

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

**REPLY BRIEF FOR DEFENDANT-APPELLEE/CROSS-APPELLANT
GENERAL MOTORS CORPORATION**

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INTRODUCTION

The early retirees' position in this case amounts to the following: General Motors promised that they alone, among GM's hundreds of thousands of employees and retirees, would enjoy lifetime vested health benefits at no cost. In accepting this astonishing claim, the district court did not rely on any ERISA plan document or other formal communication sent to all early retirees. Instead, the court below focused entirely on informal statements that did no more than describe the existing GM health plan in the most general terms. These informal statements, made by various GM personnel, were transmuted into 40,000 individual enforceable "side agreements" promising that existing levels of health benefits would be frozen forever.

This claim, as the early retirees seem to recognize, is both contrary to common sense and fraught with legal difficulties. To begin with, Congress made clear in enacting ERISA that health benefits do not vest, unless the employer has unambiguously waived its statutory right to amend or eliminate its plan. Yet the early retirees never offered any evidence of an unambiguous waiver of that right; in fact, the formal ERISA plan documents repeatedly stated that GM reserved the right to amend its health plan at any time. Moreover, none of the informal statements made to the early retirees contained a waiver of GM's right to amend the plan. Finally, this Court and the other courts of appeals have consistently construed ERISA to reject claims to vested health benefits based on such informal communications.

The early retirees deal with these problems largely by ignoring them. Thus, they never explain how their submission can possibly be squared with the bedrock principle that, as the Supreme Court very

recently put it, "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." Curtiss-Wright Corp. v. Schoonejongen, 1995 U.S. LEXIS 1807 (March 6, 1995), at *10 (emphasis added). Similarly, they are unable to respond to this Court's repeated pronouncements that any such vesting requirement must be set out in the governing plan document. And they have no answer to our contention that the informal statements underlying their claims were nothing more than a wholly accurate description of GM's current health benefit plan -- statements that this and other courts have uniformly held not to embody an immutable promise of future benefits.

Perhaps the most telling defect in the early retirees' case is their utter failure to grapple with the fact that inferences of "vesting" based on informal statements would create chaos in the administration of ERISA plans. Here, for example, the early retirees do not seriously contend that GM ever meant to surrender its right to amend its health benefits package. Yet, despite GM's intent not to vest health benefits, despite GM's express reservation of the right to amend in formal plan documents, and despite GM's repeated practice of amending its health plan to add co-payments and deductibles, the court below held that informal statements generally describing the plan constituted a waiver of the right to amend and a promise to vest health benefits forever.

The upshot of this astounding decision is that GM will now be forced to administer more than 40,000 separate health plans, each reflecting the benefits and restrictions in effect at the moment of an

employee's early retirement. What is more, GM has been stripped of any discretion to tailor its health plan to encourage rational use; the company has been exposed to tens of millions of dollars in additional medical expenses annually; and existing GM employees and other retirees may well find their benefits limited in order to fund the vested rights of an unintentionally favored class. As Congress feared, no sensible employer would adopt a health care plan in the face of this result.

In sum, to prevail here, the early retirees must persuade this Court to disregard the intent of Congress, overrule Circuit precedent, create a conflict with the decisions of many other courts of appeals, ignore undisputed evidence in the record that GM never unambiguously waived its statutory right to amend its health plan, and sanction a regime in which thousands of retirees have no disincentive to waste scarce health care resources. The Court should refuse to do so, particularly at the behest of a group that concededly always has had, and continues to have, access to excellent health benefits.

ARGUMENT

A. The Early Retirees' Claim of Vesting Cannot be Reconciled With the Plan Documents and SPDs

1. As explained in our opening brief (at 13-15), the modern case law makes clear that courts should "not lightly infer the existence of an agreement to vest employee welfare benefits." Gable, 35 F.3d at 855. The early retirees take issue with this proposition, asserting (at Reply Br. 12) that GM's "proposed rule has been implicitly rejected in every ERISA case which required inquiry into ambiguous plan terms." But the area of vesting is one that Congress specifically considered,

deliberately choosing "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, cited with approval in Curtiss-Wright, at *10.

Looking to this congressional determination, the courts uniformly have made clear that "[t]o prevail [on a claim of vesting], Plaintiffs must assert strong prohibitory or granting language." Wise, 986 F.2d at 938. And this Court's most recent decisions have confirmed that it will avoid any approach "'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. Whether or not the plan documents must use any particular form of words to vest benefits, plaintiffs plainly carry a very heavy burden when they set out to prove "that their employer's ERISA plan contains a promise to provide vested benefits." Gable, 35 F.3d at 855.^{1/} In this regard, it is significant that, as we stated in our opening brief (and as

^{1/} The decisions cited by the early retirees (at Reply Br. 12-13) as inconsistent with this principle are not on point. International Resources v. New York Life Ins. Co., 950 F.2d 294, 301-302 (6th Cir. 1992), simply remanded the case for a determination whether vesting should occur "because this point was not addressed by the district court and because we feel that it merits further development"; the Court said nothing about the sort of evidence relevant to this inquiry. In White Farm "there was either no SPD or formal plan document, or there was confusion as to what documents constituted the plan" (Alday, 906 F.2d at 666); the Court's remand in that case did not specify the circumstances in which benefits would vest. While the Court suggested in Boyer v. Douglas Components Corp., 986 F.2d 999, 1005 (6th Cir. 1993), that extrinsic evidence could be considered to interpret an ambiguous plan -- a situation not presented here -- the Court held that the plan in that case unambiguously did not vest benefits; the Court declined to consider extrinsic evidence.

plaintiffs do not deny), this Court never has construed any plan to vest welfare benefits.^{2/}

Plaintiffs thus entirely miss the point when they argue (at Reply Br. 33-35) that an increase in costs cannot justify an employer's breach of a contractual guarantee of vested benefits. That, of course, is not GM's submission. Congress and the courts have declined to vest benefits lightly precisely because increases in health costs are "unpredictable" (Moore, 856 F.2d at 492), the size of those costs may be staggering (see Wise, 986 F.2d at 937), and employers therefore surely will altogether forgo the creation of health plans if they have "the slightest reason to suppose that future amendments to the medical insurance coverage could be invalidated under ERISA." Musto, 861 F.2d at 912. See Curtiss-Wright, at *16 (ERISA's "laudable goals" include avoiding "risk" that plan would become "forever unamendable"). This principle requires use of interpretative rules that preclude vesting absent the clearest indications of the employer's intent.

2. It is easy to apply the governing rules in this case: GM's plan documents and SPDs not only failed to vest benefits unambiguously, but also expressly reserved GM's right to amend (or terminate) the health plan. The early retirees barely take issue with the first of these propositions. They insist (at Reply Br. 6-7), however, that most SPDs did not contain a reservation of the right to amend and that those

^{2/} The only exception has been cases involving collective bargaining agreements, which are distinguishable for reasons stated in our opening brief (at 15 n.7). Plaintiffs effectively concede this point, because they have made absolutely no response to our arguments.

that did were not distributed to employees contemplating retirement. Both of these submissions are wrong.

First, although an employer need not reserve its statutory right to amend a welfare plan (see GM Opening Br. 14), it is undisputed that eight of eleven SPDs distributed between 1965 and 1984 did contain such reservations.^{3/} We cited in our opening brief (at 27-28) a host of decisions establishing that such a clause defeats a claim of vesting even where the SPD also contains language indicating that benefits will continue at company expense. The early retirees make no response to this point and no attempt to distinguish these decisions. Certainly, for those plaintiffs retiring before late 1974 and after mid-1985, the application of that principle here is not fairly subject to dispute: the reservations in the benefits booklets distributed during those periods were italicized or otherwise highlighted, and no rational person reading those documents could form the impression that GM was surrendering its statutory entitlement to amend the plan. The best proof here is the documents themselves, and we urge the Court to read them. See Swinney v. General Motors Corp., No. 93-3872 (6th Cir. Jan. 26, 1995), slip op. 15 n.4 (reservation placed beneficiaries on notice of possible plan changes).

^{3/} Plaintiffs contend (at Reply Br. 24) that the disclaimer in the 1977 and 1980 retiree SPDs -- that the plan is "subject to change in the future" -- reserved only GM's right to improve the plan. But this is a misreading of unambiguous text, and it can hardly be the case that GM's improvement of the plan in the past (coupled, of course, with increases in co-payments and deductibles) precludes it from increasing employee and retiree contributions in the future. We explained in our opening brief (at 26 n.16) that the Fifth Circuit reached precisely that conclusion in Wise, 986 F.2d at 937, and plaintiffs make no attempt to distinguish that decision.

Second, there can be no doubt that the 1977 and 1980 retiree SPDs containing reservations of GM's right to amend also were widely distributed to employees prior to their retirement. In our opening brief (at 4) we cited substantial and uncontradicted evidence of distribution; the early retirees make no attempt to explain it away.^{4/} They instead assert (at Reply Br. 6) that "it was not a 'routine' practice to distribute retiree booklets before retirement." Not surprisingly, the evidence they cite does not support this proposition.^{5/} And they do not deny, as we demonstrated in our opening brief (at 29), that many plaintiffs themselves acknowledged receiving and reading the retiree SPDs prior to retirement. At a minimum, then, it is plain that early retirees throughout the workforce received SPDs

^{4/} Nor could they. See, e.g., Tr. V(B), at 11 (GM personnel "went through the book ['Your Benefits in Retirement'], and I handed it to the employee and as we went through each section, after we were done, I said we will * * * briefly go through each section but I want to give you a homework assignment. I want you to read this from the front to back and come back with any specific questions you might have."); Tr. VI(A), at 19 (at exit interviews "we would make ['Your Benefits in Retirement'] available to them"); Tr. XV(A), at 31-32 ("when we would prepare their retirement folder the one handout * * * that we gave to each and every employee was the benefit booklet, 'Your Benefits in Retirement.' * * * It was our common practice to do that. In fact, we went a step further. We would staple our business card to the front of the benefit booklet. * * * That way if the retiree or potential retiree had any question during the process or even after retirement had been processed, we urged them to feel free to give us a call.").

^{5/} Plaintiffs cite the testimony of five retirees. Of these, one acknowledged that he did receive a copy of "Your Benefits in Retirement" (Tr. IV(B), at 13), one acknowledged that he "saw" the booklet (Tr. VII(A), at 72), one acknowledged that the booklet was available to "anyone who saw fit to obtain one" (Tr. III(B), at 31), and one could not remember whether he received the booklet (Tr. VI(A), at 72). Only one testified that he did not receive a copy. Tr. XVI(B), at 57. Another witness testified that active employee booklets routinely were mailed to active employees, but said nothing about whether retiree SPDs were given to employees contemplating retirement. Tr. IV(A), at 68.

containing GM's reservation of a right to amend, and that all of them were on notice of that right. Sprague III, 857 F. Supp. at 1189.6/ See also Gordon, 999 F.2d at 137; Curtiss-Wright, at *19 ("plan documents" are available "for inspection"). And wholly apart from the issue of distribution and notice, GM cannot reasonably be deemed to have "waived" a right that it expressly reserved in published documents.

3. Even if the plan or SPDs here were ambiguous and it was appropriate to examine extrinsic evidence, the early retirees have entirely failed to rebut GM's showing that its understanding of the plan is correct. In fact, the early retirees have failed to establish that any of the relevant considerations supports the conclusion that the plan vests benefits under any legal standard.

While plaintiffs (at Reply Br. 25) make hints to the contrary, there can be no doubt that GM never intended health benefits to vest as to any early retiree.7/ Plaintiffs do not (and could not) deny that

6/ While the district court determined unequivocally in Sprague I that SPDs containing reservations were generally distributed, its findings in Sprague II were more equivocal. Plaintiffs suggest that the latter conclusion should be given greater weight because it came after the development of a full trial record. But the court's last word on the subject came in Sprague III, where -- after trial -- it reaffirmed the conclusions reached in Sprague I. See 857 F. Supp. at 1189. The district court necessarily believed that SPDs including reservation clauses were generally distributed to retirees; it rejected the general retirees' estoppel claim precisely because they had received those documents. See ibid.

7/ We explained in our opening brief (at 30) that GM officials uniformly and consistently testified that GM never intended health benefits to vest as to any retiree, and the early retirees do not challenge that testimony. The district court acknowledged that the "evidence support[s] GM's claim that it did not subjectively intend to offer early retirees a special health care program." Sprague II, 843

consistent past practice -- GM's repeated exercise of the right to amend the plan by increasing co-payments and deductibles, and the failure of anyone to object when GM did so -- unambiguously supports GM's view. And while plaintiffs assert (at Br. 20-21) that the reasonable understanding of the beneficiaries is controlling, they make no attempt to show that beneficiaries could reasonably have believed the plan to vest benefits when they were aware from experience that benefits changed over time and were on notice from the SPDs that GM reserved the right to make changes.

B. Informal Communications Cannot Vest Welfare Benefits

1. The claims of the early retirees fail for another, independently-sufficient reason. Those claims rest entirely on statements outside the plan documents and SPDs. But the law is clear that such "occasional corporate communications" (Curtiss-Wright, at *17) -- whether written or oral -- cannot vest rights to welfare benefits. As the Supreme Court recently explained, "ERISA already has an elaborate scheme in place for enabling beneficiaries to learn their rights and obligations at any time, a scheme that is built around reliance on the

F. Supp. at 306 (emphasis in original). The purportedly contrary evidence cited by plaintiffs (at Reply Br. 25) is wholly off the point. While the former director of GM health care testified that GM personnel generally "emphasiz[ed] the positive" when describing the health plan (id. at 305), he nowhere suggested that GM intended benefits to "vest." The speculation of a single GM staff attorney that GM might have difficulty prevailing in litigation was premised on the conclusion that GM had not "stressed the possibility of 'negative' program changes" (id. at 305); needless to say, that speculation was inconsistent with the views of others on GM's legal staff (see TX 782; Tr. XV(B), at 6), was premised on a legally erroneous view of what employers must do to reserve their right to make plan changes -- and did not, in any event, say anything about GM's intent to vest plan benefits.

face of written plan documents." Id. at 9 (first emphasis in original). The early retirees' only response on this score is their bizarre declaration that GM has "acknowledg[ed] that no ERISA case has prohibited vesting in these circumstances." Reply Br. 10. That assertion is demonstrably wrong.

In fact, as we explained at some length in our opening brief (at 16, 32-34), courts of appeals uniformly have held that written statements outside the formal ERISA documents (the plan and the SPDs) cannot supersede the terms of an ERISA plan. Thus, we noted that in Gable, 35 F.3d at 854, retirees made a claim identical to the one here, asserting that their rights had been vested by written benefits summaries stating that "the company would 'continue [health] [c]overage for you during the remainder of your lifetime at company expense.'" In an opinion by Judge Wilkinson, the Fourth Circuit emphatically rejected this claim, explaining that "[w]ere we to hold that other communications could nullify [the written terms of the ERISA plan], plan documents would no longer serve to ensure predictability as to employers' future liabilities, and 'consequently, substantial disincentives for even offering such plans would be created.'" Id. at 857.

The Second Circuit reached the same conclusion in Moore, 856 F.2d at 490-492, perhaps the leading case in the area and one that this Court has cited with approval. See Musto, 861 F.2d at 908 n.6. On facts that were, again, substantially identical to those here, retirees in Moore claimed that their rights to health care had been vested by letters and benefits presentations "describ[ing] these benefits as being for the employee's 'lifetime,' and 'at no cost.'" 856 F.2d at

490. Rejecting this claim, Judge Winter wrote for the court that "Congress intended that plan documents and the SPDs exclusively govern an employer's obligations under ERISA plans." Id. at 492.

Similarly, in Alday, 906 F.2d at 662-665, the Eleventh Circuit rejected a claim that health benefits could be vested by extra-plan writings, including one stating "that upon retirement '[h]ealth insurance [is] available to you and your dependents at a modest cost.'" Id. at 662-663. The court explained that "any retiree's right to lifetime medical benefits at a particular cost can only be found if it is established by contract under the terms of the ERISA-governed benefit plan document." Id. at 665 (emphasis added). And in Borst, 36 F.3d at 1323, the Fifth Circuit held that extra-plan written statements -- including a letter from the chairman of the employer's board of directors -- could not create enforceable rights. The court stated that "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 [29 U.S.C.] section 1102(b)(3)." See Curtiss-Wright, at *16-20. This rule cannot be circumvented simply by labeling the claim one for breach of contract.

We are not aware of any case in which any court has held welfare benefits vested by statements -- whether written or oral -- appearing outside the plan documents or SPDs, and plaintiffs have not purported to cite one. Nor have they made any attempt to distinguish the controlling cases discussed above (and in our opening brief); their reply brief does not so much as cite Moore, Alday, or Borst.

2. This Court emphatically applied the rule against use of extra-plan statements in Musto, 861 F.2d at 909-910, holding that oral statements are particularly defective and never may vest welfare benefits. The early retirees evidently recognize that this is the law. They contend, however, that this principle does not apply here because "all early retirement agreements were in writing in the form of statements of acceptance." Br. 2 (emphasis in original). They maintain that this fact alone means that all members of the class received written "benefits representations." Ibid; see id. at 3.8/ This Houdini-like effort to escape the force of Musto is fruitless. To begin with, the early retirees are wrong even in their description of the statements of acceptance: the "benefits" referenced in the statements plainly are retirement -- that is, pension -- benefits, not health benefits.^{9/}

^{8/} In fact, not all members of the class signed written statements of acceptance. As plaintiffs themselves recognize later in their reply brief (at 30 n.14), members of subclass 3 signed only statements of intent to retire; members of subclass 4 signed nothing at all.

^{9/} This is manifest on the face of the so-called short-form statements of acceptance. These typically stated that "[m]anagement has discussed with me the possibility of retiring under the Special Early Retirement Provisions of the General Motors Retirement Program for Salaried Employees. I have evaluated the benefits applicable to me under the provisions of the Program and am agreeable to accepting Special Early Retirement effective _____. I understand that implementation of this retirement is subject to the necessary approvals." Sprague II, 843 F. Supp. at 300 (emphasis added). The Retirement Program referred to in the form paid pension benefits; health care was provided under the separate General Motors Health Care Insurance Program, in which all GM "consent" retirees (including those taking special early retirements) participated. The form's reference to "benefits applicable to me under the provisions of the Program" therefore necessarily refers to pension benefits, which were greatly enhanced for early retirees. The district court's conclusion to the contrary -- which, as a matter of contractual interpretation, is

More fundamentally, whatever the meaning of the statements of acceptance, the early retirees' contention is entirely frivolous. It is undisputed that the statements of acceptance do not remotely set out the terms of the purportedly vested health care plan. In this setting, the Musto rationale is expressly applicable:

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 * * * the degree of certainty that Congress sought to provide for would be utterly impossible to attain.

Musto, 861 F.2d at 910 (emphasis added). Because the terms of the vested rights that plaintiffs claim would, in the cases of many retirees, have to be determined by reference exclusively to oral benefits descriptions, the principle of Musto controls. Of course, even if plaintiffs' claims relied on informal written statements, they still would lose under cases such as Gable, Moore, Alday, and Borst.

3. Against all of this, the early retirees make two exceedingly feeble arguments in support of the contention that extra-plan statements may create vested benefits. First, they say, "'it is settled law that an employer and an employee may contract for post-employment welfare benefits.'" Br. 14, quoting White Farm, 788 F.2d at 1191. But White Farm did not suggest that extra-plan statements are

subject to review de novo -- was premised on GM's practice of giving information about all of its benefits programs to persons contemplating retirement. See id. at 307-308. That employees took all available benefits into account when making a retirement decision, however, hardly converts those benefits into aspects of the "Retirement Program." There is no evidence that the so-called long-form statements of acceptance (see id. at 300) were intended to differ in any substantive way from the short-form statements.

enforceable; to the contrary, this Court there held that "the parties may themselves set out by agreement or by private design, as set out in plan documents, whether retiree welfare benefits vest." Id. at 1193 (emphasis added). See Musto, 861 F.2d at 907 (emphasis added) (describing White Farm as remanding "for consideration of the question whether an agreement or 'private design' set out in the governing plan document provided for the vesting of welfare benefits on retirement"). Plaintiffs also cite Gill, 981 F.2d at 860. But the Court there observed, in rejecting a claim that benefits had vested, that a "court must look to the language of the 'written instrument' establishing the welfare benefit plan required by ERISA."

Second, the early retirees parrot the district court's reasoning that, just as an SPD may prevail when it is inconsistent with the plan documents, so informal benefits statements may prevail when they are inconsistent with an SPD. Reply Br. 18-20. In fact, this Court has explicitly left open the question whether even an SPD may vest welfare benefits (see Musto, 861 F.2d at 905-906), expressing considerable skepticism on the point. See id. at 905 (such a conclusion "would seem to conflict with what is said in ERISA (the plan must be established pursuant to 'a written instrument,' of which the participants are to be furnished a 'summary')"). But even leaving that aside, plaintiffs cannot by wishful thinking convert informal benefits descriptions into the equivalent of formal SPDs. As we explained in our opening brief (at 24-25 & n.24), SPDs are paramount because Congress made them so, "intend[ing] that plan documents and the SPDs exclusively govern an employer's obligations under ERISA plans." Moore, 856 F.2d at 492.

"[I]n the words of a key congressional report, '[a] written plan is to be required in order that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan.'" Curtiss-Wright, at *18, quoting H.R. Rep. No. 93-1280, p. 297 (1974) (emphasis added by the Court). Plaintiffs' departure from that principle would turn ERISA on its head by attributing the greatest significance to the least formal and least precise statement of benefits, an approach that would lead to chaos in the administration of plans. See Curtiss-Wright, at *17-18.

C. The Extra-Plan Statements Did Not Promise Vested Benefits

1. Even if extra-plan statements could vest welfare benefits, the early retirees offer virtually no reply to the demonstration in GM's opening brief (at 22-23, 37) that the statements upon which they rely here did not make any commitment at all. They observe (Reply Br. 4) only that certain of the extra-plan statements indicated that "[t]he following provisions will apply during the period of your retirement." But this is wholly nonresponsive to our argument. On its face, this statement simply -- and accurately -- described the health plan then in effect, which continued benefits throughout retirement. In contrast, the early retirees do not (and could not) assert that they were told that the health plan would not be amended, that the health benefits were vested, or that the health coverage was "paid up."

In our opening brief (at 23-24, 37), we explained that this and other courts uniformly have held that language virtually identical to that in the benefits summaries here, whether appearing in SPDs or in extra-plan statements, must be read as describing the existing terms of

the plan rather than as guaranteeing no change in future benefit levels. Remarkably, the early retirees make no attempt to distinguish these decisions. Nor do they make any attempt to explain away this Court's clear holding in Musto that a written extra-plan statement may give rise to vested rights, if at all, only if it "promise[s] that all of the 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. See id. at 908. Nor do the early retirees deny that, as we demonstrated in our opening brief (at 22-23), their approach would mean that every SPD describing the availability of benefits in retirement would have the effect of vesting those benefits. And while not disputing that existing GM coverages made use of co-payments and deductibles, plaintiffs make absolutely no attempt to explain how an informal assurance of continued health care at "no cost" possibly could have been meant to exclude such charges.10/

10/ The early retirees recite (at Reply Br. 24) the district court's conclusion that the 1988 plan modification was a major change. But neither they nor the district court offer any explanation of how the phrase "no cost" can be read to permit the pre-1988 co-payments and deductibles, which included payments for most medical services not approved in advance, while excluding those implemented in 1988; the court simply asserted that "no cost" meant "no added cost." By the same token, plaintiffs have offered no theory explaining how CMEP could have vested. Since participation in that program always has required beneficiaries to make substantial payments, it is impossible to see how CMEP could be included within a "promise" of coverage "continued at no cost to the employe[e]" (Sprague II, 843 F. Supp. at 311). Indeed, plaintiffs' counsel conceded as much at trial. See Tr. VII(B), at 41-42, 52. Moreover, the "lifetime" and "no cost" references in the benefits statements upon which plaintiffs rely referred only to the basic health care coverages, not CMEP.

Finally, the early retirees do not deny that there can be no vesting for employees whose benefits descriptions noted that GM reserved the right to change the plan -- and they also do not deny that many benefits documents contained such reservations. Instead, they contend (at Reply Br. 4) that some of them did not receive these documents. But that assertion is flatly contradicted both by the record and by the district court's findings. The court below noted a substantial number of specific retirees who "had seen and studied [such a] document before" retirement (Sprague II, 843 F. Supp. at 281), or who were told "very specifically" that "benefits were subject to change" (id. at 282), or who "received" such documents (id. at 283), and noted as well the testimony of GM personnel officials that such documents were distributed at various locations as a matter of corporate policy. Id. at 298; see id. at 290. Plaintiffs have offered no theory that would permit recovery by any early retiree who was on notice of such a statement. See Curtiss-Wright, at *15-21. The assertion (at Pl. Reply Br. 4) that few of these documents were found in the "sample files" is completely nonprobative: these samples contained documents taken from particular personnel and retirement files that recorded information specific to the individual employee, and typically did not contain material provided to employees generally.

2. The early retirees' alternative argument (at Br. 16-17) that the benefits statements themselves constituted a multitude of individual plans or plan amendments is ridiculous. In plaintiffs' view, one-line phrases in the benefits statements -- to the effect that "[c]overage after retirement will be continued at no cost to the employe[e]"

(Sprague II, 843 F. Supp. at 311) or "[y]our present coverage will be continued on a Corporation paid basis" (id. at 314) -- are ERISA plans. If this were so, any casual remark by an employer, whether written or oral, would be enforceable as a plan. This would fly in the face of the congressional determination that welfare benefits should not be vested lightly, would make plan administration a practical impossibility, and accordingly "the degree of certainty that Congress sought to provide for would be utterly impossible to attain." Musto, 861 F.2d at 910. See Curtiss-Wright, at *16-17. It therefore comes as no surprise that, as the decisions cited in our opening brief (at 38-39 & n.26) establish, courts uniformly have rejected plaintiffs' argument.

D. GM's Position is Supported by the District Court's Findings and the Record

The early retirees' contention (at Reply Br. 22-24) that GM is challenging the district court's factual findings is incorrect -- and ironic, given the frequency with which plaintiffs themselves depart both from the record and from the district court's factual conclusions. In fact, most of GM's arguments are directed at questions of law or at the application of law to undisputed facts, although where the district court's factual findings are inconsistent -- for example, regarding the distribution of certain SPDs (see note 6, supra) -- recourse to the original record is necessary.

As for the particular areas where the early retirees assert (at Reply Br. 22-23) -- without citation either to the district court's factual findings or to the record -- that GM has departed from the district court's findings, we point out the following:

(1) As we already have explained (at 11-12), plaintiffs' contention that all early retirees received written statements of health benefits is an exercise in deception. It was the statements of acceptance (which said nothing about health care and were not signed by all retirees, see note 8, supra) that were in writing; it is undisputed that many of the benefits descriptions were oral.

(2) GM's argument that the statements of acceptance referred only to the pension program involves an issue of contract interpretation, a question of law, and is subject to de novo review. See note 9, supra.

(3) As we already have explained (at 6), the district court's findings regarding the distribution of the 1977 and 1980 retiree SPDs are inconclusive; there is overwhelming evidence that those SPDs were widely distributed to employees contemplating retirement.

(4) Plaintiffs deny that many plan documents "'over a period of twenty years'" reserved GM's right to amend the plan. In fact, as we explained in our opening brief (at 2-3, 17-19 & nn.8, 10) and as plaintiffs do not dispute, the underlying plan documents, certificates, and benefits summaries uniformly stated that the plan could be amended. It also is undisputed that eight of the eleven SPDs distributed during the relevant period contained such language; as we have explained, these SPDs were widely distributed even during the 1974-1985 time period that has become the focus of plaintiffs' argument. And the changing terms described by these documents clearly demonstrated the dynamic and evolutionary nature of the plan.

(5) As we have explained (at 15), both the district court's factual findings and the record establish that many of the benefit

descriptions provided to early retirees contained express reservation provisions.

(6) Plaintiffs take issue with what they characterize as "GM's argument that there was not the requisite 'lifetime' language in many benefit explanations because they only contained the phrase 'upon retirement,' when in fact the majority of those statements also contained the introductory phrase 'during the period of your retirement.'" This contention misperceives GM's legal submission, which is that all of the benefits summaries, expressly including those that contained what plaintiffs describe as "lifetime" language, simply summarized the terms of the existing plan.

(7) Plaintiffs take issue with GM's characterization of the benefits summaries as informal because they assertedly were "the primary source of information about health care." In fact, it is impossible to understand how the summaries could have been the primary source of such information when they say nothing about what benefits are provided, referring instead in the most conclusory terms to "present coverage" (Sprague II, 843 F. Supp. at 314) or "[f]ull basic health care coverages" (id. at 279) -- which, of course, required anyone who wanted to know what coverage was provided to consult the SPDs or plan documents. But that is not our principal point: the written and oral benefits summaries are informal because they are not ERISA documents and therefore cannot give rise to vested rights. See Curtiss-Wright, at *15-21.

E. GM is Entitled to Judgment on the Estoppel Claims as a Matter of Law

The early retirees' arguments on estoppel entirely fail to come to grips with our submission. Even assuming that an estoppel theory is available under ERISA -- and plaintiffs manifestly have not shown that to be the case^{11/} -- plaintiffs have failed to prove that GM made false statements, that they reasonably could have relied on statements that GM did make, or that they did in fact detrimentally rely on any GM statement.

First, on the question whether a false promise or other assurance was made, it is clear that the statements that plaintiffs cite, including the so-called "Morris memorandum," were fully accurate descriptions of the then-existing plan terms. There was absolutely nothing deceptive in GM's advising prospective retirees that they would continue to participate in the GM health care program after retirement. In doing so, GM necessarily described (in brief and conclusory terms) the operation of that program. But as we explain above, GM never suggested that the plan would not be changed.^{12/}

^{11/} Plaintiffs do not deny, as we explained in our opening brief (at 40-41 & n.29), that this Court has never enforced an estoppel claim under ERISA. Nor do they deny (indeed, they acknowledge at Br. 25 n.10) that other courts have permitted estoppel claims only when the statement relied upon clarified the terms of an ambiguous plan, which expressly was not the basis for the district court's decision here.

^{12/} The early retirees complain that GM did not "stress[]" that the plan could be changed. Reply Br. 28 (citation omitted). But that possibility was expressly noted in plan documents, in SPDs, in benefits summaries and insurance certificates given to employees (see GM Opening Br. 18 n.8, 19 n.10), and in many benefits statements distributed immediately prior to retirement -- and, of course, the plan did change with increased charges over the years. More fundamentally, the early retirees' argument serves to underscore their misunderstanding of the

Second, the early retirees evidently recognize that, under this Court's decisions, a retiree cannot reasonably rely on extra-plan statements when a right to amend the plan is reserved in SPDs or basic plan documents. And as we have explained, plaintiffs' contention that there was no such reservation in the ERISA documents here (as well as in many of the informal benefits statements) itself is, in plaintiffs' words, "an impermissible attack on the totality of the findings in Sprague II." Reply Br. 28. Whether or not GM intended to encourage early retirement by informing employees that they would continue to participate in the health plan after retirement, plaintiffs presented with a reservation of rights in the SPDs or plan documents -- and aware of the continuous evolution of their health plan -- could not reasonably have twisted GM's general statements into assurances that the plan itself would not be amended.

Third, we explained in our opening brief (at 40) that it could not be the case that an early retiree who otherwise would have stayed on the job left only because of assurances that the plan's co-payments, deductibles, and premiums would not change, since an employee concerned about changes in the health plan could not have avoided those changes by refusing to retire. In reply, plaintiffs assert (at Br. 29) that "[i]n departing early they forfeited the right to earn future salary and pension benefits which would have helped to compensate for any new health care costs." But the district court rejected precisely that

law: under ERISA the employer need not expressly reserve its statutory right to amend at all, let alone "stress" it, to retain the power to change or terminate a plan. See id. at 14.

argument when it was presented by the general retirees. See Sprague III, 857 F. Supp. at 1189 (faced with argument that "workers who retired at 65 might have worked longer to accumulate greater assets had they not been assured lifetime health care at GM's expense," the court concluded that "[t]his is mere speculation").

The other evidence that the early retirees did not rely on any asserted promise of unchanging health care is compelling. We explained in our opening brief (at 40), and plaintiffs do not deny, that their hand-picked witnesses failed to testify that they left the job because of promises that co-payments, deductibles, and premiums would not change. Prior to retirement very few plaintiffs asked about health care at all, and those who raised the subject did not seek assurances about deductibles, co-payments, and premiums. See, e.g., Tr. II(A), at 31; Tr. II(B), at 26; Tr. V(A), at 92; Tr. V(B), at 19; Tr. X(A), at 12, 36, 38. See also Sprague II, 843 F. Supp. at 281-282 (prospective retirees only "occasionally asked" about health care), 289 ("[o]nly about ten percent of retirees had questions about health care"), 292 ("[g]enerally health care was not discussed"), 297 ("'health care was not * * * an issue at all'"). Indeed, there is no evidence that any employee who signed a statement of intent to retire prior to announcement of the health plan changes in 1988 -- including some who retired after the changes went into effect -- sought to rescind it afterwards. In these circumstances, relief on an estoppel theory is unavailable.

F. This Court Should Reverse the Class Certification

We demonstrated in our opening brief that class certification was inappropriate here, because the early retirees' contract and estoppel

claims necessarily depend upon proof unique to each plaintiff rather than "questions of law or fact [that] are common to the class." Fed. R. Civ. P. 23(a). Plaintiffs' response to that argument is feeble. Indeed, they do not even mention a recent Seventh Circuit case that held class certification improper on virtually identical facts. Retired Chicago Police Ass'n, 7 F.3d at 596-598, discussed at GM Opening Br. 49.13/

Although plaintiffs assert that there are "indisputably" both common questions of law and fact (Reply Br. 30), they identify only one: "the meaning and effect of the early retirement agreements as evidenced by the statements of acceptance which members of subclasses 1 and 2 were uniformly required to sign." Ibid. But, as noted above, the statements of acceptance say nothing about free lifetime health care coverage. See page 11, supra. Indeed, plaintiffs have never claimed otherwise; rather, they alleged at trial that the general language "benefits applicable to me" in the statements of acceptance incorporated individualized communications made to each early retiree allegedly promising unreduced health benefits. See Sprague II, 843 F.

13/ Rather than responding to our arguments, plaintiffs pin their hopes on deferential appellate review. See Pl. Reply Br. 29-30, 32. But review for abuse of discretion does not mean no review at all. See Falcon, 457 U.S. at 161. Moreover, the district court never offered any defense of class certification that would be entitled to deference. The opinion in Sprague II restated, without explanation, the conclusory determinations in the court's class certification order dated November 4, 1991, and amended April 9, 1992. See 843 F. Supp. at 271-272. In the November 4 order, the court merely recited the language of Rule 23 after invoking the phrase "[t]he court finds." In the April 9 order, the court did nothing more than "make explicit [that] the class is certified under Rule 23(b)(2)." Neither order made actual findings of fact or otherwise explained how the requirements of Rule 23 could be met by the early retirees' claims in this case.

Supp. at 302. Thus, plaintiffs' contract and estoppel claims depend entirely on specific oral or written statements made to each early retiree; neither the statements of acceptance nor any other common communication provide any support for these claims.^{14/}

Plaintiffs' position makes a mockery of Rule 23. The class here covers people who retired at dozens of different GM plants over a period of 20 years; included are class members (e.g., everyone who retired after 1985) who received SPDs stating in italic type that the health plan could be changed at any time; included are class members who acknowledged that GM had reserved the right to amend its plan; included are class members who never received any informal communications about their health benefits in retirement; included are class members who intended to take early retirement regardless of the possibility that changes in co-payments and deductibles might be made in the future; included are class members who never even signed a statement of acceptance (subclasses 3 and 4); indeed, included are class members who took or agreed to take early retirement after GM announced the changes to its health care coverage in 1987! See, e.g., Sprague II, 843 F. Supp. at 270.

Plaintiffs try to pass off the significant differences among the 40,000 class members as mere "factual variations." Reply Br. 31 n.15. But the factual differences in this case are hardly immaterial and do

^{14/} Plaintiffs' assertion (Reply Br. 31 n.16) that GM waived its repeated objection to classwide treatment of the estoppel claims is, typically, not supported by the record. The fact that GM agreed that the district court could adjudicate the estoppel claims on the basis of the record developed in Sprague II hardly means that GM no longer opposed deciding those fact-bound claims on a classwide basis.

not relate simply to damages.^{15/} Proof of each early retiree's claim depends entirely on (a) what was said to that early retiree, (b) what other knowledge that retiree had about GM's health plan, (c) how a reasonable person would have understood the informal communication in light of that other knowledge, and (d) whether the communication was material to that retiree's decision to accept early retirement. Plaintiffs have yet to explain how evidence that one early retiree received a particular communication in a particular context could possibly support relief to another early retiree who received a different communication in a totally different context.

Indeed, even as to the class representatives, the differences on critical questions of proof were enormous. There were 451 class representatives, 200 picked at random and 251 "self-selected" by plaintiffs. Sprague II, 843 F. Supp. at 272. Significantly, none of plaintiffs' witnesses at trial were from the randomly selected group. Yet, even among plaintiffs' hand-picked subset of witnesses, some early retirees admitted that they received formal documents prior to retirement stating that GM reserved the right to make health plan changes (Tr. II(B), at 4; Tr. IV(A), at 22-23; Tr. IV(B), at 24), other early retirees acknowledged that co-payments had increased during their employment (Tr. XVI(B), at 38), others stated that no one had ever

^{15/} The early retirees suggest that individual differences can be dealt with in separate damages proceedings. Reply Br. 31. But this ignores the district court's injunction requiring GM to provide free lifetime health care coverage to the entire class, irrespective of whether particular class members can show that they in fact formed a "side agreement" with GM or in fact relied on any special promise in deciding to retire.

promised them special health benefits in retirement (Tr. II(B), at 17-18; Tr. XVI(B), at 44), and still others testified that these details had no material effect on their decision to retire (Tr. VI(A), at 58). Plainly, to grant vested health benefits to 40,000 class members based on evidence such as this is class action litigation run amok, with no attempt to satisfy the requirements of Rule 23 and no semblance of fundamental fairness.

Not surprisingly, the authorities cited by plaintiffs lend no support to their position. One of their principal cases held that class certification was not proper where a plaintiff alleging race discrimination presented evidence concerning individualized transactions, since "grievances of other employees similar to those asserted by plaintiff" do not satisfy Rule 23. Patterson v. General Motors Corp., 631 F.2d 476, 481 (7th Cir. 1980):

The issue of whether a particular job assignment or promotion denial was discriminatory would depend upon any number of factors peculiar to the individuals competing for the vacancy * * * . Each disciplinary action would present a different set of facts for each employee.

The other cases cited by plaintiffs confirm that class certification is not appropriate in a case such as this, "where no one set of operative facts establishes liability, [or] no single proximate cause equally applies to each potential class member and each defendant." Sterling v. Velsicol Chemical Corp., 855 F.2d 1188, 1197 (6th Cir. 1988). Unlike a claim of race discrimination, a claim that GM entered into side agreements with various early retirees based on diverse informal communications over a period of many years is not "peculiarly

class discrimination." Senter v. General Motors Corp., 532 F.2d 511, 524 (6th Cir. 1976).

Finally, plaintiffs demonstrate a fundamental misunderstanding of Rule 23 in claiming that GM improperly seeks to "have it both ways." Reply Br. 30. The law is clear that there is a common basis for GM to prevail: the early retirees have not pointed to any unambiguous waiver of GM's statutory right to amend, and GM's ERISA plan documents clearly reserved that right. By contrast, the early retirees have failed to identify any common basis for ruling in their favor. In these circumstances, the district court's decision to award injunctive relief to 40,000 class members, vesting unreduced health benefits forever, was a gross abuse of discretion.

* * * * *

We refer to GM's opening brief throughout this reply brief because we there cited innumerable decisions that establish the principles controlling in this case. The significance of those principles was emphatically confirmed by the Supreme Court in Curtiss-Wright. Yet the early retirees make virtually no response to our submissions and no attempt at all to distinguish the many dispositive authorities cited in our opening brief. Simply stated, the early retirees have tried to sell this Court a pig in a poke -- urging that they should be accorded lifetime vested benefits without bothering to explain how the result can be reconciled with settled ERISA law.

CONCLUSION

The judgment of the district court in favor of the early retirees should be reversed.

Respectfully submitted.

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