Where the Law Ends - Part 2: A Ceremonial Approach to the Interpretation of Collective Bargaining Agreements in Tackett and Reese

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WHERE THE LAW ENDS - 'PART 2
A CEREMONIAL APPROACH TO THE
INTERPRETATION OF COLLECTIVE
BARGAINING AGREEMENTS IN TACKETT AND
REESE

Roger J. McClow*

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I. INTRODUCTION

On February 20, 2018, in a per curiam decision, CNH Industrial LLC v. Reese, the Supreme Court summarily reversed the Sixth Circuit’s split decision in favor of a class of about four thousand retirees and spouses.1 Citing its 2015 decision in M&G Polymers USA, LLC v. Tackett,2 the Court held that, as a matter of law, the retirees’ right to health care benefits did not survive the expiration of the collective bargaining agreements

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under which they had retired. The Supreme Court considered the issue, under "ordinary principles of contract law," as so "straightforward" that briefing and oral argument on the merits was unnecessary.

After fifteen years of intense litigation in two related cases, during which three decades of collective bargaining history were explored, more than 145,000 documents produced and catalogued, more than 1300 docket entries filed, more than 60 depositions taken and dozens of orders entered on procedural and substantive issues, the Supreme Court discovered all of this litigation had all been pointless. The dispositive answer had been in plain sight all along. Case New Holland (hereinafter "CNH") a multi-billion-dollar manufacturer of tractors and agricultural equipment won, saving it hundreds of millions of dollars; its former employees lost the retirement security they had earned through decades of industrial labor.

As might be expected after such extensive litigation, nothing about this case was "straightforward" – an issue this article explores. As important, in Tackett, the Supreme Court engaged in a "ceremonial" approach to contract interpretation, selectively identifying only some "ordinary principles" of contract interpretation and emphasizing textual factors while ignoring or minimizing contextual ones. This permitted the

4. Id. at 766.
5. See Yolton v. El Paso Tenn. Pipeline Co., 435 F.3d 571, 574 (6th Cir. 2006) (involving a class of retirees, and their spouses, who retired from CNH before a July 1, 1994 reorganization and initial public offering (IPO); Reese, 583 U.S. __, 138 S. Ct. at 761 (involving a class of retirees who retired thereafter, under the same and later CBAs).
7. CNH is the company, which resulted from the 1999 merger between Case Corporation and New Holland. Yolton, 435 F.3d at 574. The 1998 CBA, and prior CBAs, were actually between Case Corporation and the UAW. Id. Prior to 1990, Case Corporation was known as J.I. Case Co., which was originally founded in 1842. Id. Prior to the 1994 initial public offering (IPO), Case Corporation was wholly owned by Tenneco (later El Paso Tennessee Pipeline Company and now KinderMorgan). Id. Throughout this article, Case will be referred to as CNH or Case Corporation.
9. According to Farnsworth, the application of rules of contract interpretation "is often more ceremonial (as being decorative rationalizations of decisions already reached on other grounds) than persuasive (as moving the court toward a decision not yet reached) . . . . Indeed, a court can often
Supreme Court in *Reese* to short-circuit the contractual inquiry, based on faulty contract analysis applied to a fictional factual premise. As a result, *Reese* never focused on (or attempted to determine) the actual intent of the parties. Instead, *Reese* held that one selected provision of the 1998 Collective Bargaining Agreement (hereinafter “CBA”) in isolation foreclosed any such inquiry.

II. **TACKETT, REESE AND “ORDINARY PRINCIPLES OF CONTRACT LAW”**

A. **THE MAJORITY OPINION IN TACKETT**

If anything can be taken from *Tackett* with certainty, it is that collective bargaining agreements must be interpreted “according to ordinary principles of contract law.” 10 While noting *Textile Workers v. Lincoln Mills* 11 for the proviso that, this is true “at least when those principles are not inconsistent with federal labor policy,” 12 the Court proceeded to ignore decades of Supreme Court precedent holding unequivocally that CBAs are not “ordinary contracts” and that the “same old rules” that apply to ordinary contracts do not apply to CBAs. 13

Three years later, *Reese* expunged the federal labor policy proviso from the governing principle and cited *Tackett* for the completely erroneous proposition that: “This Court has long held that collective-bargaining agreements must be interpreted ‘according to ordinary principles of contract law.’” 14

This article focuses on whether *Tackett*, as amplified by *Reese*, actually employed “ordinary principles” of contract interpretation or, instead, applied those rules ceremonially, fashioning an almost irrebuttable presumption against the vesting of collectively bargained healthcare benefits, a presumption entirely at odds with traditional contract principles and,  

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consequently, contrary to the fundamental judicial objective in contract cases – to discern the actual intent of the contracting parties.

After paying lip service to federal labor policy, Tackett cited the ordinary principle that, "as with any other contract, the parties’ intentions control." 15 The Court then quoted Williston on Contracts for the “plain meaning” rule that: “Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent.” 16

Tackett granted certiorari to address the issue of whether the Sixth Circuit in UAW v. Yard-Man, had improperly fashioned an inference from the context of collective bargaining and the status of retirees that supported its finding that retiree healthcare benefits had vested. 17 On this issue, the Court stated: “As an initial matter, Yard-Man violates ordinary contract principles by placing a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements. That rule has no basis in ordinary principles of contract law.” 18

Citing Williston, the Court held that the Yard-Man inference “distorts the attempt to ascertain the intention of the parties” and its “assessment of likely behavior in collective bargaining is too speculative and too far removed from the context of any particular contract to be useful in discerning the parties’ intention.” 19

Tackett criticized Yard-Man for deriving its assessment of likely behavior “from its own suppositions about the intentions of employees, unions, and employers negotiating retiree benefits,” not from record evidence. 20 While Tackett recognized that customs or usages in a particular industry were relevant in discerning the meaning of a contract, the Court held that any such practices must be proven through affirmative evidence in a given case, not, as in Yard-Man, “indiscriminately across industries.” 21

Tackett stated that Yard-Man inferences rest on “a shaky factual foundation,” that is, on the premises that: 1) retiree healthcare benefits are

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16. Id. (quoting 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 30:6 at 108 (2012)).
17. UAW v. Yard-Man, 716 F.2d 1476, 1482 (6th Cir. 1983).
18. Tackett, 574 U.S. at 438.
19. Id. at 438-39 (quoting 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 30:2 at 18 (2012)).
20. Id. at 439.
21. Id.
permissive rather than mandatory subjects of bargaining;\(^22\) and 2) those benefits are a form of deferred compensation, a characterization that is, according to Tackett, “contrary to Congress’ determination otherwise.”\(^23\)

Tackett noted that, in Yard-Man and subsequent decisions, the Sixth Circuit refused to give any weight to contract provisions that supported a conclusion contrary to vesting, such as a general termination clause.\(^24\) Citing Story and Williston, Tackett stated that “[t]hese decisions distort the text of the agreement and conflict with the principle of contract law that the written agreement is presumed to encompass the whole agreement of the parties.”\(^25\)

Similarly, Tackett criticized Yard-Man’s purported application of the illusory promises rule.\(^26\) According to Tackett, the CBA promises were not, by definition, “illusory” because they benefited some classes of retirees, if not all classes of retirees equally.\(^27\) If a CBA benefits some class of retirees, that is sufficient to “serve as consideration for the Union’s promises.”\(^28\) The Court further states that Yard-Man’s interpretation ignores that CBAs are negotiated on behalf of a broad category of individuals and will necessarily include “provisions inapplicable to some category of employees.”\(^29\)

Additionally, the Court in Tackett asserted that the Sixth Circuit “failed even to consider the traditional principle that courts should not construe ambiguous writings to create lifetime promises.”\(^30\) “Contracts that are silent as to their duration will ordinarily be treated not as ‘operative in perpetuity’ [but only for] a reasonable time.”\(^31\) According to the

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\(^{22}\) Id. at 439 (“Parties, however, can and do voluntarily agree to make retiree benefits a subject of mandatory collective bargaining. Indeed, the employer and union in this case entered such an agreement in 2001.”).

\(^{23}\) Id. (citing Employment Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. § 1002(2)(A)(ii) (defining plans resulting in a deferral of income as pension, not welfare benefit plans)).

\(^{24}\) Id.

\(^{25}\) Id. at 440 (citing 1 W. STORY, LAW OF CONTRACTS § 780 (M. Bigelow ed., 5th ed. 1874); see also 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 31:5 at 470-71 (2012) Section 31.5 of 11 Williston is entitled “Courts May Not Rewrite the Contract.” The Court gave no page citation and this section does not appear to support the principle for which it is cited. And, as noted elsewhere, this “ordinary” contract principle is contrary to Supreme Court precedent that the common law of the shop is equally a part of a collective bargaining agreement even though not expressed in the written agreement. Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960).

\(^{26}\) Tackett, 574 U.S. at 436.

\(^{27}\) Id. at 440-41.

\(^{28}\) Id. at 441.

\(^{29}\) Id.

\(^{30}\) Id.

\(^{31}\) Id. (citing ARTHUR LINTON CORBIN, 3 CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW § 553 at 216 (1960)).
Court, there was a “stark contrast” between the Sixth Circuit’s treatment of collectively bargained and non-collectively bargained retiree healthcare benefits. In Sprague v. General Motors Corp., the Sixth Circuit held that, for non-collectively bargained benefits to vest, the employer’s intent must be “stated in clear and express language.” From this, Tackett concluded that “[t]he different treatment of these two types of employment contracts only underscores Yard-Man’s deviation from ordinary principles of contract law.”

The Court in Tackett cited Litton Financial Printing Div. v. NLRB for “the traditional principle that ‘contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement’” and for the proposition that “a collective bargaining agreement . . . provide[s] in explicit terms that certain benefits continue after the agreement’s expiration.” But, Tackett concluded: “When a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life.”

As to the case before it, Tackett stated that “[t]here is no doubt that Yard-Man and its progeny affected the outcome here.” Tackett noted that the Sixth Circuit referenced “the context of . . . labor-management negotiations” and reasoned that the union likely would not have agreed to language providing for a “full Company contribution” for retiree healthcare if the company could change the level of that contribution. Tackett criticized the Sixth Circuit for concluding “that the tying of eligibility for health care benefits to receipt of pension benefits suggested an intent to vest health care benefits.”

Tackett concluded: “We reject the Yard-Man inferences as inconsistent with ordinary principles of contract law.” But, recognizing it was the court of final review, the Court remanded to the lower “court to apply ordinary principles of contract law in the first instance.”

32. Id.
33. Sprague v. General Motors Corp., 133 F.3d 388, 400 (6th Cir. 1998).
34. Tackett, 574 U.S. at 441.
35. Id. at 441-42 (quoting Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 207 (1991)).
36. Id.
37. Id.
38. Id. at 443.
39. Id. at 442. In particular, Tackett criticized Noe v. PolyOne Corp., which held “that a provision that ties eligibility for retirement-health benefits to eligibility for a pension . . . leaves little room for debate that retirees’ health benefits vest upon retirement.” Id. at 438 (quoting Noe v. PolyOne Corp., 520 F.3d 548, 555 (6th Cir. 2008)).
40. Tackett, 574 U.S. at 442.
41. Id.
B. THE TACKETT CONCURRENCE

The four-member Tackett concurrence agreed that the majority’s “decision rightly holds that courts must apply ordinary contract principles, shorn of presumptions, to determine whether retiree health-care benefits survive the expiration of a collective-bargaining agreement.” But, it pointed out that, according to Williston, “[u]nder the ‘cardinal principle’ of [ordinary] contract interpretation, ‘the intention of the parties, to be gathered from the whole instrument, must prevail.’” In determining what the parties intended, “a court must examine the entire agreement in light of relevant industry-specific ‘customs, practices, usages, and terminology.’” When intent is “unambiguously expressed in the contract, that expression controls;” but when a contract is unambiguous, a court may consider extrinsic evidence.

The concurrence clarified that “clear and convincing” evidence of vesting is not required, noting that Litton held that “[c]onstraints upon the employer after the expiration date of a collective-bargaining agreement . . . may be derived from the agreement’s ‘explicit terms,’ but they ‘may arise as well from . . . implied terms of the expired agreement.’” The concurrence concluded by reminding the parties that the CBA was not silent as to duration. The CBA contained language that retirees will receive healthcare benefits if they are receiving a monthly (lifetime) pension and if a retiree dies, the surviving spouse “will continue to receive the retiree’s benefits . . . until death or remarriage.” The concurrence stated that such language was relevant to the inquiry on remand.

C. THE REESE PER CURIAM REVERSAL

On February 20, 2018, the Supreme Court issued a per curiam decision, CNH Industrial LLC v. Reese, summarily reversing the Sixth Circuit’s post-Tackett decision in favor of a class of nearly four thousand retirees and spouses. Based on the certiorari petition alone, the Court

42. Id. at 443 (Ginsburg, J., concurring).
43. Id. (quoting 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 30:2 at 27 (2012)).
44. Id. at 443 (internal citation omitted).
45. Id.
46. Id. (quoting Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 203 (1991)).
47. See id. at 443-44.
48. Id. at 444.
49. See id. at 443.
decided that retiree healthcare benefits did not survive expiration of the CBA under which the class members retired.\footnote{See id. at 766.} The Supreme Court saw this "[s]horn of *Yard-Man* inferences," as a "straightforward" issue requiring no briefing or oral argument on the merits.\footnote{Id.}

*Reese* began its analysis by stating: "This Court has long held that collective-bargaining agreements must be interpreted "according to ordinary principles of contract law,"" quoting only *Tackett* for that premise throughout the decision.\footnote{Id. at 763 (internal citation omitted).} In particular, *Reese* quoted *Tackett*'s reference to Story and Williston for "the principle of contract law that the written agreement is presumed to encompass the whole agreement of the parties."\footnote{Id. at 763.}

*Reese* adopted the reasoning of Judge Jeffrey Sutton's dissent in *Reese v. CNH Industrial LLC.*\footnote{See *Reese* v. CNH Indus. N.V., 854 F.3d 877, 887-93 (6th Cir. 2017), rev'd 583 U.S. __, 138 S. Ct. 761 (2018) (hereinafter *Reese III*).} *Reese* quoted Judge Sutton's view that the majority's analysis in *Reese III* was simply "*Yard-Man* re-born, re-built, and re-purposed for new adventures."\footnote{Id. at 763. Neither *Tackett* nor *Reese* cited *Steelworkers v. Warrior & Gulf Navigation Co.*, which held the written CBA was not the "whole agreement" but rather that "the industrial common law – the practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it." *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960) (emphasis added).} It adopted Judge Sutton's assessment that a clause in the 1998 CBA, which stated that the insurance agreement ran "concurrently" with the CBA and was "made a part of" the CBA, was "all anyone needs to know to decide this case."\footnote{See *Reese* v. CNH Indus. N.V., 854 F.3d 877, 887-93 (6th Cir. 2017), rev'd 583 U.S. __, 138 S. Ct. 761 (2018) (hereinafter *Reese III*).} It was this premise that *Reese* found to be so straightforward that no briefing on the merits was necessary.\footnote{Id. at 765; *Reese III*, 854 F.3d at 888-89 (Sutton, J., dissenting).}

*Reese* also faulted the *Reese III* majority for its analysis of internal contract clues of intent from other provisions in the insurance agreement.\footnote{See *Reese* v. CNH Indus. N.V., 854 F.3d 877, 887-93 (6th Cir. 2017), rev'd 583 U.S. __, 138 S. Ct. 761 (2018) (hereinafter *Reese III*).} *Reese* held that the majority erred in even considering what the Group Benefits Plan (hereinafter "GBP")\footnote{See *Reese* v. CNH Indus. N.V., 854 F.3d 877, 887-93 (6th Cir. 2017), rev'd 583 U.S. __, 138 S. Ct. 761 (2018) (hereinafter *Reese III*).} said about retiree healthcare – or about other benefits – because the CBA's general duration clause,
incorporated in the GBP through the "concurrent" provision, governed. 61 Reese explained that Tackett rejected any such inferences from other parts of the CBA "because they are not established rules of interpretation." 62

Quoting Tackett, Reese stated that "[t]he Yard-Man inferences 'distort the text of the agreement,' fail 'to apply general duration clauses,' erroneously presume lifetime vesting from silence, and contradict how 'Congress specifically defined' key terms in ERISA." 63 Because the CBA was unambiguous, Reese held that extrinsic evidence of intent was inadmissible. 64

Finally, again echoing Sutton's dissent, Reese faulted the Sixth Circuit's analysis because, the Court opined, no other Circuit would have found vested benefits under the facts of Reese III. 65

III. THE STRAIGHTFORWARD ISSUE IN REESE – THE CBA'S "CONCURRENT" CLAUSE

A. All Anyone Needs to Know

The source of the straightforward issue identified by Reese – what Judge Sutton claimed was "all anyone needs to know to decide this case" – was Section 4A of the 1998 CBA between CNH and the UAW. As stated by Judge Sutton, Section 4A provides: "the Group Benefit Plan 'will run concurrently with this Agreement and is hereby made a part of this Agreement.'" 66

Because the 1998 Group Benefit Plan contained the provisions conferring retiree health care benefits, Reese agreed with Judge Sutton that those benefits were unambiguously limited to the term of the 1998 CBA through the Section 4A concurrent provision. 67

B. A Clear Manifestation of Intent?

The Supreme Court purported to rely on the same plain meaning rule in Reese, as in Tackett. 68 This rule provides that if the intent of the parties

62. Id.
63. Id.
64. Id.
65. Id. (citing Reese III, 854 F.3d at 893 (Sutton, J., dissenting)).
68. Id.
is unambiguously expressed in the contract, the court must enforce that intent without further inquiry. 69 There is only an ambiguity, Reese states, when there are "two competing interpretations, both of which are fairly plausible." 70 Finding no such ambiguity, Reese summarily held that retiree healthcare benefits were confined to the term of the CBA. 71

As discussed below, courts and commentators have cautioned that the plain meaning rule is often employed to foreclose inquiry into actual intent, rather than as a means of discovering it. 72 So then, what is the plain meaning of the concurrent clause.

The concurrent clause says nothing about retiree healthcare benefits. It does not say that "all retiree healthcare benefits terminate at the expiration of the CBA." It does not say that "the employer will provide retiree healthcare benefits for the term of this Agreement only." It does not say that "retiree healthcare benefits will not vest during the term of the CBA." Any of these statements would make the meaning plain, but the parties said nothing of the kind. Even if the concurrent clause provided that "all benefits provided for under the insurance agreement will terminate concurrently with the expiration of the CBA," the meaning would have been plainer, although still far less than explicit as to whether retirement benefits accrued or vested during the CBA's term.

The concurrent clause only says that the GBP runs concurrently with the CBA and is made a part of it — something anyone familiar with collective bargaining would expect. At CNH, as elsewhere, employee insurance benefits were almost always negotiated at the same time as other collectively bargained subjects, during the economics sessions of labor negotiations. When all contract terms were agreed upon and summarized in a tentative agreement, the membership ratified the new CBA as a complete package of contractual agreements. The concurrent clause making the GBP a part of the CBA says nothing about the duration of any particular CBA provision or any specific benefit in the GBP.

In Litton Financial Printing Div. v. NLRB, as the concurrence noted, the Supreme Court stated that "constraints upon the employer after the expiration date of a collective-bargaining agreement . . . may arise . . . from the express or implied terms of the expired agreement itself." 73 Later in the opinion, Litton stated:

69. Id.
70. Id. at 765 (quoting Reese III, 854 F.3d 877 (Sutton, J., dissenting)).
71. Id. at 766.
72. See infra Section IV.A.
[C]ontractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement. Exceptions are determined by contract interpretation. Rights which accrued or vested under the agreement will, as a general rule, survive termination of the agreement. And of course, if a collective bargaining agreement provides in explicit terms that certain benefits continue after the agreement’s expiration, disputes as to such continuing benefits may be found to arise under the agreement.

If "accrued or vested" contract rights can survive a CBA's termination clause based on implied contract terms, as Litton held, the duration of a CBA obligation cannot be determined simply by the fact that there is a termination clause in the CBA.

The concurrent clause, after all, only makes the insurance plan a part of the CBA. If employer obligations can extend beyond the expiration of the CBA if they vested or accrued during its term through either explicit or implied terms, as Litton holds, provisions of an incorporated GBP can survive the CBA’s expiration as well — and can arise from the implied terms of the GBP that ran concurrently with the CBA. Thus, the Supreme Court took a leap from the meaning of the actual language of the concurrent clause to a presumption that it unambiguously limited retiree health care. Such a presumption necessarily limits all negotiated benefits in the CBA, as well as the GBP, to the term of the 1998 CBA — in a manner inconsistent with Litton. Such a presumption forecloses analysis of the actual meaning of specific contract provisions, contrary to those exceptions to the "general rule" stated in Litton. Certainly, the meaning of the concurrent clause was not that plain, at least not in the sense necessary to make the issue of the duration of retiree healthcare benefits that straightforward.

74. Id. at 207. Tackett cited Litton but, quoted only the first and last sentence of this paragraph, leaving the definite, but erroneous impression that only the only exceptions to the general rule are when the CBA explicitly provides that obligations survive the CBA’s expiration date. Id. Reese also cited Litton but only for the proposition that, in the ordinary course, obligations do not survive the expiration of a CBA. Reese, 583 U.S. __, 138 U.S. at 763. In his dissent in Reese III, Judge Sutton quoted only the first sentence from Litton. Reese III, 854 F.3d at 888 (Sutton, J., dissenting). Ironically, more than twenty years before Reese, the Sixth Circuit, in Golden v. Kelsey-Hayes Co., rejected the employer’s attempt to limit the holding in Litton in the same manner. Golden v. Kelsey-Hayes Co., 73 F.3d 648 (6th Cir. 1996). After quoting this paragraph from Litton, Golden stated: "[I]n making this argument, the defendant ignores the portion of the above quotation . . . in which the Court recognizes that courts, through rules of contract interpretation, can find that rights accrue or vest under the agreement even if they are not explicitly set out in the agreement." Id. at 655 (concluding that "[I]t is not from contradicting Yard-Man, Litton actually supports its reasoning); see also Bidlack v. Wheelabrator Corp., 993 F.2d 603, 606-08 (7th Cir. 1993).
The obvious message of Reese is that the Supreme Court intended its summary decision to reinforce and amplify its holding in Tackett — and in the process substitute a presumption against vesting in all cases in place of the Yard-Man inference that provided a “nudge in favor of vesting in close cases.” But, there is far more to the story and it shows why the Reese retirees desired better than the shabby, summary treatment they received from the Supreme Court.

IV. ORDINARY PRINCIPLES OF CONTRACT LAW

Tackett’s admonition to apply ordinary principles of contract law to collective bargaining agreements governed by Section 301 is contrary to long-standing precedent that CBAs are not ordinary contracts and are not governed by the same rules governing ordinary contracts and that the written CBA does not contain all of the terms governing the parties’ collective bargaining relationship. This admonition also violates the long-established mandate that Section 301 requires a uniform federal common law developed under Section 301 that is not dependent on the laws of the fifty states.

Although there is broad agreement over some basic principles of contract interpretation, each state has its own body of common law governing the interpretation of contracts. For example, Tackett cites Corbin’s 1960 treatise on Contracts. But, Corbin on Contracts was revised thirty-eight years later, in 1998, adding a new, separate volume on Interpretation of Contracts. This new volume expands upon Corbin’s view that “[i]t is

77. Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960) (“Industrial common law — the practices of the industry and the shop — is equally a part of the collective bargaining agreement although not expressed in it.”).
78. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 404 (1988). In Lingle, the Court held that: “[S]ection 301 mandate[s] resort to federal rules of law in order to ensure uniform interpretation of collective-bargaining agreements, and thus to promote the peaceable, consistent resolution of labor-management disputes.” Id. Lingle cited Teamsters v. Lucas Flour Co., where the Court rejected the application of state law rules of contract interpretation to the issue of whether the CBA implicitly prohibited a strike called by the union: “[T]he subject matter of § 301(a) ‘is peculiarly one that calls for uniform law’ … [t]he possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.” Id. n.3 (internal citations omitted).
therefore invariably necessary, before a court can give any meaning to the words of a contract . . . that extrinsic evidence be admitted to make the court aware of the ‘surrounding circumstances.’"81 According to Professor Margaret Kniffin, the author of the 1998 volume, Corbin’s approach, calling for an examination of extrinsic evidence before any judicial determination of whether ambiguity exists, is inconsistent with the “plain meaning rule.”82 She tracks the evolution, beginning in 1968, with the Supreme Court of California,83 and later followed by other states, where courts have become increasingly receptive to Corbin’s arguments for the admission of extrinsic evidence to discern intent “without [first] inquiring whether the contract terms are susceptible to the meaning that may be shown.”84

By definition, there cannot be any uniform application of ordinary principles of contract law if there is no universal agreement on what those principles are. Tackett employed a strict application of the plain meaning rule – without acknowledging the Court’s departure from Corbin’s approach.85 Federal courts are now left with the task of applying the different jurisdictional and theoretical variations of ordinary principles of contract law to CBAs, rather than the objective, uniform interpretation approach established in Lucas Flour and Lingle.86

This article is not about such abstract jurisprudential issues. Rather, it is about how an actual application of ordinary principles of contract law would have disclosed the actual intent of the parties in Reese, an intent annulled by the Supreme Court’s ceremonial application of those principles.

A. The Plain Meaning Rule – Unambiguous Contract Language Need Not be Interpreted in a Vacuum; the Underlying Goal in Interpreting a Contract is to Ascertain the Intent of the Parties

In explicating the ordinary principles of contract interpretation, Tackett began with the uncontested proposition that, when interpreting contracts, including CBAs, “the parties’ intentions control.”87 Tackett then quoted Williston for the proposition that: “Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained
in accordance with its plainly expressed intent."\textsuperscript{88} Furthermore, the Court cited Story for the proposition that "the written agreement is presumed to encompass the whole agreement of the parties"\textsuperscript{89} and Corbin for the "traditional principle that courts should not construe ambiguous writings to create lifetime promises."\textsuperscript{90}

Even cursory examination of Tackett's analysis shows how thin and selective it is. While the Court did not exclude the use of other ordinary contract principles, its focus was on literalness within the confines of the written document.\textsuperscript{91} Reese's subsequent per curiam reversal, summarily rejecting the Sixth Circuit's post-Tackett analysis in Reese III, demonstrates that, going forward, an employer's obligations will survive the expiration of a CBA, if at all, only in the most exceptional circumstances - regardless of the parties' intent.\textsuperscript{92}

Williston is hardly as dogmatic as Tackett implied. Instead, immediately following the "clear and unambiguous" passage quoted by Tackett, Williston elaborated on the correct interpretive principles:

While unambiguous contract language is generally interpreted without resort to extrinsic evidence, it need not be interpreted in a vacuum; the underlying goal in interpreting a contract is to ascertain the intent of the

\textsuperscript{88} Id. (internal citation omitted).

\textsuperscript{89} Id. at 440 (internal citation omitted).

\textsuperscript{90} Id. at 441.


\textsuperscript{92} CNH Indus. N.V. v. Reese, 583 U.S. __, 138 S. Ct. 761, 763 (2018). Tackett was remanded from the Sixth Circuit to the district court to determine whether retiree healthcare benefits vested under ordinary principles of contract law. In doing so, the court stated that it cannot be presumed that "a general durational clause says everything about the intent to vest." Tackett v. M&G Polymers USA, LLC, 811 F.3d 204, 209 (6th Cir. 2016) (hereinafter Tackett III). But, starting with Gallo v. Moen Inc., it became apparent that a CBA's general durational clause had added significance. Gallo v. Moen Inc., 813 F.3d 265, 269-71 (6th Cir. 2016). For example, in Serafino v. City of Hamtramck, the Sixth Circuit cited Gallo for the proposition that while a general duration clause may not say everything about the parties' intent to vest a benefit, "it certainly says a lot." Serafino v. City of Hamtramck, 707 F. App'x 345, 352 (6th Cir. 2017); Cole v. Merritt, Inc., 855 F.3d 695, 700-01 (6th Cir. 2017); Watkins v. Honeywell Int'l, Inc., 875 F.3d 321, 324 (6th Cir. 2017). Since Reese, the Sixth Circuit has not found a single CBA where the parties intended for retiree healthcare benefits to survive the CBA's expiration. See Cooper v. Honeywell Int'l, Inc., 884 F.3d 612, 623 (6th Cir. 2018); Fletcher v. Honeywell Int'l, Inc., 892 F.3d 217, 228 (6th Cir. 2018); Zino v. Whirlpool Corp., 763 F. App'x 470, 473 (6th Cir. 2019).
parties, and the surrounding circumstances when the parties entered the contract, among other relevant considerations, may well shed light on that intent.\textsuperscript{93}

In fact, Williston also stated:

Under the prevailing, more expansive view of what the court may consider, the court does not simply determine whether, from its perspective, the contractual language is clear; rather, the court hears the proffer of the parties and determines if there are objective indicia that, from the parties' linguistic reference point, the contract's terms are susceptible of different meanings. The court must consider the words of the agreement, including writings made a part of the contract by annexation or incorporation by reference, the alternative meanings suggested by the parties, and any extrinsic evidence offered in support of those meanings. Extrinsic evidence properly considered . . . may include the structure of the contract; the parties' relative positions and bargaining power; the bargaining history; . . . and any conduct of the parties which reflects their understanding of the contract's meaning.

Only after a careful and painstaking search of all the factors shedding light on the intent of the parties will the court conclude that the language in any given case is clear and unambiguous.\textsuperscript{94}

Corbin also suggests that evidence of surrounding circumstances should generally be admitted to enable a court to determine what the "plain" meaning of the contract actually is.\textsuperscript{95} According to Corbin:

Seldom should the court hold that the written words exclude evidence of the custom, since even what are often called "plain" meanings are shown to be incorrect when all the circumstances of the transaction are known; and usages and customs are a part of those circumstances by which the meaning of words is to be judged.\textsuperscript{96}

In the 1998 Revised Edition of Corbin, Professor Kniffin doubts that words ever have "only one true meaning."\textsuperscript{97} She quotes Holmes: "It is not true that in practice (and I know no reason why theory should disagree

\textsuperscript{93} See WILLISTON, supra note 25, § 30:6 at 108.
\textsuperscript{94} Id. § 30:5 at 82-86.
\textsuperscript{95} ARTHUR LINTON CORBIN, 3 CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW § 532, § 542 at 100-03 (1960).
\textsuperscript{96} Id. § 555 at 239.
\textsuperscript{97} KNIFFIN, supra note 80, § 24.7 at 30.
with the facts) a given word or even a given collocation of words has one meaning and no other."98 She then states:

It is therefore invariably necessary, before a court can give any meaning to the words of a contract and can select a single meaning rather than other possible ones as the basis for the determination of rights and other legal effects, that extrinsic evidence be admitted to make the court aware of the “surrounding circumstance,” including the persons, objects, and events to which the words can be applied and which caused the words to be used.99

The Restatement (Second) of Contracts also rejects strict application of the plain meaning rule.100 According to the Restatement: “Words and other conduct are interpreted in the light of all the circumstances.”101 Application of the rules set forth in the Restatement “do not depend upon any determination that there is an ambiguity, but are used in determining what meanings are reasonably possible as well as in choosing among possible meanings.”102

Wigmore also rejected rigid reliance on any judicially-supposed plain meaning of contract words.103 “The history of the law of [i]nterpretation is the history of a progress from a stiff and superstitious formalism to a flexible rationalism.”104 “The fallacy consists in assuming that there is or ever can be someone real or absolute meaning.”105 “The truth had finally to be recognized that words always need interpretation; that the process of interpretation inherently and invariably means the ascertainment of the association between words and external objects; and that this makes inevitable a free resort to extrinsic matters for applying and enforcing the document.”106

These authorities reinforce the point that discovering and enforcing the actual intent of the parties to a contract – not strict adherence to any supposed literal meaning – is the “cardinal,” overriding rule of contract construction.107

98. Id. (internal citation omitted).
99. Id. § 24.7 at 31 (elaborating on her criticisms of the plain meaning rule).
100. RESTATEMENT (SECOND) OF CONTRACTS § 202 at 87 cmt. a (AM. LAW. INST. 1981).
101. Id. at 86.
102. Id. at 87 cmt. a.
103. 9 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2462 at 194 (3d ed. 1940).
104. Id. at 187.
105. Id. § 2462 at 191.
106. Id. § 2470 at 227.
107. KNIFFIN, supra note 80, at 37.
Although not at all apparent from either Tackett or Reese, a flexible inquiry into the parties’ actual intent, rather than a ceremonial plain meaning shortcut, has traditionally been the guiding principle of the Supreme Court.\(^\text{108}\) In Chesapeake & Ohio Canal Co. v. Hill, the Court stated:

[W]e should look carefully to the substance of the original agreement . . . as contradistinguished from its mere form, in order that we may give it a fair and just construction, and ascertain the substantial intent of the parties, which is the fundamental rule in the construction of all agreements.\(^\text{109}\)

In Towne v. Eisner, Justice Holmes wrote: “A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.”\(^\text{110}\)

In Boston Sand & Gravel Co. v. United States, the Supreme Court wrote: “It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.”\(^\text{111}\)

In Williams v. Fenix and Scission, Inc., then circuit judge Anthony Kennedy, in a concurring opinion, relied in part on Williston in rejecting a strict plain meaning approach to contract interpretation:

This approach to contractual interpretation has been rejected by the circuit and it is out of line with better-reasoned contract law cases. It results in the exclusion of evidence clearly probative of the parties’ understanding of their obligations. Examination of the circumstances which give rise to the agreement, and of subsequent acts and communications which bear on the parties’ intent at the time of contracting, are relevant to show the intended meaning of a provision in a contract.\(^\text{112}\)

\(^{108}\) Hillman, supra note 91, at 301.

\(^{109}\) Canal Co. v. Hill, 82 U.S. 94 (1872).


\(^{111}\) Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928).

\(^{112}\) Williams v. Fenix and Scission, Inc., 608 F.2d 1205, 1210-11 (9th Cir. 1979) (Kennedy, J., concurring). A decade earlier, in Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., Chief Justice Traynor rejected the plain meaning rule, stating that limiting “the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained.” Pac. Gas & Elec. Co., v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 644 (Cal. 1968).
In addressing the meaning of CBAs, Justice Brennan, in his concurrence in Steelworkers v. American Manufacturing Co., stated: “Words in a collective bargaining agreement, rightly viewed by the Court to be the charter instrument of a system of industrial self-government, like words in a statute, are to be understood only by reference to the background which give rise to their inclusion.”\(^{113}\)

Justice Brennan’s invocation of statutory interpretation is demonstrated through United States v. Witkovich, wherein the Supreme Court rejected a literal approach to statutory construction stating: “[O]nce the tyranny of literalness is rejected, all relevant considerations for giving a rational content to the words become operative.”\(^{114}\) In United States v. American Trucking Ass’ns, the Court reiterated the rule that the literal meaning of a statute should be disregarded if necessary to enforce Congressional intent.\(^{115}\)

Ironically, one of the basic principles of contract interpretation that Yard-Man found “fully appropriate for discerning the parties’ intent in collective bargaining agreements” was this very principle – “[t]he intended meaning of even the most explicit language can, of course, only be understood in light of the context which gave rise to its inclusion.”\(^{116}\)

Taking a strict textual approach, Tackett gave Yard-Man no credit for applying this basic principle of contract law, one recognized by most authorities – and the Supreme Court before Tackett – as essential for discerning the contracting parties’ actual intent.\(^{117}\)

While Tackett allowed consideration of other contract rules – which it did not identify\(^{118}\) – Reese appears to have shut the door on any practical limitations on strict application of the plain meaning rule, at least for


\(^{117}\) Id. Another ordinary principle of contract interpretation that modifies the plain meaning rule is the distinction between latent and patent ambiguities. Id. A latent ambiguity exists when contract language that appears to have a plain meaning on its face is shown to have a different meaning in the particular circumstances by either extrinsic evidence or collateral circumstances. Zubers v. Boscov’s, 871 F.3d 255, 258 (3d Cir. 2017) (construing Pennsylvania law); Nautilus Ins. Co. v. Country Oaks Apartments Ltd., 566 F.3d 452, 455 (5th Cir. 2009) (construing Texas law); Burlison v. United States, 533 F.3d 419, 430 (6th Cir. 2008) (construing Tennessee law); Rossetto v. Pabst Brewing Co., Inc., 217 F.3d 539, 542-44 (7th Cir. 2000) (addressing collectively bargained retiree healthcare). In such cases, resort to such evidence is not only proper but is often essential in determining the actual intent of the parties. See WILLISTON, supra note 25, at 1199. Unsurprisingly, after Tackett, the Sixth Circuit rejected the retirees’ argument that there was a latent ambiguity in the general duration clause of the CBA. Watkins v. Honeywell Int’l, Inc., 875 F.3d 321, 328 (6th Cir. 2017).

\(^{118}\) See Tackett v. M&G Polymers U.S., LLC, 811 F.3d 204, 208 (6th Cir. 2016) (Tackett III) (The Supreme Court “did not purport to discuss all of the ordinary principles of contract law.”).
collective bargaining agreements. Instead, Tackett and Reese create a presumption that a CBA's general duration clause controls not only the duration of the particular CBA, but the duration of all benefits provided therein. An examination of the actual CBA language shows that Reese short circuited the required analysis and abrogated the court’s primary role in contract cases – to determine and enforce the actual intent of the parties.

B. The Parties’ Intent Must Be Gathered From the Whole Document

A basic contract interpretation principle is that courts must look at the contract as a whole, rather than at individual provisions in isolation. In United States v. Utah, Nev. & Cal. Stage Co., the Supreme Court stated: “The elementary canon of interpretation is not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them.”

More than a hundred years later, the First Circuit, in VFC Partners 26, LLC v. Candlerocks Centennial Drive LLC, reiterated that point, stating that the intent of contracting parties must be gathered from “the contract as a whole and not by a special emphasis on any one part.”

In Mastro Plastics Corp. v. NLRB, the Supreme Court applied this “elementary canon of interpretation” to the interpretation of CBAs – twenty-five years before Yard-Man. It stated: “Like other contracts, [CBAs] must be read as a whole and in the light of the law relating to it


120. In the wake of Reese, the Sixth Circuit has adopted such a presumption. For example, in Fletcher v. Honeywell International, Inc., the Sixth Circuit reversed a district court judgment for the retirees. Fletcher v. Honeywell Int'l, Inc., 892 F.3d 217, 223 (6th Cir. 2018). The Sixth Circuit stated that it could “distill a clear rule” from post-Tackett decisions and from the Supreme Court’s reversals in Reese and Kelsey-Hayes that “a CBA’s general durational clause applies to healthcare benefits unless it contains clear, affirmative language indicating the contrary.” Id.


122. VFC Partners 26 v. Candlerocks Centennial Drive, 735 F.3d 25, 29 (1st Cir. 2013) (construing Massachusetts law). See also, e.g., Pauma Band of Luiseno Mission Indians v. Cal., 813 F.3d 1155, 1170 (9th Cir. 2015); Aeroground, Inc. v. CenterPoint Properties Trust, 738 F.3d 810, 813 (7th Cir. 2013) (citing Illinois law).

when made." According to Williston, "a contract will be read as a whole and every part will be read with reference to the whole. If possible, the contract will be so interpreted as to give effect to its general purpose as revealed within its four corners or in its entirety."125

1. The Other Concurrent Provision

Had Reese applied this ordinary contract principle, that a contract must be read as an integrated whole rather than as a series of isolated provisions, Reese would not have had to delve deeply into the 1998 CBA to discover that its entire analysis was based on a false premise. There is an important fact within the contract itself, not disclosed in Reese or in Judge Sutton's dissent in Reese III, that readers unfamiliar with the history of the Reese litigation would never know. But when known, this single undiscovered fact demonstrates that the notion that the issue was "straightforward" because the insurance concurrent clause was "all anyone needs to know" is utter nonsense.

The "concurrent" provision cited by Reese and Judge Sutton in his Reese III dissent, Section 4A of the 1998 CBA, states "[t]he group insurance plan agreed to between the parties will run concurrently with this Agreement and is hereby made a part of this Agreement."126 Section 4 was entitled "Group Insurance and Pension."127 The contract fact that neither Reese nor Judge Sutton disclosed is that Section 4C of the 1998 CBA provided, in language identical to 4A, that "[t]he pension plan agreed to between the parties will run concurrently with this Agreement and is hereby made a part of this agreement."128

It is possible to imagine, as a contractual matter, that pension benefits might be limited to the terms of the 1998 CBA. But, it is absurd to think that any court considering that issue would consider it a "straightforward" issue or "all anyone needs to know" to terminate pension benefits. That is because it is seemingly a universal concept that pension benefits are "lifetime" benefits.129

124. Id.
125. WILLISTON, supra note 25, § 32.5 at 692.
127. Id.
128. Id. at 77 (emphasis added).
So, if the 1998 GBP provides that retirees and surviving spouses of retirees "shall be eligible" for health care benefits if they are "receiving" or are "eligible to receive" a lifetime pension — which it does and has since the language was first negotiated in 1971130 — why then would those same retirees and surviving spouses not have those health care benefits as long as their pension benefits last, that is, for their lifetime? In the light of these few undisputed facts, is there not at least an ambiguity about the duration of pension-tied retiree health care benefits?131 Why did Supreme Court summarily dismiss the retirees’ claims rather than first allowing them an opportunity to be heard on the merits of this issue? Did Reese believe that, in sending a message to the Sixth Circuit that it had failed to faithfully implement Tackett, the contractual healthcare rights of four thousand CNH retirees and their spouses who were receiving pensions were simply acceptable collateral damage?132


131. It was this general connection of retiree healthcare benefits to pension benefits that Yolton found sufficiently convincing to affirm a preliminary injunction. Yolton v. El Paso Tenn. Pipeline Co., 435 F.3d 571, 580, 583 (6th Cir. 2006). In Reese I, this tying of retiree healthcare to pensions was a key factor in the court’s affirmation of summary judgment for retirees. Reese v. CNH America LLC (Reese I), 574 F.3d 315 (6th Cir. 2009), rev’d 583 U.S. ___, 138 S. Ct. 761 (2018) (affirming a preliminary injunction based on the textual connection of retiree health care benefits to pension benefits).

132. In effect, the Supreme Court used Reese to act as the surrogate for the Sixth Circuit acting en banc. There had been several Sixth Circuit decisions presuming to implement Tackett principles before the Court summarily reversed Reese III. See, e.g., Watkins v. Honeywell Int’l, Inc., 875 F.3d 321, 328 (6th Cir. 2017); UAW v. Kelsey-Hayes Co., 854 F.3d 862 (6th Cir. 2017); Cole v. ArvinMeritor, Inc., 855 F.2d 695 (6th Cir. 2017); Gallo v. Moon Inc., 813 F.3d 265 (6th Cir. 2016); Tackett v. M&G Polymers USA, LLC, 811 F.3d 204 (6th Cir. 2015) (Tackett III). The normal procedure when there is an intra-circuit dispute is for the Circuit to decide the issue acting en banc. Reese stepped into the void, noting the Sixth Circuit had denied rehearing en banc in UAW v. Kelsey-Hayes Co. CNH Indus. N.V. v. Reese (Reese III), 583 U.S. ___, 138 S. Ct. 761, 765 n.2 (2018). Reese quoted Judge Griffin’s dissent to the denial that “[o]ur post-Tackett case law is a mess” and Judge Sutton’s concurrence in the denial because “there is a real possibility that we would not have nine votes for any one [approach].” Id. After Reese, the Sixth Circuit’s case law is no longer “a mess.” Id. Regardless of Litton’s actual holding, or ordinary principles of contract law or any particular evidence of actual intent, retirees now lose whenever there is, and there always is, a general duration clause in a CBA. Cooper v. Honeywell Int’l, Inc., 894 F.3d 612 (6th Cir. 2018); Fletcher v. Honeywell Int’l, Inc., 892 F.3d 217 (6th Cir. 2018); Zino v. Whirlpool Corp., 763 F. App’x 470 (6th Cir. 2019).
2. A Concise History of the Litigation of the Dual "Concurrent" Clauses

None of the three Reese appellate opinions mentioned either of the parallel concurrent provisions of the 1998 CBA.133

In his dissent in Reese III, Judge Sutton referred only to Section 4A of the 1998 CBA relating to the group insurance plan or GBP.134 Judge Sutton certainly knew better. So did the Supreme Court, or it would have if it had read the district court decision it reversed — or if it had read the retirees' appellate brief defending that decision.

The fact that there were two concurrent clauses in the 1998 CBA, one for the insurance plan and one for the pension plan, was no litigation secret.135 Early in the Yolton litigation, CNH argued that the identical insurance "concurrent" provision in the 1990 CBA proved that retiree health care benefits had not vested.136 Because it was CNH’s primary textual defense to vesting, the Yolton plaintiffs focused on the "concurrent" provision in discovery.137 In early depositions, the plaintiff’s questioned CNH management representatives about both of the CBA’s two "concurrent" clauses. CNH had designated Paul Crist, its longtime Manager of Labor Relations, as its Rule 30(b)(6) witness for a June 11, 2003 deposition taken by El Paso.138 Under cross examination, Mr. Crist admitted that, despite the pension concurrent clause, retirees nonetheless had pension benefits "until they die;" he admitted, too, that surviving spouses had survivor pension benefits "until their death."139 Mr. Crist further admitted that Section 4C of the CBA "does not limit [the duration of] the pension benefit."140

On appeal from the district court’s preliminary injunction in favor of the retirees,141 CNH again asserted the group insurance concurrent

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133. See Reese v. CNH America LLC (Reese I), 574 F.3d 315 (6th Cir. 2009); Reese v. CNH Am., LLC (Reese II), 694 F.3d 681(6th Cir. 2012); Reese v. CNH Indus. N.V. (Reese III), 874 F.3d 877 (6th Cir. 2017).
134. See Reese III, 874 F.3d at 887-893 (Sutton, J., dissenting).
136. Id. at 580.
137. Id.
138. Deposition of Paul Crist at 12, 156, Yolton v. El Paso Tenn. Pipeline Co., No. 02-75164 (E.D. Mich.) ECF No. 61; see also FED. R. CIV. P. 30(b)(6) (stating one party can request that an opposing party designate a witness to testify about particular issues).
139. Deposition of Paul Crist, supra note 138, at 223. Mr. Crist initially answered that ERISA does not allow termination of pension benefits with the expiration of the CBA, but when he was then asked, "Well, the pension plan doesn’t allow it either, does it?" Mr. Crist answered "No." Id. at 232.
140. Id. at 237.
provision as its primary contract defense to healthcare vesting.\textsuperscript{142} In response, the retirees argued that the parallel pension concurrent clause and Mr. Crist's deposition testimony demonstrated conclusively that the insurance concurrent clause did not limit retiree healthcare benefits to the term of the CBA.\textsuperscript{143}

In \textit{Yolton v. El Paso Tennessee Pipeline Co.},\textsuperscript{144} the Sixth Circuit, after quoting \textit{both} Sections 4A and 4C, agreed with the retirees stating:

[Plaintiffs] argue that the agreements would not use the same language in sections 4A and 4C if it had different meanings. This argument further bolsters the interpretation noted above that the expiration of a CBA affects only future retirees in the context of benefits. \textit{Reviewing “each provision in question as part of the integrated whole,”} the use of similar language in sections 4A and 4C provides substantial support for the plaintiffs' position.\textsuperscript{145}

In litigating \textit{Reese} in the district court, CNH did not initially argue that the insurance concurrent clause limited retiree healthcare benefits to the term of the agreement.\textsuperscript{146} In its summary judgment motion, CNH cited the insurance provision (but not the parallel pension provision) in its factual recitation of the 1990, 1995 and 1998 CBAs.\textsuperscript{147} But, CNH's summary judgment motion was based primarily on: 1) a “letter of understanding” relating to the cost of healthcare for retirees selecting an alternate health care plan; and 2) summary plan descriptions (SPDs) that CNH had unilaterally prepared after the negotiations.\textsuperscript{148} In its response to plaintiffs' summary judgment motion, CNH never alluded to the insurance concurrent provision.\textsuperscript{149}

\textsuperscript{142} Final Brief of Defendant-Appellant at 45, Yolton v. El Paso Tenn. Pipeline Co., No. 04-1182 (6th Cir.), ECF No. 52.
\textsuperscript{143} Final Brief of Appellees at 39, Yolton v. El Paso Tenn. Pipeline Co., 435 F.3d 571 (6th Cir. 2006) (No. 04-1182), ECF No. 56.
\textsuperscript{144} \textit{Yolton}, 435 F.3d at 571.
\textsuperscript{145} \textit{Id.} at 581 (quoting UAW v. Yard-Man, 716 F.2d 1476, 1479 (6th Cir. 1983)) (emphasis added). "The district court in \textit{Golden}, likewise rejected the defendant's argument regarding the durational clauses because the same language was used regarding pensions and health insurance benefits. The district court stated that '[g]iven the defendant's logic, because its pension plan was incorporated into the collective bargaining agreement, its obligation to provide pensions ended with the expiration of the agreement.' \textit{Id.} at 581 n.7 (quoting Golden v. Kelsey-Hayes Co., 845 F. Supp. 410, 415 n.1 (E.D. Mich. 1994)).
\textsuperscript{147} \textit{Id.} at 3, 5.
\textsuperscript{148} \textit{Id.} at 13, 17.
\textsuperscript{149} Defendants' Brief in Opposition to Plaintiffs' Motion for Summary Judgment, Reese v. CNH Indus. N.V., No. 04-70592 (E.D. Mich.), ECF No. 163.
In *Reese I*, Judge Sutton relied on *Yolton* in holding that retiree healthcare benefits had vested.\(^{150}\) As he stated in *Reese I*, *Yolton* earlier construed "effectively identical" collectively bargained commitments.\(^{151}\) While Judge Sutton did not specifically address *Yolton*'s discussion of the parallel concurrent clauses, he necessarily knew of *Yolton*'s holding on that issue.\(^{152}\)

In the lead up to *Reese*, the district court explicitly addressed the significance of the parallel concurrent clauses.\(^{153}\) In its November 9, 2015 post-*Tackett* decision re-affirming summary judgment for the retirees, the district court wrote:

> Whether the parties intended certain obligations to survive the agreement’s expiration is, again, determined by looking at the contract as a whole. Notably, here, the 1998 Central Agreement states that the group insurance plan and the pension plan “run concurrently with this Agreement . . . .” Yet no one contends that the company’s obligation to provide pension benefits ceased upon the expiration of the agreement.\(^{154}\)

On CNH’s appeal of this decision, the retirees specifically addressed the two concurrent clauses\(^{155}\) and quoted *Yolton*’s discussion that the duality of these clauses supported the retirees.\(^{156}\) This was the district court decision and the appellate brief that Judge Sutton had before him when he wrote his dissent, asserting that the insurance concurrent clause, in isolation, was “all anyone needs to know to decide this case.”\(^{157}\) Furthermore, this was the district court’s final decision and the retirees’ final merits brief before the Supreme Court when it accepted Judge Sutton’s misstatement of the operative “facts.”

It bears repeating that both the Sixth Circuit in *Yolton* and the district court in *Reese* determined the meaning of the concurrent clauses in the CBA according to the “basic principles of contract interpretation” – viewing “each provision in question as part of the integrated whole.”\(^{158}\) The

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151. *Id.* at 322.
152. *Id.* at 322-23.
154. *Id.* (emphasis added) (internal citation omitted).
156. *Id.* at 23 (quoting *Yolton* v. El Paso Tenn. Pipeline Co., 435 F.3d 571, 581 (6th Cir. 2006)).
158. *Yolton*, 435 F.3d at 581; *Reese*, 143 F. Supp. 3d at 613.
question is how, more than a decade after Yolton, a discredited and repeatedly rejected argument— one CNH itself had initially abandoned in litigating Reese— was resurrected by Judge Sutton in his Reese III dissent and employed “isolatedly” by the Supreme Court in violation of an “elementary canon” of contract interpretation—and as the sole basis to summarily deprive thousands of retirees and spouses of benefits to which they were undoubtedly entitled. The only plausible answer is that the Supreme Court did not care about what the CBA actually said; about ordinary principles of contract law; about the actual intent of the parties; or about the end of retiree healthcare tied to lifetime pensions, earned by each retiree through decades of labor.

The Supreme Court presented the issue as straightforward to make the point that the Sixth Circuit failed to heed its directions in Tackett. This is clear from the Court’s adoption of Judge Sutton’s baseless pronouncement that the majority’s analysis in Reese III is “Yard-Man re-born, re-built, and re-purposed for new adventures” and from Reese’s uncritical adoption of Sutton’s worthless conjecture that no other Circuit would have found vested benefits under “facts” of Reese. But, in using Reese for this purpose, the Supreme Court adopted Sutton’s misrepresentation of essential contract facts while, at the same time, summarily foreclosing any further opportunity for the retirees to present the facts that would muddy up the Court’s straightforward issue.

In making its point, the Supreme Court ran roughshod over ordinary rules of contract interpretation it trumpeted in Tackett—and over the Reese retirees’ right to have their contractual rights enforced based on actual—as opposed to selected and isolated and distorted—contract facts. As least in Tackett, the Court remanded the case to the Sixth Circuit to “apply ordinary rules of contract law in the first instance.” It did so because “[t]his Court is one of final review, not of first view.” The Reese retirees were not so fortunate. In its rush to make a point in Reese,

159. See supra notes 141-49.
160. See supra notes 121-25.
162. Id.
163. Id. Worthless, because it assumes that every other Circuit would, as Judge Sutton did, misrepresent basic contract facts, ignore other compelling evidence of intent and refuse to apply applicable principles of contact interpretation.
164. M&G Polymers USA, LLC v. Tackett, 574 U.S. 427 (2015). Tackett failed to cite the canon that contracts must be read as a whole, leaving that to the concurrence. Id. at 443 (Ginsburg, J., concurring) (“Cardinal principle . . . [is that] intention of the parties, to be gathered from the whole instrument, must prevail.”).
165. Tackett, 574 U.S. at 442.
166. Id.
this Supreme Court of final review summarily reversed a judgment in the retirees’ favor without giving them an opportunity to present the facts necessary to refute the Court’s rationale for its decision.

3. Other Durational Provisions in the Group Benefit Plans

In Reese, the Supreme Court found fault with the majority’s use of “several of the Yard-Man inferences” to find ambiguity, such as other durational provisions in the insurance agreement and the tying of healthcare to pensioner status. Whatever those unidentified provisions were, Reese decided that these “inferences” could not withstand the force of what it called the “general durational clause.” Because the “concurrent clause” did not mean what the Supreme Court so cavalierly presumed, we now explore those provisions for additional indicia of intent.

The 1998 GBP contained provisions addressing other kinds of “insurance,” not just health care benefits. For example, the 1998 and earlier GBPs promised short term accident and sickness benefits, long term disability benefits, supplemental income benefits, survivor income benefits and life insurance benefits, of limited and specific duration.

Short term accident and sickness benefits were provided for up to fifty-two weeks. If, at the end of that period, the employee was still disabled and under age sixty, long term disability benefits were payable for the period of the employee’s seniority less one year or until age sixty-five. An employee on disability was also entitled to continued healthcare benefits “for the period during which he receives Weekly Accident and Sickness benefits and Long-Term Disability benefits.”

Survivor Income Benefits (hereinafter “SIB”) were monthly payments to surviving spouses of employees who died while actively employed at CNH. There were two parts to SIB benefits, transition benefits and bridge benefits. The transition benefit was paid to all spouses of deceased active employees for twenty-four months.

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168. Id. at 766.
170. Id.
171. Id. at 8.
172. Id. at 15.
173. Declaration of Jack Reese, Ex. 50C, supra note 130, at 62.
175. Id. at 4.
176. Id.
Monthly bridge benefits were then provided if the spouse was at least forty-five years old or if the spouse’s age and the deceased active employee’s years of service total fifty-five or more. An eligible surviving spouse was entitled to bridge benefits until the earliest of the “date the surviving spouse remarries or dies,” the date the spouse reaches “age 62 and one month,” or “any lower age at which full benefits become payable under the Federal Social Security Act” – hence the “bridge.”

As to life insurance, the 1998 GBP provides that disability retirees:

Shall have the amount of their Group Life Insurance continued in an unreduced amount until attainment of Age 65. At Age 65, the Life Insurance shall be reduced by 25%; then reduced again by 25% of the original active amount upon attainment of age 66. The resulting benefit will [be] 50% of the original active amount.

The 1998 GBP also provided that, if an employee died as the result of a work-incurred accident or illness for which worker’s compensation benefits are payable, the surviving spouse “will be entitled to continue [healthcare] coverage at no cost. Such coverage shall cease on the surviving spouse’s remarriage, attainment of age when such surviving spouse is eligible for Medicare or upon death.” Children of these deceased employees were entitled to “for as long as the children would have continued if the spouse had not died or remarried.”

4. The 1998 GBP’s Durational Provisions in the Context of the Contract Read as a Whole

In the 1998 GBP, CNH made long term commitments to employees, to their surviving spouses, and to dependent children under these provisions. Employees with twenty or more years of seniority at disability were entitled to disability benefits and healthcare for an equivalent number of years. If the employee had twenty years of service at the time of death,

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177. Id. at 5.
178. Id. at 5-6.
179. Declaration of Jack Reese, Ex. 50C, supra note 130, at 65.
180. Declaration of Jack Reese, Ex. 50A, supra note 169, at 5.
181. Id. Unmarried children were eligible to at least age 19 and to age 25 under certain conditions. Declaration of Jack Reese, Ex. 50B, at 40-41, Reese v. CNH Global N.V., No. 04-70592 (E.D. Mich.), ECF No. 273-56. Mentally or physically disabled children are entitled to coverage without age restrictions if they are unmarried, incapable of self-support upon reaching age 19 or 25 and claimed as a dependent on federal tax returns. Id. at 42.
182. Declaration of Jack Reese, Ex. 50A, supra note 169, at 15; Declaration of Jack Reese, Ex. 50C, supra note 130, at 62.
a thirty-five-year old surviving spouse was eligible for bridge benefits until death, remarriage or age sixty-two – for more than a quarter of a century.\textsuperscript{183} If an employee who died in a workplace accident had a spouse who was twenty years old, the spouse could receive health care benefits for more than forty years.\textsuperscript{184}

It was in this contractual context that the 1998 GBP provided that employees “retired on” or “eligible for” and surviving spouses “eligible for” or “receiving” a company pension “shall be eligible for” defined medical, prescription drug, dental, vision and hearing benefits.\textsuperscript{185}

The express durational provisions show at least three critical things. \textit{First}, the concurrent insurance clause, even in isolation, did not necessarily mean what the Supreme Court said it meant – that all benefits in the 1998 GBP expired with the 1998 CBA. Provisions that explicitly provide that specific benefits last far beyond – sometimes decades beyond – the term of the existing CBA cannot reasonably be interpreted as confined to the limited term of that agreement.

\textit{Second}, taken together with the fact that retiree healthcare benefits have no similar durational limits, but are provided while a retiree or surviving spouse is eligible for or receiving a pension benefit – that admittedly lasts “until death” – these provisions at the very least fairly support an interpretation that retiree healthcare benefits are lifetime benefits. It goes without saying (or should go without saying) that the UAW would not have sought (and CNH would not have agreed to provide) \textit{better} benefits for employees who had worked only a few years for CNH than for retirees who had spent decades working to earn the benefits promised upon retirement.\textsuperscript{186}

\textit{Third}, CNH promised long term SIB benefits and healthcare coverage to certain surviving spouses and dependents of deceased employees, that is, to persons who \textit{never} worked for CNH and who never had or would have any future connection with CNH or to the CBA under which they obtained the right to those benefits. It is unlikely that CNH would have agreed to CBAs providing persons who never worked for CNH with benefits lasting decades beyond the CBAs’ expiration while limiting benefits for retirees who worked decades for CNH.\textsuperscript{187}

\begin{itemize}
  \item \textsuperscript{183} Declaration of Jack Reese, Ex. 50A, \textit{supra} note 169, at 5-6.
  \item \textsuperscript{184} \textit{Id.} at 5.
  \item \textsuperscript{185} Declaration of Jack Reese, Ex. 50C, \textit{supra} note 130, at 65.
  \item \textsuperscript{186} Golden v. Kelsey-Hayes Co., 73 F.3d 648, 656-57 (6th Cir. 1996) (stating that it is anomalous to guarantee lifetime coverage to retirees with a "couple of years" of service but not to those with "dozens of years of service").
  \item \textsuperscript{187} \textit{Id.} at 656-57.
\end{itemize}
In a post-*Tackett* decision, *Gallo v. Moen Inc.*, Judge Sutton reiterated the obvious, that CBAs, by their nature, have limited terms.188 He stated that "everything [CBAs] say about the topic [of retiree healthcare] was contained in a three-year agreement."189 What Judge Sutton ignored, of course, is that while all CBAs have limited terms, unlike private contracts CBAs are interim agreements governing long-standing relationships.190 Each individual CBA represents a temporal segment of what is intended to be a long-term employment arrangement overseen by the federal statutory requirement that the employer and union bargain in good faith to reach a subsequent agreement.191 In this context, employees only earn retirement benefits by working through the terms of many such CBAs. In order to obtain a 30-year and out pension (and accompanying retiree healthcare) at CNH, for example, an employee had work through at least ten three-year CBAs.

The same is true of bridge survivor income benefits and long-term disability benefits. These benefits are predicated, in whole or in part, on how long the employee worked for CNH, not simply on whether the employee was employed at the moment of disability or death.192 These benefits, like retiree healthcare, were compensation for long service – far in excess of the term of any single CBA – by rewarding loyalty, seniority and employment longevity with correspondingly long-lasting fringe benefits.193

But, even for holdouts who still think that CNH’s explicit promises of benefits lasting decades were nonetheless confined to the term of a CBA, the issue of the duration of retiree healthcare should no longer be "straightforward."194 An impartial observer would need to know more, rather than less, to reach a conclusion on the parties’ intent – if that were actually the goal of the inquiry.195

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189. *Id.* at 269.
193. *Id.* at 5-6, 15.
195. *See Farnsworth, supra note 9*, at 456 (stating that the application of rules of contract interpretation “is often more ceremonial (as being decorative rationalizations of decisions already reached on other grounds) than persuasive”).
C. A Contract Must Be Construed in The Context In Which It Was Negotiated

While contractual provisions must be interpreted as part of an entire, integrated agreement, another “ordinary principle” of contract law is that the “context” in which the contract was negotiated is also relevant to a determination of intent.196

As noted above, Williston stated that because “the underlying goal in interpreting a contract is to ascertain the intent of the parties, ... the surrounding circumstances when the parties entered the contract ... may well shed light on that intent.”197

Corbin also recognizes that “what are often called ‘plain’ meanings are shown to be incorrect when all the circumstances of the transaction are known . . . .”198

The Tackett concurrence seemed to consider this kind of evidence to be extrinsic, admissible only if there is a textual ambiguity.199 But, that is inconsistent with the idea expressed by Williston and Corbin that the plain meaning of contract language can sometimes only be determined by viewing that language in the context of the circumstances in which it was negotiated.200 According to Williston and Corbin, the circumstances surrounding the contract negotiations are an integral part of the contract and admissible to discern intent – rather than an extrinsic event.201

D. Courts Must Give Effect to the Mutual Intent of the Parties At the Time of Contracting

The relevant mutual “intent” is the intent that existed at the time the parties agreed upon the language in dispute, construed in the context that then existed. According to Williston: “the underlying goal in interpreting a contract is to ascertain the intent of the parties, and the

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196. See supra Section IV.A.
197. WILLISTON, supra note 25, § 30:6 at 108.
198. CORBIN, supra note 95, § 555 at 239; see also KNIFFIN, supra note 80, § 24.7 at 31 (“[E]xtrinsic evidence [must] be admitted to make the court aware of the ‘surrounding circumstances’ ... to which the words can be applied and which caused the words to be used.”).
199. M&G Polymers USA, LLC v. Tackett, 574 U.S. 427, 443 (2015) (Ginsburg, J., concurring); see also FARNSWORTH, supra note 9, at 453 (stating that extrinsic evidence includes “all writings, oral statements, and other conduct by which the parties manifested their assent, together with any prior negotiations between them and any applicable course of dealing, course of performance, or usage”).
200. KNIFFIN, supra note 80, at 31; WILLISTON, supra note 25, at 108.
201. KNIFFIN, supra note 80, at 31; WILLISTON, supra note 25, at 108.
surrounding circumstances when the parties entered the contract, among other relevant considerations, may well shed light on that intent."

Williston states that the "basic rule of universal acceptance" is "for the court, so far as possible, to put itself in the place of the parties when their minds met upon the terms of the agreement, and, taking into consideration the writing itself, its purpose, and the circumstances leading up to and attending its execution . . . ." According to Williston, the court in doing so, "will look forward from the date when the parties entered into the bargain, not backward from some vantage point of a future day."

In Chesapeake & Ohio Canal Co. v. Hill, the Court stated that, in seeking to ascertain the mutual intent of the parties, courts "should look carefully to the substance of the original agreement . . . as contradistinguished from its mere form . . . ."

In U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc., the Ninth Circuit stated that "the fundamental goal of contract interpretation is to give effect to the mutual intent of the parties as it existed at the time of contracting."

CBAs are evolutionary agreements; they are not re-negotiated from scratch every three years, but rather are modified, if at all, incrementally over time. As to the 1998 CBA, there are different vantage points from which to determine the original intent. The most important is the intent of the parties when they first negotiated the retiree healthcare provisions in 1971. Other possible vantage points disclosing parties’ intent are those contract negotiations when the initial promise of benefits was addressed and discussed. In Reese, there were at least two later negotiations, one in 1990 and one in 1998, where analysis of the underlying circumstances sheds light on the parties’ actual intent regarding retiree healthcare.

202. KNIFFIN, supra note 80, at 31; WILLISTON, supra note 25, at 108.

203. WILLISTON, supra note 25, at 541 (quoting Liberty Nat’l Bank & Trust Co. v. Bank of Am. Nat’l Tr. & Sav. Ass’n, 218 F.2d 831 (10th Cir. 1955)).

204. Id. at 541-42; KNIFFIN, supra note 80, § 24.7 at 37 (“There is universal agreement that the first duty of the court is to put itself in the position of the parties at the time the contract was made.”).


206. U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc., 281 F.3d 929, 934 (9th Cir. 2002).

207. Carbon Fuel Co. v. United Mine Workers, 444 U.S. 212, 219-21 (1979) (describing evolution of arbitration/no strike provision in sequential CBAs). In UAW v. BVR Liquidating, Inc., the court stated “[w]hen interpreting a collective bargaining agreement this court assumes that terms from previous collective bargaining agreements continue unchanged unless specifically renegotiated.” UAW v. BVR Liquidating, Inc., 190 F.3d 768, 774 (6th Cir. 1999).
1. The 1971 Negotiations Creating Retiree Healthcare Benefits

The operative language of the GBPs relating to retiree health care benefits – the language tying eligibility for retiree healthcare to eligibility or receipt of a pension – was first agreed upon in the 1971 negotiations. 208 Clement Divine, as Case’s Director of Benefits & Practices, represented Case on its Benefit Committee in those negotiations. 209 Shortly after the 1971 negotiations ended, Mr. Divine wrote to the company’s hourly retirees telling them what Case agreed to in those negotiations. 210 Mr. Divine stated that he composed the letter in a question and answer format to make it easier for retirees to understand. 211

Mr. Divine told retirees that Case agreed to provide retirees and their surviving spouses with fully paid healthcare coverage beginning at age 65. 212 The last of his questions was what would happen when a retiree died. 213 Mr. Divine’s answer was that a retiree’s surviving spouse would have these healthcare benefits “for the remainder of her lifetime.” 214

Mr. Devine’s letter was not a casual or uninformed communication. 215 Mr. Divine was Case’s Director of Benefits. 216 He participated in the 1971 negotiations – on the Benefits Committee representing Case. 217 At a meeting between Case and the UAW, a little more than month after the letter was sent, the UAW pointed out to Case management that Mr. Divine’s description of the duration of dependent child benefits in the letter was inaccurate. 218 Case agreed. Mr. Divine then sent a follow up letter to the retirees making the correction – assuring retirees that their

211. Id.
212. Id.
213. Id. at 4.
214. Id.
215. Case understood its import. Mr. Divine informed retirees that, “[b]ecause this letter contains considerable important information, please read it carefully and keep it for future reference.” Id. at 1. Thirty-five years later, Virginia Clark, the surviving spouse of Merlin Clark, provided her copy of Mr. Devine’s letter, in its original envelope, to Class Counsel. This is the copy of the letter that Judy Lojeski, who typed it for Mr. Devine, identified in her deposition. Id. at 29-30.
216. Id. at 4.
217. Plaintiff’s Motion for Summary Judgment as to Liability, supra note 209, Ex. 44 at 2.
218. Deposition of Judy Lojeski, supra note 210, Ex. 10.
dependent children were covered up to age twenty-five under certain circumstances and that disabled children were covered "beyond age 25." 219

From this, we know what Case (later, CNH) intended when it agreed in the 1971 CBA that "Surviving Spouses Receiving Company Pension . . . shall be eligible" for healthcare benefits. We know that, at the instant when Case first undertook the obligation to provide retiree healthcare benefits, Case understood that its obligation lasted beyond the term of any CBA, and that, for a surviving spouse, healthcare lasted a "lifetime." We also know that the UAW carefully reviewed Case's representations to retirees and had Case correct a "durational" error in its letter to retirees. We know that both Case and the UAW had the same understanding of the lifetime duration of Case's obligation – from the very beginning. This was the record evidence of the context in which Case's commitment was made – and at the time it was made. The Supreme Court never considered this written, unequivocal admission because it determined that the "plain meaning" of the concurrent clause in the 1998 CBA precluded consideration of any other evidence of the parties' intent.

2. The 1990 CBA Negotiations Relating to Reba Williams

During the 1990 negotiations, Mr. Divine was still Case's chief benefits representative. 220 Jack Reese, who later became the lead plaintiff, was the International Representative in the UAW's Ag-Imp Department assigned to the 1990 Case negotiations. 221 In those negotiations, Case and the UAW agreed to extend healthcare benefits to Reba Williams, the surviving spouse of a disability retiree who, because of a quirk relating to Mr. Williams pension eligibility, did not live long enough for Ms. Williams to qualify for a spousal pension. 222 Therefore, because Ms. Williams was not "eligible for" or "receiving" a spousal pension, she did not qualify for healthcare benefits under the terms of the GBP under which her husband retired. 223

219.  Id. Ex. 9 at 2.
222.  Ms. Williams would have been qualified for a spousal option pension if Mr. Williams had lived to age 55. Because Mr. Williams died at age 53, Ms. Williams did not receive a pension. See Brief in Support of Plaintiffs' Motion for Summary Judgment as to Liability at fn. 14, Ex. 62, Reese v. CNH America LLC, No. 04-70592 (E.D. Mich.), ECF No. 129, 154 (filed under seal).
223.  The Group Insurance Plans during the 1980's had the same requirements as the 1998 GBP – a surviving spouse had to be "receiving" or "eligible to receive" a spousal pension to "be eligible
After the 1990 CBA was finalized, Mr. Devine wrote to Ms. Williams on June 18, 1990 informing her that now, at "the recent labor contract negotiations," Case agreed to extend to her "coverages [that] are the same as those provided to other surviving spouses of deceased retirees, . . . including group medical insurance, prescription drug coverage, group dental coverage, and vision and hearing care expense insurance." Mr. Devine wrote that Ms. Williams "will now have these coverages for [her] lifetime." Mr. Devine copied Mr. Reese, the UAW's representative. From this, we know that both Case and the UAW had the same understanding of the lifetime duration of Case's obligation for two decades.

The Reese III majority specifically noted Mr. Divine's letter as extrinsic evidence supporting a finding that the benefits had vested. But, the court did not indicate the context in which that statement was made in the 1990 negotiations - or that CNH's benefits director made it - or that it was copied to the UAW's International Representative in the negotiations. Reese III also did not mention that the letter was written by the same CNH representative who, twenty years earlier, after the 1971 negotiations, had informed retirees that their spouses were entitled to lifetime healthcare benefits after their death.

Reese III did not mention that this letter, like Mr. Divine's 1971 letter, was a party admission on the ultimate issue - CNH's actual intent. Under ordinary rules of contract interpretation, where the context in which contracts are negotiated is critical, it is impossible to diminish the import of this evidence of a lifetime obligation, unless, as in Reese, application of those ordinary contract principles is purely ceremonial.
3. The FAS 106 Letter

a. The Negotiation of the FAS 106 Letter in 1993

An issue that complicated the Yolton/Reese litigation from the beginning – from late 2002 when the Yolton retirees filed their lawsuit – was the FAS 106 Letter.228

The Financial Standards Accounting Board issued its new Standard 106 in December 1990.229 Before FAS 106, companies generally expensed annual expenditures for retiree healthcare as they did other routine expenses – on a “pay as you go” basis.230 FAS 106 changed that by requiring companies to report their retiree healthcare obligations as “lifetime” obligations on an “accrual” basis.231 Companies could add this new “debt” to their balance sheet immediately or amortize it on a delayed basis over the plan participant’s future service periods – up to twenty years.232

The implementation of FAS 106 was a very big deal.233 Companies generally had to add huge chunks of debt to their balance sheets.234 The resulting reduction in net worth affected companies’ ability to obtain financing and subjected them to higher financing costs.235 Mergers and acquisitions became more difficult and complex to negotiate and implement.236

230. Id.
231. Id.
232. Id. Cf. Musa Al-Darayseh, The $1,000,000,000,000 dilemma: accounting for postretirement benefits under FASB statement #106, NAT'L PUB. ACCT. (Nov. 1, 1992).
233. See generally Gregory J. Ossi, It Doesn't Add Up: the Broken Promises of Lifetime Health Benefits, Medicare, and Accounting Rule FAS 106 Do Not Equal Satisfactory Medical Coverage for Retirees, 13 J. CONTEMP. HEALTH L. & POL'Y 233 (1997) (explaining changes companies will not have to make as a result); see also Al-Darayseh, supra note 232.
There were only so many ways to address the impact of FAS 106 through accounting practices. The actuarial assumptions that went into valuing lifetime retiree obligations were basically the rate of medical inflation, the discount rate and participant mortality. Accountants could tinker with these assumptions – they could assume a lower medical inflation rate or a higher discount rate or increase the mortality rate – but only to a certain, objectively-justifiable extent. The result was that employers began to unilaterally cut retiree healthcare benefits to reduce their reportable debt, leading to litigation by retirees to enforce their rights to lifetime healthcare.

During the term of the 1990 CBA, Case came to the UAW seeking relief from its FAS 106 reporting liability. The result of those negotiations was included in the 1993 Extension Agreement, which extended the 1990 CBA through February 5, 1995 and contained Section 9, entitled “FAS 106 Out-Year Cost Limiters,” referring to an attached Letter of Agreement. The 1993 FAS 106 Letter provided that Case would pay the full cost of retiree health care benefits through April 1, 1998, more than three years beyond the term of the extended 1990 CBA. After April 1, 1998, Case’s obligation would be capped at a per person dollar maximum, one amount for Medicare-eligible individuals and a greater amount for persons not Medicare-eligible.

In 1994, Tenneco, which owned 100 percent of Case stock, offered that stock for sale through an initial public offering (hereinafter “IPO”). Under a Reorganization Agreement preceding the IPO, Tenneco agreed to assume the healthcare liability for pre-IPO retirees. Case was responsible for healthcare benefits for each employee who retired after the IPO. July 1, 1994, the effective date the Agreement, became the date

237. See Al-Darayseh, supra note 232.
238. Id.
239. Id.
240. See e.g., Wise v. El Paso Nat. Gas Co., 986 F.2d 929, 932-33 nn.3-4 (5th Cir. 1993).
244. Id.
246. Id. at 575-76.
247. Id. at 576.
by which the *Yolton* and *Reese* classes were defined: *Yolton* covered pre-IPO retirees and spouses; *Reese* covered post-IPO retirees and spouses.\(^{248}\)

Case and the UAW negotiated a new CBA in 1995, with a term through March 29, 1998.\(^{249}\) In those negotiations, the UAW and Case agreed to continue the FAS 106 Letter.\(^{250}\) The dollar caps in the 1995 FAS 106 Letter remained the same, but the date the "caps" could be imposed was extended to January 1, 1999, a date intentionally set beyond the term of the 1995 CBA.\(^{251}\)

b. The Elimination of the FAS 106 Letter in 1998

In late 1997, Tenneco, which through a merger had become El Paso Tennessee Pipeline Co., notified the *Yolton* retirees that it intended to enforce the 1993 FAS 106 Letter beginning on April 1, 1998, the date the "caps" in the 1993 Letter became effective.\(^{252}\) After that date, El Paso wrote that pre-IPO (*Yolton*) retirees would have to pay a specified monthly amount to retain their healthcare.\(^{253}\)

Expressing shock and outrage, the UAW responded that the FAS 106 letter was only intended to give Case accounting relief as to its FAS 106 liability, not to limit its actual obligation to retirees.\(^{254}\) In the 1998 CBA negotiations, stung by El Paso’s decision to charge pre-IPO (*Yolton*) retirees for their healthcare coverage, the UAW demanded that Case agree to *eliminate* the FAS 106 Letter entirely.\(^{255}\) Case’s initial bargaining response was to demand the letter be retained.\(^{256}\) It later proposed to suspend the effective date of caps to July 1, 2004, beyond the projected expiration date of the CBA.\(^{257}\) But, as the negotiations neared conclusion,

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251. Id.


253. Id.

254. Id. at 21-22.

255. Declaration of Jack Reese, supra note 221, at 7 ¶¶ 38, 39.


Case finally acquiesced in the UAW’s demand.\(^{258}\) As an integral part of the 1998 negotiations, as stated in the Tentative Agreement signed by the parties and as ratified by the union membership, the FAS 106 Letter was eliminated.\(^{259}\)

The significance of this is (and should have been) unmistakable. By agreeing to eliminate the FAS 106 Letter in the 1998 negotiations, Case agreed that there was no longer any limit (dollar cap) on its post-CBA obligation to provide retiree health care benefits. Case could no longer claim, as had El Paso, that its post-CBA obligation for retiree health care was capped at the dollar levels included in the 1993 Letter. In other words, by agreeing to eliminate the FAS-106 Letter, Case agreed that its post-CBA obligation for retiree healthcare benefits was not only indefinite, but also indefinitely unlimited.

During the Reese litigation, the retirees repeatedly pointed out that the elimination of the FAS 106 Letter provided incontrovertible proof that Case, by express agreement, had acknowledged its unlimited, post-CBA obligation for retiree healthcare benefits – an acknowledgment that required judgment for the retirees. In those pleadings, plaintiffs stressed that the entire point of the elimination of the FAS 106 Letter was so that Case could never do what El Paso had done in using the FAS 106 Letter to justify any limitation in its post-CBA obligation to retirees.\(^{260}\)

When the district court, post-Tackett, initially entered summary judgment for CNH, the retirees moved to reconsider, arguing just that fact.\(^{261}\) The district court reconsidered and re-instated judgment for the retirees, holding that, even under Tackett, the CBA was at least ambiguous, citing the FAS 106 Cap Letters and other evidence in support of the retirees’ position.\(^{262}\)

In Reese III, despite its prominence in the retirees’ appeal brief,\(^{263}\) the majority never mentioned the negotiated elimination of the FAS 106 Letter. And of course, the Supreme Court did not mention it. The failure


\(^{261}\) Brief in Support of Plaintiffs’ Motion for Reconsideration, supra note 260, at 13-19.


\(^{263}\) Brief of Plaintiffs-Appellees, supra note 155, at 9, 29, 38-39.
to acknowledge this undisputed contract fact was an abrogation of the courts’ fundamental duty – to determine the actual intent of the contracting parties.

E. The Parties’ Practical Construction of a Contract Is Entitled to Great, If Not Controlling Influence

1. “No Surer Way to Find Out What the Parties Mean”

Another long-established rule of contract interpretation ignored in the Tackett/Reese ceremonial, textual approach to contract interpretation is that the parties’ words and deeds are relevant, compelling, and determinative evidence of what the contracting parties intended. In Brooklyn Life Ins. Co. v. Dutcher, for example, the Court stated that “[t]here is no surer way to find out what the parties meant, than to see what they have done.”

In Lowrey v. Hawaii, the Court cited the value of evidence of the parties’ conduct in determining the intent of the parties in various circumstances

to ascertain the identity of the subject; in others its extent. In some, to ascertain the meaning of a term, where it had acquired by use a particular meaning; in others, to ascertain in what sense it was used, where it admitted of several meanings. But in all the purpose was the same. To ascertain by this medium of proof the intention of the parties, where, without the aid of such evidence, that could not be done, so as to give a just interpretation to the contract.

The Court in Lowery quoted Dutcher stating “[t]here is no surer way to find out what the parties mean, than to see what they have done.” This “obvious and potent” principle, according to the Court, “hardly needs the repetition it has received.”

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266. Id. (quoting Ins. Co. v. Dutcher, 95 U.S. 269, 273 (1887)).
267. Id. (“And equally obvious and potent is a resort to the circumstances and conditions which preceded a contract. Necessarily in such circumstances and conditions will be found the inducement to the contract and a test of its purpose. The conventions of parties may change such circumstances and conditions, or continue them, but it cannot be separated from them. And this makes the value of contemporaneous construction. It is valuable to explain a statute where disinterested judgment is alone invoked and exercised. It is of greater value to explain a contract where self-interest is quick to discern the extent of rights or obligations, and never yield more than the written or spoken word requires.”).
In *Old Colony Trust Co v. City of Omaha*, the Court held that "[t]he practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence." As recently as 2010, in *Alabama v. North Carolina*, the Supreme Court reiterated that the practical construction, or the parties’ conduct under the agreement, is "highly significant" evidence of the parties' intent.

Williston states this rule as follows:

Given that the purpose of judicial interpretation is to ascertain the parties’ intentions, the parties’ own practical interpretation of the contract – how they actually acted, thereby giving meaning to their contract during the course of performing it – can be an important aid to the court. Thus, courts give great weight to the parties’ practical interpretation.

In the 1998 revision of Corbin, Professor Kniffin states:

In the process of interpreting a contract, the court can receive great assistance from the interpreting statements made by the parties themselves or from their conduct in rendering or in receiving performance under it. The practical interpretation of a contract may thus be evidenced by the parties’ acts or by their words.

The Restatement (Second) of Contracts provides that "[w]ords and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight." Additionally, "any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement." Finally, "[t]he parties to an agreement know best what they meant, and their action under it is often the strongest evidence of its meaning."
According to the Uniform Commercial Code: "The parties themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of what that meaning was."275

This ordinary rule of contract construction has been uniformly applied by circuit courts of appeal.276 The Second Circuit was understandably reluctant to credit the employer's asserted plain meaning of a contract provision at trial when that meaning was at odds with the employer's previous interpretation of that language.277 And, looking beyond any asserted plain meaning of language is particularly applicable in the setting of collective bargaining, where the parties are entitled to rely on settled mutual understanding of intent relating to long-standing obligations.278 This is true even when it appears that the settled, mutual interpretation of the employer's obligation conflicts with "some unambiguous contract provision."279

2. "Entitled to full," "unchanged," "medical coverage" "for your lifetime," "for life," "for as long as you are living."

CNH's understanding that it committed to provide retirees with lifetime health care benefits was repeatedly communicated by CNH to the

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275. U.C.C. § 2-208 cmt 1 (AM. LAW INST.).
276. Croce v. Kurnit, 737 F.2d 229, 235 (2d Cir. 1984); Natco Corp. v. United States, 240 F.2d 398, 402-03 (3d Cir. 1956) ("construction against interest by a party to a contract is strong evidence of its meaning"); Pac. Portland Cement Co. v. Food Mach. & Chem. Corp., 178 F.2d 541, 554 (9th Cir. 1949) (stating that the conduct of the parties after the execution of contract and before controversy arose may indicate the actual construction which the parties have placed on the contract); Begnau v. White, 170 F.2d 323, 325-26 (6th Cir. 1948) ("recognized rule[] for construing a written contract, which has been partially performed, is to ascertain how the parties have themselves construed it by their partial performance of it.").
278. See Teamsters Indus. Emps. Welfare Fund v. Rolls-Royce Motor Cars, 989 F.2d 137, 132, 137 (3d Cir. 1993) (stating that a course of dealing is particularly compelling over long period of time); Int'l Bhd. Of Elec. Workers, Local 47 v. S. Cal. Edison Co., 880 F.2d 104, 107 (9th Cir. 1989); Cronin v. Sears, Roebuck & Co., 588 F.2d 616, 619 (8th Cir. 1978) (citing Pekar v. Local 181, 311 F.2d 628 (6th Cir. 1962)); Acheson v. Falstaff Brewing Corp., 523 F.2d 1327, 1330 (9th Cir. 1975) ("fundamental rule of contract interpretation that great weight should be given the interpretation of the contract to the parties thereto") (citing Oddie v. Ross Gear & Tool Co., 305 F.2d 143, 150-51 (6th Cir. 1962)).
279. Cronin, 588 F.2d at 619 (citing Sanderson v. Ford Motor Co., 483 F.2d 102 (5th Cir. 1973)). In Sanderson, the Fifth Circuit held that both oral agreements and written policies accepted by both parties to a CBA can modify or supplement the CBA's written provisions. Sanderson, 483 F.2d at 111.
UAW. This understanding was also communicated to employees as well, to induce them to retire when CNH offered early retirement programs; when the company explained plant shutdown options; during exit interviews with retirees; and in communications with surviving spouses when a retiree died. It was this common understanding lasting decades that had long-since settled the issue of CNH’s lifetime intent — or would have if the Supreme Court had applied ordinary principles of contract law.

A few additional written examples of CNH’s practical construction of its obligation to retirees ought to be conclusive proof for any impartial reader.

In 1980, the Case benefit specialist at the Burlington plant wrote to the attorney for a surviving spouse that the survivor was “entitled to full medical and dental coverage” “for her lifetime.” This same Case benefits representative wrote unequivocal letters containing the same promise of lifetime benefits for more than a decade thereafter.


At the Terre Haute plant, the benefits supervisor prepared worksheets describing the lifetime benefits available for retirees. On these worksheets, she wrote, sometimes handwritten and sometimes typed, “Medical: For Lifetime.” In 1984, she prepared a separate summary for a surviving spouse that her medical coverage “will also continue unchanged for your lifetime . . .

In 1986, a corporate benefits representative wrote to an East Moline surviving spouse that her insurance “will be continued for you at no cost for your lifetime.”

283. Id. at Ex. 6, 8, 9, 10, 12.
286. Id.
In 1987, Case closed the Terre Haute plant. Under the plant closing agreement, there was an option for employees not yet eligible for a pension to “grow into” eligibility after the plant closed. The benefits supervisor sent the “grow in” employees a letter enclosing prescription drug cards that expired the date their special early retirement was to begin. She then wrote: “You will then receive a permanent (plastic) card from Metropolitan which will reflect your lifetime coverage.” These retirees later received MediMet cards containing the words “Lifetime Coverage” or “Lifetime.” More than 100 retiring employees received benefit summaries that informed them that their various health insurance coverage “continues unchanged.”

In 1989, the benefits coordinator at Racine wrote to the surviving spouse of an active employee who died before retirement: “As Richard was eligible to retire, you are entitled to an automatic spouse’s pension benefit for life. You are also entitled to free group coverage (unless you remarry).”

On December 18, 1992, the Racine benefits director wrote to a recently approved disability retiree: “Of course, all insurance benefits remain in effect as long as you are living.”

In 1993, Case entered into a plant closing agreement relating to the Wausau plant and Memphis (Southaven) parts depot. Case’s corporate Human Resources Department prepared a summary entitled “Closed Plant Benefits.” It stated that hourly employees who selected the special early retirement option would “[r]eceive retiree medical benefits for life.”

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289. Affidavit of Darla Clark, supra note 285, at 3.
290. Id. at 4.
291. Id. at Ex. B.
292. Id. at Ex. C.
293. Id. at Ex. A; see also Plaintiffs’ Motion for Summary Judgment as to Liability, Ex. 54, Reese v. CNH Global N.V., No. 04-70592 (E.D. Mich.), ECF No. 146 (filed under seal).
297. Deposition of Judy Lojeski, supra note 210, at 126-29, Ex. 40 (Closed Plant Benefits).
298. Id.
In 1996, the Racine benefits director wrote to an employee who had been approved for disability benefits.\textsuperscript{299} She told him that, if he remained on long term disability until age sixty-five and died thereafter, his spouse would be entitled to fifty-five percent of his pension and “group coverage for her lifetime as if you had retired...”\textsuperscript{300}

In 1997, the same Burlington plant benefits representative whose 1980 letter is described above, prepared a benefit summary for the spouse of an active retiree who died on May 11, 1997 at the age of forty-nine.\textsuperscript{301} The spouse was entitled to SIB (transition and bridge) benefits to age sixty-two or remarriage.\textsuperscript{302} She was also entitled to an automatic spousal pension benefit, which would be offset by the SIB benefits until they expire, at which time the full amount would begin.\textsuperscript{303} As to “Health ins.,” she wrote: “will have medical, prescription drug, dental, vision + hearing for rest of life.”\textsuperscript{304}

In March 2002, a corporate benefit administrator emailed an East Moline benefits representative to confirm the insurance benefits available to a surviving spouse of an employee who died while eligible to retire.\textsuperscript{305} As to the spouse, the email stated that “Denise will be covered for her lifetime.”\textsuperscript{306}

In November 2002, the same corporate benefits administrator responded to the question of another East Moline benefit representation about an employee, stating: “It looks like he had over 30 years of service so his wife would have insurance for life.”\textsuperscript{307}

\begin{itemize}
\item \textsuperscript{299} Plaintiffs’ Motion for Summary Judgment as to Liability, Ex. 65 (April 26, 1996 Intra-Company Correspondence – Karen Hamilton to Jerome Kaisler), Reese v. CNH Global N.V., No. 04-70592 (E.D. Mich.), ECF No. 157.
\item \textsuperscript{300} Id.
\item \textsuperscript{301} Deposition of Susan Nelson, supra note 282, Ex. 12.
\item \textsuperscript{302} Id.
\item \textsuperscript{303} Id.
\item \textsuperscript{304} Id.
\item \textsuperscript{305} Deposition of Karen Benson, Ex. 27 (Mar. 15, 2002 Email – Karen Benson to Jennifer Boyd re Denise Strupp), Reese v. CNH Global N.V., No. 04-70592 (E.D. Mich.), ECF No. 130.
\item \textsuperscript{306} Id.
\item \textsuperscript{307} Plaintiffs’ Motion for Summary Judgment as to Liability, Ex. 66 (Nov. 20, 2002 Email – Karen Benson to Barbara Erenberger re Keith Hartman), Reese v. CNH Global N.V., No. 04-70592 (E.D. Mich.), ECF No. 158.
\end{itemize}
3. The Transformation of "Compelling" Admissions to "Loose Talk"

The court's central function in contract cases is to try to determine the mutual intent of the parties at the time of contracting.\textsuperscript{308} Any analysis that excludes consideration of the actual, expressed understanding of one contracting party of its obligations after the contract takes effect and for decades before a controversy exists is inherently destructive of the judiciary's primary role in contract interpretation. In actuality, of course, no "ordinary" rule supports such an analysis. In its purely ceremonial approach to the 1998 CBA, Reese simply ignored interpretative rules courts had ordinarily applied in the past.

This rule of interpretation – that the practical construction by the parties is of great significance in their determining intent – is a rule of evidence as well; all of the acts and statements of CNH confirming its "life-time" obligation for retiree healthcare are statements against CNH's interest under Fed. R. Evid. 804(3)\textsuperscript{309} as well as party admissions under Fed. R. Evid. 801(D)(2).\textsuperscript{310} There is a reason for these rules. Statements and acts of a party against its pecuniary interest have always been considered reliable indicia of a party's actual intent.\textsuperscript{311} A party can attempt to explain away its words and its deeds, but they are nevertheless admissible against the party.\textsuperscript{312}

Inherent in the plain meaning rule is an understandable reticence to open up a contract to self-serving evidence from one party about what a contract means when it has a plainly opposite meaning.\textsuperscript{313} But there is a natural and critical difference between that kind of self-serving, \textit{post hoc} extrinsic evidence at odds with a contract's apparent plain meaning and

\textsuperscript{308} See supra notes 196-206.

\textsuperscript{309} FED. R. EVID. 804(b)(3)(A) ("Statement Against Interest. A statement that: ... a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability .... ").

\textsuperscript{310} FED. R. EVID. 801(d)(2)(d) ("An Opposing Party's Statement. The statement is offered against an opposing party and: ... was made by the party's agent or employee on a matter within the scope of that relationship and while it existed.").

\textsuperscript{311} FED. R. EVID. 804(b)(3)(A).

\textsuperscript{312} Id.

objective, contemporaneous evidence about what a party always understood its own contractual obligation to be before there is a dispute.\textsuperscript{314}

This is the same distinction made in the rules of evidence between self-serving testimony and admissions against interest. For example, in \textit{Williamson v. United States}, the Court held that the "most faithful reading" of Fed. R. Evid. 804(b)(3) is that it permits excision of self-serving statements when they are made in a broader narrative that is generally self-inculpatory.\textsuperscript{315} The issue is one of trustworthiness.\textsuperscript{316} Statements – by word or deed – against a party’s interest have the hallmarks of trustworthiness; self-serving statements do not.\textsuperscript{317}

Professor Kniffin writes that extrinsic evidence is critical if the court is actually interested in discerning the parties’ intent.\textsuperscript{318} To her, the only issue should be the weight accorded to the evidence presented.\textsuperscript{319} "The extent to which the court is persuaded by a particular item of extrinsic evidence is a function of the weight of that evidence."\textsuperscript{320} Because "[t]he court [that perceives a plain meaning in contract language] may, of course, be mistaken . . . ."

The question should be not the admissibility of relevant extrinsic evidence, but an assessment of the weight of such evidence, including its persuasive quality and cogency, which the court can accomplish only after viewing it. This is true despite the fact that courts have often disposed of flimsy and untrustworthy evidence by labeling it as inadmissible.\textsuperscript{321}

Under \textit{Tackett} and \textit{Reese}, the elevation of the CBA’s general duration clause to a presumption against vesting has led to contortions by judges who had once correctly seen a party’s acts and words as illuminating its actual intent.

\textsuperscript{314} See Bower v. Bunker Hill Co., 725 F.2d 1221, 1225 (9th Cir. 1984) (stating that objective manifestations of intent prevail over self-serving testimony); Philhall Corp. v. United States, 546 F.2d 210, 215 (6th Cir. 1976) ("Contemporaneous facts, not self-serving testimony given years later, are important in establishing intent.").

\textsuperscript{315} Williamson v. United States, 512 U.S. 594, 600-01 (1994); see also Vincent v. Seabold, 226 F.3d 681, 687 (6th Cir. 2000); Woodall v. Comm’r of Internal Revenue, 964 F.2d 361, 364-65 (5th Cir. 1992); United States v. Hooks, 848 F.2d 785, 796 (7th Cir. 1988).

\textsuperscript{316} Williamson, 512 U.S. at 602, 605.

\textsuperscript{317} Rock v. Huffco Gas & Oil Co., Inc., 922 F.2d 272, 282-83 (5th Cir. 1991).

\textsuperscript{318} KNIFFIN, supra note 80, at 59.

\textsuperscript{319} Id.

\textsuperscript{320} Id. ("A party will not be permitted to build up an argument by means of self-serving statements. Such statements should be admissible against that party, however, as admissions against that party’s interest.").

\textsuperscript{321} Id. at 60-61.
For example, pre-Tackett, the Sixth Circuit in *Cole v. ArvinMeritor, Inc.*, noted that the district court’s finding of vested retiree benefits was confirmed by, *inter alia*, “substantial evidence of written assurances of lifetime healthcare benefits,” including “lifetime letters” sent by the employer to retirees for thirteen years, “for life” prescription cards issued for twelve years, an employer booklet promising “lifetime” healthcare benefits, other booklets and summary plan descriptions promising health benefits “during your retirement” and various “oral “lifetime” assurances’ made over four decades by company officials.”322 Because the court concluded that the CBA contained an unambiguous promise of vested benefits, it did not consider this extrinsic evidence beyond noting that the evidence “weighs heavily in the favor of the plaintiffs and indicates the defendants’ intention to provide lifetime retiree healthcare benefits.”323

After that 2008 decision, the employers’ petition for rehearing was then held in abeyance for eight years while the parties attempted to settle their dispute.324 After Tackett, the parties (not surprisingly) quickly reached impasse; the employer’s petition for rehearing was promptly granted; and the Sixth Circuit reversed itself.325 In *Cole v. Meritor, Inc.* Judge Gilman, writing for the majority, held that, retiree benefits, earlier held to be clearly vested as a matter of law, had not vested at all — also as a matter of law.326 The retirees’ position, once conclusive as to intent, was no longer even a “fairly plausible” interpretation.327 All of the evidence of the employers’ intent that retiree benefits were “lifetime” benefits devolved, the Sixth Circuit decided, into no more than “loose talk” devoid of any evidentiary value.328

Evidence that the Supreme Court has always been considered to be entitled to “great, if not controlling, influence” can never be irrelevant or inadmissible.329 Evidence that has always been “highly significant”330 in the determination of intent can never be discounted as “loose talk.”331

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323. *Id.* at 1075.
325. *Id.* at 696, 702.
326. *Id.* at 702.
327. *See id.*
328. *Id.* at 702.
331. *Cole*, 855 F.3d at 702. Judge Gilman’s analysis simply begs the following question — had the employer kept its “actual intent” close to its vest, so it could disclose that “intent” at some future date when it became convenient — that is, after having “fooled” the employees-and the union for decades, CBA after CBA, with its “loose talk?” Apparently, this was the “solution” that satisfied
When a court transforms what it once held to be compelling evidence of a party’s intent into “loose talk,” the court has lost its bearings. It can no longer claim to be an impartial arbiter of what contracts mean or what the contracting parties intended.

Cole demonstrates the absurdity of the Tackett/Reese analysis – if determining the parties’ actual intent is the goal of judicial interpretation of contracts. For decades, the parties to the CBAs in both Cole and Reese operated under a common understanding that retiree health care benefits were lifetime benefits. The employer’s words and deeds over decades gave meaning and content to the words chosen by the parties to express their intent in the CBA. The union relied on the employer’s words and deeds because the employer had the same understanding of its lifetime obligation. The union has no reason to question the meaning of or tinker with the existing CBA language because the meaning of the language had been settled by mutual agreement. In other words, the employer’s statements and conduct had become inseparable from the operative intent of the CBA language.332

The employer’s words and deeds – its express promises to employees – also form the basis for the employee’s performance of the conditions precedent to the promise of lifetime healthcare – a working lifetime of manual labor for the employer. The employer’s words give solace and security – and were intended to give solace and security – to survivors who, as factory workers’ spouses, depend on those promises for their security in old age.333

It is for these reasons, in addition to being admissions against interest, that evidence of an employer’s words and deeds can never be dismissed as “loose talk.” To the contrary, the employer’s actions, in word and deed, are probative admissions of the employer’s intent concerning the fundamental issue before the court. In Cole, as in Reese, this evidence comes from those very persons whom the employer designated to communicate that intent to the union and to the employees. Courts may be concerned that trials on what the employer intended may degenerate into an after the fact “company said/union said” swearing contest. But, courts have always weighed evidence and sorted the wheat from the chaff.334

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332. Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960) (stating that this understanding was the “common law of the shop” which became the contract).
333. Cole, 855 F.3d at 697-98.
334. See supra notes 315-21.
That is what they are supposed to do.\textsuperscript{335} Of course, that was not the issue in either Cole or Reese – or in many of the other retiree cases. The only evidence needed in Reese to prove CNH’s intent was evidence of what CNH said and what CNH did.\textsuperscript{336} To denigrate or ignore this evidence is to abrogate the courts’ core responsibility in contract cases as well as the Anglo-American social contract and its foundation in the Rule of Law.

4. Judge Sutton’s Reese III Dissent – Undoing the Facts and the Law

In his Reese III dissent, Judge Sutton discounted all the evidence of CNH’s intent because “most of it predates the relevant time period.”\textsuperscript{337} Judge Sutton then declared that the “relevant period” was July 1, 1994 and April 1, 2005, the inclusive retirement dates of the class of retirees.\textsuperscript{338} According to Judge Sutton, “[n]o amount of parol evidence regarding prior agreements, including promises made to workers who retired in the 1970s and ‘80s, is probative of . . . a set of distinct promises made by a new corporate parent for the first time in 1995, and then in altered form in 1998.”\textsuperscript{339}

As with other aspects of Judge Sutton’s dissent, the Reese III majority did not bother to address or counter his dismissal of CNH’s words and deeds. And, the Supreme Court refused to provide the retirees with an opportunity to do so. But, consistent with other aspects of his dissent, Judge Sutton’s take on this issue has little to do with the actual facts or the law – and nothing to do with the intent of the parties.

First, for example, Judge Sutton mis-characterized this evidence as “parol evidence.”\textsuperscript{340} Parol evidence is generally “oral,” not written or documentary evidence.\textsuperscript{341} The evidence that Judge Sutton discounts (and

\begin{itemize}
\item \textsuperscript{335} Pullman-Standard, Div. of Pullman v. Swint, 456 U.S. 273, 291-92 (1982) (“Factfinding is the basic responsibility of district court.”).
\item \textsuperscript{336} There certainly was corroborating evidence from the union and from retirees and surviving spouses, but the Reese retirees relied almost exclusively on what CNH said and did over three decades. Brief in Support of Plaintiffs’ Motion for Summary Judgment as to Liability, supra note 222, at 15-27.
\item \textsuperscript{338} Id.
\item \textsuperscript{339} Id.
\item \textsuperscript{340} Id. at 892.
\item \textsuperscript{341} Parol, XI OXFORD ENGLISH DICTIONARY 248 (2d ed. 1989). While Judge Sutton did not explicitly rely on the “parol evidence rule,” his reference to “prior agreements” indicates that is what he had in mind. See Reese, 854 F.3d at 892 (Sutton, J. dissenting). But, the parol evidence rule applies to “prior or contemporaneous oral agreements, or prior written agreements, whose effect is to add to, vary, modify, or contradict the terms of a writing.” WILLISTON, supra note 25, § 33.1 at 862.
\end{itemize}
excluded from consideration)\textsuperscript{342} consists of \textit{written} party admissions – admissions \textit{against} CNH’s interest – made by CNH \textit{after} the CBA was finalized, that gave giving meaning to \textit{identical} language in the \textit{written} CBAs, provided \textit{while} the CBAs were in effect, over a period of thirty years; evidence that the Supreme Court has held to be “of great, if not controlling influence.”\textsuperscript{343}

\textit{Second}, there was no “new corporate parent” after July 1, 1994. The stated purpose of the 1994 IPO was so that Tenneco could sell its 100 percent equity ownership of Case Corporation stock to the public.\textsuperscript{344} After the IPO was completed, Case Corporation had no “corporate parent;” it was a continuing, but stand alone, publicly held corporation.\textsuperscript{345} It was not until 1999 that Case Corporation indirectly merged with New Holland to form CNH Global N.V.\textsuperscript{346}

\textsuperscript{342} Professor Kniffin states that “[w]hen a court refuses to examine extrinsic evidence because the court believes that it perceives a clear, plain meaning of a disputed contract term, this is a decision that such evidence will automatically be deemed to have no weight at all. The court may, of course, be mistaken . . . because no word can ever have a fixed meaning, and the proffered extrinsic evidence may reveal a possible meaning that had not occurred to the court. The question should be not the admissibility of relevant extrinsic evidence, but an assessment of the weight of such evidence, including its persuasive quality and cogency . . . .” KNIFFIN, supra note 80, at 60-61.

\textsuperscript{343} Old Colony Trust Co. v. City of Omaha, 230 U.S. 100, 118 (1913).


\textsuperscript{345} \textit{Id.} Even if there had been a “new corporate parent,” that fact would not have affected the liability of Case Corporation. It is an elementary principle of both corporate law and federal labor law that a transfer of corporate stock has no implications on underlying corporate obligations. See Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1246 (6th Cir. 1991); Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91 (3d Cir. 1988); Tucker v. Paxson Mach. Co., 645 F.2d 620, 622 (8th Cir. 1981) (corporate law). See Holly Farms Corp. v. NLRB, 48 F.3d 1360, 1367 (4th Cir. 1995); Esmark, Inc. v. NLRB, 887 F.2d 739, 752 (7th Cir. 1989); EPE, Inc. v. NLRB, 845 F.2d 483, 488 (4th Cir. 1988); Miami Foundry Corp. v. NLRB, 682 F.2d 587, 589 (6th Cir. 1982) (federal labor law).

\textsuperscript{346} Reese v. CNH Global N.V., No. 04-70592, 2007 WL 2484989, at *2 (E.D. Mich. Aug. 29, 2007). In any case, courts look to the intent when and after the disputed contract provision was negotiated, even if there had been a subsequent change in ownership. Seiden Assocs., Inc. v. ANC Holdings, Inc., 959 F.2d 425, 430 (2d Cir. 1992) (remanding contract action against successor corporation for a determination of “what the original contracting parties intended”); Rest. Emps., Bartenders & Hotel Serv. Emps. Health & Welfare Pension Tr. v. Ferrymen, No. 92-36642, 1994 WL 35020, at *3 (9th Cir. Feb. 7, 1994) (stating that to discern parties intent to a CBA, court “may properly look not only to [the plaintiff’s] behavior, but to the practice of his predecessor (who actually negotiated the contract)”.

https://scholarlycommons.law.hofstra.edu/hlelj/vol37/iss1/5

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Judge Sutton’s license with the facts is all the more troubling because, like most issues in Yolton and Reese, the issue of the corporate continuity had been exhaustively litigated and finally decided. In Yolton, the district court held that Case Corporation was the same entity after the July 1, 1994 IPO as it had been before—and not even the name had changed. The following are the actual facts as determined in Yolton.

After the district court issued a preliminary injunction against El Paso in late 2003, El Paso filed a motion for reconsideration asserting that CNH, not El Paso, was directly obligated to the pre-IPO retirees. CNH argued that it was a new corporate entity, one that did not exist before July 1, 1994, and therefore, it had no obligation to pre-IPO retirees. The district court granted El Paso’s motion, holding that pre-IPO retirees were likely to succeed on their claim that CNH was “merely a disguised continuation or alter ego of the company which employed Plaintiffs or Plaintiffs’ spouses and which retained the old Case Corporation’s labor law obligations.” The Sixth Circuit, after a detailed examination of the various “factors indicate that CNH America is, for purposes of this case, the alter ego of JI Case,” affirmed the district court.

At the close of discovery in Yolton, CNH moved for summary judgment asserting again that it was not contractually liable for the healthcare benefits of pre-IPO retirees. After extensive evaluation of the evidence, the district court denied the motion, concluding that “CNH is the same entity that employed Plaintiffs or Plaintiffs’ spouses and therefore is contractually obligated for the costs of Plaintiffs’ retiree health insurance benefits.” In a separate opinion issued the same day, the district court granted the retirees’ motion for summary judgment against CNH.

Third, the “set of promises” in the 1995 and 1998 CBAs was no different from the 1990 CBA that CNH “assumed” in 1994. The Judge Sutton who pronounced them different in Reese III ignored what the same Judge Sutton wrote about this very issue in Reese I. In Reese I, Judge Sutton relied on Yolton in affirming the district court’s entry of summary judgment for the retirees. In Reese I, Judge Sutton wrote that “past is prologue;” that “Yolton arose from a nearly identical CBA;” and that “promise for promise, the two sets of commitments [in the 1990 CBA and the 1998 CBA] are effectively identical;” and that “[i]ke Yolton, this case . . . involves a health-care benefits plan with identical language concerning entitlement to benefits upon retirement . . . .”

In Reese I, Judge Sutton stated that this was not surprising because the “Yolton CBA involved retirees who worked at the same plant as today’s retirees and concerned an employer that was different in name – Case’s former parent company, Tenneco – but in few other meaningful ways.” After reviewing the “identical language concerning entitlement to benefits upon retirement” in Yolton, Judge Sutton stated: “[A]bove all, [Yolton] concerns employees who worked in virtually identical circumstances (apparently making the same products in the same plant) to the Yolton employees before each group retired.”

In his Reese I assessment, Judge Sutton got one fact wrong, but it only underscores the bankruptcy of his Reese III pronouncements. The name of the “employer” never changed during this period. The signatory to the 1990 CBA was Case Corporation. The signatory to the 1993 Extension Agreement was Case Corporation. The signatory to the 1995 CBA was Case Corporation and the signatory to the 1998 CBA was Case Corporation. Three of Case’s corporate employees, Paul Crist, Case’s corporate Director of Labor Relations, Marc Castor and Judy Lojeski, signed all three CBAs for “Case Corporation.” Mr. Crist alone signed the 1993 Extension Agreement for “Case Corporation.”

357. Id. (emphasis added).
358. Id. at 322.
359. Id. at 323.
361. Deposition of Tim Haas, supra note 243, Ex. 5.
363. Id.
364. Deposition of Tim Haas, supra note 243, Ex. 5 at 7.
Every benefit representative who made the post-IPO admissions had been employed in the same position before the IPO. Karen Benson, who made the 2002 admissions, was employed at Case beginning in 1989 and in the corporate benefits department in the fall of 1993. Karen Hamilton, the benefit rep at the Racine tractor plant who made the 1996 admission, had made identical statements regarding lifetime medical benefits prior to the IPO, while acting in the same capacity. Likewise, Susan Nelson, a long-term benefits representative at the Burlington plant, who prepared the 1997 “lifetime” summary, had sent similar letters to retirees and surviving spouses, beginning at least since 1980.

Because of its importance, the Yolton retirees spent enormous efforts litigating the corporate continuity issue to final conclusion. All for naught. In Reese III, Judge Sutton made up his own facts – and ignored his previous opinion – to fashion a “theory” of why critical, relevant evidence of intent was worthless. This was the defective analysis on which the Supreme Court relied to negate the contractual bargain.

The pertinent contractual inquiries are: 1) what did the parties mean when they first negotiated the language in 1971, the language that is in every CBA through 1998; and 2) what was the parties’ understanding of Case’s obligation in the performance of the contract before the controversy arose. If the role of the court, as Williston says, is to place itself in the position of the parties and “look forward from the date when the parties entered the bargain, not backward from some vantage point of a future day,” the written evidence of how the obligated party views its

365. As noted above, the effective date of the IPO, July 1, 1994, separated the Yolton and Reese cases. See supra note 248.
366. See supra notes 305-07.
367. See Deposition of Karen Benson, supra note 305, at 11-12.
368. See supra notes 299-300.
370. See supra notes 301-04.
371. See supra notes 282-83.
372. For example, Plaintiffs a detailed response to CNH’s motion for summary judgment, relying on dozens of corporate and other documents they had obtained, to show the corporate continuity. Plaintiffs’ Response in Opposition to CNH’s Motion for Summary Judgment, Yolton v. El Paso Tenn. Pipeline Co., No. 02-75164 (E.D. Mich.), ECF No. 313. In preparation, Plaintiffs’ had submitted 715 Requests of Admission to CNH, focusing on every aspect of the corporate continuity of Case Corporation before and after July 1, 1994. Id. at Ex.1. CNH Answers to the Requests were attached to the Response. Id. at Ex. 3. Plaintiffs also relied on the Rule 30(b)(6) deposition of former Case executive Richard Christman on April 18, 2007. Id. at Ex 10.
373. See supra Sections IV.C, IV.D.
374. See supra Section IV-E.
375. See WILLISTON, supra note 25, § 31:9 at 541. In Reese, the Court stated that, “[i]f the parties meant to vest health care benefits for life, they easily could . . . s[a]y so in the text.” Reese, 583 U.S. ___, 138 S. Ct. at 766. Of course, it is not the Court’s role to second guess how the parties
obligation from the date it entered the bargain is indispensable in determining that parties’ intent.376

In *Reese III*, Judge Sutton got it all wrong – the facts, the evidentiary rules and the ordinary principles of contract law. By adopting his dissent in a per curiam summary reversal, the Supreme Court precluded any chance of correction and, at the same time, reached a decision entirely at odds with the cardinal objective of contract interpretation – to discern and enforce the intent of the parties.

The irony is that retiree litigants in the Sixth Circuit seldom relied on the *Yard-Man* inference at all and never counted on *Yard-Man* as the sole proof of their cases.377 They did not rely on self-serving statements of union representatives. To the contrary, they typically presented the explicit, contemporaneous employer admissions like those of Case’s corporate representatives. The author, in litigating *Yolton* and *Reese* and other earlier retiree cases, intentionally relied on the ordinary principle of contract law that the words and actions of the employer are highly significant, if not controlling, evidence of the employer’s intent.378 Relying on this “ordinary” principle of contract law, the author spent countless hours examining hundreds of thousands pages of documents and thousands of individual employee and benefit files uncovering evidence of the employer’s written commitments to retirees and surviving spouses.379 After *Reese*, that same kind of probative evidence – traditionally viewed as the

expressed their intention – otherwise oblique promises would never be enforced. See *Kiffin*, supra note 80, § 24.7 at 37. But, especially in the context of collective bargaining, this *post hoc* musing of how the parties should have written their promises more than forty years earlier turns the appropriate inquiry on its head. *Id.* The issue is not what the parties could have done differently from the vantage point of 2018, but what they did and what they intended in 1971 and what Case (CNH) understood it obligation to be at that time and during the decades that followed. See generally *id.* (“The cardinal rule with which all interpretation begins is that the purpose of interpretation is to ascertain the intention of the parties.”).

376. See *Williston*, supra note 25, § 31:9 at 541; see also *supra* notes 264-79.


379. The author summarized some of that evidence, presented in four cases, in the amicus brief he filed in *Tackett* on behalf of various Retiree Committees. See Brief of Amicus Curiae In Support of Respondents, *Fox Retiree Committee, Golden Retiree Committee and Yolton Retiree Committee at 13-36, M&G Polymers USA, LLC v. Tackett, 574 U.S. 427 (2015) (No. 13-1010).
“sure[st] way to find out what the parties mean”380—cannot even be considered; it must be discarded as irrelevant “loose talk.”381

F. Courts, in Interpreting Contracts, Should Construe All Agreements Relating to the Same Subject Together As One Contract.

Unlike many private contracts, any mature collective bargaining relationship is the result of a series of CBAs, often going back decades, carrying many of the same provisions forward verbatim.382 The latest CBA in that series is not a standalone agreement that can be interpreted in isolation, but the product of years of negotiations, interim agreements and mutual understandings.383 There are often events that require, or result in, ancillary agreements, negotiated for particular purposes.384 At Case, for example, the company closed various facilities over the years and entered into shutdown agreements with the UAW that included special early retirement programs for employees, programs that included provisions for continuing retiree healthcare benefits.385 Case also offered early retirement incentives to reduce its workforce which resulted in negotiations relating to enhanced pensions and continuing healthcare for departing employees.386 The Sixth Circuit and the Supreme Court in Reese ignored all of these agreements.

Under "ordinary" contract principles, these related agreements are relevant in determining the parties' intent. According to Williston:

[W]hen the same parties execute two instruments concerning the same subject matter, the writings may, under some circumstances, be regarded as one contract and may be construed together, whether they were made simultaneously or at different times, the fact that they were made or

383. See supra note 379.
385. Id.
386. Id.
dated at different times being insignificant if they are related to and were part of the same transaction.\textsuperscript{387}

This principle is particularly applicable where the contract is a CBA because of the very nature of a CBA. In \textit{Transportation Employees v. Union Pacific R. Co.},\textsuperscript{388} the Court stated: "In order to interpret [a CBA], it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements."

1. The Plant Shutdown Agreements and the Termination of the CBAs

Over the years, CNH closed several of its facilities. In 1987, two years after CNH purchased the tractor division of International Harvester, CNH closed its existing factories in Bettendorf, Iowa, Rock Island, Illinois and Terre Haute, Indiana.\textsuperscript{389} In 1993, it closed its Wausau, Wisconsin factory, its Memphis parts depot and part of its Hinsdale, Illinois engineering facility.\textsuperscript{390} In 2002, following its 1999 merger with New Holland, CNH closed its massive combine factory on the Mississippi River in East Moline, Illinois.\textsuperscript{391}

On each of these occasions, CNH and the UAW entered into a plant closing shutdown agreement.\textsuperscript{392} In each case, the parties agreed on special plant shutdown options that affected employees could elect, including: 1) remaining on the master recall list (to be relocated to other CNH plants); 2) electing a severance option that included a cash buy out; or 3) electing an enhanced early retirement option available to those employees not yet eligible to retire under the terms of the pension plan.\textsuperscript{393} Individuals who selected the enhanced pension option would receive “special early

\textsuperscript{387} See \textit{WILLISTON}, supra note 25, § 30:26 at 321-22.


\textsuperscript{390} \textit{Id.}


retirement” benefits that were outlined in the Pension Agreement and Plan.\textsuperscript{394} The option included the “Retiree Insurances that accompany such Special Early Retirement,” specifically referencing the “Pension Agreement and Plan and Insurance Agreement.”\textsuperscript{395}

Under the 2002 East Moline Shutdown Agreement, employees could “grow into” a special retirement shutdown benefit for a period up to five years \textit{after} the plant closed.\textsuperscript{396} This 2002 Shutdown Agreement provided that the retiree would have “retiree medical beginning at age 55”, the age when the employee “grew into” the special early retirement benefits.\textsuperscript{397}

These shutdown agreements expressly provided for the termination of the CBAs at the facilities that were being closed. The 1993 Shutdown Agreement, for example, stated:

Upon ratification of the Shutdown Agreement, as noted above, the current Labor Agreement between the Company and the Union (the stated term of which is June 2, 1990 through October 2, 1993, and Extension Agreement) shall terminate as it relates to Wausau and Memphis and shall have no further application to the affected employees at Hinsdale.\textsuperscript{398}

The 2002 East Moline Shutdown similarly provided that, as to East Moline, the 1998 CBA “shall terminate and be of no further effect provided, however, that this Shutdown Agreement and the benefit plans and agreements related thereto shall not terminate and continue to apply to the extent they govern and provide rights and benefits to separated employees.”\textsuperscript{399}

The 2002 East Moline Shutdown Agreement provided that: “The economic closedown benefits established and set forth in this Shutdown Agreement shall not be altered by any subsequent agreements in any future negotiations.”\textsuperscript{400} The 1993 Plant Shutdown Agreement had an identical provision.\textsuperscript{401}

\textsuperscript{396} 2002 Shutdown Agreement, \textit{supra} note 392, at 46, 51-52. Under the 1993 Shutdown Agreement, the “grow in” period was two years. See 1993 Shutdown Agreement, \textit{supra} note 392, at Ex. I-Option B.
\textsuperscript{397} 2002 Shutdown Agreement, \textit{supra} note 392, at 50, 51.
\textsuperscript{398} See 1993 Shutdown Agreement, \textit{supra} note 392, at 28.
\textsuperscript{399} 2002 Shutdown Agreement, \textit{supra} note 392, at 20.
\textsuperscript{400} \textit{Id.} at 19.
\textsuperscript{401} See 1993 Shutdown Agreement, \textit{supra} note 392, at 9.
Thus, under the plant closing agreements, the underlying CBAs, including both the “concurrent” clause(s) and the general duration clause of the CBA, were terminated while the GBP (referred to as the “Insurance Agreement” or “benefit plans and agreements” in the shutdown agreements) remained as the source for the future and continuing benefits for employees retiring under the shutdown agreements.

In Reese, the Supreme Court held that the CBA’s general duration clause, applicable to the GBP through the “concurrent” clause, was the determinative factor for its decision – the factor that made the case so “straightforward.” The termination of the CBA in the plant closing agreements, with the concomitant elimination of the “concurrent” clause and the general duration clause, dramatically changes the legal landscape – at least for employees retiring under the plant closing agreements.

Under the plant closing agreements, the parties’ intent is unambiguous. Even though the CBA was terminated, “Retiree Insurances,” those that accompanied the special early retirement option, and referenced the “Pension Agreement and Plan and Insurance Agreement,” were not. In the 2002 East Moline Shutdown Agreement, the parties agreed that “this Shutdown Agreement and the benefit plans and agreements related thereto shall not terminate” and will “continue to apply to the extent they govern and provide rights to separated employees.” The 1993 and the 2002 Shutdown Agreements both provided that the economic benefits they provided could “not be altered” in any future negotiations. If there were any remaining doubt, CNH prepared a “Closed Plant Benefits” summary shortly before the 1993 Shutdown Agreement. Under “Special Early Retirement,” the summary stated: “Receive retiree medical benefits for life.”

In the three Reese decisions, there is no discussion of the impact of the plant closing agreements on the duration of retiree healthcare benefits. As long as all CNH retirees had lifetime healthcare benefits, there

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403. See supra notes 394-95.
404. 2002 Shutdown Agreement, supra note 392, at 22.
405. Id. at 21; 1987 Shutdown Agreement, supra note 392.
406. Deposition of Judy Lojeski, supra note 210, Ex. 40 (Closed Plant Benefits).
407. In Reese v. CNH America LLC, Judge Sutton rejected Plaintiffs argument, and the district court’s opinion, that the 2002 East Moline Shutdown Agreement prohibited CNH from reasonably modifying benefits, stating that the closing agreement did not mention retiree health care benefits. Reese v. CNH America LLC (Reese II), 694 F.3d 681, 686 (6th Cir. 2012), rev’d 583 U.S. __, 138 S. Ct. 761 (2018). In doing so, Judge Sutton simply refused to acknowledge those parts of the agreement that did mention retiree health care benefits. Compare Id, with 2002 Shutdown Agreement, supra note 392, at 40, 41, 48, 49, 50, 51. Judge Sutton also ignored the fact that the major reason for maintaining the GBP (while terminating the CBA) was that the GBP described retiree healthcare

https://scholarlycommons.law.hofstra.edu/hlelj/vol37/iss1/5
was no harm done to the 700 or so Wausau, Memphis, Hinsdale or East Moline retirees (or to their spouses and dependents) whose continuing benefits were "established and set forth" in the shutdown agreements and "shall not be altered by any subsequent agreements."408 But, by pronouncing the case "straightforward," the Supreme Court foreclosed any factual development these retirees had to an independent contractual claim to lifetime benefits under the shutdown agreements.

Before Tackett, in Temme v. Bemis Company, Inc.,409 the Seventh Circuit interpreted a plant closing agreement as providing lifetime retiree medical benefits.410 In that closing agreement, the court found "straightforward indications" of the parties' intent to create lifetime benefits.411 While, the court stated, "a presumption against vesting is a natural fit" with CBAs because CBAs are short term agreements, such a presumption is "less persuasive" for shutdown agreements where the parties are "aware that they are establishing and settling claims for employees in a permanent and enduring fashion."412

In Temme, the court relied on an earlier decision involving a shutdown agreement, Zielinski v. Pabst Brewing Co., Inc.413 In Zielinski, the district court granted summary judgment for Pabst, reasoning that there was no statement in either the CBA or the shutdown agreement that healthcare benefits vested.414 The Seventh Circuit stated: "We do not find this reasoning persuasive. The shutdown agreement contains ... no termination date and we cannot find any basis for interpolating one."415 The Seventh Circuit continued that CBAs:

being short term agreements are presumed not to create rights or duties that continue after the agreement's termination date. The rights that the plaintiffs assert in this case originated in the collective bargaining agreement but were carried forward into the shutdown agreement, which, unlike a collective bargaining agreement, has no end date.416

409. Temme v. Bemis Co., 622 F.3d 730, 739 (7th Cir. 2010).
410. Id.
411. Id. at 736.
412. Id.
413. Id.; see also Zielinski v. Pabst Brewing Co., 463 F.3d 615 (7th Cir. 2006).
414. Zielinski, 463 F.3d at 617.
415. Id.
416. Id.
The Seventh Circuit vacated the district court’s judgment and remanded for further proceedings on the appropriate level of benefits.\textsuperscript{417} The entire premise of Reese was that the “concurrent” clause unambiguously limited retiree healthcare benefits to the term of the CBA.\textsuperscript{418} Under the plant closing agreements, that premise, dubious as it was, had been eliminated by express language \textit{terminating} the CBAs as it pertained to employees retiring under those agreements. Under the shutdown agreements, retiree healthcare benefits continued \textit{despite} and often commenced long \textit{after} the termination of the CBA.\textsuperscript{419} The shutdown agreements contained the further contract promise that those economic benefits “shall not be altered by any subsequent agreements in any future negotiations.”\textsuperscript{420} With the termination of the CBAs, the GBP no longer ran “concurrently” with the CBA, but continued \textit{notwithstanding} the CBA expiration.\textsuperscript{421} For employees retiring under the plant closing agreements, the GBP, which explicitly continued after the termination of the CBA, was freed from any presumptive constraints in the CBAs.

Of course, it does not make sense that CNH would agree to lifetime healthcare benefits \textit{only} for those persons who left employment under a special early retirement option created under the plant shutdown agreement. It does not make sense that CNH would give \textit{better} benefits to those employees who had too few years or were too young to qualify for a regular pension than to those who were older and had worked far longer.\textsuperscript{422} It was for this reason that the Reese retirees cited the plant shutdown agreements as proof that \textit{all} retirees had lifetime health care benefits.\textsuperscript{423}

After the Supreme Court decision, the retirees filed a motion to remand the case to the district court for consideration of whether the shutdown agreements independently vested benefits in those retirees who retired under them.\textsuperscript{424} The court of appeals denied the motion.\textsuperscript{425} In other words, the Sixth Circuit summarily refused to allow the district court to conduct even a ceremonial analysis into whether employees retiring under

\textsuperscript{417} Id. at 621.
\textsuperscript{419} 2002 Shutdown Agreement, \textit{supra} note 392, at 40, 41, 48, 49, 50, 51.
\textsuperscript{420} Id. at 19.
\textsuperscript{421} Id. at 20.
\textsuperscript{422} \textit{See} Golden v. Kelsey-Hayes Co., 73 F.3d 648, 656-57 (6th Cir. 1996) (“it would be anomalous for the defendant to guarantee lifetime health coverage to retirees with only a couple of years of service while neglecting to provide equal benefits to pensioners with dozens of years of service.”).
\textsuperscript{423} Brief in Support of Plaintiffs’ Motion for Summary Judgment as to Liability, \textit{supra} note 222, at 26-30.
\textsuperscript{424} Appellees’ Motion for Remand to the District Court for Consideration of Undecided Issues, Reese v. CNH Indus. N.V., No. 15-2382 (6th Cir.), ECF 80-1.
the shutdown agreements had an independent contractual right to vested healthcare benefits.\(^\text{426}\)

2. **The Voluntary Termination of Employment Program**

CNH offered a special early retirement program in 1991 and 1992, where employees could receive an enhanced pension and severance if they retired voluntarily.\(^\text{427}\) In calculating the cost of that program, CNH determined that 2,624 employees would be eligible to grow into the early special pension benefit with retiree insurance beginning at age 55; that is, employees who were age 50 at the time could grow into the benefit at age 55.\(^\text{428}\) CNH assumed that such a retiree would live to an average of 74 years and that the cost of retiree insurance would be more than $112 million.\(^\text{429}\)

At informational meetings explaining the VTEP program in 1991 and 1992, CNH passed out a summary describing the benefits.\(^\text{430}\) The summary stated: "the surviving spouse will continue coverage for all medical, dental, vision, etc. benefits for life."\(^\text{431}\)

**G. Contracts Are Construed to Give Meaning to All Provisions Without Rendering Any Terms Meaningless**

"A contract must be construed as a whole so as to not render any terms meaningless and a construction that gives a reasonable meaning to each phrase and clause and harmonizes all provisions is preferred over a construction that leaves some of the provisions without function or sense."\(^\text{432}\)

In *Mastrobuono v. Shearson Lehman Hutton*, the Court stated that it is a "cardinal principle of contract construction that a document should be

\(^{426}\) The Sixth Circuit denied the retirees' petition for rehearing en banc. Order, Reese v. CNH Industrial N.V., No. 15-2382 (6th Cir. Oct. 11, 2018), ECF No. 87-1


\(^{428}\) Deposition of Tim Haas, supra note 243, Ex. 23.

\(^{429}\) Id.


\(^{431}\) Id. Ex. 6 at 4, Ex. 19 at 6.

\(^{432}\) Midwest Reg'l Allergy Ctr. v. Cincinnati Ins. Co., 795 F.3d 853, 856 (8th Cir. 2015) (applying Missouri law); see also Aeroground Inc. v. Centerpoint Props. Trust, 738 F.3d 810, 813 (7th Cir. 2013) (stating that the court must "seek to give effect to 'each clause and each word used,' without rendering any terms meaningless") (emphasis added).
read to give effect to all of its provisions and to render them consistent with each other."

According to Williston: "A contract will be read as a whole and every part will be read with reference to the whole." "An interpretation that gives effect to all provisions of the contract is preferred to one which renders part of the writing superfluous, useless or inexplicable. A court will interpret a contract in a manner that gives reasonable meaning to all its provisions if possible."

In *Yard-Man*, the Sixth Circuit held that the contract promise to one group of retirees, that they would have healthcare benefits beginning at age 65, would be illusory if they retired at age 55 and the employer's promise was limited to the term of the CBA. *Tackett* criticized *Yard-Man*'s use of the "illusory" contract principle, stating that it implicates the concept of consideration and that, as long as there is some consideration from the employer, the contract is, by definition not "illusory." *Tackett* continued that, if the CBA "benefits some class of retirees, then it may serve as consideration for the union's promises." *Tackett* concluded that *Yard-Man*'s interpretation was "particularly inappropriate in the context of collective-bargaining agreements, which are negotiated on behalf of a broad category of individuals and consequently will often include provisions inapplicable to some category of employees."

*Yard-Man* does not address the issue of consideration; it was instead concerned with looking at the contract as a whole and construing every term as having independent meaning, as required by "ordinary rules" of contract interpretation. *Yard-Man* determined that the promise to provide benefits to retirees beginning at age 65 would be illusory -- that is, it would have no meaning, it would be "superfluous," for anyone who retired before age 62 during the three-year CBA.

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434. WILLISTON, supra note 25, § 32:5 at 692.
435. Id. at 704-07.
438. Id.
439. Id.
441. Id. at 1480-81, (citing to Cordovan Associates, Inc. v. Dayton Rubber Co., 290 F.2d 858 (6th Cir. 1961)). Cordovan Associates did not address a situation where there was a complete lack of consideration. Cordovan Associates, 290 F.2d at 860. There, the issue concerned the meaning the term "prevailing prices" for tires purchased under a contract with a chain store. Id. The defendant argued that the term meant the price it charged under the contract rather than the lower price it charged its other chain store customer. Id. The court determined that it meant the lowest price that it...
It is in this context that, in characterizing *Yard-Man*'s analysis as coming under the "illusory" promise doctrine, *Tackett* missed the point. And, while *Tackett* is right that CBAs are different from ordinary contracts, it completely failed to comprehend that difference. Under federal labor law, unions bargain on behalf of the entire bargaining unit and owe each member of that unit a duty of fair representation. Unlike ordinary contracts, unions do not seek benefits primarily for themselves. Instead, unions, as the statutory bargaining agent of the employees, are required to act in the interest of the employee in negotiating their terms and conditions of employment – wages, seniority rights, working conditions and benefits. Individual employees, who ratify the CBAs, are the primary beneficiaries of the employer's promises under the CBA.

The union's promises to an employer under a CBA are minimal – for instance, the union agrees to arbitrate rather than litigate disputes and to use its best efforts to prevent work stoppages during the term of a CBA. The real consideration to the employer is the promise that the employees will perform in accordance with the terms of the CBA. In return for that performance, the employer promises wages and benefits for the hours and years the employee works.

If the employer fails to perform, the union and active employees generally have recourse through the collectively-bargained grievance procedure. And, under certain circumstances, employees can sue the employer directly for breach of contract under Section 301. And retirees, who are no longer members of the bargaining unit, have a direct cause of action charged to the other customer, regardless of whether the contract referenced the other customer or the price charged to it. *Id.*


443. *See generally Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 468 (1960) (stating that collective bargaining agreements are different from third party beneficiary contracts and go far beyond the mere performance of its promise to that third party).

444. In a decision ignored by *Tackett*, the Supreme Court held that CBAs are not ordinary third party contracts and are not subject to the same defenses as private third party contracts. *Lewis*, 361 U.S. at 459, 468. *Lewis* identified that the employer's interest in providing such things as retiree insurance as rooted in the "commonplace of modern industrial relations for employers to provide security for employees and their families to enable them to meet problems arising from unemployment, illness, old age or death." *Id.* Thus, the promise goes from the employer directly to its individual employees. *Id.*

445. *Id.*


447. *Id.* at 219.

448. *Id.*

449. *Id.* at 216.

action under Section 301 against the employer if the employer breaches a promise under a CBA to provide benefits.\textsuperscript{451}

\textit{Yard-Man} was viewing the issue from the point of the employee, not from the perspective of the two contracting parties.\textsuperscript{452} Thus, \textit{Yard-Man} considered that, because a retiree is a third-party beneficiary to the CBA and has an individual contract right under Section 301, the focus of whether the employer’s promise is meaningless or illusory is on particular employees, not the union or the bargaining unit as a whole.\textsuperscript{453} When the employee has fully performed the condition precedent for that promise – a lifetime of industrial labor in exchange for the employer’s promised performance at retirement – the issue is not whether the employer performed other promises made to other employees covered by the CBA.\textsuperscript{454}

Under the “illusory” promise doctrine, which appears to be distinct from the rule that contracts are to be interpreted so that no provision is meaningless, “[a]n illusory promise is one where the promisor is ‘not obligated to do anything in consideration of’ the other party’s promise or performance.”\textsuperscript{455} So, if CNH is not obligated to do anything after a CBA expires in consideration of a retired employee’s performance, the promise of healthcare while eligible for or receiving a pension is illusory.

While the promise of benefits through the end of a CBA is “some” consideration for a lifetime of work, there are instances where – even then – the employer would be obligated to provide nothing. For instance, an employee retires shortly before a CBA expires but the retirement does not become effective until the first of the month following the expiration of the CBA. If an employer is not obligated to provide any retiree healthcare because the contract expired before retirement, that is an illusory promise. But, it seems absurd to think that even a few days or even a few months of healthcare is actually adequate consideration for a lifetime of work.

Another illustration of an illusory promise is in the various shutdown agreements where the UAW and CNH agreed to the terms covering the closing of its facilities and the termination of the CBA at those locations.\textsuperscript{456} In the 2002 East Moline Shutdown Agreement, for example, employees could choose to “grow into” certain “special early retirement”

\textsuperscript{452} UAW v. Yard-Man, Inc., 716 F.2d 1476, 1481 (6th Cir. 1983).
\textsuperscript{453} Id. at 1481.
\textsuperscript{454} Id.
\textsuperscript{456} \textit{See supra} notes 389-401.
programs.\textsuperscript{457} Under the 2002 Shutdown Agreement, employees could select this option if they were 50 years old and had 9.1 years of credited service.\textsuperscript{458} If they qualified, they would be entitled to two benefits: a "special early retirement" pension benefit plus the "retiree insurances that accompany such Special Early Retirement."\textsuperscript{459} Under these options, the benefits included "retiree medical beginning at age 55."\textsuperscript{460} These employees signed a plant shutdown option sheet stating: "This also means that . . . I will be eligible to enroll in retiree insurance at the time I start my retirement."\textsuperscript{461} CNH and the employee who accepted this option understood that both the pension and health care benefits would begin at age 55 – up to five years after the termination of the CBA at their plant locations.

If these benefits terminated with the end of the CBA, an event occurring up to five years before the benefits were to take effect, those benefits would be, by definition, illusory. And, CNH would retain the millions it had allocated for that obligation. This is what Tackett and Reese permitted CNH under so-called "ordinary" principles of contract law.

In his Reese III dissent, Judge Sutton discussed the two FAS 106 letters, negotiated in 1993 and 1995.\textsuperscript{462} As noted above, these letters, which CNH collectively bargained with the UAW, stated that CNH would pay a fixed amount per person for retiree healthcare, but that the retirees would not have to make any contributions for healthcare until a date beyond the expiration of the then current CBA.\textsuperscript{463} These letters necessarily and completely refute any suggestion that CNH's obligation expired with the CBA under the "concurrent" clause of the CBA as well as any notion that the CBAs are "silent" as to the duration of retiree healthcare benefits.

Nevertheless, Judge Sutton provided his spin on these letters, one supported by no record facts. Judge Sutton concluded that these letters simply "showed that CNH planned to provide coverage beyond the term of the 1995 agreement, but again a commendable and hope-filled plan does not entail a binding commitment."\textsuperscript{464} Really? A contractual commitment that is not binding on the party who has unconditionally agreed to perform it? What could be more illusory than that?

\textsuperscript{457} 2002 Shutdown Agreement, supra note 392, at 51.
\textsuperscript{458} Id.
\textsuperscript{459} Id. at 41.
\textsuperscript{460} Id. at 51.
\textsuperscript{461} Id. at 16, 25. These shutdown option sheets were produced by CNH during discovery and are in the possession of the retirees' counsel.
\textsuperscript{463} See supra notes 241-51.
\textsuperscript{464} See Reese III, 854 F.3d at 892 (Sutton, J., dissenting).
If the FAS-106 letters were just a "hope-filled" aspiration rather than a binding agreement, CNH would not have fought so hard to maintain those letters in the 1998 negotiations.\textsuperscript{465} And what of the undisputed fact that CNH did finally agree to the UAW’s demand to eliminate those letters and, thus, the post-CBA cap on CNH’s continuing post-CBA obligation to retirees?\textsuperscript{466} Apparently, CNH’s obligation when the “caps” were eliminated – to pay the full cost of retiree healthcare after the post-CBA date of the (eliminated) caps – an explicit agreement Judge Sutton and the Supreme Court refused to acknowledge – was illusory as well.

As noted above, the post-Tackett stampede to stamp out employer obligations for retiree healthcare has resulted in absolutely bizarre decisions. In Grove v. Johnson Controls, Inc., the CBA expressly stated that retiree healthcare benefits would be provided “until your death.”\textsuperscript{467} While acknowledging that this seemed to be an explicit promise of lifetime benefits, the court rejected any such interpretation as a matter of law.\textsuperscript{468} It concluded instead that the language simply meant that the “retirees were entitled to benefits during the term of the applicable CBA, unless death came before the CBA’s expiration.”\textsuperscript{469}

The most obvious problem with that analysis is that the subject was healthcare benefits. By definition, healthcare benefits do not survive the death of a retiree. Hospitals and doctors do not provide healthcare benefits to deceased retirees. Construing “until death” as Grove did, renders the phrase superfluous and therefore meaningless. If “until death” means anything in the context in which it was used, it means “until death” notwithstanding the expiration of the CBA. But, even if “until death” could act as a “limiting” provision, the court must still consider that it could be a “right-granting” provision,\textsuperscript{470} one that survives the general durational

\textsuperscript{465} See supra notes 252-59.


\textsuperscript{468} Id. at 477.

\textsuperscript{469} Id. In Grove, the court concluded that it had to follow the Third Circuit’s “clear and express” language rule enunciated in U.A.W. v. Skinner Engine Co., despite Justice Ginsberg’s concurrence noting that, under Litton, an employer’s obligations can survive the expiration of a CBA based on either “explicit” or “implicit” promises. Grove, 176 F. Supp.3d at 469-70 n. 2; see also U.A.W. v. Skinner Engine Co., 188 F.3d 130, 139 (3d Cir.1999). Because there is no “clear and express” standard in “ordinary” contract law, it is hard to see how that standard survived Tackett. Of course, because Tackett and Reese deliberately emasculated the actual holding of Litton, and subsequent courts have elevated the duration clause to presumptive status, it hardly matters that “express” durational provisions such as “until death” are rendered meaningless.

\textsuperscript{470} Id. at 477 (citing Machinists v. Masonite Corp., 122 F.3d 228, 234 (5th Cir. 1997)). The proposition that the-phrase “until death” does not automatically vest benefits but “can be construed either as a limiting or right-granting provision.” Id. Because “death” itself is limiting, there is no
clause, and which then requires the court to determine the actual intent of the
parties.

The Second Circuit has not gone so far as to ignore “express” language of a long-term obligation. In *Kelly v. Honeywell Int'l, Inc.*, the employer and its successors had continued to provide healthcare benefits for retirees of a closed plant for 18 years, until *Tackett* caused the Honeywell to re-evaluate its predecessor’s obligation.\(^1\) The district court held that the language “for the life of the retiree or surviving spouse” means just that—notwithstanding a general termination clause in the collectively bargained insurance agreement.\(^2\) The Second Circuit agreed.\(^3\) In rejecting the argument that the general duration clause prevailed, the court noted the *Litton* exception (omitted in *Tackett* and *Reese*) that “[r]ights which accrued or vested under the agreement will, as a general rule, survive termination of the agreement.”\(^4\)

In *Reese*, the 1998 GBP provided that CNH agreed to pay the full cost of the defined healthcare benefits while employees and surviving spouses were “eligible for or receiving” a pension benefit.\(^5\) Every other bit of evidence informs and supports that this is exactly what CNH agreed to in 1971 and what, during the following decades, CNH always understood its obligation to be. In short-circuiting the process informed by the ordinary rules of contract interpretation by applying the “plain meaning” rule to exclude probative evidence, the Supreme Court in *Reese* ignored its primary function – to determine what the parties actually intended.

**H. Contracts Containing No Provisions as to Duration Of An Obligation Will Be Construed to Operate For a Reasonable Time, Determined With Due Consideration of All Factors Involved**

In *Tackett*, the Court cited Corbin for the proposition that contracts that are silent as to the duration of an obligation will not ordinarily be treated as “operative in perpetuity” but only for “a reasonable time.”\(^6\) As usual, the Court gave short shrift to the appropriate analysis.

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\(^1\) *Kelly v. Honeywell Int'l, Inc.*, 933 F. 3d 173, 178 (2d Cir. 2019).

\(^2\) *Id.* at 183.

\(^3\) *Id.*

\(^4\) *Id.* at 182 (quoting Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 207 (1991)).

\(^5\) Declaration of Jack Reese, Ex. 50C, *supra* note 130, at 65.

First, the predicate that Corbin was addressing – where the contract had no durational provisions as to an obligation – did not exist in either Tackett or Reese. In Tackett, as the concurrence noted, the obligation lasted while a retiree was “receiving” a pension and “until death or remarriage” for a surviving spouse.477

Reese, following Judge Sutton’s lead, characterized the GBP as being “silent” as to the duration of the benefits.478 This is another odd turnaround for Judge Sutton who, in Reese I concluded that the retirees were entitled to summary judgment based on the “plain language” of the 1998 GBP.479 By Reese III, this “plain language” somehow morphed into “silence.”

The operative language of the GBPs did not change over the years. Under the heading “Provisions Applicable to Employees Retired on Company Pension and Surviving Spouses Receiving Company Pension,” the 1998 GBP provided: “Employees who retire under the Case Corporation Pension Plan for Hourly Paid Employees after 7/1/94, or their surviving spouses eligible to receive a spouse’s pension under the provisions of that Plan, shall be eligible for the Group [healthcare and life insurance] benefits as described in the following paragraphs.”480

In Reese I, Judge Sutton agreed that this language was “nearly identical” to that which the district court in Yolton held was “express” language tying eligibility for retiree health care to eligibility for a lifetime pension.481 In Yolton, the Sixth Circuit held that this “plain language of the CBAs requires us to conclude that the district court did not abuse its discretion by issuing the injunction . . . .”482 In Reese I, Judge Sutton characterized this very language as a “commitment” and a “promise,”483 noting further that, as in Yolton, the 1998 GBP contains “language

477. Tackett, 574 U.S. at 444 (Ginsburg, J., concurring). At oral argument in Tackett, the first comment from the bench, by Justice Ginsberg, was “[b]ut the – we’re dealing with a case where there isn’t silence.” Transcript of Oral Argument at 3, Tackett, 574 U.S. 427 (2015) (No. 13-1010). Throughout oral argument, the justices and counsel discussed the CBA’s durational language. Id. at 18, 19, 32, 40, 41, 43.


480. Declaration of Jack Reese, Ex. 50C, supra note 130, at 65.

481. Reese I, 574 F.3d at 322.


483. Reese I, 574 F.3d at 322.
concerning entitlement to benefits upon retirement; it ties eligibility for health benefits to eligibility for a pension.\textsuperscript{484}

How did "express" and "plain" language – language that contained an explicit "promise" and an express "commitment" – become "silence?" To deprive the words the parties themselves chose of all meaning by judicially rendering them "silent" is to judicially negate any "commitment" made and to relieve one party of the "promise" those words express.

Second, unlike \textit{Tackett}, \textsuperscript{485} Corbin did not equate "in perpetuity" with "lifetime."\textsuperscript{485} To the contrary, Corbin saw those concepts as distinct. In the very section cited by \textit{Tackett}, Corbin used an example of a sales contract containing a provision that "no other lot in the tract shall ever be sold for less than $1,000."\textsuperscript{486} Corbin stated that a court could avoid construing those words as a perpetual obligation by interpreting them as one lasting a lifetime; as "meaning only that the promoter himself will never, \textit{during his life}, sell any lot for less than $1,000."\textsuperscript{487}

Third, Corbin's solution, when there was no durational provision for an obligation, was to construe the obligation as "operative for 'a reasonable time' to be determined as a question of fact with due consideration to all factors involved."\textsuperscript{488} Of course, Corbin was not thinking about CBAs and the factors involved when considering the duration of retirement benefits. Thus, even if this contract principle were pertinent, when the issue is retiree healthcare, "factors" that must be given due consideration are language in the CBA that provides benefits "until death," or "until death or remarriage," or language that "ties" healthcare benefits to a lifetime pension and other durational language conferring other long term benefits on retirees, employees and spouses.\textsuperscript{489} It must include evidence of what the parties themselves thought their obligation to mean.\textsuperscript{490} It must include the reality that employees work through many CBAs to earn eligibility for healthcare in retirement. It must include due consideration of whether benefits only to the end of the current CBA are "reasonable" in light of

\textsuperscript{484} \textit{Id.} at 323.

\textsuperscript{485} \textit{See CORBIN, supra} note 95, § 553 at 212-213. Neither did the Seventh Circuit. \textit{See Bidlack v. Wheelabrator Corp.}, 993 F.2d 603, 607 (7th Cir. 1993) ("The obligation for which the plaintiffs contend in this suit is not perpetual, because retired people and their widows (or widowers) do not live forever.").

\textsuperscript{486} \textit{CORBIN, supra} note 95, § 553 at 213.

\textsuperscript{487} \textit{Id.} (emphasis added).

\textsuperscript{488} \textit{Id.} § 553 at 216.

\textsuperscript{489} \textit{See generally} UAW v. Yard-Man, Inc., 716 F.2d 1476, 1479 (6th Cir. 1983) ("Resolution of the UAW's claim of lifelong insurance benefits for retirees requires interpretation of key contractual language in the collective bargaining agreement.").

\textsuperscript{490} \textit{See id.} ("[T]he court should first look to the explicit language of the collective bargaining agreement for clear manifestations of intent.").
these factors and the common understanding (at least before *Tackett*) that retiree healthcare benefits are a kind of deferred compensation. Of course, these are among the factors that *Yard-Man* and its Sixth Circuit progeny considered in their determination of what the parties considered to be a "reasonable" duration of the employer's obligation for retiree healthcare.

On this issue, Williston quoted at length from *Warner-Lambert Pharmaceutical Co. v. John J. Reynolds, Inc.*, where the issue was how long the makers of Listerine were required to pay royalties to the company that had developed the original formula. At the time of the dispute, the obligation had been in effect for seventy-five years. The district court cautioned against "re-writing" a contract based on an "indiscriminate application" of the word "perpetuity," stating:

> Contracts which provide no fixed date for the termination of the promisor's obligation but condition the obligation upon an event which would necessarily terminate the contract are in quite a different category and it is in this category that the . . . agreements fall. On the face of the agreements the obligation . . . to pay is conditioned upon the continued manufacture or sale of Listerine.

Likewise, the GBPs at issue here expressly condition payment of retiree healthcare benefits on an event stated in the contract itself – the period that a retiree or surviving spouse is "eligible for" or "receiving" a company pension. Or, at the very least, that is a "fairly plausible" interpretation of the contract language. As the district court stated in *Warner-Lambert*, "[t]here is nothing unreasonable or irrational about imposing such an obligation."

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491. Allied Chem. & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co., Chem. Div., 404 U.S. 157, 180 (1971); see also Summary of Statement No. 106, *supra* note 229 ("Since payment is deferred, the benefits are a type of deferred compensation. The employer's obligation for that compensation is incurred as employees render the services necessary to earn postretirement benefits.").

492. *Yard-Man*, 716 F.2d at 1480-82.


495. *supra* note 25, § 31.5.

496. *Id.* at 661-62.


I. Final Comments On A Ceremonial Interpretation of CBAs

Given that “intent” is often subjective and contract language is an imperfect means of expressing what people “intend,” contracts are often messy things. That is especially true with CBAs, which are contracts that necessarily address the whole range of subjects governing the employment relationship for an entire workforce in a single document. In most situations, courts are not equipped to address and reconcile all of the messy complexity of details arising from a “mature” CBA. It is not surprising that pertinent facts are ignored when courts attempt to boil things down into a more simplified, coherent analysis. Courts often cite what “facts” they deem sufficient to support their decision, ignoring factual details entirely or simply referring to them obliquely. That certainly was the problem with the majority opinion in Reese III, something that Judge Sutton took full advantage of when he selectively employed Section 4A of the 1998 CBA, the group insurance “concurrent” clause, as a durational clause and “all anyone needs to know to decide this case.”

That, of course, does not excuse indifferent, negligent factual or legal analysis. When the Supreme Court decided to review Reese III, the CNH retirees had a right to a full, fair, and impartial treatment of their claims. By now, it should be apparent that the Supreme Court in Reese, relying on Judge Sutton’s intentionally distorted analysis of the facts, provided only a ceremonial application of selected ordinary principles of contract interpretation instead of the full legal process they were due. Worse, by its summary reversal, the Court foreclosed any opportunity for the retirees to point out the many flaws in the Court’s ceremonial approach to “ordinary principles” of contract law.

499. See supra notes 93-110.
501. Id. at 581-82 (“The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance [as an arbitrator chosen by the parties], because he cannot be similarly informed.”).
V. **TACKETT'S INference Conflation - "inference" Is Not a DiRty WOrd in contract iNTerpretatIon**

A. **TACKETT'S Conflation of the Yard-Man "inference"**

In *Yard-Man*, the discussion of a “contextual” or “status” inference favoring vesting came at the conclusion of the *Yard-Man* analysis, and only after the court had already determined the intent of the parties by looking for contract indicia of intent within the CBA itself.503 But, in *Tackett*, the Court went far beyond what had been considered the “*Yard-Man* inference” to condemn the entire analysis of *Yard-Man* and later Sixth Circuit decisions as a series of unsupportable “inferences.”504

In *Yard-Man*, the court initially stated that “traditional rules for contractual interpretation” apply as long as they are consistent with federal labor policies.505 A “court should first look to the explicit language of the collective bargaining agreement for clear manifestations of intent,” keeping in mind that “even the most explicit language can, of course, only be understood in light of the context which gave rise to its inclusion.”506 Each CBA provision should be interpreted “consistently with the entire document and the relative positions and purposes of the parties.”507 Labor agreements should be construed so as to render no terms “nugatory” and to “avoid illusory promises.”508 Where ambiguities exist, the court “may look to other words and phrases” in the CBA “for guidance,” “[v]ariations in language used in other durational provisions of the agreement may, for example, provide inferences of intent useful in clarifying a provision whose intended duration is ambiguous.”509 Applying these principles, the Sixth Circuit agreed with the district court that the parties intended retiree health benefits to extend beyond the CBA’s expiration.510

*Yard-Man* did not end its discussion with this conclusion based on the language of the CBA itself. Instead, as a “final” point, the Sixth Circuit explained that the *context* in which retiree benefits were negotiated supported its conclusion. The court recounted the legal fact that retiree benefits are permissive subjects of bargaining and, in light of this, it was

505. *Yard-Man*, 716 F.2d at 1479.
506. *Id*.
507. *Id*.
508. *Id.* at 1480.
509. *Id.* (emphasis added).
510. *Id.*
“unlikely that such benefits, which are typically understood as a form of delayed compensation,” would be left to “the contingencies of future negotiations.” 511

Only then, as a “further” point, Yard-Man stated that retiree benefits are in a sense “status” benefits that carry an inference that they are intended to last as long as the prerequisite status-retirement lasts. 512 Yard-Man concluded that retiree healthcare benefits were not “interminable by their nature” and added:

Nor does any federal labor policy . . . presumptively favor the finding of interminable rights to retiree insurance benefits when the collective bargaining agreement is silent. Rather, as part of the context from which the collective bargaining agreement arose, the nature of such benefits simply provides another inference of intent. Standing alone, [that contextual inference] would be insufficient to find an intent to create interminable benefits. In the present case, however, this contextual factor buttresses the already sufficient evidence of such intent in the language of [the CBA]. 513

It was this extra-contractual “inference” of Yard-Man, gleaned from the general context of federal labor law and the “status” of retirement that became known as the Yard-Man inference. 514 This inference was attacked by employers repeatedly over the years, 515 generally rejected by other Circuits, 516 and criticized by Judge Sutton in his Noe dissent as effectively a

511. Id. at 1482.
512. Id.
513. Id.
515. See, e.g., Cole, 549 F.3d at 1074 (stating that defendant employers contended that cases involving the utilization of the Yard-Man inferences were “wrongly decided”); Yolton, 435 F.3d at 579 (“[The Yard-Man] inference has caused much consternation for employers.”); Maurer, 212 F.3d at 917 (stating that defendant employer argued that lower court erred in its application of the Yard-Man inference); Golden, 73 F.3d at 654-55 (stating employer argued that the court should modify the Yard-Man inference).
516. See Senior v. NSTAR Electric and Gas Corp., 449 F.3d 206, 217 n.16 (1st Cir. 2006) (stating plaintiffs argued that the standard the 6th Circuit Court used in Yard-Man would require an inference in favor of vesting benefits, however, the court felt that “[i]t is doubtful that Yard-Man itself stands for the broad rule that plaintiffs ascribe to it”); UAW v. Skinner Engine Co., 188 F.3d 130, 140-41 (3d Cir. 1999) (“[W]e disagree with Yard-Man to the extent that it recognizes an inference of an intent to vest.”); Int'l Ass'n of Machinists and Aerospace Workers v. Masonite Corp., 122 F.3d 228, 231 (5th Cir. 1997) (“[T]his circuit questioned the [Yard-Man] inference.”); Bidlack v. Wheelabrator Corp., 993 F.2d 603, 606-07 (7th Cir. 1993) (reinstating the Seventh Circuit's position that there is no presumption that health benefits vest on retirement); Anderson v. Alpha Portland Indus.,
"presumption" that benefits vest.517 By the time Reese I was decided in 2009, the Yard-Man inference had been demoted by Judge Sutton himself, in a typically piquant phrase, to "nothing more than this: a nudge in favor of vesting in close cases."518

In Tackett, the Supreme Court granted certiorari in order to resolve the conflict between the circuits relating to the Yard-Man inference, something it had refused to on many occasions in the past.519 Mindful of how toxic the Yard-Man inference had become, the Tackett retirees basically abandoned it in their brief.520 At the hearing, counsel for the retirees assured the Supreme Court that the retirees would welcome a remand to prove a contractual right to lifetime health care benefits under "ordinary" principles of contract interpretation without relying on any extra-contractual "inference."521

In Tackett, the Court emphatically rejected the Yard-Man inference, noting that, while a court could look at extra-contractual evidence such as industry practices, there must be concrete evidence to support such an inference, and it cannot be the kind of general conceptions referenced in Yard-Man in support of its additional inference of vesting.522 In the process, the "Yard-Man inference" somehow became synonymous with Yard-Man's entire legal analysis. Thus, in Tackett, the extra-contractual "Yard-Man inference" had morphed into the "Yard-Man inferences," demonstrated by Tackett's criticism of Yard-Man's analysis of the illusory promises doctrine and of post-Yard-Man decisions that had accorded

836 F.2d 1512, 1517 (8th Cir. 1988) ("[W]e disagree with Yard-Man to the extent that it recognizes an inference of an intent to vest."). But see Keffer v. H.K. Porter Co., 872 F.2d 60, 64 (4th Cir. 1989) ("Surely the parties to the collective bargaining agreement realized that employees who are willing to forego current compensation in expectation of retiree benefits 'would want assurances that once they retire they will continue to receive such benefits.'") (quoting Yard-Man, 716 F.2d at 1482).

517. --, 520 F.3d at 567-68 (Sutton, J., concurring in part and dissenting in part).


520. In its reply, the petitioner stated that "[R]espondents try to put as much distance as they can between Yard-Man and the judgment in this case." Reply Brief for Petitioners at 1, M&G Polymers USA, LLC v. Tackett, 574 U.S. 427 (2016) (No. 13-1010).


weight to actual contractual provisions that tied eligibility for health care benefits to eligibility for pension.523

The concurrence, in what seemed to be a disguised dissent, stressed the limits of the majority decision, noting that traditional concepts of contract interpretation looked at the "entire agreement," that vested rights could be implied as well as explicit, and that language tying the eligibility for health care benefits to pensions or a consideration of other durational provisions in the CBA could illuminate the meaning of the retiree health care provisions.524

However valid (or invalid) Tackett's criticism of the "tying" analysis may otherwise be, that analysis does not involve any extra-contractual inference. The language "tying" eligibility for healthcare benefits to pensions comes directly from the 1998 GBP itself – and from the express language conferring health care benefits on retirees525 – and either defines eligibility for a limited benefit, as employers' argued, or discloses the duration of that benefit, as retirees argued. It is not much of an "inference," for example, to deduce that when the CBA provides a retiree is entitled to healthcare benefits if she is "receiving a pension," that the employer's contractual obligation is to provide healthcare benefits for the duration of time that the retiree is receiving a pension.

Likewise, any comparative analysis of CBA language conferring other benefits on active employees (or on their spouses) with language conferring retiree healthcare benefits is based on specific provisions of the CBA.526 Such a comparison of contractual language is certainly not "extra-contractual," the supposed defect in the Yard-Man status inference analysis.527

B. DRAWING INFERENCES OF INTENT FROM OTHER ESTABLISHED FACTS IS COMMON PRACTICE IN THE CONTRACT INTERPRETATION

What is missing from the Tackett/Reese approach is any consideration of just what an inference is and the critical and legitimate function

523. Id. at 428, 438.
524. Id. at 443 (Ginsburg, J., concurring).
525. See Declaration of Jack Reese, Ex. 50C, supra note 130, at 65.
526. See supra notes 167-81.
527. See Tackett, 574 U.S. at 438-39 ("Yard-Man's assessment of likely behavior in collective bargaining is too speculative and too far removed from the context of any particular contract to be useful in discerning the parties' intention.").
inferences play in “ordinary” rules of contract interpretation.\footnote{528} According to Black’s Law Dictionary, an inference involves the “process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted.”\footnote{529} In other words, when the parties’ intent is not clear on the face of a contract, contractual interpretation involves drawing inferences about intent – guessing at what the parties meant based on what they said in other parts of the written agreement, from the context in which the agreement was negotiated or from the parties’ practices in administering the agreement.

The Supreme Court, in \textit{Barnhart v. Peabody Coal Co.}, noted that interpretative canon \textit{expressio unius est exclusio alterius} employs the “inference that items not mentioned were excluded by deliberate choice, not inadvertence.”\footnote{530} In \textit{Cramer Products, Inc. v. International Comfort Products, Ltd.}, the Tenth Circuit stated that the ordinary contract rule favoring specific over general provisions is premised on the “reasonable inference . . . that the specific provisions express more exactly what the parties intended.”\footnote{531} In \textit{Pacific Portland Cement Co. v. Food Machinery & Chemical Corp.}, the Ninth Circuit held that a “deduction” of the parties’ intent was warranted from their conduct subsequent to the execution of the contract and before the controversy arose.\footnote{532} In \textit{re Am Trust Financial Corp.}, the Sixth Circuit stated that: “making inferences from circumstantial evidence and the parties’ course of performance is standard procedure in construing ambiguous contracts.”\footnote{533}

\textit{Yard-Man’s} inquiry into the “context in which these benefits arose” is, like all other matters of contract interpretation, based upon inference.\footnote{534} But, it was premised directly on Brennan’s concurrence in \textit{America Manufacturing} that “[w]ords in a collective bargaining agreement . . . are to be understood only by reference to the background which gave rise to their inclusion.”\footnote{535} And, \textit{Yard-Man} relied explicitly on \textit{Pittsburgh Plate Glass} for the “context” in which retiree health care benefits are negotiated.

\textit{Inference, BLACK’S LAW DICTIONARY} (11th ed. 2019).
\textit{Pacific Portland Cement Co. v. Food Mach. & Chem. Corp.}, 178 F.2d 541, 554 (9th Cir. 1949).
\textit{In re Amtrust Fin. Corp.}, 694 F.3d 741, 757 (6th Cir. 2012).
\textit{UAW v. Yard-Man, Inc.}, 716 F.2d 1476, 1482 (6th Cir. 1983).
as permissive subjects of bargaining and a form of delayed compensation. Tackett missed or simply ignored the contextual aspect of the Yard-Man analysis, which is not surprising given Tackett’s failure to cite American Manufacturing and Pittsburgh Plate Glass or analyze the concepts those cases addressed.

In Reese III, the majority focused on the CBA language and agreed with the district court’s post-Tackett analysis that, based solely on the terms of the CBA itself, there was at least ambiguity as to the parties’ intent, ambiguity resolved by the unequivocal extrinsic evidence favoring the retirees’ interpretation. The majority in Reese III employed no extra- contractual “inferences.”

No matter. The Supreme Court summarily reversed, siding unequivocally with Judge Sutton’s factual misrepresentations that the insurance “concurrent” clause was all anyone – at least any judge—needed to know. In doing so, the Court asserted that the Sixth Circuit was still employing the outlawed “Yard-Man inferences,” consistently using the plural form. In the process, the Court relegated specific language relating to the duration of retiree health care benefits – the language tying eligibility for retiree healthcare to eligibility for or receipt of a lifetime pension – subservient to the more general, and selectively cited, “concurrent” provision of the CBA.

Incredibly, the Court stated that the 1998 CBA was “silent” on the duration of retiree health care benefits. This assertion of “silence” was critical to the Court’s elevation of the general durational clause to presumptive status. But, when the GBP states that retirees and their surviving spouses are eligible for healthcare benefits if they are “eligible for” or “receiving” pension benefits, it is the opposite of silence. Both eligibility and receipt of pension benefits are durational concepts. Thus, this

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537. In Tackett, the Court discounted any reliance on the permissive/mandatory bargaining subject dichotomy, noting that in the case before it, the parties had agreed to make retiree benefits a mandatory subject of bargaining. M&G Polymers USA, LLC v. Tackett, 574 U.S. 427, 439 (2015). In Pittsburgh Plate Glass, however, the Court concluded that the fact that it was an established industry practice to bargain over retiree healthcare did not alter is conclusion about the status of retirees in bargaining. Pittsburgh Plate Glass Co., 404 U.S. at 176.


539. Id.


541. Id. at 762, 763, 764, 765, 766.

542. Id. at 766.

543. Id.
contractual language – previously interpreted as clear evidence of intent in Reese I and in Cole544 – still could be “fairly” interpreted to mean that, as long as that person is eligible for or receiving pension benefits, he/she is eligible for healthcare benefits.545 In fact, neither an inference nor ordinary rules of contract interpretation seem remotely necessary to this “plain meaning” reading, which may be why the Sixth Circuit had historically found such language so probative.546 The Reese retirees and surviving spouses are still eligible for and/or receiving a lifetime pension. But, they have been deprived of the healthcare that the GBPs tied to pension eligibility.

Likewise, the FAS 106 Letters, which capped CNH’s obligation for retiree healthcare, but only after the expiration of the CBA, were collectively bargained and spoke explicitly to the duration of that obligation, as did the negotiated 1998 elimination of that post-CBA cap.547 The only way to maintain that the CBA was “silent” on the issue of the duration of retiree healthcare benefits was to silence those and other durational provisions of the CBA by ignoring them – or as Judge Sutton did, by calling them aspirational and therefore illusory.548

The final irony, for retirees at least, is that the Reese plaintiffs disclaimed any reliance on the Yard-Man inference from the very beginning, as they did in the parallel Yolton litigation.549 The disclaimer was in recognition both of the disputed nature of the inference and the perceived strength of the facts, based on the express CBA language and the unequivocal extrinsic evidence – in words and deeds – of CNH’s intent to provide lifetime healthcare benefits for retirees. In the end, the benefits that CNH had so clearly promised for life were lost on the basis of a summary reversal that cannot be justified under “ordinary” principles of contract interpretation or on any objective analysis of the actual facts.

546. See generally Cole, 549 F.3d at 1075 (an opinion by the Sixth Circuit stating, “[h]ere, unlike the facts in North Bend, the parties expressed their intent in unambiguous contract language”); Yolton v. El Paso Tenn. Pipeline Co., 435 F.3d 471, 580 (6th Cir. 2006); Golden v. Kelsey-Hayes Co., 73 F.3d 648, 656 (6th Cir. 1996).
547. See supra notes 241-59.
548. See supra notes 462-64.
549. Brief in Support of Plaintiffs' Motion for Summary Judgment as to Liability (Reese), supra note 222, at 8 n.7; Plaintiffs' Brief in Support of Plaintiffs' Motion for Summary Judgment as to Liability (Yolton), supra note 377, at 9 n.7.
VI. THE SIGNIFICANCE OF A PER CURIAM REVERSAL BASED ON THE REESE III DISSENT

For the author, who had spent fifteen years navigating the Yolton and Reese retirees through the shoals of hard fought, well-financed litigation – litigation that resulted in decision after decision from the district court based on actual facts – the per curiam reversal based on a misrepresentation of “facts” was a devastating blow. When he finally mustered the fortitude to closely read the Reese decision, the author was stunned to learn that the Supreme Court had uncritically accepted Judge Sutton’s dissent as the basis for its decision.

There are hints as to how this could have happened. Judge Sutton was a well-regarded clerk for Justice Powell and then for Justice Scalia; he was one of Judge Scalia’s favorite clerks. In turn, Judge Sutton has been one of the more prolific “feeder” judges, sending ten law clerks to the Supreme Court between 2010 and 2014. Kirkland & Ellis attorneys K. Winn Allen and Craig Primis authored an amicus brief for the ERISA Industry Committee supporting the employers’ position in both Tackett and Reese. Mr. Allen clerked for Judge Sutton and then Justice Alito. Mr. Primis clerked for Justice Thomas, who wrote Tackett. These circumstances may have engendered (or represented) a symbiotic relationship that affected how both the Justices and clerks viewed Judge Sutton’s opinions.

550. The author was not involved in the litigation by the time Reese III was decided.

551. Adam Liptak, On the Bench and Off, the Eminently Quotable Justice Scalia, N.Y. TIMES (May 11, 2009), https://www.nytimes.com/2009/05/12/us/12bar.html (“One of my former clerks whom I am the most proud of now sits on the Sixth Circuit Court of Appeals’ in Cincinnati [Justice Scalia] said, referring to Judge Jeffrey S. Sutton.”).


Bobby Burchfield, CNH’s attorney for a decade in *Reese*, also had written an amicus brief for the National Association of Manufacturers in *Tackett*. Mr. Burchfield was a long-time Republican operative, who had served as General Counsel to the George H.W. Bush reelection campaign, was appointed by George W. Bush to the Antitrust Modernization Commission, and served as Ethics Advisor for the Donald J. Trump Revocable Trust. There are many additional connections, which go beyond the scope of this article that might explain the blind faith, if that is what it was, the conservative Justices and their clerks had in CNH’s arguments and Judge Sutton’s views.

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558. See 2017 Annual Report, *FEDERALIST SOCIETY* (Apr. 9 2018), https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/MvqGg29Q81NllLcw0wGDQlspEPHGMkvUxyjJays.pdf [hereinafter *Annual Report*]. In its 2017 Annual Report, the Federalist Society highlighted many past events, including “Celebrating Justice Thomas: 25 Years on the Supreme Court” and a discussion on “Interpreting State Constitutions,” featuring Judge Sutton. *Id.* at 8, 22. Justice Gorsuch gave a speech at the Antonin Scalia Memorial Dinner, which was attended by Justice Alito, Senate Majority Leader Mitch McConnell and then Attorney General Jeff Sessions. *Id.* at 32, 33, 57, 58. Justice Thomas and several high ranking Trump administration officials either spoke at, attended or were highlighted at the National Convention including Vice President Pence, Chief of Staff Mulvaney, former Labor Secretary Acosta, former EPA Administrator Pruitt, Kellyanne Conway, former White House Counsel McGahn and Transportation Secretary Chao. *Id.* at 21, 32, 33, 39, 58. Contributors to the Federalist Society in 2017 included Mr. Burchfield; Allyson Ho (who argued *Tackett* for M&G Polymers); Kathryn Todd (former clerk for Justice Thomas and Chamber of Commerce attorney on amicus brief in *Tackett*); Steven Lehotsky (attorney on Chamber of Commerce amicus brief in *Tackett* and former Scalia clerk); the U.S. Chamber of Commerce (amicus in *Tackett* and *Reese*); Winston & Strawn (counsel for the Chamber of Commerce in *Tackett*); Kirkland & Ellis (counsel for amicus ERISA Industry Committee in *Reese*); Morgan, Lewis & Bockius (counsel for M&G Polymers in *Tackett*); Mayer Brown (counsel for amicus Whirlpool in *Reese*); Jones Day (counsel for amicus Chamber of Commerce et al, in *Reese*) and Ogletree Deakins, Nash, Smoak & Stewart (counsel for amicus Council on Labor Law Equality in *Tackett*). *Id.* at 48, 49, 50; see also *Tackett*, 574 U.S. at 429; *Kate Comerford Todd, FEDERALIST SOCIETY*, https://fedsoc.org/contributors/kate-todd (last visited Nov. 20, 2019); Brief for the Chamber of Commerce of the United States of America and Business Roundtable as Amici Curiae in Support of Petitioners, *Tackett*, 574 U.S. 427 (No. 13-1010); *Steven Lehotsky, FEDERALIST SOCIETY*, https://fedsoc.org/contributors/steven-lehotsky (last visited Nov. 20, 2019); ERISA Motion for Leave, *supra* note 553; Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curia for Whirlpool Corporation in Support of Petitioners, CNH Indus. N.V. v. Reese, 583 U.S. ___, 138 S. Ct. 761 (2018) (No. 17-515); Motion and Brief of the Chamber of Commerce of the United States of America, the National Association of Manufacturers, American Benefits Council, and the Business Roundtable as Amici Curiae in Support of Petitioners, *Reese*, 583 U.S. ___, 138 S. Ct. 761 (No. 17-515); Brief of the Council on Labor Law Equality and the Society for Human Resource Management as Amici Curiae in Support of Petitioner M&G Polymers USA, LLC, *Tackett*, 574 U.S. 427 (No. 13-1010). The Federalist Society describes itself as a “group of conservatives and libertarians” who place a premium on the “rule of law.” *Annual Report, supra* note 558, at 3. It was
From the standpoint of a cynical union lawyer like the author, none of this is all that surprising. Unions have hardly been the beneficiaries of the largesse of "conservative" Justices. What was bewildering, and to the author most heart-rending, was the silence of the four "liberal" Justices in Reese.559 The absence of even a hint of protest is striking and strikingly disappointing. Because one must not infer that indolence, indifference, incompetence, ignorance or naïveté explains the failure of four Justices of the United States Supreme Court to probe beneath the surface of Judge Sutton’s dissent – or at least suggest that the retirees should be given the opportunity to do so – the alternative possible rationales for their silence are chilling. Did these paragons of liberal democratic thought (in the classic and contemporary sense) actually know what was happening and what they were doing and, hiding behind a per curiam decision, not care enough to even note the travesty?560 Or, do they have no interest in the welfare of working class Americans? Or, perhaps, given that the issue was simply one of "contract interpretation," were they reserving their influence and dissents for more "important" issues?

VII. CONCLUSION

Courts have developed principles of contract interpretation to guide the attempt to discern the actual intent of the contracting parties in dispute. That goal is, most lawyers and legal scholars agree, the "cardinal rule" of contract interpretation: It is the raison d'être for judicial intervention in and resolution of contract disputes.561

In Tackett and Reese, the Supreme Court engaged in a ceremonial application of some "ordinary principles" of contract interpretation, an exercise that precluded consideration of a wealth of relevant and compelling evidence of intent. After Tackett, and especially after Reese, lower courts must now apply, in place of "ordinary" principles of contract

founded on the principle that "it is emphatically the province and duty of the judiciary to say what the law is, not what it should be." Id. Whether Federalist Society members should be proud of Tackett and Reese depends on how seriously they view these foundational principles.

560. See Ira P. Robbins, Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions, 86 TUL. L. REV. 1197, 1210-11 (2012) ("Thomas Jefferson likely would have agreed, because the per curiam 'shield[s] the [Justices] compleatly [sic].' He argued that '[t]he practice is certainly convenient for the lazy, the modest, & the incompetent.'") (alterations in original) (footnote omitted) (quoting Thomas Jefferson).
561. See WILLISTON, supra note 25, § 32.14 (noting that the "purpose of judicial interpretation is to ascertain the parties' intentions"); see also KNIFFIN, supra note 80, § 24.7 ("The cardinal rule with which all interpretation begins is that the purpose of interpretation is to ascertain the intention of the parties.").
interpretation, a shabby substitute – an almost irrebuttable presumption that retiree healthcare benefits do not survive the expiration of the CBA regardless of the actual evidence of what the parties intended. Of course, courts have always selectively manipulated “ordinary” rules and the purported “facts” to reach a desired result.562 But, that is the antithesis of the legitimate function of the judiciary; it is the antithesis of the impartial “Rule of Law” that is the bedrock of our democracy.563 When the Supreme Court engages in this kind of unseemly behavior, and does it so blatantly as in Reese, confidence in the Court as the impartial arbiter of last resort should and must be questioned. The best response is a direct and comprehensive – a distinctly non-ceremonial – inquiry into what happened.

When the Supreme Court makes controversial decisions on issues of Constitutional importance, legal scholars question and analyze the Court’s “legitimacy.”564 Because the Court is comprised of individual justices, whose individual political and judicial views vary widely, even within ideological spectrums, the concept of the Court’s “legitimacy” is intertwined with, and affected by, those views and how they play out over time in individual decisions involving disparate issues.565

None of these weighty matters were involved here. Tackett and Reese dealt with the mundane task of interpreting a collective bargaining agreement. No evolving question of Constitutional law, or of a fundamental personal or political right, was implicated in the inquiry or the result. But can the Supreme Court be trusted to decide any dispute impartially in the wake of decisions as “ordinary” as Tackett and Reese – where the Court ignores its own precedent, misrepresents undisputed facts, displays an

562. See FARNSWORTH, supra note 9.
563. On November 29, 2018, the Sixth Circuit docketed a letter it received from a Reese retiree about the court’s refusal to reconsider its refusal to remand the case to the district court for a decision on the meaning of the 2002 Shutdown Agreement. The letter stated, in part: “If the Sixth Circuit Court of Appeals cannot even look at this Agreement, then where do we go? The court is the only and last place we can turn to. The court is there for everyone, I thought, rich or poor, white collar or blue collar, and justice for all. I don’t believe we are asking too much, for the court to read and rule on this Agreement separately. This was something we worked for all our lives and were promised in our senior years. To have this taken away without one of our US courts to at least review it is a tragedy.” Letter, Kevin Diederich to [Clerk] Deborah S. Hunt, Reese v. CNH Industrial N.V., No. 15-2382 (6th Cir.), ECF No. 89.
ignorance of the legal and practical context of collective bargaining and federal labor policy and selectively (mis)applies it "ordinary" contract principles it purports to champion? Can the Court be trusted to get the "big" things right if get the "little" things so wrong?

Complicating matters is that both Tackett and Reese were unanimous decisions. Every justice in Tackett ignored explicit Supreme Court precedent that CBAs are not ordinary contracts. Reese was decided as a per curiam reversal, showing that all nine Justices signed off to the theory that the dispute was "straightforward." What can scholars or lawyers make of these kinds of routine decisions based on mundane contract law? Are these decisions simply aberrations; does anyone care; and, in the end, what does it matter?

As to the Reese retirees, this article will be of no consolation. The Supreme Court negated their contractual benefits to lifetime healthcare without a hearing, based on a judicial misrepresentation of the basic, undisputed facts. For the author, who spent a majority of his career representing retirees, and more than a decade representing the Reese retirees, this article was a necessary catharsis but no lasting comfort.

The author hopes that an impartial observer who happens to come across this article will be appalled by Tackett and even more so by Reese. He hopes that whatever sunlight this article casts on this particular miscarriage of justice will result in some additional critical scrutiny of every Supreme Court decision. For the "rule of law" is nowhere to be found in Tackett and Reese and, in the words of John Locke, engraved on the Department of Justice Building in Washington, D.C., "wherever law ends, tyranny begins."

VIII. POSTSCRIPT

In the early 1990's, Jim Ellis, a UAW International Representative whom I had known and respected for years, asked me to represent a group of retirees who had once worked for Bendix Corporation and who were


568. John Locke, Two Treatises of Government: In the Former, the False Principles, and Foundation of Sir Robert Filmer and His Followers Are Detected and Overthrown, The Latter is an Essay Concerning the True Original, Extent, and End of Civil Government, bk II, §202 (Hollis ed. 1689) ("[Wherever] law ends, tyranny begins, if the law be transgressed to another's harm . . . [a]nd whosoever, in authority, exceeds the power given him by the law, and makes use of the force he has under his command, to compass that upon the subject, which the law allows not; ceases in that to be a magistrate . . . ").
receiving deferred vested pensions. The case was based on the Bendix Guaranty, a two-page agreement, dated April 1, 1976, between Bendix and the UAW, that protected pension and healthcare benefits for certain employees who would be affected by the planned divestiture of certain Bendix divisions in Michigan and New York.

The Bendix Guaranty provided that after and despite the divestiture, Bendix would guaranty certain pension benefit payments under the Bendix Pension Plan ("the Protected Amount") and would also guaranty the level of health care benefits provided in the 1974 CBA. The duration of the latter obligation was for "the period of time installments of the Protected Amount are due"569 – another instance where retiree healthcare was "tied" to receipt of pension benefits.

The Guaranty was not specifically limited to those employees who retired from active employment. Instead, it defined the protected class of employees as those who had terminated employment before the divestiture date and who, at their termination, "had at least ten years of Credited Service under the terms of the Bendix (Pension) Plan." Based on the plain language of the Bendix Agreement, Ellis wanted me to sue on behalf of employees with deferred vested pension benefits, those who left employment at Bendix with a vested pension (at least ten years of credited service), but before they were eligible to retire from active employment.

Under most UAW CBAs, retiree healthcare benefits are not available to employees who quit before they are eligible to retire from active employment.570 But the Bendix Guaranty made no such distinction – so the plain meaning was that all retired Bendix employees who had ten years of service when they terminated employment, would be covered by the Guaranty – and thus would be entitled to healthcare benefits for as long as they received a pension.

After reviewing the Bendix Guaranty, I filed suit on behalf of two persons receiving deferred vested pensions.571 During discovery, an attorney for the employer and I traveled to Elmira, New York, the location of one of the divested Bendix plants, to review local union documents. These documents were housed in the union’s office at the factory as well as at its headquarters. After reviewing the documents at the plant, I went


570. The CNH Group Benefit Plans, for example, have a specific provision that the retiree health care provisions do not apply to deferred vested retirees. See Declaration of Jack Reese, Ex. 50C, supra note 130, at 67.

to the union’s headquarters while the employer’s attorney went to lunch. There was a bank of metal filing cabinets at the Local. I started leafing through the documents by first looking at the labels on the file drawers.

I soon came across some local union newsletters in one of the files. I looked for copies dated around the time of the 1976 Bendix Guaranty. Almost immediately, and to my surprise, I came across the newsletter announcing the Bendix Guaranty. The newsletter said something to the effect that “of course, the Guaranty does not cover retirees receiving deferred vested benefits.”

I immediately called Jordan Rossen, the UAW’s General Counsel, and told him what I had discovered. Jordan told me to do whatever I thought was appropriate under the circumstance. After talking to him, I replaced the newsletter in the file folder where I had found it and closed the file drawer. When the employer’s lawyer showed up, I showed him the bank of file drawers. He started at the beginning and got nowhere close to the drawer containing the newsletters by the time he had to leave to catch his plane.

Shortly thereafter, I talked to Jay Whitman, another legendary UAW lawyer, who I learned had been instrumental in drafting the Bendix Guaranty for the UAW. Jay told me that it was never the UAW’s intention to extend the healthcare guaranty to deferred vested pensioners.

With this information, and after discussing the matter with Mr. Ellis, I called the employer’s principal lawyer and told him that I had an offer he could not refuse. If the employer provided lifetime healthcare for the two named plaintiffs and a nominal attorney fee, I would dismiss the lawsuit. The offer was possible because the proposed class had not yet been certified. The employer’s lawyer was caught off guard but agreed that I had indeed made him an offer he could not refuse. Shortly thereafter, we settled the case on the proposed terms.

Neither Jay nor Jordan – nor Jim Ellis, after learning the underlying context – suggested that I try to enforce the plain meaning of the Bendix Guaranty. Instead, they all understood that the actual, mutual intent of the parties was what mattered.

This article is dedicated to the memory of Jordan and Jay, who, like Jim Ellis and so many other dedicated men and women of the UAW, devoted their lives to the pursuit of justice for working people. This article is also dedicated to the memory of UAW v. Yard-Man, Inc., where the Sixth Circuit wisely reminded everyone that, as to CBAs, “even the most explicit language can, of course, only be understood in light of the context
which gave rise to its inclusion." And finally, this article is dedicated to the 4,000 Reese retirees and surviving spouses who deserved so much more from the Supreme Court.