminate at retirement or any other predetermined point ("[y]our coverages will be provided at GM expense for your lifetime"). If that is enough to vest benefits, every welfare plan will be vested unless the employer expressly reserves a right to amend -- even though, as we explain above, it is a basic tenet of ERISA that no such reservation is required. Indeed, in plaintiffs' view even a reservation would not be enough to guarantee the employer's right to change the plan; plaintiffs (at Br. 28) and DOL (at Br. 25-26) contend that an employer's express assertion of the right to change plan terms, when combined with assertedly "promissory" language such as that in GM's SPDs, simply renders the document as a whole "ambiguous," allowing beneficiaries to introduce extrinsic evidence about their understanding of the plan.

The upshot would be that an employer never could be certain that its plan did not vest. If that were the law, no rational employer ever would create a health plan. As the Fourth Circuit recently explained:

[E]xplanations of plan benefits * * * tend to sound promissory by their very nature. While these explanations may state a company's current intentions with respect to the plan, they cannot be expected to foreclose the possibility that changing financial conditions will require a company to modify welfare benefit plan provisions at some point in the future. * * * Benefit descriptions cannot be translated into guarantees that benefits will never be altered, especially where, as here, the descriptions fall well short of the "precise language denying the right to withdraw benefits" that courts require to find the creation of a vested right.

Gable, 35 F.3d at 857-858 (citation omitted; emphasis added).

b. The courts uniformly have read SPDs like those here not to vest benefits. It should come as no surprise that this Court repeatedly has held that language virtually identical to that appearing in GM's SPDs must be read as describing the existing terms of the plan rather than as promising no change in future benefit levels. In Musto, for example, an SPD provided that "[a]fter your retirement, Comprehensive Medical Expense Insurance coverage will continue on you" and that "[n]o contributions are required for continued coverage on you and your spouse after retirement." 861 F.2d at 904, 905 (internal quotations omitted). This Court rejected the contention that this language vested the retirees' health coverage, explaining that "[e]ach booklet * * * did accurately summarize the main features of the group insurance policy as in effect at the time the booklet was issued" but that "[n]o booklet ever said that the policy would not be changed in the future to require contributions for continued coverage." Id. at 906. See id. at 903 (statement that "[y]ou are not required to contribute for these benefits after your retirement" was "perfectly accurate at the time" it was made and "said nothing one way or the other about the possibility of future amendments regarding insurance benefits"). Similarly, in Huart v. Fifth Third Bank of Toledo, No. 90-4040, 1991 U.S. App. LEXIS 12114 (6th Cir. June 4, 1991) (cited pursuant to Circuit Rule 10(f) and reprinted in the addendum to this brief), this Court considered the significance of a benefits summary providing that "benefits which would

continue after your retirement" included "[f]amily medical insurance coverage at no cost to you." Id. at *5. The Court "interpret[ed this] as no more than a statement as to the status of Huart's benefits as of the date of his retirement." Id. at *5-6. These Sixth Circuit precedents dispose completely of plaintiffs' contentions in this case.

Other courts have reached an identical conclusion. In Wise, for example, SPDs -- which did not expressly reserve the employer's right to amend the plan -- provided that "[u]pon retirement, you * * * are automatically insured for retirement health care benefits and the company pays the entire cost." The Fifth Circuit held that this "discussed what the Plan then provided, not whether it would be offered in perpetuity. * * * Nowhere does the SPD contain specific language establishing a vesting of health benefits." 986 F.2d at 937-938. And in Gable, 35 F.3d at 854, 857, the Fourth Circuit held that the statement in a benefits summary that the employer would "continue [health] Coverage for you during the remainder of your lifetime at company expense" conveyed only the "company's current intentions with respect to the plan."^{13/} Plaintiffs therefore are wrong in contending that anything in the SPDs vests their health benefits.

c. GM expressly reserved the right to amend the plan. Plaintiffs' reliance on the SPDs is flawed for a second reason as well. Needless to say, the SPDs contained more than the single sentence emphasized by plaintiffs and DOL; most SPDs also expressly reserved GM's right to make changes in its welfare plans. Many plaintiffs

^{13/} Contrary to the suggestion of plaintiffs (Br. 22) and DOL (Br. 30), Policy does not support their argument. Policy involved application of the Yard-Man inference (see note 7, supra) to reach the conclusion that benefits for retirees did not expire with the governing collective bargaining agreement. Policy, 770 F.2d at 614-615. That holding has no bearing here. Smith, also cited by plaintiffs (Br. 22) and DOL (Br. 26-27), likewise was a collective bargaining case turning on the Yard-Man inference. See Smith, 890 F.2d at 845-846.

received SPDs containing such reservations prior to retirement -- and it is plain that those retirees cannot possibly prevail.^{14/}

Express reservations of the right to amend were included in the SPDs distributed both to active employees and to retirees in 1985, in the "Your Benefits in Retirement" SPDs distributed in 1980 and 1977, and in pre-ERISA benefits summaries distributed in 1965, 1968, and 1971.^{15/} As the district court found in both Sprague I and Sprague III, these provisions -- disseminated in innumerable plan documents over a period of 20 years -- "expressly" and "unambiguously reserved [GM's] right to change the plan." Sprague I, 768 F. Supp. at 610, 611. See Sprague III, 857 F. Supp. at 1189. That conclusion unquestionably was correct.

The 1985 active employee SPD stated on its first page, in italic type, that "General Motors Corporation reserves the right to amend, change or terminate the Plans and Programs described in this booklet." TX 31, at 413. The 1985 retiree SPD had an identical statement on its first page and subsequently repeated, under the heading "WHAT ARE MY RIGHTS AS A PARTICIPANT OR BENEFICIARY IN THE EVENT OF TERMINATION OF

^{14/} Even apart from the express reservation clauses, no reasonable reader could conclude that the SPDs guaranteed unchanging, no-cost health care. The SPDs are replete with descriptions of co-payments and other benefits limitations -- including definitions of the terms "co-payment" and "reasonable and customary charges," and statements that only "most medical needs" and "most services" are covered -- and repeatedly note changes in the program. See TX 31, at 424-428, 431-433; TX 507, at 215-222, 227-228; TX 506, at 266-272, 275-276; TX 505, at 308-313, 315; TX 29, at 487-490, 492, 494; TX 27, at 542-544, 546, 549; TX 504, at 595-596.

^{15/} Such reservations were not included in versions of "Your GM Benefits" published in 1966, 1974, 1977, and 1980. As noted above, however, none of these documents contained language that promised unchanging benefits (as opposed to describing current plan features). Moreover, the 1980, 1977, and 1974 SPDs made clear that their description of health benefits was "only * * * an outline of your GM health care coverages. Actual governing provisions and specific exclusions are contained in the applicable benefit certificates * * *. Certificates will be made available to you upon request * * *." TX 29, at 493; TX 27, at 548; TX 504, at 597. Those certificates, of course, expressly stated that the plan could be terminated.

ANY GM BENEFIT PLAN OR PROGRAM?", that "[t]he Corporation reserves the right to amend, modify, suspend, or terminate its benefit Plans or Programs by action of its Board of Directors." TX 507, at 246. See also TX 31, at 478. The 1971, 1968, and 1965 booklets contained virtually identical reservations, prominently displayed within a black border. TX 503, at 646; TX 502, at 662; TX 500, at 696. And the 1980 and 1977 versions of "Your Benefits in Retirement" stated -- in the second sentence of the health plan description and on the same page as the assertedly promissory language relied upon by plaintiffs -- that "GM Health Care coverages have been changed from time to time through the years and are subject to change in the future." TX 506, at 266; TX 505, at 308 (emphasis added). As this Court stated of a substantially similar reservation clause, "[i]f there is any ambiguity in this sentence, we have not been able to detect it." Musto, 861 F.2d at 902.16/

Notwithstanding the clarity of the reservation clauses, plaintiffs and DOL maintain that "the presence of statements of reserved right to change benefits, coupled with statements explicitly or arguably promising benefits for life or continuing during retirement, gives rise

16/ DOL attempts to evade the "subject to change in the future" disclaimer with the assertion that "[t]he word 'change' does not apprise employees of a benefit forfeiture after retirement, especially in light of what the plaintiffs proved at trial to be an historical pattern of benefit improvements, not reductions." Br. 21-22 n.20. But benefits are not "forfeited" at retirement; instead, the disclaimer informs all beneficiaries, whether active employees or retirees, that the plan terms may be changed at any time. And while GM certainly has improved the plan over the years (indeed, it continues to so do), it has added or increased charges on many occasions. See pages 5-6, supra. The suggestion that the plain language of the reservation therefore may be read as reserving only GM's right to add benefits is ridiculous. As the Fifth Circuit explained in rejecting an identical argument in Wise, 986 F.2d at 937, "amendments, almost by definition, do not always herald pro-beneficiary news. The average plan participant must realize that amendments to welfare benefit plans are not enacted for the sole purpose of augmenting benefits, but often to diminish them as well." Indeed, GM hardly would have needed to reserve the right to alter the plan if any changes could only have increased benefits.

to an ambiguity that can only be resolved by resort to extrinsic evidence." Pl. Br. 28; see DOL Br. 25-26. Plaintiffs and DOL are wrong; this Court already has rejected an identical contention. In Musto, the district court found an SPD ambiguous because, while it reserved a right to amend, it also "'promise[d] to continue the plans after the plaintiffs[] * * * retired, without further cost to the retiree.'" 861 F.2d at 905 (citation omitted). This Court reversed, explaining that

the district court erred, as a matter of law, in determining that the provisions of the plan summaries cannot be reconciled with one another. * * * To read this summary as saying that the plan can never be changed in such a way as [] to mandate retiree contributions for continued medical coverage is to read into the summary something its authors did not put there (a promise to provide lifetime "paid up" medical insurance), while reading out of the summary something that clearly was put there (an express reservation of the right to change the plan). Such a reading violates the basic principle that each provision of a contract should be interpreted as part of an integrated whole, to the end that all of the provisions may be given effect if possible.

Id. at 906 (first emphasis added).^{17/} See also Cattin v. General Motors Corp., 955 F.2d 416, 426 (6th Cir. 1992) ("an unambiguous termination or amendment clause * * * must be given effect"); Gordon, 999 F.2d at 136 (same). Other courts have reached the same conclusion. See, e.g., Schoonejongen, 18 F.3d at 1042 ("Even if the plan contained unambiguous assurances that all retirees would have health insurance benefits for life so long as [the employer] maintained a post-retirement health insurance program, the general reserved right to amend the

^{17/} The attempts by plaintiffs (Br. 33) and DOL (Br. 30) to distinguish Musto are singularly unpersuasive. Plaintiffs assert that in Musto "there was a total absence of a promise of lifetime benefits at company expense." But the SPD in Musto provided that "[n]o contributions are required for continued coverage on you and your spouse after retirement" (861 F.2d at 905); we fail to see any meaningful difference between that statement and the one in GM's SPDs. Plaintiffs also assert (Br. 33) that in Musto, unlike here, there was a single underlying plan document reserving the company's right to change the plan. But we have explained that all of the underlying plan documents here contained termination language -- and, in any event, the Court's holding in Musto turned on the language of the SPDs rather than the underlying plan documents. See 861 F.2d at 906.

terms of the plan in whole or in part would render the right of any retiree or group of retirees terminable by the adoption of a legally effective amendment."); Wise, 986 F.2d at 938-939.^{18/}

These holdings are dispositive. It is undisputed that all salaried employees who retired in 1985 or later, as well as those who retired prior to the end of 1974, received SPDs or pre-ERISA summaries that expressly reserved GM's right to amend the health plan.^{19/} And while plaintiffs contend (Br. 23) that between 1974 and 1985 employees did not receive copies of the "Your Benefits in Retirement" SPD containing GM's reservation until after they retired, that is demonstrably false. There was unrefuted testimony (some noted by plaintiffs at Br. 6) that GM personnel routinely distributed "Your Benefits in Retirement" to employees prior to retirement (see page 4, supra), and

^{18/} Plaintiffs' assertion (Br. 28) that "[a]lmost all courts considering the issue" have found ambiguity where an employer's reserved right to amend appears in the same document as a reference to continuing or lifetime benefits is insupportable -- and certainly is not supported by the decisions cited at Pl. Br. 28 n.29. In Alexander v. Primerica Holdings, Inc., 967 F.2d 90 (3d Cir. 1992), the reservation clause itself was held ambiguous because it stated that the plan might be amended "in the future in conformity with applicable legislation"; the court found that this language could be read as a promise to amend the plan only when compelled to do so by legislation. See id. at 92-93. Anderson was a collective bargaining case; moreover, while the district court did admit extrinsic evidence, the court of appeals nowhere suggested that the plan documents were ambiguous. See Anderson, 836 F.2d at 1518-1519. In Jensen v. SIPCO, Inc., 38 F.3d 945 (8th Cir. 1994), the court "agree[d] that a reservation-of-rights provision is inconsistent with, and in most cases would defeat, a claim of vested benefits" (id. at 950); the court found, however, that the reservation clause before it was ambiguous because it "leave[s] at least some doubt as to whether SIPCO intended to reserve the right to change or terminate benefits to already retired pensioners." Ibid. The court also found "a wealth of extrinsic evidence," including testimony by the company's president and CEO, supporting the proposition that the company intended the benefits to vest. Id. at 950, 951. The plan in United Paperworkers Int'l v. Champion Int'l Corp., 908 F.2d 1252 (5th Cir. 1990), a collective bargaining agreement, did not contain a reservation-of-rights provision at all.

^{19/} A reservation clause did not appear in the 1966 summary booklet. But such clauses did appear in the booklets distributed in 1965, 1968, and 1971, generally placing employees on notice of GM's right to amend the plan. See Moore, 856 F.2d at 492.

many plaintiffs themselves acknowledged receiving SPDs containing the reservation before retiring. See Tr. II(B), at 3-4; Tr. IV(A), at 22-23; Tr. IV(B), at 24-26; Tr. VII(A), at 50; Tr. XVI(B), at 39-41.^{20/}

3. **Extrinsic evidence confirms that the health benefits are not vested.** Even if plaintiffs and DOL were correct in contending that the SPDs are sufficiently ambiguous to warrant consideration of extrinsic evidence, they plainly would still be wrong in their further assertion that a remand is necessary to supplement the record. In interpreting ambiguous ERISA plans, courts have considered "the intent of the plan's sponsor, the reasonable understanding of the beneficiaries, and past practice." Alexander, 967 F.2d at 96. See generally Wulf v. Quantum Chemical Corp., 26 F.3d 1368, 1376-1377 (6th Cir. 1994). The record in Sprague I, as well as evidence developed during the trial of Sprague II, establishes that each of these considerations decisively favors GM.^{21/}

First, the employer's intent is of paramount importance in a case, such as this one, where the plan was unilaterally created by the sponsor and was not the subject of bargaining; "it is especially

^{20/} In Sprague I the district court found that "GM employees were generally put on notice of GM's right to modify its health care plan" (768 F. Supp. at 611 n.7) and that the reservation provisions "effectively informed plaintiffs that GM's present policy was to pay the full cost of basic health care coverage during plaintiffs' retirement, but that GM reserved the right to change that policy." Id. at 611. While the court in Sprague II indicated, somewhat inconsistently, that many early retirees did not receive "Your Benefits in Retirement" until after they retired "or just before they walked out the door" (843 F. Supp. at 303), it acknowledged that "[o]thers may have received it earlier in the process." Id. at 303 n.19.

^{21/} Plaintiffs and DOL argue repeatedly that ambiguities in plans must be resolved against the sponsor. That is not the law. "Construing ambiguities against the drafter should be the last step of interpretation, not the first step. Using plaintiffs' analysis, the instant that we determine that the plan documents are ambiguous, they win. We disagree. Ambiguities should be construed against the drafter only if after application of ordinary rules of construction and consideration of extrinsic evidence, the ambiguities remain." DeGeare, 837 F.2d at 816. See Delk v. Durham Life Insurance Co., 959 F.2d 104, 105-106 (8th Cir. 1992).

important that plaintiffs bear the burden of proof in cases such as this where the benefits in question are unilaterally provided by the employer." DeGeare, 837 F.2d at 815. See also Wulf, 26 F.3d at 1377 (looking to what was "of primary concern to [the employer]"). Here, it is undisputed that GM never intended health benefits to vest as to any retiree. GM officials unanimously testified to that effect in Sprague II (see Tr. X(A), at 50; Tr. XIII(A), at 13:10-15:15; Tr. XV(A), at 71:1-73:8), and the district court found as much. See 843 F. Supp. at 306. Plaintiffs have never contended otherwise.

Second, past practice confirmed GM's authority to modify the program at will. Deductibles or co-payments for various medical services had been increased at least three times prior to the initiation of this suit (see pages 5-6, supra). And in 1985 GM added a requirement that beneficiaries seeking traditional fee-for-service medical treatment obtain advance approval for certain procedures; individuals who failed to receive that approval were obligated to pay both a deductible and a co-payment. See pages 5-6, supra. That GM repeatedly exercised its right to amend the plan -- and that "no one objected" when GM did so (DeGeare, 837 F.2d at 816) -- is compelling evidence that both GM and its retirees understood coverage not to be vested.

Third, plaintiffs could not reasonably have believed that the terms of the plan were unalterable. They were aware from experience and on notice from the SPDs that the health plan was subject to unilateral modification by GM. They also were put on notice by these documents that GM consistently had maintained a single, uniform program for active employees and retirees. It is evident from the record in Sprague II that retirees were not told that GM lacked the authority to amend the plan. And had such a statement been made, plaintiffs could not reasonably have believed that the comments of GM personnel super-

seded the terms of the plan -- as they themselves acknowledged during the trial of Sprague II. See Tr. II(A), at 46:21-47:4; Tr. II(B), at 26; Tr V(A), at 17-18. In these circumstances, the plan benefits cannot be held vested.^{22/}

C. Extra-Plan Statements Do Not Vest The Benefits Of The Early Retirees

While the district court correctly rejected the contract claims of the general retirees in Sprague I, GM submits in its cross-appeal that the court committed plain legal error when it accepted the claims of the early retirees in Sprague II. It is worth emphasizing that despite the length of the district court's decision, the court's rationale regarding the early retirees was simple and straightforward.

The district court plainly recognized -- having so held in Sprague I -- that the ERISA plan documents unambiguously reserved GM's right to alter its health plan at any time. But the court nevertheless concluded that the early retirees were entitled to disregard these official documents and SPDs, and could instead rely on informal benefit descriptions included in individual "side agreements" with GM. This was so even though the court acknowledged that the descriptions given to various retirees differed in content from one another (see Sprague II, 843 F. Supp. at 317), were ambiguous (see id. at 308 ("GM used imprecise language")), and failed either to spell out the details of

^{22/} Plaintiffs' contention (Br. 44-48) that they were entitled to a jury trial is frivolous, for the reasons stated by the district court. See 823 F. Supp. 442; 804 F. Supp. 931. This Court has repeatedly held that claimants seeking benefits under ERISA are not entitled to a jury trial. Bair v. General Motors Corp., 895 F.2d 1094, 1096-1097 (6th Cir. 1990); Daniel v. Eaton Corp., 839 F.2d 263, 268 (6th Cir. 1988); Crews v. Central States Pension Fund, 788 F.2d 332, 338 (6th Cir. 1986). Plaintiffs' claim (Br. 29-30) that the district court should have permitted additional discovery before deciding Sprague I is equally insubstantial. The court granted extensive discovery that it carefully supervised, requiring the production of all "plan and plan-related documents" and the depositions of persons who created the plan. R 60.

the purportedly guaranteed coverage or to suggest that GM would not exercise its reserved right to modify the health plan.

This holding is insupportable on both factual and legal grounds. The asserted "promises" relied upon by the early retirees were not commitments at all; like the language of the SPDs discussed above, the informal benefits summaries simply described current program terms without so much as hinting that GM never would amend its health plan. Beyond this, it is settled under ERISA that under no circumstances may such informal statements create vested rights.

1. **Informal and generalized extra-plan statements cannot give rise to vested rights.** As we explain above (at pages 15-16), the courts repeatedly have rejected the contention that informal statements may give rise to vested rights that differ from those spelled out in the formal ERISA plan or SPD. It could hardly be otherwise: assuming benefits may vest at all, courts look to "whether an agreement or 'private design' set out in the governing plan document provided for the vesting of welfare benefits on retirement." Musto, 861 F.2d at 907 (emphasis added).

This Court's seminal decision in the area is Musto. The facts of Musto were strikingly similar to those here: a class of retirees claimed that they had been given a "vested contractual right" to unchanging health benefits (861 F.2d at 900) because they had been told at the time of retirement that medical insurance "would continue after retirement" and "that '[y]ou are not required to contribute for these benefits after your retirement.'" Id. at 903. The plan documents, however, expressly reserved the employer's right to amend the terms of the health plan. See id. at 900, 903-905.

Against this background, the Court flatly rejected the proposition that oral statements guaranteeing vested welfare benefits ever could be enforceable. Although the Court could not exclude the possibility that

employees had received oral promises that their "post-retirement medical insurance coverage would be permanently, irrevocably, and fully 'paid up'" -- promises that went far beyond anything alleged by plaintiffs in this case -- it held that such promises could have no effect because "the clear terms of a written employee benefit plan may not be modified or superseded by oral undertakings on the part of the employer." 861 F.2d at 909, 910. As this Court explained:

It is not always easy to determine exactly what a benefit plan says even when the language of the plan has been reduced to writing. If the terms of these often complex plans could be made to depend upon evidence as to oral statements that may not have been worded very precisely in the first place, that may have been made many years earlier, and that cannot be proved except through the testimony of lay witnesses whose memories will seldom be infallible and who, being human, may have tended to hear what they wanted to hear, the degree of certainty that Congress sought to provide for would be utterly impossible to attain.

Id. at 910. Accord Boyer, 986 F.2d at 1004-1005. This holding disposes of the claims of those retirees who alleged that they were given only oral benefits descriptions.^{23/}

Moreover, while the Court in Musto had no occasion to consider whether written extra-plan statements could give rise to vested contractual rights (see 861 F.2d at 907), other courts have held that informal written statements cannot supersede the terms of an ERISA plan. In Gable, for example, on facts remarkably similar to those here, a benefits summary stated that "the company would 'continue [health] coverage for you during the remainder of your lifetime at company expense.'" 35 F.3d at 854. The Fourth Circuit nevertheless

^{23/} Other courts uniformly have reached the same conclusion. See, e.g., Degan v. Ford Motor Co., 869 F.2d 889, 895 (5th Cir. 1989) ("ERISA precludes oral modifications to benefit plans"); Greany v. Western Farm Bureau Life Insurance Co., 973 F.2d 812, 821 (9th Cir. 1992) (no action "where recovery on the claim would contradict written plan provisions"); Straub v. Western Union Telegraph Co., 851 F.2d 1262, 1265 (10th Cir. 1988) ("no liability exists under ERISA for purported oral modifications of the terms of an employee benefit plan"); Alday v. Container Corp., 906 F.2d 660, 665 (11th Cir. 1990) ("oral representations or promises cannot modify the clear terms of an employee benefit plan") (citation omitted).

held that "the fact that [the benefits] documents referred to retirees' benefits as 'lifetime benefits' does not nullify the company's right to modify, because the [documents] are informal communications that do not govern the company's obligations under an ERISA plan." Id. at 857.

Similarly, in Moore -- cited with approval by this Court in Musto (861 F.2d at 908 n.6) -- written statements distributed to employees described the company's plan as providing "'lifetime' [health] benefits 'at no cost.'" 856 F.2d at 489. The Second Circuit rejected the argument that this statement vested the benefits, explaining that "the unambiguous provisions of the plan must govern, because altering a welfare benefit plan on the basis of non-plan documents and communications, absent a particularized showing of conduct tantamount to fraud, would undermine ERISA." Ibid. Other circuits have reached the same conclusion. See Alday, 905 F.2d at 665; Borst v. Chevron Corp., 36 F.3d 1308, 1323 (5th Cir. 1994).

It may be added that, while this principle applies with obvious force in cases (such as this one) where the plan documents expressly reserve the company's right to modify the terms of the plan, it also must control even in the absence of such a clause. The ultimately dispositive consideration is that

Congress intended that plan documents and the SPDs exclusively govern an employer's obligations under ERISA plans. This intention was based on a sound rationale. Were all communications between an employer and plan beneficiaries to be considered along with the SPDs as establishing the terms of a welfare plan, the plan documents and the SPDs would establish merely a floor for an employer's future obligations. Predictability as to the extent of future obligations would be lost, and, consequently, substantial disincentives for even offering such plans would be created.

Moore, 856 F.2d at 492. See Gable, 35 F.2d at 857-858. And certainly, prospective retirees cannot reasonably expect that cursory and informal benefits summaries will have consequences as profound as the vesting of an enormous health plan.

2. **Extra-plan statements may not be substituted for SPDs.** In ruling for the early retirees, the district court, in the section of its opinion that constitutes the heart of its legal analysis, relied on decisions permitting consideration of extra-plan documents and other extrinsic evidence to determine the meaning of an ambiguous plan. See 843 F. Supp. at 305, 307. But those decisions are simply inapposite here. The district court itself recognized in Sprague I and Sprague III that the plan documents and SPDs are wholly unambiguous. And nothing in the decisions cited by the court authorizes the use of extrinsic evidence to supersede an unambiguous written plan.

The district court also held that the early retirees were entitled to disregard the SPDs because "the benefit explanations provided early retirees at the time of their retirement were the primary source of information they received regarding employee benefits" (Sprague II, 843 F. Supp. at 306); the court reasoned that, just as the SPD will be deemed controlling if it is inconsistent with the actual terms of the plan, so the informal benefits summaries should trump the SPD. Ibid. But this disregard of the SPDs turns the structure of ERISA on its head. This and other courts have recognized repeatedly that the SPD is paramount because it is "the statutorily established means of informing participants of the terms of the plan and its benefits" (Alday, 906 F.2d at 665); "'the statute contemplates that the [SPD] will be an employee's primary source of information regarding employment benefits.'" Pierce v. Security Trust Life Ins. Co., 979 F.2d 23, 27 (4th Cir. 1992) (citation omitted).^{24/}

^{24/} See Flacche v. Sun Life Assurance Co. of Canada, 958 F.2d 730, 736 (6th Cir. 1992) (noting "the importance of the SPD, which is required by 29 U.S.C. § 1022"); Moore, 856 F.2d at 492 ("Congress intended that plan documents and the SPDs exclusively govern an employer's obligations under ERISA plans"); Edwards v. State Farm Mutual Automobile Insurance Co., 851 F.2d 134, 136 (6th Cir. 1988) ("statements in a summary plan are binding").

If courts may ignore SPDs and rely instead on the varying terms of literally thousands of extra-plan statements made at different times and places to different retirees, "the degree of certainty that Congress sought to provide for would be utterly impossible to attain." Musto, 861 F.2d at 910. As a consequence, "[i]f a document is to be afforded the legal effects of an SPD, such as conferring benefits when it is at variance with the plan itself, that document should be sufficient to constitute an SPD for filing and qualification purposes. Quite simply, there should be no accidental or inadvertent SPDs." Hicks v. Fleming Cos., Inc., 961 F.2d 537, 542 (5th Cir. 1992). The decision below cannot be reconciled with that principle.

3. The extra-plan statements did not unambiguously vest benefits.

As discussed above (see pages 14-15, supra), courts may not find that an employer has agreed to vest welfare benefits absent "clear and express" language in the plan documents. Gable, 35 F.3d at 855. Accordingly, it follows that, even if extra-plan statements could in some circumstances give rise to enforceable, contractual rights, the same requirement of unambiguosness must apply. Indeed, this Court held precisely that in Musto, making clear that if written statements ever may vest benefits, those statements must be entirely unambiguous, "promis[ing] that all of an employee's medical insurance premiums would be fully and permanently 'paid up' upon retirement, regardless of how the medical insurance policy might be amended thereafter." 861 F.2d at 907. (emphasis added). The statement made to employees in Musto -- that "[y]ou are not required to contribute for [health] benefits after your retirement" (id. at 903) -- did not satisfy this stringent requirement. That holding is dispositive of the claims in this case, because no document provided to any plaintiff suggested that plan amendments would be ineffective.

Insofar as the benefits summaries promised anything at all by such statements as "[u]pon retirement all health care coverages will be continued at Corporation expense," they may reasonably be read only as setting out the benefits then available to retirees under the prevailing health plan, and not as committing GM never to change that plan. As we explain in connection with the language of the SPDs (see pages 22-23, supra), this Court already has reached just that conclusion in factually identical settings.

4. **GM did not violate any extra-plan agreement.** There is a further defect in the district court's analysis of the early retirees' claims: even if GM promised to provide lifetime benefits at "no cost," the plan amendments at issue here did not depart from that promise. The GM health plan has always had significant deductibles and co-payments for a range of widely used services, including X-rays, prescription drugs, dental care, vision care, and, since 1985, all medical procedures not approved in advance. It therefore cannot be the case that, if GM guaranteed plaintiffs lifetime health care at "no cost," it meant that assurance to exclude charges of the limited kind at issue in this case.

In addition, the brief benefit summaries upon which the district court relied, with their references to "[y]our company-paid medical insurance coverages" or "[y]our present coverage," are simply unintelligible without reference to the ERISA documents governing the GM health care plan. Those documents, of course, include GM's unqualified right to amend; there was no ground for the district court to ignore that aspect, and only that aspect, of the controlling plan documents. That is especially so because, as the district court recognized, hundreds of thousands of benefits summaries distributed over a period of 20 years themselves expressly declared that "General Motors Corporation reserves the right to amend, change or terminate the

Programs described." 843 F. Supp. at 281.^{25/} The court below made no attempt to explain how the early retirees -- virtually all of whom were on notice of such disclaimers -- could prevail. Again, plaintiffs have failed to carry their burden of proof.

5. **The extra-plan statements do not constitute separate, individual plans.** Finally, DOL's alternative argument (Br. 44-48) that the informal benefits statements given to early retirees themselves constituted separate ERISA plans or plan amendments is absurd. DOL's contention -- that informal oral or written statements that are inconsistent with the terms of a plan nevertheless are enforceable as plans -- would render wholly nugatory the entire body of law holding that extra-plan statements may not be given effect. It therefore should come as no surprise that this Court already has rejected this very contention. In Boyer, the plaintiffs asserted that verbal assurances of lifetime health care constituted a plan separate from the ERISA documents (986 F.2d at 1002-1003); this Court disagreed, holding that "verbal assurances by [the employer] do not constitute a plan." Id. at 1004. Other courts have reached the same conclusion.^{26/}

^{25/} See 843 F. Supp. at 282 (prospective retirees told "very specifically [that] benefits were subject to change"); id. at 290 ("Because General Motors reserves the right to amend or terminate its benefit plans and to amend its employment policies, your actual benefit entitlement may be affected by future plan amendments."); id. at 295 ("The [benefit] summary i[s] not intended to and does not create any contractual obligations. General Motors reserves the right to amend or terminate programs."); id. at 297 (when prospective retirees asked whether health care coverages could be changed, "[t]he response generally went along the vein that it could be changed, either improved or some, you know, items taken away")(internal quotations and citation omitted).

^{26/} See, e.g., Borst, 36 F.3d at 1323 ("an oral agreement cannot sustain a cause of action under ERISA. * * * This reasoning extends to written modifications or promises which are not, and do not purport to be, formal amendments of a plan following the procedures required by section 1102(b)(3)"); Peckham v. Gem State Mutual of Utah, 964 F.2d 1043, 1050 n.13 (10th Cir. 1992) ("[w]here the written language of a plan is clear, as it is here, any representation that is contrary to that language can be viewed only as a purported modification of the

II. PLAINTIFFS ARE NOT ENTITLED TO VESTED, LIFETIME HEALTH BENEFITS ON AN ESTOPPEL THEORY

1. **Plaintiffs' estoppel theory adds nothing to their contract claims.** Even assuming that estoppel claims are cognizable under ERISA, there is no factual basis for estoppel in this case as to either the general or the early retirees. For reasons already explained (at pages 20-28, 36-37), plaintiffs were not promised or otherwise assured that they would receive vested and unalterable health care benefits. As a consequence, there simply were no statements made by GM that warranted reliance, much less the clear and definite kind of commitment that will support a finding of estoppel. See Adcox v. Teledyne, Inc., 21 F.3d 1381, 1389 (6th Cir. 1994).

At the same time, of course, even if ERISA does not wholly preclude estoppel claims, "a basic principle of ERISA [is] that terms of a plan may not be modified or superseded by oral statements or other extrinsic evidence." Gordon, 999 F.2d at 137. This means that plan participants could not reasonably have relied on statements promising vested rights (had such statements been made) when they "knew or should have known from the express terms of the [plan documents] that benefits could be altered at any time." Ibid. See Gill, 981 F.2d at 860 (where plan "unambiguously provides" that benefits may be modified, "there is simply no factual basis for the application of estoppel"); Tregoning v. American Community Mutual Insurance Co., 12 F.3d 79, 84 (6th Cir. 1993) (same). Because the plan documents and SPDs distributed over a period of 20 years reserved GM's right to amend the plan, and because GM frequently did change the plan to add new payment obligations for participants, plaintiffs cannot establish reasonable reliance.

plan and, hence, preempted by ERISA"); Hamilton v. Air Jamaica, Ltd., 945 F.2d 74 (3d Cir. 1991) ("even if an oral amendment of an ERISA plan would increase employee benefits, ERISA does not provide for the enforcement of that amendment because it is not part of the plan"); Moore, 856 F.2d at 492 ("an ERISA welfare plan is not subject to amendment as a result of informal communications between an employer and plan beneficiaries").

Finally, plaintiffs have entirely failed to establish that they detrimentally relied on any statement made by GM. The district court correctly found that the general retirees' claim of reliance was wholly speculative. See Sprague III, 857 F. Supp. at 1189. But the court's finding that the early retirees relied on an asserted promise of vested health care, which was based on the court's conclusory observation that health benefits were an important part of the early retirement offers (see id. at 1191), was equally speculative. "[C]ourts may not infer the existence of detrimental reliance or prejudice without some affirmative evidence to that effect." Gable, 35 F.3d at 859. Here, however, the early retirees did not testify that they left the job because of promises that the plan's co-payments, deductibles, and premiums would not change. In fact, such testimony would have been incredible: an employee concerned about changes in the health care program could not have avoided those changes by staying on the job, since it is indisputable that GM has always been empowered to change the plan as it applied to active employees. Indeed, plaintiffs' claim is belied by the decisions of thousands of employees to take early retirement after 1988, with the full knowledge that the plan may be (and had been) changed.

2. It is doubtful that estoppel claims are cognizable under ERISA at all. This Court, like many others, has held that "an employer cannot be estopped on the basis of oral representations." Sutter v. BASF Corp., 964 F.2d 556, 563 (6th Cir. 1992).^{27/} As the district court itself recognized (Sprague III, 857 F. Supp. at 1187), at least one Circuit, the Ninth, has further concluded that estoppel claims simply may not be asserted under ERISA. Watkins v. Westinghouse

^{27/} See, e.g., Lordmann Enterprises, Inc. v. Equicor, Inc., 32 F.3d 1529, 1534 (11th Cir. 1994); Thomason v. Aetna Life Insurance Co., 9 F.3d 645, 649-650 (7th Cir. 1993); Jensen, 38 F.3d at 953; Pierce, 979 F.2d at 29; Degan, 869 F.2d at 895; Straub, 851 F.2d at 1265.

Hanford Co., 12 F.3d 1517, 1527-1528 (9th Cir. 1994). See also Jensen, 38 F.3d at 953 ("Although we have left open the question whether equitable estoppel will ever give rise to an ERISA claim, we have held that an ERISA plaintiff may not use equitable estoppel to recover money damages for reliance on an 'extra-contractual promise.'). Other courts have held that estoppel may be asserted only when the statement relied upon clarified the terms of an ambiguous plan^{28/} -- which, as we explain above, is not the case here.

For its part, this Court has never enforced an estoppel claim under ERISA.^{29/} The Court should do so, creating new law and provoking a conflict in the circuits, only if the case for estoppel is compelling. That certainly is not true here.^{30/}

^{28/} See, e.g., Averhart v. US West Management Pension Plan, 1994 WL 588622, at *4 (10th Cir. Oct. 28, 1994); Slice v. Sons of Norway, 34 F.3d 630, 634-635 (8th Cir. 1994); Greany, 973 F.2d at 821.

^{29/} In holding to the contrary, the district court relied almost exclusively on Armistead v. Vernitron Corp., 944 F.2d 1287 (6th Cir. 1991). See Sprague III, 857 F. Supp. at 1186-1188. That reliance was misplaced. While Armistead did suggest that estoppel claims may be asserted consistent with ERISA (see 944 F.2d at 1298-1300), that observation plainly was dictum, and has been so characterized by this Court. See Gordon, 999 F.2d at 137. The holding of Armistead, in contrast, was that rights asserted in that case were vested by a collective bargaining agreement that the Court found to constitute the welfare benefit plan. Armistead, 944 F.2d at 1294-1298. See Cattin, 955 F.2d at 426. In addition, in Armistead, the employer plainly had intended to vest the retirees' benefits, and later chose to abrogate them entirely; here, in contrast, GM never had an intent to vest, and continues to offer generous health benefits. We note that Armistead's dictum turned on the conclusion that estoppel is permitted as to welfare, but not pension, plans. See 944 F.2d at 1298-1300. That analysis has since been rejected by the Fourth Circuit. See Coleman v. Nationwide Life Ins. Co., 969 F.2d 54, 59-60 (4th Cir. 1992).

^{30/} Plaintiffs' fiduciary duty claim (Br. 39-42) is foreclosed by decisions of this Court. As the Court recently made clear, the section of ERISA establishing liability for breach of fiduciary duty "provides relief only for a plan and not for individual participants." Tregoning, 12 F.3d at 83. See Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 139-144 (1985); Tassinare v. American Nat'l Ins. Co., 32 F.3d 220, 222-223 & n.3 (6th Cir. 1994); Adcox, 21 F.3d at

3. **Congress' goals under ERISA weigh heavily against all of plaintiffs' contract and estoppel claims.** Changes of the sort made by GM, which are essential to the sound and efficient functioning of its health plan, are precisely what Congress had in mind when it left decisions regarding vesting of welfare benefits to the employer.

Automatic vesting was rejected because the costs of [health] plans are subject to fluctuating and unpredictable variables. Actuarial decisions concerning fixed annuities are based on fairly stable data, and vesting is appropriate. In contrast, medical insurance must take account of inflation, changes in medical practice and technology, and increases in the cost of treatment independent of inflation. These unstable variables prevent accurate predictions of future needs and costs.

Moore, 856 F.2d at 492.

This case is a textbook illustration of these concerns. In the ten years leading up to the changes challenged here, the costs of GM's health plan, like those of many businesses, nearly tripled; the costs of GM's retiree health benefits increased nearly five-fold. TX 766. Against this background, GM's addition of co-payments and deductibles to what remains the largest and one of the most generous private health plans in the nation was a modest but essential step toward encouraging the rational and efficient use of health care resources. GM's approach was in no sense unusual; to the contrary, it was part of an urgent national effort to constrain health costs. See, e.g., Economic Report of the President 131-167 (Feb. 1994) (citing the value of co-payments,

1390; see also Richards v. General Motors Corp., 850 F. Supp. 1325, 1335 (E.D. Mich. 1994). Thus, plaintiffs' contention that GM breached its fiduciary duty, even if correct, would not entitle them to the relief they seek -- damages and future economic benefits not shared by millions of other plan participants. Beyond this, plaintiffs' fiduciary duty claim is wholly insubstantial. For the reasons stated in the text, plaintiffs have no valid claim of breach of contract or estoppel; it would defy common sense to allow them to recycle this same meritless argument under a new label as a device to strip away GM's statutory rights. This case bears no resemblance to Berlin v. Michigan Bell Tel. Co., 858 F.2d 1154 (6th Cir. 1988), or Drennan v. General Motors Corp., 977 F.2d 246 (6th Cir. 1992). Any suggestion that GM deliberately concealed from its employees the possibility that the plan would change is frivolous in light of the express reservation in the SPDs and plan documents, and the continuous changes in the plan over a period of 20 years.

deductibles, and HMO alternatives in creating rational incentives and avoiding waste).^{31/}

A victory in this case for plaintiffs would have enormous adverse effects. It would balkanize GM's health care plan and frustrate meaningful efforts at cost control.^{32/} Moreover, it would require active employees (and future retirees) -- whose wages already are subject to the downward pressure exerted by exponentially rising health care costs -- to pay for current retirees' unconstrained use of limited health care resources.^{33/} There can be no doubt, then, that "[w]hile these plaintiffs would be helped by a decision in their favor, such a ruling would not only fly in the face of ERISA's plain language but would also decrease protection for future employees and retirees." Moore, 856 F.2d at 492.

As another court recently wrote of claims identical to those advanced in this case:

ERISA simply does not grant employees unfettered rights to the corporate treasury. Employers need not abandon prudent business

^{31/} By 1987, some 95% of employer-sponsored health plans made use of deductibles. Rice, Containing Health Care Costs in the United States, 49 Med. Care Rev. 19, 26 (Spr. 1992). In 1989, 90% of all employer-sponsored health insurance plans also included co-insurance. Gabel, Employer-Sponsored Health Insurance, 1989, 9 Health Aff. 161, 166 (Fall 1990). See also Bodenheimer, Underinsurance in America, 327 N.E.J. Med. 274, 275 (July 1992).

^{32/} The district court's ruling creates an administrative nightmare. The court did not recognize two plans, one for all early retirees and another for all other GM personnel. Instead, the court froze the plan as to each retiree as of the date that he or she retired. Because the plan changed over the years, the benefits to which a retiree is entitled by the court's decision, and the co-payments to which he or she is subject, will vary with the retirement date. (For example, plaintiffs who retired prior to 1977, the year in which dental care was first provided to retirees, would no longer be entitled to dental care.) Insofar as the informal benefits statements given to the retirees differed from one another, there could be hundreds -- or thousands -- of separate plans for GM to administer.

^{33/} See Congressional Budget Office, Economic Implications of Rising Health Care Costs 8 (Oct. 1992); Reinhardt, Reorganizing the Financial Flows in American Health Care, 12 Health Aff. 172, 180-181 (Supp. 1993).

behavior when marketplace forces compel them to rethink earlier offers of contingent, non-vested benefits. In light of today's spiraling health care costs, cutbacks in government-sponsored health care coverage * * *, and our ever-aging population, Congress may enact changes. But the current ERISA requires no more.

Wise, 986 F.2d at 937. See Gable, 35 F.3d at 859-860.

III. THE DISTRICT COURT ERRED IN CERTIFYING THIS CASE AS A CLASS ACTION

Although GM is entitled to a classwide judgment in its favor based on the legal principles discussed above, the district court erred in granting relief to plaintiff early retirees on a class-wide basis. The class action device is appropriate only when the "issues involved are common to the class as a whole," such that the court may assume that the evidence offered on behalf of a few plaintiffs applies equally to every member of the class. Califano v. Yamasaki, 442 U.S. 682, 700-701 (1979). Thus, Fed. R. Civ. P. 23(a)(2) and (3) provide that a class action may go forward only if the disputed "questions of law or fact are common to the class" and the claims of the representative parties are "typical of the claims * * * of the class." A class may not be certified unless it is determined, "after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." General Tel. Co., 457 U.S. at 161. See Thompson v. County of Medina, Ohio, 29 F.3d 238, 241 (6th Cir. 1994).

The district court ignored these principles in granting relief to a class composed of all GM salaried employees who accepted offers of early retirement between 1974 and 1988. The complaint alleged that GM promised early retirees that it would continue free lifetime health care coverage without any changes in co-payments, deductibles, or premium contributions. If this claim could be resolved in plaintiffs' favor by looking to some communication common to all members of the class -- such as the formal health plan documents -- then class certification might have been warranted. But (as the court below correctly found) the plan documents in fact repudiate plaintiffs' con-

tentions: they unambiguously state that GM reserved the right to change or eliminate health benefits at any time. See Sprague I, 768 F. Supp. at 609-612.

Rather than rely on any common communications, plaintiffs asserted that GM, acting through hundreds of different company officials acting with no authority to change the plan, entered into separate and independent informal side agreements with each member of the class, designed to vary the terms of the formal plan documents. As proof of these side agreements, plaintiffs pointed to a host of different oral and written communications, most of which were made to only one or a handful of employees. Significantly, plaintiffs were unable to identify a single source, whether written or oral, that was common to all class members; and the class members themselves had different amounts of information, garnered from different communications, and different understandings of the meaning of those communications. Each plaintiff who testified at trial attempted to predicate a promise of vested lifetime health benefits on a variety of statements unique to the time of his retirement, plant location, and division involved; most relied on oral communications made only to themselves.

The district court considered only a small number of these communications for only a small sample -- less than 1% -- of the plaintiff class, resorting finally (after a 22-page "summary of evidence," Sprague II, 843 F. Supp. at 278, 278-299) to a 10-page table charting some of the various and individualized sources for the claims of this tiny subset of the entire class. Id. at 308-317. A glance at the diversity of evidence relied on by these individuals demonstrates conclusively that they in no way share the commonality or typicality required by Rule 23.

For example, many plaintiffs received information that specifically directed them to the SPD for the terms and conditions of the plan.

See, e.g., Sprague II, 843 F. Supp. at 282 (Bickmyer), 283-284 (Petro-
lina), 290 (Wiegandt), 291 (Lampert), 295 (Knight). In addition to the
reservations in the SPDs and plan documents, other plaintiffs received
explicit disclaimers concerning GM's right to change the terms of its
health care benefits. See, e.g., id. at 281 (Greenan), 290 (Snyder).
Many class members alleged specific oral representations that were not
communicated to others. See, e.g., id. at 281 (Kugler), 287 (Sadler),
291 (Lampert), 295 (Knight). Some plaintiffs were made aware that
their benefits after early retirement would be no different than they
would be after normal retirement. See, e.g., id. at 283 (Huppenbauer).
Finally, even the alleged representations concerning the continuation
of health care coverage differ substantially among the plaintiffs, and
many are general, uncertain, and indefinite in substance. Compare,
e.g., id. at 290 (Robinson, "Continued health care coverage during
retirement"), 287 (Franklin, "[y]ou will retain this coverage for
life"), 284 (Pruyn, "the same health care program they had as employees
as long as they lived, at no cost to them"), 289 (Denner, "nothing
would be changing drastically"), at 285 (some versions of a brochure
"state[] that, 'Upon retirement all health care coverages will be
continued.'; [others] add 'at Corporation expense'").

In addition to the widely varying representations alleged by the
different plaintiffs, each of them also received plan documents (in
particular, the SPDs) detailing the terms of the plan and expressly
reserving GM's right to change those terms. See Sprague II, 843 F.
Supp. at 298-299. The district court's decision to certify a class
precluded it from undertaking any individualized consideration of what
documents were received by, and how the terms of those documents were
understood by, particular plaintiffs. For example, the court stated
that "[i]f [the] plaintiff class relied on, or reasonably should have
relied on, the SPDs for the terms of their early retirement agreements,

then the SPDs have significance." Id. at 303. But the court proceeded to disregard the SPDs for all members of the class, on the basis of only a few isolated examples of individuals who asserted that they had not seen the SPDs prior to retirement, or (if they were aware of them) who simply did not believe that the SPDs applied to them. Ibid. The acknowledgement that there clearly were "others [who] may have received [the SPD] earlier in the process," id. at 303 n.19, received only footnote mention and no analysis.^{34/}

The principles of contract law applied by the district court (see Sprague II, 843 F. Supp. at 302) demonstrate the need for individualized consideration of the circumstances asserted by the different plaintiffs. To begin with, the specifics of the offer and acceptance must be carefully scrutinized for "definiteness" in order to "determine the scope of [the] promise with some precision." 1 E. Allan Farnsworth, Farnsworth on Contracts § 3.1, at 160-161; § 3.27, at 353-355 (1990). "The overarching principle of contract interpretation is that the court is free to look to all the relevant circumstances surrounding the transaction." 2 id. § 7.10, at 255. Yet, by employing the class action device, the court below plainly avoided its duty to consider "all the relevant circumstances surrounding" each of the alleged contracts between GM and thousands of members of the class.

Moreover, in determining whether GM entered into a side agreement with a particular employee, it is essential to take into account the "many acts and statements of the parties antecedent to and contemporaneous with the making of the contract." 3 Arthur L. Corbin, Corbin on

^{34/} Plaintiffs' brief in this Court acknowledges (Br. 6-16) that there was variation in summary plan descriptions and insurance documents over the 14-year period at issue here. And DOL recognizes (Br. 24 n.23) that, where "plaintiffs' claims are based on different documents depending on precisely when they retired," individualized "proof of the documents in force at the time of retirement" must be presented at trial. These statements are flatly inconsistent with resort to the class action device for any category of retiree.

Contracts § 543, at 130, 132-134 (1960); see also id. at 140, 143; Restatement (Second) of Contracts § 214 (1981). There simply is no way for a court to consider the "many acts and statements" of some 40,000 plaintiffs in a class action proceeding when they necessarily depend upon the unique situation of each plaintiff. Information known to one early retiree (say, Sadler) by virtue of a specific question he asked, see Sprague II, 843 F. Supp. at 287, cannot properly be considered when determining whether GM entered into a contract with another employee (say, Wiegandt), who received information explicitly noting that the terms of health benefits were subject to change. Id. at 290.

Plaintiffs' estoppel claims fare no better. Even if (as seems implausible) every early retiree received oral or written representations that conflicted with the plan documents, there is no way to determine, on a class basis, whether any particular plaintiff reasonably relied on those representations. To prevail on an estoppel claim, each member of the class had to show that (a) he reasonably believed that he was being promised unchangeable health care benefits, and (b) he would not have chosen to retire if he had known that, in fact, GM was entitled to impose co-payment and deductible costs for health care coverage in the future. See Sprague III, 857 F. Supp. at 1191. Those determinations necessarily depend upon an assessment of each individual plaintiff, to determine the state of his knowledge of GM's health care program and his own economic situation, family status and personal concerns. See AARP Br. 7. The district court nonetheless erroneously made those fact findings on behalf of thousands of individual employees based on the testimony of a handful of plaintiffs. See Jensen, 38 F.3d at 953 (holding under ERISA that "[a]t a minimum, these considerations demonstrate that, if estoppel is an available doctrine, it must be applied with factual precision and therefore is not a suitable basis for class-wide relief") (emphasis added).

The Seventh Circuit recently considered a case strikingly similar to this one, holding that class certification would be erroneous where a large number of retirees relied on various representations concerning the availability of free lifetime health care. Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584, 596-598 (7th Cir. 1993). The Seventh Circuit emphasized that different groups of retirees had relied on different representations, many of which were oral and necessarily varied somewhat over time and among different groups of people.

Appellants have not provided any evidence other than speculation that any alleged communications by the City or the Funds to the fire, laborer, or municipal annuitants were the same as those made to the police. Even among the police, the record indicates that some annuitants heard these communications at retirement seminars, some read a booklet, some heard through word of mouth, and many simply had a general impression of the benefits to which they were allegedly entitled. Some were ignorant of any alleged promises.

Ibid. The Seventh Circuit relied on numerous cases establishing that "claims based substantially on oral rather than written communications are inappropriate for treatment as class actions unless the communications are shown to be standardized." Id. at 597 n.17. Here, not even the written communications to plaintiffs were standardized.

Other courts have reached the identical conclusion in cases where class members pointed to different representations as the basis for their claims. See, e.g., Basic, Inc. v. Levinson, 485 U.S. 224, 242 (1988); Zimmerman v. Bell, 800 F.2d 386, 390 (4th Cir. 1986) (class certification denied where information available to plaintiffs differed); Cohn v. American Appraisal Associates, Inc., 628 F.2d 994, 998 (7th Cir. 1980) (class certification denied where relevant statements "were contained in several different oral and written communications issued at various times during this period"). Appellate courts have routinely acknowledged the need to reverse an improper class certification on the ground that the class lacked commonality or typicality. See, e.g., Stott v. Broyhill, 916 F.2d 134, 143, 145 (4th Cir. 1990); Griffin v. Dugger, 823 F.2d 1476, 1490-1491 (11th Cir.

1987); Scott v. University of Delaware, 601 F.2d 76, 84-88 (3d Cir. 1979).

The same result should follow here. Given the absence of typicality and commonality among the tens of thousands of retirees in this case, who worked in dozens of different locations across the country and retired over a time span of 14 years, it was plainly an abuse of discretion for the district court to certify a plaintiff class. Imposing class procedures in a case involving such disparate claims virtually guaranteed an arbitrary disposition: based on the testimony of a few carefully selected plaintiffs, the court awarded lifetime vested health benefits to more than 40,000 class members, most of whom (for all the evidence shows) may not have received any such alleged promise, or may not have been misled by the promise, or may not have relied on it in deciding to retire. Simplicity may not be purchased at the cost of such fundamental unfairness.

CONCLUSION

The judgment of the district court should be affirmed as to the general retirees and reversed as to the early retirees.

Respectfully submitted.

ROBERT F. WALKER
ELLIOT K. GORDON
PAUL, HASTINGS, JANOFSKY
& WALKER
1299 Ocean Ave.
Santa Monica, CA 90401
(310) 319-3300

STEPHEN M. SHAPIRO
KENNETH S. GELLER
CHARLES ROTHFELD
JAMES D. HOLZHAUER
MAYER, BROWN & PLATT
190 South LaSalle Street
Chicago, IL 60603
(312) 701-7327

RODERICK D. GILLUM
ALICE M. OSBURN
DANIEL G. GALANT
GENERAL MOTORS CORP.
New Center One Building
3031 West Grand Blvd.
P.O. Box 33122
Detroit, MI 48232
(313) 974-1608

January 18, 1995