ERISA, FASB, AND BENEFIT PLAN AMENDMENTS: A SECTION 402(b)(3) VIOLATION AS A LOSS CONTINGENCY FOR A PLAN AMENDMENT

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I. INTRODUCTION

Many companies that sought to eliminate or reduce liabilities and expenses of employee and postretirement welfare benefit plans in complying with the

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Financial Accounting Standards Board (FASB)[1] *Statement No. 106* (*FASB Statement No. 106*)[2] may have violated the plan amendment provision of the

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1. The Financial Accounting Standards Board (FASB) is a privately funded, nongovernmental organization that establishes accounting standards and guidelines for financial accounting. PAUL B. W. MILLER & RODNEY J. REDDING, THE FASB: THE PEOPLE, THE PROCESS, AND THE POLITICS 15-21 (2d ed. 1988). FASB determines the usefulness of different types of financial information. *Id.* at 16. FASB was formed in 1973, the same year the Securities and Exchange Commission (SEC) recognized FASB as an official source of financial accounting principles. *Id.*; *see also* FLOYD W. WINDAL & ROBERT N. CORLEY, THE ACCOUNTING PROFESSIONAL: ETHICS, RESPONSIBILITY AND LIABILITY 12 (1980) (citing Statement of Policy on the Establishment and Improvement of Accounting Principles and Standards, Accounting Series Release No. 150, [1937-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 72,172 (Dec. 20, 1973)). Accounting Series Release No. 150 was recodified and reissued as parts of the Financial Reporting Series 1 when the SEC changed the title of the Accounting Series Releases to Financial Reporting Releases. MILLER & REDDING, *supra*, at 20; LOREN A. NIKOLAI & JOHN D. BAZLEY, INTERMEDIATE ACCOUNTING 15 (6th ed. 1994).

The SEC is the federal agency responsible for establishing accounting principles. *See* 15 U.S.C. § 78(b)(2) (1994); Marilyn J. Ward Ford, *Broken Promises: Implementation of Financial Accounting Standards Board Rule 106, ERISA, and Legal Challenges to Modification and Termination of Postretirement Health Care Benefit Plans*, 68 ST. JOHN'S L. REV. 427, 433 n.20 (1994); MILLER & REDDING, *supra*, at 20; NIKOLAI & BAZLEY, *supra*, at 15; WINDAL & CORLEY, *supra*, at 11-12. FASB receives its authority from federal and state regulatory agencies, and thus its standards have substantive authority. *See* MILLER & REDDING, *supra*, at 18-22; NIKOLAI & BAZLEY, *supra*, at 15; WINDAL & CORLEY, *supra*, at 11-12; *see also* Ford, *supra* at 433 n.20.

2. EMPLOYERS' ACCOUNTING FOR POSTRETIREMENT BENEFITS OTHER THAN PENSIONS, FINANCIAL ACCOUNTING STANDARDS NO. 106 (Financial Accounting Standards Bd., 1990) [hereinafter FASB STATEMENT NO. 106]. FASB describes postretirement welfare benefits as:

> Postretirement benefits include, but are not limited to, postretirement health care; life insurance provided outside a pension plan to retirees; and other welfare benefits such as tuition assistance, day care, legal services, and housing subsidies provided after retirement. Often those benefits are in the form of a reimbursement to plan participants or direct payment to providers for the cost of specified services as the need for those services arises, but they may also include benefits payable as a lump sum, such as death benefits.

Id. ¶ 6 (footnote omitted). FASB considers the "postretirement benefit plan as a deferred compensation arrangement whereby an employer promises to exchange future benefits for employees' current services. *Id.* ¶ 3. For FASB's purposes and objectives in promulgating FASB STATEMENT NO. 106, see *infra* note 62.

The Employee Retirement Income Security Act of 1974 (ERISA) defines a welfare benefits plan as:

> (1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, appren-

Employee Retirement Income Security Act of 1974 (ERISA).[3] ERISA's plan amendment provision is found in section 402(b)(3),[4] and it may have been violated when some companies sought to expressly identify events and actions that could eventually eliminate or reduce welfare plan benefits of retirees and employees. In disclosing these events and actions, these companies clarified the amendment, termination, and modification provision of their welfare benefit plans.[5] They listed specific events that would trigger elimination and reduction of these benefits.[6] The amendment, termination, and modification provision is

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> ticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1002(1) (1994). In this Article, some of the judicial decisions resolved issues involving the amendment of severance benefit plans that do not necessarily affect retirement or retirees. However, these issues addressing changes to severance benefit plan provisions by employers show how ERISA affects the administration of welfare benefit plans. *See infra* note 78 and accompanying text.

FASB defines severance benefits as a postemployment benefit. EMPLOYERS' ACCOUNTING FOR POSTEMPLOYMENT BENEFITS AN AMENDMENT OF FASB STATEMENTS NO. 5 AND 43, FINANCIAL ACCOUNTING STANDARDS No. 112 (Financial Accounting Standards Bd. 1995) [hereinafter FASB STATEMENT NO. 112]. "Postemployment benefits are all types of benefits provided to former or inactive employees, their beneficiaries, and covered dependents." *Id.* ¶ 1. "Postemployment benefits include, but are not limited to, salary continuation, supplemental unemployment benefits, severance benefits, [and] disability-related benefits (including workers' compensation) . . . ." *Id.* For a discussion of the coverage of FASB STATEMENT NO. 112 on accounting for severance and other postemployment welfare benefits, see *infra* note 62 and accompanying text.

3. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1994). For a discussion of the coverage of ERISA, see *infra* note 47; *see also* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223 (1995). Curtiss-Wright Corporation's 1993 Annual Report stated that it was adopting *FASB Statement No. 106* and that it would continue to fund its nonvested benefits on a pay-as-you-go-basis. CURTISS-WRIGHT CORP., 1993 ANNUAL REPORT 19 (1994).

Curtiss-Wright expressly reported that its welfare benefits were not vested under its employee benefits plan. *Id.* In a note to its 1993 consolidated financial statements, Curtiss-Wright reported a contingency. *Id.* at 18. It reported that some of its retirees were suing it for terminating its postretirement welfare benefit plan. *Id.* Curtiss-Wright expected to be successful and saw no adverse effects from the outcome of the litigation. *Id.*

Undoubtedly, Curtiss-Wright was not alone in eliminating and modifying welfare benefits in implementing *FASB Statement No. 106* and responding to other factors causing an increase in the cost of employee benefits, mostly health care. *See* Gene Koretz, *More Costly Golden Years: Retiree Medical Plans Get Rerigged*, BUSINESS WEEK, Jan. 15, 1996, at 22, 22; *see infra* notes 52-73 and accompanying text.

4. 29 U.S.C. § 1102(b)(3). For the pertinent language of 29 U.S.C. § 1102(b)(3), see *infra* note 109 and accompanying text.

5. *See infra* notes 66-83 and accompanying text.

6. *See infra* notes 69-71 and accompanying text. *But see infra* note 194 (noting that courts have held that postretirement welfare benefits plans can be terminated at the occurrence of specific events and activities).

referred to as a reservation clause, a contractual clause that reserves the right of a company to terminate, modify, and amend unilaterally its employee benefit plan at will.[7] The reservation clause permits companies to make unilateral changes to their welfare benefit plans by terminating or modifying health care, dental care, life insurance, or other welfare benefits at any time.

Some companies considered their changes to be a clarification of the reservation clauses or other provisions of their plans and, thus, not substantially affecting the terms and conditions of their plan, including the termination of the plan benefits.[8] Later, when these companies terminated or modified their plans, retirees and employees did not agree that the changes to the reservation clauses or other provisions were just insignificant changes to benefit plan terms.[9] They alleged that these changes were a substantial change to the reservation clauses or other provisions of their benefit plans and, thus, were plan amendments.[10] They claimed that these amendments were invalid because the companies had failed to establish a procedure to identify persons that possessed authority to amend these plans and also had failed to establish a procedure to amend these plans.[11] Some employees and retirees argued that the absence of an authority identification procedure and amendment procedure—failing to provide and follow procedures for amending these plans—was a violation of ERISA section 402(b)(3).[12]

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7. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223, 1228 (1995) (citing Adams v. Avondale Indus., 905 F.2d 943, 947 (6th Cir. 1990)); *see infra* note 17 and accompanying text.

8. Schoonejongen v. Curtiss-Wright Corp., 18 F.3d 1034, 1038-39 (3d Cir. 1994), *rev'd*, 115 S. Ct. 1223 (1995); *see infra* notes 17-62 and accompanying text.

9. *See infra* notes 88, 111 and accompanying text. For an application of section 402(b)(3), 29 U.S.C. § 1102(b)(3), to plan terminations as well as plan amendments, see *infra* note 12 and accompanying text.

10. *See infra* notes 95-98 and accompanying text.

11. *See infra* notes 112-31 and accompanying text. Although plan amendments are in compliance with 29 U.S.C. § 1102(b)(1), it is possible that these amendments can still be invalid and thus, ineffective to implement plan terms. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231. However, in *Lockheed Corp. v. Spink*, the Court concluded that a company must be acting as a fiduciary to amend a pension or welfare benefits plan to violate ERISA's fiduciary duties. Lockheed Corp. v. Spink, 116 S. Ct. 1783, 1789-90 (1996). In *Lockheed*, the Court concluded that the employer acted as a settlor, and not a fiduciary, in amending the plan. *Id.* In *Lockheed*, the Court also observed that plan administrators would need to engage in a prohibited transaction or activity in violation of ERISA and trust law to render a technically valid amendment ineffective under a lawful plan. *Id.* at 1788-89. Furthermore, the Court concluded that the plan administrator's "payment of benefits [to participants] pursuant to an amended plan" was not a prohibited transaction under 29 U.S.C. § 1106(a)(1)(D). *Id.* at 1792. The payment of benefits by a plan administrator is not a transaction that "constitutes a direct or indirect . . . transfer to, or use by or for the benefit of a party in interest, of any assets of the plan." *Id.* at 1790 (citing 29 U.S.C. § 1106(a)(1)(D)). Thus, the Court held that the payment of benefits under an early retirement program could be conditioned on the release or waiver of employment-related claims that actually gave significant benefits to the settlor or plan sponsor—the employer. *Id.* at 1791-92.

12. *See supra* note 8 and accompanying text. It is well settled that the ERISA plan amendment provisions, 29 U.S.C. § 1102(b)(3), apply to welfare plan amendments. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227. It is also well-settled that the ERISA plan amendment

Therefore, according to employees and retirees, adding and changing plan terms in violation of section 402(b)(3) made reservation clauses and other provisions ineffective to terminate or modify employee and postretirement welfare and pension benefits plans of their companies.[13]

A. *Trying to Save Postretirement Welfare Benefits*

This Article explains that companies may remain statutorily liable under ERISA for providing health care and other welfare benefits even though these companies actually had modified and terminated postretirement welfare benefit plans and some employee welfare benefit plans. This liability exists until federal courts determine whether companies lawfully complied with ERISA section

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provision also applies to pension plan amendments. Lockheed Corp. v. Spink, 116 S. Ct. at 1789 n.4.

The Federal Circuit Courts are split on the applicability of 29 U.S.C. § 1102(b)(3) to a plan termination. The United States Court of Appeals for the Third Circuit concluded that 29 U.S.C. § 1102(b)(3) applies to a plan termination, and thus, companies must provide identification authority and amendment procedures before terminating welfare benefits plans. Hennessy v. FDIC, 58 F.3d 908, 922 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1318 (1996); Ackerman v. Warnaco, Inc., 55 F.3d 117, 121 (3d Cir. 1995). In *Ackerman*, Warnaco shut down its Altoona plant and then terminated its employees over several months. Ackerman v. Warnaco, Inc., 55 F.3d at 120. On the issue of a plan termination, the Third Circuit concluded "that the requirements of section 402(b)(3) apply to plan termination as well as plan amendments." *Id.* at 120. The court reasoned that ERISA protects against both plan amendments and plan terminations. *Id.* at 121.

The United States Court of Appeals for the Eleventh Circuit concluded that 29 U.S.C. § 1102(b)(3) did not apply to a pension plan termination. Aldridge v. Lily-Tulip, Inc., 40 F.3d 1202, 1210 (11th Cir. 1994), *cert. denied*, 116 S. Ct. 565 (1995). The Eleventh Circuit found that 29 U.S.C. § 1102(b)(3) requires "employers to adopt [a] written plan instrument and establish written amendment procedures" to apprise employees and retirees of their obligations and rights. *Id.* The court concluded that the application of 29 U.S.C. § 1102(b)(3) to a plan termination does not further the purposes of the section. *Id.* It found that this application does not prevent "unanticipated amendments from defeating employees' expectations of benefits." *Id.*

Aldridge gives less protection to employees under ERISA but is consistent with *Curtiss-Wright*. In *Curtiss-Wright*, the Court observed that ERISA provided an elaborate scheme to "enable . . . beneficiaries to learn their rights and obligations at any time." Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1230.

13. *See* Schoonejongen v. Curtiss-Wright Corp., 18 F.3d at 1038. *Curtiss-Wright* points out the need for many employers to comply with ERISA requirements for amending employee welfare benefit plans. *See* Michael S. Melbinger, *Avoid Lawsuits: Get Changes to Your Plan Right the First Time*, PENSION MGMT., June 1995, at 48, 48-49 (discussing two recent court decisions that illustrate the proper way to provide authority identification and amendment procedures); Jeffrey D. Mamorsky, *Supreme Court Reverses* Curtiss-Wright, J. COMPENSATION & BENEFITS, May/June 1995, at 57, 59 (stating that the standard reservation clause provided enough detail to establish amendment procedures); Brian K. Wydajewski, *Standard Plan Amendment Provision Upheld*, 22 J. CORP. TAX'N 347, 347-53 (1996) (stating that the standard reservation clause provides sufficient detail and employers need to follow amendment procedures). For the text of the reservation clause of Curtiss-Wright's postretirement welfare benefits plan, see *infra* note 89 and accompanying text.

402(b)(3), the amendment provision.[14] These companies may have failed to comply with section 402(b)(3), but they may have never considered it in adding new terms and provisions and changing old terms and provisions of their benefit plans.[15] This Article also points out that ERISA liability must be resolved by litigation, creating a loss contingency under *FASB Statement No. 5*,[16] notwithstanding the fact that many companies had already terminated or modified these plans. Companies believed that their actions to eliminate and reduce benefit plan liabilities and expenses were technically correct under ERISA procedural requirements. Part II explains how companies have created a contingent liability as they sought to comply with ERISA and *FASB Statement No. 106*. Part II also explains how companies created a contingent liability by failing to establish and follow a procedure for amending their benefit plans. Part III examines the seminal federal law and judicial decisions that need to be considered in determining whether the company action and benefit plan amendment procedures are in compliance with section 402(b)(3). In determining the extent of compliance with section 402(b)(3), it examines circumstances and federal common law that must be considered in ascertaining whether these procedures were followed in amending the plan. Part IV examines the economic, social, and ethical realities regarding employers' unilateral termination and modification of employee and postretirement welfare benefit plans under American law and management. Part IV finds that these realities are most consistent with the common law and its at will employment doctrine, leaving employment

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14. *See infra* notes 139-70 and accompanying text.

15. *See infra* notes 157-70 and accompanying text.

16. STATEMENT OF FINANCIAL ACCOUNTING STANDARDS NO. 5 (Financial Accounting Standards Bd. 1994) [Hereinafter FASB STATEMENT NO. 5]. *FASB Statement No. 5* defines a contingency as:

> For the purpose of this Statement, a contingency is defined as an existing condition, situation, or set of circumstances involving uncertainty as to possible gain (hereafter a "gain contingency") or loss (hereafter a "loss contingency") to [a company] that will ultimately be resolved when one or more future events occur or fail to occur. Resolution of the uncertainty may confirm the acquisition of an asset or the reduction of a liability or the loss or impairment of an asset or the incurrence of a liability.

Id. ¶ 1. "Examples of loss contingencies include . . . [p]ending or threatened litigation . . . [and] actual or possible claims and assessments . . . ." *Id.* ¶ 4.

There were employee benefit plan costs to Curtiss-Wright and other companies whose amendment procedures were ineffective to terminate their postretirement welfare benefits plan. Melbinger, *supra* note 14, at 48. Melbinger identifies the actual and potential financial impact of ineffective amendments, stating that: 'Failure to adhere to these [amendment procedure] requirements has led to almost 12 years of costly litigation for Curtiss-Wright, and may lead yet to a more costly court decision to the effect that, although Curtiss-Wright had the right to modify retirees' benefits, its attempt to do so was ineffective." *Id.*; *see infra* notes 139-56 and accompanying text. *FASB Statement No. 112* amended *FASB Statement No. 5*, and thus accrues the cost of postemployment benefits that had been excluded from coverage under *FASB Statement No. 5*, as contingencies. *See* FASB STATEMENT NO. 112, *supra* note 2, ¶ 3. FASB concluded that postemployment benefits "are a part of the compensation provided to an employee in exchange for services." *Id. FASB Statement No. 112* went into effect on December 15, 1993. *Id.* ¶ 12.

decisions regarding the allocation of financial resources entirely to the discretion of employers. Therefore, this Article concludes that the federal government and FASB provide administrative guidelines and financial accounting specifications, respectively, for welfare benefits plan management. These guidelines and specifications are merely technicalities that do not make welfare benefits either social mandates or ethical obligations of companies and, thus, do not advance public policy that would require employer-provided welfare and pension benefits, such as health care.

B. *Creating a Loss Contingency Through Procedural Violations*

There is one reality shared by all companies, courts, and policy-makers—ERISA and American management did not intend for postretirement welfare benefits to vest in the first place.[17] Under lawful amendments to these plans, a

17. *See* 29 U.S.C. § 1051(1) (1994). Congress purposely excluded welfare benefit plans from mandatory vesting and other requirements. *Id.* Congress found that imposing these mandatory requirements on welfare benefits would complicate administration and increase the cost of employee benefit plans. Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 491 (2d Cir. 1988). With either foresight or fortuity, Congress anticipated that vested welfare benefits that could not be unilaterally terminated and modified by employers would undermine pension benefits. *Id.* at 492. Permitting unilateral terminations by employers under ERISA gave greater protection to pension benefits. *See infra* note 47 and accompanying text. But this policy has resulted in many disputes regarding losses of health care and other welfare benefits by retirees and employees. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1229; Allied Chem. & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 181 n.20 (1971); Murphy v. Keystone Steel & Wire Co., 61 F.3d 560, 563 (7th Cir. 1995); Senn v. United Dominion Indus., 951 F.2d 806, 807 (7th Cir. 1992); Howe v. Varity Corp., 896 F.2d 1107, 1109 (8th Cir. 1990); Ryan v. Chromalloy Am. Corp., 877 F.2d 598, 600-01 (7th Cir. 1989); Musto v. American Gen. Corp., 861 F.2d 897, 913 (6th Cir. 1988); Moore v. Metropolitan Life Ins. Co., 856 F.2d at 492; DeGreare v. Alpha Portland Indus., 837 F.2d 812, 813 (8th Cir. 1988); Anderson v. Alpha Portland Indus., 836 F.2d 1512, 1517 (8th Cir. 1988); *In re* White Farm Equip. Co., 788 F.2d 1186, 1193-94 (6th Cir. 1986); Policy v. Powell Pressed Steel Co., 770 F.2d 609, 618 (6th Cir. 1985); UAW Local 134 v. Yardman, Inc., 716 F.2d 1476, 1478 (6th Cir. 1984).

Many companies still provide postretirement benefits and a few do guarantee lifetime benefits. *See* Nancy Ann Jeffrey, *Could Retirees Pre-Empt Cut in Health Plan?*, WALL ST. J., Mar. 13, 1996, at B1 ("U.S. West recently issued a formal guarantee. Both sides agreed to the dismissal of the claims of the suit, filed in federal district court in Denver . . . .").

Plan documents that govern group health, life, and other welfare benefits should contain termination, amendment, modification, and other provisions that are usually inserted in employers' retirement plan documents. *See* Melbinger, *supra* note 13, at 48; *see also* Algie v. RCA Global Communications, Inc., 891 F. Supp. 839, 861 (S.D.N.Y. 1992). In *Algie*, the court stated a plan amendment must be in writing to be effective. *Id.* Thus, the board of directors never approved the termination of the severance plan before or after the merger. *Id.*; *see also supra* note 12.

The termination and modification of postretirement welfare benefits has generated many scholarly articles. *See generally* Ford, *supra* note 1; Judith A. Gordon & Keith A. Hunsaker, Jr., *Employer Strategies for Modifying or Terminating Retiree Benefits in the 1990s*, 18 EMPLOYEE REL. L.J. 413 (1992-93); John Thacher McNeil, *The Failure of Free Contract in the Context of Employer-Sponsored Retiree Welfare Benefits: Moving Towards a Solution*, 25 HARV. J. ON LEGIS.

company can terminate benefits without creating legal liabilities under ERISA, section 402(b)(3), or financial liability under *FASB Statement No. 106*.[18] However, the recent interpretation of section 402(b)(3) may increase litigation by giving retirees hope that a plan amendment claim will save postretirement welfare benefit plans.[19] Saving postretirement welfare benefits is a public policy issue for federal and state policy-makers to resolve, and not the federal courts. Litigation has little saving grace in this instance.

An invalid benefit plan procedure that results in litigation to establish who the companies either failed to identify possessed authority to amend the plan or failed to state how the plan would be amended creates a contingent liability under *FASB Statement No. 5*.[20] Contingent liabilities exist even though these companies were trying to avoid accruing huge liabilities and expenses in implementing *FASB Statement No. 106*.[21] They may still be liable for health care and other benefits under self-insured and insured plans if retirees and employees pursue litigation challenging past plan amendments and terminations.[22] Under an insured plan, a company pays a premium to a health care insurance company.[23] When the company terminates an insured postretirement welfare benefit plan, the company no longer has to pay the premium, which is a labor cost. This reduction in cost, however, is not the most significant loss contingency under *FASB Statement No. 5* for an insured plan.[24] Another contingency is repayment of benefits

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213 (1988); Leonard R. Page, *Retiree Insurance Benefits: Enforcing Employer Obligations*, 38 LAB. L.J. 496 (1987); Joan Vogel, *Until Death Do Us Part: Vesting of Retiree Insurance*, 9 INDUS. & LAB. REL. REV. 183 (1987); Note, *Pension Plans and the Rights of the Retired Worker*, 70 COLUM. L. REV. 909 (1970).

18. *See supra* note 17 and accompanying text.

19. *See supra* notes 8, 12 and accompanying text. Congress created the right for retirees, both union and nonunion, to file claims under 29 U.S.C. § 1132(a)(1)(A), for the unlawful termination and modification of ERISA protected postretirement welfare benefits under at will employment contracts and collective bargaining agreements. *See, e.g.*, Curtiss-Wright Corp. v. Shoonejongen, 115 S. Ct. at 1227-28 (interpreting section 402(b)(3) to require a procedure for amending a plan and a procedure for identifying the person who has authority to amend a plan); Allied Chem. & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. at 181 n.20 (stating that the vested rights of retired workers may not be altered without the consent of the retired worker).

20. *See infra* notes 30, 78 and accompanying text.

21. *See supra* note 16 and accompanying text; *infra* notes 41-56 and accompanying text.

22. *See infra* notes 132-45 and accompanying text.

23. *See* Travelers Ins. Co. v. Cuomo, 14 F.3d 708, 712 (2d Cir. 1993), *rev'd on other grounds sub nom.* Pataki v. Travelers Ins. Co., 115 S. Ct. 1671 (1995).

24. Schoonejongen v. Curtiss-Wright Corp., 18 F.3d 1034, 1038 (3d Cir. 1994), *rev'd*, 115 S. Ct. 1223 (1995). The United States District Court for the District of New Jersey awarded the plaintiffs $2.6 million in benefits due, and the court of appeals affirmed this judgment. *Id.* at 1034. This amount needs to be recognized as a loss contingency. *See* FASB STATEMENT NO. 5, *supra* note 16, ¶ 4. On remand to the district court, a loss contingency still exists until the district court resolves whether Curtiss-Wright complied with its authority identification and amendment procedures. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231. Even though Curtiss-Wright could terminate the plan and avoid complying with *FASB Statement No. 106*, it still must

that would have been covered under the insured plan. If a federal or state court awards equitable relief, the costs of the benefits due could be a substantial loss contingency under *FASB Statement No. 5*.[25] In addition, for financial reporting purposes under *FASB Statement No. 106*, when a company terminated or modified its welfare benefits plan, it believed that it had reduced existing plan liabilities and future plan expenses.[26] Now those expenses and liabilities will have to be recognized by a company if a federal or state court reinstates a company's employee or postretirement benefits plan that had been unlawfully amended, modified, or terminated by the company.[27]

Many companies had either amended, terminated, or modified these plans to implement *FASB Statement No. 106* and adjust to spiraling health care costs.[28] When amending, terminating, and modifying these plans, if they had made changes that clarified or added terms and conditions to the reservation clauses or other plan provisions, they might have violated ERISA.[29] Until federal courts decide whether companies' changes and additions to their reservation clauses and other provisions were not substantial enough to be amendments, a loss contingency exists for each company.[30] This loss contingency could be a substantial liability that costs companies millions of dollars in payments to retirees, and perhaps employees, for benefits due.[31]

Where litigation between plan participants and companies create a loss contingency, the existence of liability is dependent upon the company's response to three procedural questions in complying with section 402(b)(3).[32] The first question is whether the company failed to provide an identification procedure "for identifying the persons who have authority to amend the plan" within the company.[33] The second question is whether the company failed to provide "[a]

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recognize any equitable relief the district court might award retirees if the district court concludes that Curtiss-Wright did not comply with its plan emendment procedures. *See* Jeffrey D. Mamorsky, *Supreme Court Reverses* Curtiss-Wright, J. COMPENSATION BENEFITS 57, 57-58 (1995).

25. *See supra* note 16.

26. *See infra* notes 78, 100-06 and accompanying text.

27. *See* FASB STATEMENT NO. 106, *supra* note 2, ¶ 3; *infra* notes 62, 97 and accompanying text.

28. *See infra* notes 52-73 and accompanying text.

29. *See infra* notes 74-78 and accompanying text.

30. *See* FASB STATEMENT NO. 5, *supra* note 16, ¶¶ 2-3.

31. *See* Paul M. Barrett, *Supreme Court Agrees to Review Ruling on How Employers Revamp Benefits*, WALL ST. J., Sept. 27, 1994, at A11. "The U.S. Chamber of Commerce has warned that if benefit plans are found to have violated Erisa, companies could lose tax deductions taken in connection with their contributions to the plans, and workers could incur unanticipated taxes on their interests in the plans." *Id.* The liability could be even greater if ERISA section 402(b)(3) applies to a plan amendment as well as a plan termination. *See supra* notes 12-13. For a discussion of the substantive harm caused by procedural violations of ERISA, see *infra* note 78 and accompanying text.

32. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223, 1227-29 (1995); *see infra* notes 34-40 and accompanying text.

33. 29 U.S.C. § 1102(b)(3) (1994).

procedure for amending such plan."[34] Finally, the third question is whether the company followed its authority identification and amendment procedures in making changes that were later found to be amendments to an employee benefit plan.[35] The first two questions do not present a formidable challenge under the court's interpretation of section 402(b)(3).

The third question, however, is a factual issue that may prove difficult for companies to answer to the satisfaction of many retirees and employees. The reason is that many companies may have believed they were merely clarifying the language of their plans. They never considered these clarifications to be amendments that required them to follow their identification and amendment procedures in making changes to these plans.[36] The existence of the latter question will create many disputes between participants and plan sponsors.[37] These disputes may create substantial contingent liabilities for the payment of health care and other welfare benefits to retirees whose benefit plans had been modified or terminated by companies under invalid plan amendments.[38] This contingent liability will exist until federal courts resolve these disputes.[39] It is

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34. *Id.*

35. *See infra* notes 121-70 and accompanying text.

36. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231; *see infra* notes 157-67 and accompanying text.

37. *See infra* notes 139-70 and accompanying text.

38. *See supra* notes 16, 20-31 and accompanying text.

39. See FASB STATEMENT NO. 5, *supra* note 16, ¶ 4, for a list of the contingencies. *See also* NIKOLAI & BAZLEY, *supra* note 1, at 497. The outlook for the future could be even worse if the federal government limits the amount of medical and health care funds that are transferred to the states and their citizens.

FASB Statement No. 106 was implemented on December 15, 1992. *See* FASB STATEMENT NO. 106, *supra* note 2, ¶ 3. At that time, health care policy of the state and federal governments was starting to undergo change and the potential for even more profound changes exist in future federal policy making. *See* WHITE HOUSE DOMESTIC POLICY COUNCIL, THE PRESIDENT'S HEALTH SECURITY PLAN 20 (1993). In health care and other federal policy making, this potential came to fruition in conservative policy making that will greatly influence the ability of the retirees and employees to receive health care benefits. In fact, recent federal legislative initiatives sought to reform Medicare and Medicaid by reducing federal spending. Richard Lacayo, *It's Middle-Class Warfare*, TIME, Oct. 2, 1995, at 40-41; *see also* Health Insurance for Aged Act of 1965, 42 U.S.C. §§ 1395-1395ccc (1994); Grants for States of Medical Assistance Program, 42 U.S.C. §§ 1396-1396u. The Clinton Administration and Congress have both agreed that the growth of Medicaid and Medicare must be slowed to reduce federal health care spending and the federal deficit. *See* Lacayo, *supra*, at 41-42. At the same time, companies are reducing health care costs, as a part of labor costs, in complying with *FASB Statement No. 106*. *See infra* notes 66-73 and accompanying text. As companies offer fewer health care benefits, underinsured and uninsured employees, retirees, and other individuals seek assistance from federal and state medical assistance and insurance programs. These programs, however, will receive fewer funds and thus, will be more costly, and perhaps provide even less, coverage. *See* Lacayo, *supra*, at 42-43. Federal and state eligibility standards and benefit packages for Medicaid and Medicare will reduce the served population as federal and state funds for health care continue to decline. *See generally* David Van Biema, *Still Waiting for the Seventh Veil*, TIME, Oct. 2, 1995, at 43 (outlining the highlights of

retirees that must eventually establish that companies did not follow their plan amendment procedures.[40]

II. BENEFIT PLAN ADMINISTRATION AND FINANCIAL REPORTING

FASB and the federal government do not require companies to establish employee benefit plans.[41] FASB had permitted companies to use cash accounting, and thus companies did not accrue expenses and liabilities for postretirement welfare benefits.[42] Now *FASB Statement No. 106* requires com-

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proposed changes in Medicare). These anticipated changes in state and federal health care policy make the effects of *FASB Statement No. 106* more explosive as it plays an unlikely role in an even greater reduction of employee and retiree health care benefits. Yet, *FASB Statement No. 106* forces companies to disclose only financial and plan information that shows the precarious nature of gratuitous benefit planning—here today, gone tomorrow. *See infra* notes 60-76 and accompanying text.

Even if FASB had known that *FASB Statement No. 106* would coexist with future political and policy making events to foster a greater individual responsibility for health care needs, FASB was not predisposed to refuse to establish *FASB Statement No. 106* for such a reason. *See* MILLER & REDDING, *supra* note 1, at 15-21. FASB's objectives were to provide financial accounting information for financial markets and thus protect the creditors, investors, and other market participants' interest—not employee and retiree health care interests. *See id.* at 15-21. Ostensibly, protecting employee and retiree health care interests was not the overriding concern in establishing *FASB Statement No. 106*. *See* FASB STATEMENT NO. 106, *supra* note 2, ¶ 5.

As the states sought to address the impact of federal policy on their health care policies and programs, they found that ERISA preempted or curtailed the scope of many state health care initiatives that included employer-sponsored health care benefits and other legislative actions connected to employee benefits plans. *See generally* Mary Anne Bobinski, *Unhealthy Federalism: Barriers to Increasing Health Care Access for the Uninsured*, 24 U.C. DAVIS L. REV. 255 (1990) (discussing the preemptive effects of ERISA on state health care policy); James E. Holloway, *ERISA, Preemption and Comprehensive Federal Health Care: A Call for "Cooperative Federalism" to Preserve the States' Role in Formulating Health Care Policy*, 16 CAMPBELL L. REV. 405 (1994) (establishing cooperative federalism to address the preemptive effects of ERISA). Thus, retirees and employees can expect limited state health care policy making until Congress limits the preemptive effects of ERISA. *See Bills Relating to ERISA's Preemption of Certain State Laws: Hearings on H.R. 1602 and H.R. 2782 Before the Subcomm. on Labor-Management Relations*, 102d Cong. 9-11 (1991) (statement of Rep. Berman).

40. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231; *see also infra* notes 151-67 and accompanying text.

41. 29 U.S.C. § 1051(1); *see infra* notes 60-65 and accompanying text; *see also* FASB STATEMENT NO. 106, *supra* note 2, ¶¶ 6-7.

42. FASB STATEMENT NO. 106, *supra* note 2, ¶ 2. For commentary on the impact and implications of *FASB Statement No. 106*, see Diana J. Scott & Wayne S. Upton, Jr., *A New Era in Accounting for Postretirement Benefits Other Than Pensions*, 5 COMPENSATION & BENEFITS MGMT., 318, 322-23 (1989) (concluding that the statement would merely expose present obligations); Ford, *supra* note 1, at 431-44 nn.18 & 51.

FASB Statement No. 112 covers postemployment benefits, such as severance benefits. FASB STATEMENT NO. 112, *supra* note 2, ¶ 1. For commentary on FASB and its standards for

panies to use accrual accounting,[43] and thus, many companies modified and a few even terminated these plans.[44] Plan terminations and modifications reduce liabilities and expenses that would accrue[45] and then would be disclosed as financial information on financial accounting statements under *FASB Statement No. 106*.[46] Unilateral plan terminations and modifications of welfare benefits plans are generally permitted under ERISA.[47] These unilateral plan actions

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employment benefits, see Kjeld Sorenson & Kathleen S. Rosenow, *FASB Issues Final Statement on Postemployment Benefits*, 6 BENEFITS L.J. 73 (1993).

43. FASB STATEMENT NO. 106, *supra* note 2, ¶ 4; Ford, *supra* note 1, at 431-36; *see infra* note 62 and accompanying text.

44. *See supra* note 17 and accompanying text.

45. FASB STATEMENT NO. 106, *supra* note 2, ¶ 5; *see also infra* note 62 and accompanying text.

46. FASB STATEMENT NO. 106, *supra* note 2, ¶ 5; *see also infra* note 62 and accompanying text. Companies disclose the minimum information in footnotes to comply with *FASB Statement No. 106*. Murrary S. Akresh & Barbara S. Bald, *FAS 87/106 Disclosure: What Are Companies Doing?*, 7 J. CORP. ACC. & FIN., 77, 78 (1995). They disclose information regarding "plan description, the components of expense, the funded status table and the actuarial assumptions selected by the company." *Id.*

Some companies disclose additional information. *Id.* They disclose "[d]escription[s] of substantive health care plan[s]" and "[c]urtailments and other plan events." *Id.* at 79. In particular, companies disclose plan amendments and curtailments. *Id.* Thus, many retirees and employees may find that the companies' annual reports are sources of information on present and perhaps future events in employee benefit plan administration. Moreover, in their annual reports, companies must disclose loss contingencies that are caused by employee benefit plan litigation. *See* FASB STATEMENT NO. 5, *supra* note 16, ¶ 9; *see also supra* note 3 and accompanying text.

47. *See* 29 U.S.C. § 1051(1) (1994). ERISA regulates employee welfare and pension benefit plans. *See id.* §§ 1001-1461. Congress found, among other problems in the administration of employee benefit plans, that "many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans." *Id.* § 1001(a). ERISA standards and requirements protect interstate commerce and plan beneficiaries. *Id.* § 1001(a), (c). In enacting ERISA, Congress created reporting and disclosure requirements. *Id.* § 1021. It also established standards of conduct for the administration of employee benefit plans. *Id.* § 1104. Congress also established requirements and procedures to safeguard employee benefits. *Id.* §§ 1102-1104. Finally, Congress purposely mandated stringent vesting, funding requirements, and participation requirements for pension benefit plans. *Id.* §§ 1053(a), 1082-1085, 1052. Congress did not mandate, however, that employee welfare benefits vest during employment or at retirement. *Id.* § 1051(1).

Congress also permitted employees, retirees, and beneficiaries to bring claims on behalf of themselves and benefit plans to challenge employers and administrators' decisions, activities, and actions in administering both pension and welfare benefit plans. *Id.* § 1132(a). In addition, Congress mandated that ERISA would supersede all state laws and claims relating to employee benefit plans. *Id.* § 1144. The Supreme Court has interpreted the ERISA preemption provision broadly, invalidating state health care, tort, contract, and other laws. *See* Shaw v. Delta Airlines, 463 U.S. 85, 98 (1983). Therefore, states can not regulate the substantive contents of employee welfare benefit plans. *See* Greater Washington Bd. of Trade v. District of Columbia, 506 U.S. 125, 127 (1992) (citing 29 U.S.C. § 1144(a) (1988)); Bobinski, *supra* note 39, at 255; Holloway, *supra* note 39, at 405.

reduce or eliminate future postretirement welfare benefits of employees and present benefits of retirees.[48] ERISA permits companies to insert reservation clauses that reserve for companies the right to amend, terminate, and modify these benefits under any contingency.[49] When these clauses are implemented by companies, they eliminate all or reduce many legal and financial liabilities and financial reporting obligations.[50] In concluding, *FASB Statement No. 106* and ERISA provide little protection against the unilateral termination, modification, and amendment of postretirement welfare benefit plans.[51]

A. *Adjusting to Financial Information and Health Care Needs*

Plan sponsors companies made changes in plan provisions that stated when plan benefits would terminate or decrease.[52] They added specific terms and conditions that state explicitly when postretirement welfare benefit plans would terminate, such as the cessation of plant operations.[53] New terms were added to clarify and amend existing provisions, such as reservation clauses.[54] Under reservation clauses, companies would be disclosing more details under their general right to terminate than may be required by ERISA or other federal laws.[55]

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48. *See supra* note 17 and accompanying text.
49. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223, 1228 (1995).
50. *See infra* note 62 and accompanying text.
51. *See supra* note 17 and *infra* note 62.
52. *See infra* notes 66-73 and accompanying text.
53. *Id.*
54. *Id.*
55. *See* 29 U.S.C. § 1021 (1994). *But see* 29 U.S.C. § 1024(b)(1) (requiring employers to disclose a material modification of an employee benefit plan); Varity Corp. v. Howe, 116 S. Ct. 1065 (1996) (requiring an employer who is acting as plan administrator to disclose accurate information to avoid breaching a duty of loyalty owed to plan participants). For a discussion of material modifications of employee benefit plans, see *infra* note 97 and accompanying text. There have been various commentaries on the fiduciary duties of plan administrators. *See generally* Jeffrey A. Brauch, *The Danger of Ignoring Plain Meaning: Individual Relief for Breach of Fiduciary Duty Under ERISA*, 41 WAYNE L. REV. 1233 (1995); Jon C. Bruning, *ERISA Plan Fiduciaries Beware*, 45 LAB. L.J. 402 (1994); T. Z. Zellmer, *Settlor/Fiduciary Distinction: Not Every Decision Is Subject to ERISA*, 7 BENEFITS L.J. 347 (1994).

Often retirees and employees allege that they were not informed by employers of changes to their employee benefits plan. This issue has led to numerous scholarly and non-scholarly articles. *See generally* Edward E. Bintz, *Fiduciary Responsibility Under ERISA: Is There Ever a Fiduciary Duty to Disclose?*, 54 U. PITT. L. REV. 979 (1993); Nick C. Geannacopulos & Daniel J. Julius, *Understanding Document Disclosure Requirements Under ERISA*, 45 LAB. L.J. 359 (1994); Nancy G. Ross & Judith A. Kelley, *Employer Duties to Make BenefitsDisclosures: The Emerging Case Law*, 8 BENEFITS L.J. 5 (1995); Nancy G. Ross & Judith A. Kelley, *Misrepresenting Future Plan Changes: Fiduciary Liability Under ERISA*, 21 EMPLOYEE REL. L.J. 73 (1995). See *infra* notes 129-30 and accompanying text for cases where either employees or retirees claimed that the companies refused to disclose accurate financial and other plan information.

FASB Statement No. 106 requires the disclosure of financial accounting information to protect the financial interest and investments expectations of creditors, investors, and others who

Federal courts have generally agreed that companies can unilaterally amend, modify, and terminate benefit plans at will and that such clarification should not restrict plan terminations.[56]

The last two decades have brought huge increases in health care costs; consequently better benefit plan management is needed.[57] These costs create a most urgent need for companies to control health care costs, a component of already high labor costs.[58] For many companies that must remain competitive in national and global economies, reducing these costs and then keeping them low are a compelling management concern that includes effective, long-term health care and other benefit plan administration, such as plan amendment and termination.[59]

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use financial statements. FASB STATEMENT NO. 106, *supra* note 2, ¶ 74; *see* Ford, *supra* note 1, at 433-34.

56. *See infra* notes 198-205 and accompanying text. Even though companies make invalid amendments under unlawful authority identification and amendment procedures, they need only to correct these procedures or ratify company decisions so that they can eventually terminate or modify their plans. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223, 1231 (1995). The Third Circuit would require these companies to pay restitution, if they failed to establish these procedures. Schoonejongen v. Curtiss-Wright Corp., 18 F.3d 1034, 1040 (3d Cir. 1994), *rev'd*, 115 S. Ct. 1223 (1995). Under the Third Circuit's rationale in *Schoonejongen*, some companies retain employee plan benefit liability under *FASB Statement No. 106* if they fail to comply with ERISA amendment provisions and perhaps follow their own procedures in amending and then terminating or modifying their plans. *See id.* They remain subject to statutory liability under ERISA for procedural violations even though these violations were made in good faith. *Id.* Therefore, these violations of ERISA would temporarily suspend or restrict the general right to terminate and modify employee and postretirement benefits plans when companies fail to provide amendment and authority identification procedures. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1230-31.

57. *See* Christine Woolsey, *Doctor, the Patient Is Critical*, BUS. INS., Oct. 30, 1992, at 20, 20.

58. *Id.*

59. *See infra* notes 198-205 and accompanying text. Many companies do not perform the administrative functions of employee benefit plan management; instead, they have other companies perform these functions. *See* VICTOR S. BAROCAS, STRATEGIC BENEFIT PLANNING: MANAGING BENEFITS IN A CHANGING BUSINESS ENVIRONMENT 11 (The Conference Bd. ed., 1992); Edward G. Pringle, *The Advantages of Benefits Outsourcing*, RISK MGMT., July 1995, at 61, 61-62; Anna M. Rappaport, *Who Will Do the Work: Benefits, Outsourcing, and the Employment Contract*, EMPLOYEE BENEFIT PLAN REV., July 1995, at 10, 11-12. "Executives suggest outsourcing is not only a result of downsizing but part of their longer-term cost management efforts." BAROCAS, *supra*, at 18; *see also* Pringle, *supra*, at 61-62. Others do not agree, however, that outsourcing is a long-term solution, because employers may want to retain some control. Christine Woolsey, *Cashing in on Downsizing: As Clients Go Back to Basics, Consultants Go to Work*, BUS. INS., Dec. 19, 1994, at 13, 16. Outsourcing remains a personnel service that companies can use to relinquish the administrative functions of employee pension and welfare benefit administration. Companies retain statutory liablility for complying with ERISA in managing pension and welfare benefit plans, including revisions and other changes. *See supra* note 47.

ERISA and *FASB Statement No. 106* establish standards that impose obligations and recognize liabilities for the structure and administration of postretirement welfare benefit plans.[60] ERISA and *FASB Statement No. 106* do not require companies to establish and maintain postretirement welfare benefit plans and, thus, retirees do not have an enforceable right to welfare benefits.[61] On one hand, FASB requires companies to follow *FASB Statement No. 106* in issuing financial accounting reports that disclose postretirement welfare benefits liabilities and expenses.[62] On the other hand, the federal government requires

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For an examination of federal court decisions regarding extra-contractual remedies for violations of ERISA procedural requirements and the liabilities of fiduciaries and nonfiduciaries under ERISA for a breach of fiduciary and other duties, see *infra* note 78 and accompanying text.

60. *See supra* notes 41-47 and accompanying text.

61. 29 U.S.C. § 1051(1) (1994).

62. FASB STATEMENT NO. 106, *supra* note 2, ¶ 6. FASB gave the following explanation for changing from cash to accrual accounting:

> This Statement relies on a basic premise of generally accepted accounting principles that accrual accounting provides more relevant and useful information than cash basis accounting. Accrual accounting goes beyond cash transactions and recognizes the financial effect on an entity of transactions and their events and circumstances that have future cash consequences as those events and transactions occur, rather than only when cash is received or paid by the entity. In particular, accrual accounting provides a link between an entity's operations . . . and its cash receipts and outlays . . . .

Id. ¶ 148. FASB gave the following justification for establishing and then implementing *FASB Statement No. 106*:

> 1. This Statement establishes standards of financial accounting and reporting for an employer that offers *postretirement benefits other than pensions* . . . (hereinafter referred to as *postretirement benefits*) to its employees . . . . The Board added a project on postemployment *benefits* other than pensions to its agenda in 1979 as part of its project on accounting for pensions and other postemployment benefits. In 1984, the subject of accounting for postemployment benefits other than pensions was identified as a separate project. As interim measures, FASB Statement No. 81, *Disclosure of Postretirement Health Care and Life Insurance Benefits*, was issued in November 1984, and FASB Technical Bulletin No. 87-1, *Accounting for a Change in Method of Accounting for Certain Postretirement Benefits*, was issued in April 1987.
> 2. Most employers have accounted for postretirement benefits on a pay-as-you-go (cash) basis. As the prevalence and magnitude of employers' promises to provide those benefits have increased, there has been increased concern about the failure of financial reporting to identify the financial effects of those promises.
> 3. The Board views a *postretirement benefit plan* as a deferred compensation arrangement whereby an employer promises to exchange future benefits for employees' current services. Because the obligation to provide benefits arises as employees render the services necessary to earn the benefits pursuant to the terms of the *plan*, the Board believes that the cost of pro-

companies to comply with ERISA's technical procedures for reporting and disclosing plan information and other administrative functions in employee benefit plan administration.[63] The federal government and FASB require that companies engage in certain uniform standards and practices in the sponsoring and administration postretirement welfare benefit plans.[64] Many companies have unilaterally amended, modified, or terminated their postretirement welfare benefit plans, as permitted by ERISA, to adopt the *FASB Statement No. 106* obligations.[65]

B. *Preparing for* FASB Statement No. 106 *and Reducing Health Care Costs*

In implementing *FASB Statement No. 106* and reducing health care costs, at least one company conspicuously brought its reservation of the right to terminate and modify post retirement welfare benefits its plan at will to the attention of retirees.[66] It had reserved the right to do so under all circumstances and without the consent of retirees.[67] The company added language to its plan to clarify termination provisions and terms.[68] This language identified a specific contingency that would result in the elimination of or a change in benefit plans.[69] The company sought only to identify, in particular, what it could do in general—terminate any and all benefits.[70] Under the general reservation clause, retirees never had vested postretirement welfare benefits.[71] and the companies can always unilaterally terminate these plans at will.[72] Therefore, companies that implemented *FASB Statement No. 106* can still terminate their welfare benefits plans to stop accruing plan expenses and liabilities at any time.[73]

Some companies may have failed either to follow the ERISA amendment provision or to follow their plan amendment procedures by adding language that

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viding the benefits should be recognized over those employee service periods.

Id. ¶¶ 1-3. FASB also requires accrual accounting for postemployment benefits, such as severance benefits and disability benefits. *See* FASB STATEMENT NO. 112, *supra* note 3, ¶ 1.

63. *See* 29 U.S.C. § 1021 (1994); *see also supra* note 47 and accompanying text.

64. *See supra* notes 47, 62 and accompanying text.

65. *See supra* note 17 and accompanying text.

66. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223, 1227 (1995); *see supra* notes 27-32 and accompanying text.

67. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227; *see infra* notes 88-89 and accompanying text.

68. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227; *see infra* notes 159-64 and accompanying text.

69. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227; *see infra* note 87 and accompanying text.

70. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227; *see supra* note 17 and accompanying text.

71. *See* 29 U.S.C. § 1051(1) (1994).

72. *See supra* note 17 and accompanying text.

73. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1228.

specifies plan termination.[74] Although they believed they were only clarifying the terms of their reservation clauses, they still violated section 402(b)(3).[75] Such a violation occurred if they failed either to provide a procedure to identify persons that have authority to amend these plans or to provide a procedure for amending these plans.[76] Another violation could occur even though they had provided a procedure to identify these persons and a procedure to amend the plan. Under ERISA, companies are required to follow these procedures in making clarifications that they believed were not amendments to these plans.[77] These violations of ERISA are most significant. Plan amendments that do not comply with section 402(b)(3) are invalid under some circumstances and, thus, ineffective to terminate postretirement welfare benefit plans as well as employee welfare benefits plans.[78]

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74. For an example of changes involving contingencies for plan termination, see *infra* notes 84-101 and accompanying text.

75. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227 (citing 29 U.S.C. § 1102(b)(3)); *infra* notes 139-45 and accompanying text.

76. 29 U.S.C. § 1102(b)(3); *see infra* notes 107-20 and accompanying text.

77. *See infra* notes 121-31 and accompanying text.

78. Schoonejongen v. Curtiss-Wright Corp., 18 F.3d 1034, 1040 (3d Cir. 1994), *rev'd*, 115 S. Ct. 1223 (1995); *see infra* note 168 and accompanying text. When a company's failure to comply with section 402(b)(3) causes substantive harm, the company may be subject to restitution or money damages under ERISA for unlawfully terminating the welfare benefits of retirees. Schoonejongen v. Curtiss-Wright Corp., 18 F.3d at 1040. Although retirees have no rights to postretirement benefits under a general reservation clause, federal courts can award a substantive remedy to employees and retirees. *Id.* at 1039. The United States Courts of Appeals for the Fourth and Sixth Circuits agree with the Third Circuit. They generally agree that an inadequate plan amendment procedure that is not made in bad faith or by fraudulent acts is only a procedural violation of ERISA. Biggers v. Wittek Indus., 4 F.3d 291, 295-96 (4th Cir. 1993); Adams v. Avondale Indus., 905 F.2d 943, 949 (6th Cir. 1990). Thus, these courts would not award compensatory damages for a procedural violation of ERISA, finding no substantive harm for the loss of postretirement welfare benefits. Adams v. Avondale Indus., 905 F.2d at 949.

In *Kreutzer v. A.O. Smith Corp.*, the Seventh Circuit stated, "Most courts that have considered the issue have held that the employer must have acted in bad faith, actively concealed the benefit plan, or otherwise prejudiced their employees by inducing their reliance on a faculty plan summary before recovery for procedural violations is warranted." Kreutzer v. A.O. Smith Corp., 951 F.2d 739, 743 (7th Cir. 1991) (citing Blau v. Del Monte Corp., 748 F.2d 1348, 1353 (9th Cir. 1984); Govoni v. Bricklayers, Masons & Plasterers, 732 F.2d 250, 252 (1st Cir. 1984)); *see also* Aldridge v. Lily-Tulip, Inc., 40 F.3d 1202, 1210 (11th Cir. 1994) (stating that the company failed to comply with the notice and procedural requirements of 29 U.S.C. § 1054(g)-(h)); Berger v. Edgewater Steel Co., 911 F.2d 911, 920 (3d Cir. 1990) (stating that company failed to distribute or describe severance plan and failed to establish claims procedures as required by 29 U.S.C. § 1022(a)); Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1170 (3d Cir. 1990) (stating that although company failed to comply with disclosure and reporting requirements under 29 U.S.C. § 1024(b)(1) the requirements were not necessary because it was a plan termination, not an amendment); Adams v. Avondale Indus., 905 F.2d at 949-50 (stating that company failed to identify an amendment procedure in amending an unwritten plan); Wolfe v. J.C. Penney Co., 710 F.2d 388, 391-92 (7th Cir. 1983) (stating that company failed to explain how employees could correct deficiencies in disability application as required by 29 U.S.C. § 1133(1)).

A few courts concluded, however, that substantive harm could exist and thus, justify the award of restitution or legal relief. *See, e.g.*, Ackerman v. Warnaco, Inc., 55 F.3d 117, 125 (3d Cir. 1995) (finding an inference of bad faith or active concealment when the employer failed to disclose rescission of the termination allowance policy); Blau v. Del Monte Corp., 748 F.2d 1348, 1354 (9th Cir. 1984) (finding an inference of active concealment in employers failure to disclose the severance plan and claim procedures, engaging in inequitable treatment of employees in granting severance pay). For the elements of an estoppel claim for detrimental reliance for failing to comply with procedural requirements, see *infra* note 164 and accompanying text. For an additional case examining the requirements for detrimental reliance and prejudice, see Govoni v. Bricklayers, Masons & Plasterers, 732 F.2d 250 (1st Cir. 1984).

The United States Supreme Court agreed to review the Third Circuit's decision. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223 (1995). The Court, however, did not reach the issue of a substantive remedy because it did not find a procedural violation of 29 U.S.C. § 1102(b)(3) on the facts before it. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231. The Court has not been willing to hold that ERISA provides a substantive remedy at law, namely providing compensatory and punitive damages. In *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), the Court addressed the question of whether ERISA authorizes contractual damages for a breach of a fiduciary duty by a fiduciary for a claim brought under 29 U.S.C. § 1132 (a)(2). The Court concluded that 29 U.S.C. § 1109, which established liability for a breach of fiduciary duty, did not authorize contractual damages for claims brought under 29 U.S.C. § 1132 (a)(2), for the "improper or untimely processing of benefit claims." *Id.* at 136.

Russell was not the Court's last word on the question of an appropriate remedy for a violation of ERISA. In *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), the Court addressed the question of whether ERISA authorizes extra-contractual damages for a breach of a fiduciary duty by a nonfiduciary for a claim brought under 29 U.S.C. § 1132 (a)(3). In *Mertens*, the Court held that even though equity permitted recovery of money relief for a breach of a fiduciary duty, ERISA did not authorize suits for the recovery of compensatory or punitive damages as "appropriate equitable relief" under 29 U.S.C. § 1132 (a)(3). *Id.* at 260-61. The Court found that the participants sought "compensatory damages—monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties," and thus actually wanted legal relief. *Id.* at 255. Therefore, it seems unlikely that retirees or employees will recover contractual or other compensatory damages for procedural violations other than under usual circumstances. *See* Varity Corp. v. Howe, 116 S. Ct. 1065, 1079 (1996) (permitting plan beneficiaries and participants to pursue an action under 29 U.S.C. § 1132(a)(3) to recover restitution for a breach of a fiduciary duty by the plan administrator); *see also infra* note 129 and accompanying text.

ERISA's failure to provide remedies, other than equitable relief, to address claims of wrongful denials of benefits, breaches of procedural requirements, and breaches of fiduciary obligations has generated several scholarly articles. *See, e.g.*, George Lee Flint Jr., *ERISA: Extracontractual Damages Mandated for Benefit Claims Actions*, 36 ARIZ. L. REV. 611, 666 (1994) (concluding that for ERISA, legal remedies such as extra contractual damages are not supported under the various equitable remedy provisions); Dana M. Muir, *ERISA Remedies: Chimera or Congressional Compromise?*, 81 IOWA L. REV. 1, 53 (1995) (concluding that ERISA failed where the judiciary denied adequate compensation to successful plaintiffs and where ERISA fails to provide adequate deterrence against wrongdoing); Richard Rouco, Note, *Available Remedies Under ERISA Section 502(a)*, 45 ALA. L. REV. 631, 672-73 (1994) (stating that the Court cannot consider ERISA's remedial scheme as complete, and the Court seeks to limit an employee access to judicial remedies).

C. *Curtiss-Wright's Plan Changes to Disclose Specific Contingencies*

In *Curtiss-Wright Corp. v. Schoonejongen*,[79] the United States Supreme Court decided whether companies must provide a detailed identification procedure and amendment procedure under ERISA, section 402(b)(3).[80] Specifically, the Court was asked to determine whether the Curtiss-Wright Corporation had established a procedure under the terms of its employee benefit plan to identify any individuals that possessed authority to amend and had established a procedure to amend its plan.[81] Both procedures were contained in the reservation clause of the Curtiss-Wright plan.[82] These procedures were extremely general and thus raised the question whether they were substantial under the informational scheme and functional requirements of ERISA.[83]

The Curtiss-Wright Corporation established a postretirement health benefit program for its employees at its Wood-Ridge, New Jersey plant.[84] In September 1976, Curtiss-Wright established a welfare benefit plan (Plan) to comply with the then recently enacted ERISA.[85] The major documents of the Plan were the Constitution and Summary Plan Description (SPD).[86] In its Plan, Curtiss-Wright had always reserved the right to amend, modify, and terminate the Plan.[87]

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79. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223 (1995).

80. *Id.* at 1226.

81. *Id.* at 1228.

82. *Id.* at 1228-29.

83. *Id.* at 1230.

84. *Id.* at 1227.

85. Schoonejongen v. Curtiss-Wright Corp., 18 F.3d 1034, 1037 (3d Cir. 1994), *rev'd*, 115 S. Ct. 1223 (1995).

86. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227. ERISA requires companies to provide plan beneficiaries with a Summary Plan Description. 29 U.S.C. § 1024(b)(1) (1994). In *Curtiss-Wright*, the Court stated that the SPD's "purpose [is] to communicate to beneficiaries the essential information about the plan. . . . [That] includes the 'name and address' of the plan administrators and other plan fiduciaries." Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1230. The SPD has been a source of conflict between some retirees and companies. Mark Aquilio, *In Search of the Summary Plan Description: Judicial Conflicts Abound*, 44 LAB. L.J. 178, 178-85 (1993).

87. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227. Curtiss-Wright owned several industrial plants, including the one at Wood-Ridge, New Jersey. Schoonejongen v. Curtiss-Wright Corp., 18 F.3d at 1036. Curtiss-Wright engaged in defense-related work that it started after World War II. *Id.* Curtiss-Wright's health benefit plan was sponsored, administered, and funded entirely by Curtiss-Wright. Over the term of the program, the benefits were provided by several insurance companies: Liberty Mutual (1966-70), Prudential (1971-72), and Blue Cross-Blue Shield (1973-74). *Id.* During the 1973-74 period, Curtiss-Wright's program contained statements reserving the right to amend, modify, and revoke welfare plan benefits. *Id.* Specifically, the plan stated that "the Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan." *Id.* at 1037. The Plan also provided participants Summary Annual Reports (SARs). *Id.* During litigation, Curtiss-Wright argued that this provision set forth its amendment procedures and that the language "Company" identifies who

In 1983, Curtiss-Wright issued a new SPD,[88] which included a provision that stated: "TERMINATION OF HEALTH CARE BENEFITS. . . . Coverage under this plan will cease for retirees and their dependents upon the termination of business operations of the facility from which they retired."[89] The primary authors of the new SPD provision were the director of benefits and the legal counsel.[90] Later in 1983, Curtiss-Wright announced that it was closing the Wood-Ridge plant and that it would terminate retiree benefits for nonunion employees that had retired from Wood-Ridge.[91] Shortly thereafter, "an executive vice president wrote . . . [the retirees] a series of letters informing them that their postretirement health benefits were being terminated."[92] The retirees sued Curtiss-Wright for a violation of ERISA section 402(b)(3).[93] Among other

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could amend the Plan. *Id.* In 1979, the SARs again stated that Curtiss-Wright "reserved the right to discontinue or amend the Plan." *Id.*

88. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227. In 1982, Curtiss-Wright informed its employees and retirees that health care benefits were not vested and thus, could be terminated or modified without their consent. *Id.* Specifically, Curtiss-Wright added to its letters and other documents the following language: "Although the company fully expects to continue this benefit, you should be aware that unlike your retirement benefit which is a vested benefit, the retirement health care coverage is not a guaranteed benefit and therefore is subject to change or termination." Schoonejongen v. Curtiss-Wright Corp., 18 F.3d at 1037. The plaintiffs also appealed the district court's holding. The district court held that Curtiss-Wright had reserved the right to amend the plan and had not agreed to provide lifetime benefits. *Id.* at 1036. The district court found that Curtiss-Wright had intended to retain the right to terminate retiree's benefits even though Curtiss-Wright did not expressly use the word "retirees" in its reservation provision. *Id.* at 1038. The Court of Appeals for the Third Circuit agreed, finding the word "employee" meant "retiree" under Curtiss-Wright's benefit plan. *Id.* at 1041. The retirees then argued that Curtiss-Wright could not terminate the benefits for some participants and not others based upon criteria that was not set forth as a "determinative factor" in the Plan. *Id.* at 1042. The court of appeals saw no difference between this argument and the earlier one. *Id.* The court did address the argument, however, saying that "reserving a general right to amend is to permit the conditioning and cessation of any participants' benefits not vested by virtue of ERISA in ways not originally foreseen in order to meet unanticipated changes of circumstances." *Id.* at 1042.

89. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227 (quoting Curtiss-Wright's revised 1983 SPD) (alteration in the original). The SPD also stated that the Plan was 'for an indeterminable period, [but] this Plan is not a vested Plan and as such is subject to modification or termination at any time." Schoonejongen v. Curtiss-Wright Corp., 18 F.3d at 1037.

90. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227.

91. *Id.*

92. *Id.*

93. Schoonejongen v. Curtiss-Wright Corp., 18 F.3d at 1036. The plaintiffs were former Curtiss-Wright salaried, nonunion employees. *Id.* The retirees claimed that they had lifetime benefits. *Id.* They alleged that Curtiss-Wright had made oral representations to support their claim to lifetime benefits. *Id.* at 1038. They also alleged that they did not receive copies of the SPD issued in 1983. *Id.* at 1037. Of course, Curtiss-Wright disputed those allegations. *Id.* at 1036-37.

The retirees also claimed that between 1976 and 1983, they did not receive SPDs, though they were sent to active employees. *Id.* at 1037. The SPDs stated that the insurance coverage would cease upon termination of the policy or when an individual ceased to be a member of a class.

things, they argued that the new SPD provision, which sought to clarify the reservation clause, was a new term identifying when the Plan would terminate.[94] The retirees claimed that the new term that reserved the right to terminate in the event of a plant closure was an amendment to the Plan and that Curtiss-Wright had not complied with section 402(b)(3) by failing to provide authority identification and amendment procedures.[95] Curtiss-Wright claimed that the new term was merely language clarifying its Plan.[96]

In 1990, the United States District Court for the District of New Jersey concluded that the "new SPD provision effected a significant change in the plan's terms."[97] The district court also concluded that the new SPD was an amendment to the Plan and that the Plan did not provide procedures to identify authority or amend, as required by section 402(b)(3).[98] The court also concluded that the amendment violated section 402(b)(3) and thus, the new SPD provision, which would terminate Plan benefits upon cessation of plant operations, was invalid.[99] The district court then held that the termination was ineffective under the invalid amendment to the Plan, and as a remedy for Curtiss-Wright's violation of section 402(b)(3), the district court awarded retirees $2.6 million in back benefits.[100] Curtiss-Wright appealed.[101]

The district court's $2.6 million in back benefits is a loss contingency that Curtiss-Wright must recognize under *FASB Statement No. 5*.[102] Even though Curtiss-Wright could still terminate its Plan and avoid complying with *FASB Statement No. 106*, it must still recognize the district court's relief to retirees.[103]

Id. The SPDs did not define class, but listed salaried retirees in two classes of employees. *Id.* A "highlight summary" distributed to retirees in 1973 and revised in 1975 expressly stated that the retiree's coverage would cease if the class in which he or she is a member ceased to be covered. *Id.*

94. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227.

95. *Id.*

96. *Id.* The primary authors of the new term of the SPD testified that they were only clarifying the Plan. *Id.*

97. *Id.*

98. *Id.* Section 1022(a)(1) requires that "[a] summary of any material modification in the terms of the plan . . . shall be furnished in accordance with section 104(b)(1)." 29 U.S.C. § 1022(a)(1) (1994); *see also* Meester v. IASD Health Services Corp., 963 F.2d 194 (8th Cir. 1992) (holding that the denial of loss of benefits through "phasing out of one plan" is a material modification); Baker v. Lukens Steel Co., 793 F.2d 509, 512 (3d Cir. 1986) (stating that deletion of "Special Retirement Benefit" is a material modification).

Section 1024(b)(1) requires that "a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted." 29 U.S.C. § 1024(b)(1). Section 1024(b)(1) may not apply to a plan termination, but some courts believed that employers should be required to notify employees and retirees of a planned plan termination. *See, e.g.*, Miller v. Coastal Corp., 978 F.2d 622, 624 (10th Cir. 1992); Rucker v. Pacific FM, Inc., 806 F. Supp. 1453, 1459 (N.D. Cal. 1992).

99. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227.

100. *Id.*

101. *Id.*

102. *See* FASB STATEMENT NO. 5, *supra* note 16, ¶ 4.

103. *Id.*

The Third Circuit affirmed the district court's judgment.[104] Curtiss-Wright requested that the United States Supreme Court grant a writ of certiorari to resolve the question of whether the level of detail companies must give, first, in providing a procedure to identify which individual(s) or group of individuals has the authority to amend the plan and, second, in providing a procedure to amend the plan.[105] The Court granted a writ of certiorari and reversed the Third Circuits' decision that Curtiss-Wright violated section 402(b)(3).[106]

III. ERISA PROCEDURAL REQUIREMENTS TO AMEND THE PLAN

Section 402(b)(3) requires companies to provide a procedure identifying persons with amendment authority,[107] but not necessarily the identity of a

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104. Schoonejongen v. Curtiss-Wright Corp., 18 F.3d 1034, 1042 (3d Cir. 1994) *rev'd*, 115 S. Ct. 1223 (1995).

105. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1228. The Court did not decide whether the creation of a substantive remedy for procedural violations of ERISA is the intent of Congress. *Id.* at 1231. If the Court had addressed this question, it would have decided whether money damages are a proper remedy for the loss of nonvested rights when companies make procedural violations that do not immediately cause a direct loss of benefits.

The issue is made more difficult because these violations were made in good faith, and not intended to terminate benefits. Many of these companies believed they were in compliance with the spirit, if not the letter, of ERISA. In addition, they were reporting and disclosing more information under *FASB Statement No. 106*. *See supra* note 46 and accompanying text.

No doubt, the retirees believe that a substantive remedy is most appropriate because they had been promised lifetime benefits by these companies. The Third Circuit agreed with the retirees in *Curtiss-Wright*. Schoonejongen v. Curtiss-Wright Corp., 18 F.3d at 1039-40. Now they do not have any benefits and must pay more for health and medical care.

106. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231.

107. 29 U.S.C. § 1102(b)(3) (1994); *see also* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1228. The pertinent language of ERISA, section 402(b)(3) is as follows: "Every employee benefit plan shall . . . (3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." 29 U.S.C. § 1102(b)(3). Both the Supreme Court and the Third Circuit agreed, in part, that 29 U.S.C. § 1102(b)(3) serves a functional purpose. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1228; Schoonejongen v. Curtiss-Wright Corp., 18 F.3d at 1038. The Court stated, 'Section 402(b)(3)'s primary purpose is obviously functional: to ensure that every plan *has* a workable amendment procedure. This is clear from not only the fact of the provision but also its placement in § 402(b), which lays out the requisite functional features of ERISA plans." Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1230 (citing 29 U.S.C. § 1102(b)). The Third Circuit concluded that ERISA section 402(b)(3) "ensure[s] that all interested parties will know how a plan may be altered and who may make such alterations." Schoonejongen v. Curtiss-Wright Corp., 18 F.3d at 1038. The court also concluded that once retirees and others know this information they will "be able to determine with certainty at any given time exactly what the plan provides." *Id.* The Supreme Court did not agree with the Third Circuit's interpretation of 29 U.S.C. § 1102(b)(3) and concluded that detail and specification were not requirements of 29 U.S.C. § 1102(b)(3). Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1229-30; *see infra* notes 108-20 and accompanying text.

On appeal to the Third Circuit, Curtiss-Wright argued that its Plan was properly amended under ERISA and thus the district court erred. Schoonejongen v. Curtiss-Wright Corp., 18 F.3d at

person.[108] The Supreme Court held that the reservation clause of Curtiss-Wright's Plan satisfies the authority identification requirement of section 402(b)(3) by naming "'[t]he Company' as 'the person' with amendment authority."[109] The Court noted that "the Company" is substantial because it requires beneficiaries, retirees, employees, and others to look only to the company, and not to "outside parties" to "exercise amendment authority."[110] "The Company" serves as a functional authority identification procedure that is required by ERISA.[111]

1038. In the alternative, it argued that if the Plan was not properly amended, the district court still erred in "striking a plan term . . . [as] an appropriate remedy for a violation of [29 U.S.C. § 1102(b)(3)]." *Id.* at 1038. Its justification for the argument was that its reservation of the right to modify, terminate, and amend was consistent with the purpose of section 402(b)(3). *Id.* Thus, Curtiss-Wright relied heavily on the most general function of section 402(b)(3), establishing requirements for amendment procedures. *Id.*

108. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1228.

109. *Id.*

110. *Id.*

111. *Id.* The Third Circuit found that a "simple reservation"—the language that the "Company reserves"—does not "provide a procedure for 'identifying the persons who have authority to amend the plan.'" Schoonejongen v. Curtiss-Wright Corp., 18 F.3d at 1038. Earlier, the Third Circuit had held that a plan provision stating that "'the Trustee may amend or modify this plan in whole or in part' specified an acceptable amendment procedure." *Id.* at 1039 (quoting Huber v. Casablanca Indus., 916 F.2d 85 (3d Cir. 1990)). The court noted that in *Huber* the "amendments had been formally adopted by resolutions at a regularly constituted board meeting in accordance with the established process of the trustees." *Id.* at 1039. It concluded that Curtiss-Wright's amendment was distinguishable from the amendment in *Huber*. *Id.*

Next, the Third Circuit found that the primary purpose of ERISA's amendment provision is to "ensure that all interested parties will know how a plan may be altered and who may make such alteration." *Id.* at 1038. Finally, it found that it was unable to determine who within Curtiss-Wright could "promulgate an effective amendment," finding the language "the Company" too imprecise. *Id.* at 1039. The Third Circuit then concluded that if Curtiss-Wright had used the "Board of Director" rather than "the Company," the amendment to the reservation clause of its Plan could be lawful under ERISA. *Id.* Curtiss-Wright also claimed that the November 1983 amendment was a termination of the entire postretirement welfare benefit plan and thus effectively terminated its Plan. *Id.* at 1041-42. The Third Circuit did not agree. *Id.* at 1041. It observed that 29 U.S.C. § 1102(b)(3) does not require plan provisions specifying a procedure for the termination of a plan. *Id.* *But see* Ackerman v. Warnaco, Inc., 55 F.3d 117, 121-22 (3d Cir. 1995) (concluding that this language was a response to an argument raised by Curtiss-Wright and that section 402(b)(3) applies to a plan termination). The court stated that ERISA, 29 U.S.C. § 1024(b)(1), requires that companies notify retirees of the termination of a benefit plan. Schoonejongen v. Curtiss-Wright Corp., 18 F.3d at 1041. The court found that Curtiss-Wright did not notify its retirees. *Id.* The court also found that the economic reality of the transaction shows that the November 1983 announcement was no more than a clarification of the 1982 Plan amendment. *Id.* The Third Circuit noted that Curtiss-Wright did not introduce evidence that it planned to terminate the Plan or that it actually terminated its Plan in November 1983. *Id.*

Curtiss-Wright was arguing that the reservation of the right to terminate constitutes an actual termination upon the identification in the Plan of a specific condition that will result in cessation of the Plan. But the condition, the cessation of operations, would never have to occur until

Section 402(b)(3) also requires companies to provide "a procedure for amending the plan."[112] The Supreme Court held that the reservation clause provides a procedure for amending the plan by stating that amendments could be made "by the Company."[113] The Court found the term "by the Company" to be "the barest of procedures" but "substantial" enough under section 402(b)(3).[114]

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after the plan has been terminated under Curtiss-Wright's reasoning. The purpose of the amendment appears to be the identification of an event that would eventually result in termination. Its purpose was not to terminate the Plan when the Plan was amended. The court of appeals did not agree that Curtiss-Wright made an instant termination, and thus, required Curtiss-Wright to terminate first and then institute a new plan without benefits. *Id.* at 1040-41.

112. 29 U.S.C. § 1102(b)(3) (1994); Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1228.

113. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1228. The Third Circuit did not agree with Curtiss-Wright, finding that a simple reservation is not specific enough to be a "'procedure for amending [the] plan, [or] . . . identifying the persons who have the authority to amend the plan.'" Schoonejongen v. Curtiss-Wright Corp., 18 F.3d at 1038 (quoting 29 U.S.C. § 1102(b)(3)).

114. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1229. The Court gave three reasons for the conclusion that 29 U.S.C. § 1102(b)(3) requires a coherent amendment procedure. *Id.* at 1230. "First, for a plan not to have such a procedure would risk rendering the plan forever unamendable under standard trust law principles." *Id.* (citing RESTATEMENT (SECOND) OF TRUSTS § 331(2) (1957)). This purpose keeps plans amendable and thus, serves to preserve the managerial discretion in the allocation of human resources and funds, conserving the core of the at will employment doctrine. *See infra* notes 204-06 and accompanying text. Effectively, the Court's prevention of unamendability makes 29 U.S.C. § 1102(b)(3) consistent with 29 U.S.C. §§ 1051(1) and 1081(1) which excludes welfare benefit plan from the ERISA requirements that grossly restricted the allocation of financial resources. *See supra* notes 17, 47 and accompanying text.

The Court further stated that "such a requirement increases the likelihood that proposed plan amendments, which are fairly serious events, are recognized as such and given the special consideration they deserve." Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1230. Few companies have been found to act in bad faith, conceal, or induce detrimental reliance when changes to their plans that did not contain an amendment procedure. *See supra* note 17 and accompanying text. Instead, they have made serious administrative errors that are technical violations of 29 U.S.C. § 1102(b)(3). Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1230. The remedy is equitable—an award of restitution. *See supra* note 78 and accompanying text. In addressing disputes regarding plan changes, these changes are declared "fairly serious events." Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1230. These changes, however, are not always enforced by equitable relief because they are merely technical violations of ERISA. Restitution and short-lived reinstatement—terminated as soon as the plan can be amended—may not make companies take "proposed plan amendments" as "fairly serious events." *Id.* It is reasonable to suggest that companies facing no legal sanctions and no market penalties for making administrative errors that adversely affect retiree and employee security have little to no risk in failing to properly implement 29 U.S.C. § 1102(b)(3) and other technical provisions of ERISA.

The Court concluded, "Finally, having an amendment procedure enables plan administrators, the people who manage the plan on a day-to-day level, to have mechanism for sorting out, from among the occasional corporate communications that pass through their offices and that conflict with the existing plan terms, the bona fide amendments from those that are not."

The Court's ground for its conclusion was that Curtiss-Wright could amend its Plan at will without the consent of retirees or third parties.[115] The Court observed that Plan participants could always look directly to the Plan under such general language,[116] thus making the general language, which provides both an authority identification procedure and an amendment procedure "substantial."[117] The Court concluded that simple plans required a simple procedure and that the Cur-

Id. The Court also noted that the "plan administrator may have a statutory responsibility to do this sorting out." *Id.* (citing 29 U.S.C. § 1104(a)(1)(D)). In employee benefit plan management, plan administration can be fragmented among several departments, such as finance, accounting, and personnel. RICHARD I. HENDERSON, COMPENSATION MANAGEMENT 414 (5th ed. 1989). In some small companies, this administration could be in one department. *Id.* at 411, 414; *see also supra* note 37 and accompanying text. In spite of the organizational structure and responsibilities, *Curtiss-Wright, Ackerman, Blau,* and other decisions have made apparent that administrative errors and noncompliance are frequent occurrences. *See supra* note 78 and accompanying text. It is difficult, however, to understand the incentives to sort out "occasional corporate communications that pass through . . . offices and that conflict with the existing plan terms," when the penalty for failing to do so is limited to mostly restitution for the most egregious acts. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1230; *see also supra* note 78 and accompanying text.

115. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1229. The Court's reasons for a coherent amendment procedure are not supported by the employers' acts and conduct in the administration of employee welfare benefits plans. *See supra* note 78 and accompanying text. The only corrective policy option available that may not undermine ERISA policy—retaining employer control of the allocation of funds—is closer scrutiny of employers' actions to change, modify, and terminate plans. The application of the *de novo* review to some ERISA claims involving plan terminations already permits courts to scrutinize plan management regarding the implementation of plan provisions and thus, gives federal courts the opportunity to closely scrutinize employer decisions and their rationales. *See* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989); DeGeare v. Alpha Portland Indus., 837 F.2d 812, 814 (8th Cir. 1988), *vacated and remanded by* 489 U.S. 1049 (1989). If *de novo* review fails to prevent harsh decisions and actions, then federal courts may need to award legal relief, permitting courts to award money damages against employers and administrators. *See* Mertens v. Hewitt Associates, 508 U.S. 248, 256 (1993) (citing United States v. Mitchell, 463 U.S. 206, 226 (1983); GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, LAW OF TRUSTS AND TRUSTEES § 701, at 108 (2d ed. 1982)). Monetary relief could have a deterrent effect and thus, caused better administration where employers' actions are unethical. In addition, companies would be required to disclose threatened litigation as a loss contingency. FASB, STATEMENT NO. 5, *supra* note 16, ¶ 4. This now includes greater financial liabilities and broader market interests. FASB STATEMENT NO. 106, *supra* note 2, ¶¶ 3-5. Financial losses would be greater as courts could award employees, retirees, and other participants in excess of benefits due. This remedial action may be justified because labor and financial markets do not presently provide an immediate, if any, response to retirees and others for companies' poor administration of a benefit plan. *See infra* notes 206-30. The increasing costs of poor administration, which must be disclosed, could potentially trigger some market concerns regarding a market failure. *See infra* notes 239-53 and accompanying text.

116. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1229.

117. *See id.* The Court stated, "In any event, the literal terms of § 402(b)(3) are ultimately indifferent to the level of detail in an amendment procedure, or in an identification procedure for that matter." *Id.* Effectively, the Court requires that pension and welfare benefit plans may give the barest procedure if justified by the circumstances. *Id.*

tiss-Wright Plan was the simplest of all plans—accounting for its bare procedures.[118] Finally, the Court concluded that "requir[ing] specification of individuals or bodies within a company would lead to improbable results,"[119] and thus would invalidate a plan amendment by requiring a procedure that Congress did not intend.[120]

A. *Determining Who Has Authority to Amend*

The Court acknowledged that designating "the Company" as having the power to amend the plan, though a lawful amendment procedure, did not state who would amend and how to amend the plan.[121] The Court concluded that companies must adhere to corporate law in complying with trust rules that govern the administration of these plans.[122] Agreeing with part of the reasoning of the Third Circuit,[123] the Supreme Court concluded that "principles of corporate law provide[d] a ready-made set of rules for determining, in whatever context, who has authority to make decisions on behalf of a company."[124] The Court concluded that federal courts may determine, when a dispute arises, who "make[s] a decision to amend" or under trust law, who "'sufficiently manifest[s] . . . intention'"[125] to amend.[126] The Court noted that "the Company" was not

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118. *Id.* at 1229-30. The Court was neither impressed nor persuaded by the argument that 29 U.S.C. § 1102(b)(3) requires detail. The Court concluded that other provisions of ERISA, namely section 402(a)(1), served the purpose that detail would provide under section 402(b)(3). *Id.* at 1230. As required by section 402(a)(1), the Court found that a written plan would give every beneficiary an opportunity to learn his rights and obligations. *Id.*; *see also* Henne v. Allis-Chalmers Corp., 660 F. Supp. 1464, 1481 (E.D. Wis. 1987) (holding that the plan met minimum procedural requirements even though no procedure was set forth).

Other companies have terminated postretirement benefit plans at the closing of plant facilities, and they did so under a general reservation clause. *See supra* notes 17, 194 and accompanying text.

119. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1229.

120. *Id.* at 1229, 1231.

121. *Id.* at 1231.

122. *Id.* at 1229.

123. *Id.* at 1227-28. Judge Roth thought that under traditional corporate law principles, "by the company" meant "by the board of directors or whomever of the company has the authority to take such action." *Id.* (citing Schoonejongen v. Curtiss-Wright Corp., 18 F.3d 1034, 1039 n.3 (3d Cir. 1994)). Judge Roth believed that Curtiss-Wright's board of directors or any other person with the power to act did not ratify the new provision of the SPD. *Id.* at 1227. For a discussion of ratification of an unauthorized amendment to the plan, see *infra* notes 147-50 and accompanying text.

124. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1229.

125. *Id.* (quoting RESTATEMENT (SECOND) OF TRUSTS § 331 cmt. c (1957)). In *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560 (7th Cir. 1995), Keystone Steel & Wire Co. changed the terms of its health care benefit plan by terminating coverage and creating an entirely new plan for the plaintiffs, Keystone's retirees. *Id.* at 564. The Seventh Circuit noted with particularity that Keystone notified the plaintiffs in February 1993 that it would amend its benefit plan at the expiration of the collective bargaining agreement in May 1993. *Id.* at 569. This amendment would be effective on July 1, 1993. *Id.* at 564. The Seventh Circuit noted that Keystone had lawfully

reserved the right to amend, terminate, and modify the benefit plan. *Id.* at 569. The court found that Keystone was a settlor that had "failed to specify a procedure" for amending the plan. *Id.* (citing Biggers v. Wittek Indus., 4 F.3d 291, 295-96 (4th Cir. 1993)). The court concluded, however, that because "Keystone, like a trustee, has an inherent authority to amend . . . provided its intent to amend the Plan is clearly manifested." *Id.* The court also concluded that notification of a future change "clearly manifested" the settlor's "intent to amend the Plan." *Id.* The plaintiffs were not prejudiced by Keystone's violation of 29 U.S.C. § 1102(b)(3). *Id.* Therefore, Keystone's conduct, therefore, "would not justify granting . . . a substantive remedy" for this procedural violation. *Id.*

The *Murphy* reasoning may not strongly support Curtiss-Wright's position though some similarities do exist. Curtiss-Wright was a settlor under trust law principles and thus, retained the right to revoke, modify, and amend at any time. *See id.* Curtiss-Wright may have actually put retirees on notice or manifested an intent to amend or change its Plan. In early 1983, Curtiss-Wright issued a newly revised SPD that explicitly stated that the Plan would cease upon termination of business operations. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227. Effectively, it put retirees on notice that it would terminate the Plan under its then unlawful amendment. *See id.* The content of the new SPD was not disputed. *See id.* In November 1983, several months thereafter, Curtiss-Wright announced that it was closing its Wood-Ridge facility. Curtiss-Wright's executive vice president announced that it was terminating all postretirement welfare benefits. *Id.* The question raised is whether the issuance of the new SPD gave retirees sufficient notice that Curtiss-Wright was intending to change its plan before the actual termination. The new SPD was issued several months before Curtiss-Wright closed its plant and terminated its Plan, making it difficult for retirees to know that changes had already been made. In *Murphy*, Keystone modified its plan and then announced that it would seek these modifications at the expiration of the collective bargaining agreement. Murphy v. Keystone Steel & Wire Co., 61 F.3d at 569. The expiration of this collective bargaining agreement was definite; plant closings are not. Thus, the manifestation of intent to amend under Curtiss-Wright's new SPD would be subtle because a plant closing is not definite, nor, at times, expected. Once the closing is announced everyone takes notice. In *Curtiss-Wright*, finding a manifestation of intent to amend based on the notice that had been given by a routine issuance of the SPD would be extremely difficult. For retirees, the issuance of a SPD creates no direct impetus or an unusual event that brings to their attention a change to the reservation clause that would effect an amendment.

126. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1229. In *Murphy* and other cases, federal courts of appeals identify conduct that establishes a manifestation of intent to amend a plan. *See* Murphy v. Keystone Steel & Wire Co., 61 F.3d at 569. In *Diebler v. Local United Food & Commercial Worker Local 23*, the Third Circuit stated, "Of course, a benefit plan may be amended only through a 'manifestation of intention . . . expressed in a manner which admits of its proof in judicial proceedings.'" Diebler v. Local United Food & Commercial Worker Local 23, 973 F.2d 206, 210 (3d Cir. 1992) (quoting RESTATEMENT (SECOND) OF TRUSTS § 4 (1957)). The Third Circuit held that the trustee's "Resolution Concerning Severance Pay" was a manifestation of intent to terminate a severance plan and thus, prevented a discharged employee from recovering severance benefits. *Id.* at 212. In *Biggers v. Wittek Indus.*, the Fourth Circuit held that a revised but unsigned policy by the approving authority was not a manifestation of intent to alter or amend the plan. Biggers v. Wittek Indus., 4 F.3d 291, 296 (4th Cir. 1993).

In *Curtiss-Wright*, the new SPD provision was drafted by the labor counsel and director of benefits with the clear purpose of identifying a specific circumstance or event that would terminate the Curtiss-Wright Plan. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227. Later, the executive vice president's letter placed the new SPD provision into operation or effect

sufficient enough to identify who can actually make decisions to amend on behalf of the company.[127] The Supreme Court noted that "only natural persons are capable of making decisions."[128] Thus, it must be determined by federal courts which person or persons possessed and exercised the authority to amend the plan.

The Court observed that some companies "may want to provide greater specification to their amendment procedures" while others "may want to retain [the] flexibility that designating '[t]he Company' . . . provides them."[129] Yet the Court found this choice as only one of the problems companies face in delegating authority to employees, officers, and agents that can make legally binding decisions—decisions that are subject to be challenged as not authorized by

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and thus, fulfilled its intended purpose as an amendment, which was to terminate the Plan. *Id.* The director of benefits and labor counsel did not manifest the intent to amend the Plan in that they viewed the change as a mere a clarification of the Plan. *Id.* Because they lacked authority to amend the Plan, the change, that was actually an amendment, had to be ratified by a corporate officer or senior manger, such as the executive vice president. *Id.* at 1231. The executive vice president's letter operationalized the change, giving it the effect of an amendment that significantly changed the terms and conditions of the Plan. *See infra* notes 147-48 and accompanying text. The ratification by the vice president assumed that the authority to amend the plan was delegated to the vice president by the board of directors or another corporate officer. Moreover, senior managers, corporate officers, and the board of directors can ratify an act and decision that they have the authority to make or approve under the corporate structure. *See infra* note 146 and accompanying text.

127. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1229.

128. *Id.* at 1229. Although the Supreme Court found that the textual reading of 29 U.S.C. § 1102(b)(3) was clear on the issue of detail, it still rebutted an argument on this issue because the Third Circuit had found this argument persuasive. *Id.* The Supreme Court examined ERISA's informational scheme and made several findings and conclusions on the need for detail required under 29 U.S.C. § 1102(b)(3). First, the Court found that 29 U.S.C. § 1102(b)(3) was "indifferent to the level of detail." *Id.* at 1229. Second, the Court found that 29 U.S.C. § 1102(b)(3) provides for a "coherent amendment procedure." *Id.* at 1230. Lastly, the court found that ERISA's "informational scheme" was thorough enough without expanding 29 U.S.C. § 1102(b)(3). *Id.* at 1229.

129. *Id.* at 1231. Curiously, the Supreme Court observed that specification or detail would reduce litigation. *Id.* Curtiss-Wright probably shared the Court's thinking—look what it got. It only created litigation for itself. Perhaps, the Court speaks of the long-term. Meanwhile, litigation on the termination of postretirement welfare benefits will pursue other paths under the Court's analysis. For example, in *Howe v. Varity Corp.*, 36 F.3d 746 (8th Cir. 1994), *aff'd*, 116 S. Ct. 1065 (1996), retirees and former employees claimed that Varity Corporation's disclosure of grossly inaccurate financial information regarding the financial status of one of its subsidiaries was a breach of a fiduciary duty under 29 U.S.C. § 1104(a)(1). Therefore, they could bring a claim under 29 U.S.C. § 1132(a)(3) and should be awarded restitution. This relief would be compensation for benefits due that had been lost due to the termination of plan benefits. *See generally* Paul M. Barrett, *Did a Restructuring Mislead Workers on Benefits?*, WALL ST.J., Oct. 10, 1995, at B1 (discussing the potential impact of *Varity* on employees, retirees, and companies). For a discussion of ERISA disclosure requirements under 29 U.S.C. § 1024(b)(1), see *supra* notes 55, 86 and accompanying text.

beneficiaries and participants.[130] The Court concluded that "whatever level of specificity . . . in an amendment procedure or elsewhere, [the company] . . . is bound to that level."[131]

B. *A Statutory Obligation to Follow Plan Procedures*

The United States Supreme Court showed some caution in its approach to addressing whether the company or plan sponsor is acting in a fiduciary capacity when it inserts an amendment in the plan under its plan amendment procedure.[132] The Court noted that ERISA section 404(a)(1)(D) may impose on plan administrators a "statutory responsibility"[133] to operate the plan in accordance with valid plan documents and instruments when those documents or plan provisions comply with ERISA.[134] In terminating and amending these plans, however, these plan sponsors do not act in a fiduciary capacity.[135] The Court also found that plan sponsors must follow plan procedures for amending an ERISA plan once they have provided such procedures.[136] If they do not, the amendment would be invalid or ineffective as an operative provision and thus, would not

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130. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231 (citing ROBERT CLARK, CORPORATE LAW § 3.3.2 (1986)). In *Curtiss-Wright*, the Court noted that "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Id.* at 1228 (citing Adams v. Avondale Indus., 905 F.2d 943, 947 (6th Cir. 1990)). In *Adams*, the Sixth Circuit concluded that "a company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan." Adams v. Avondale Indus., 905 F.2d 943, 947 (6th Cir. 1990). In *Lockheed*, the Court stated, "When employers undertake those actions, [such as termination and amendment], they do not act as fiduciaries . . . , but are analogous to the settlors of a trust . . . ." Lockheed Corp. v. Spink, 116 S. Ct. 1783, 1789 (1996) (citing Johnson v. Georgia-Pacific Corp., 19 F.3d 1184, 1188 (7th Cir. 1994)). *But see* Varity Corp. v. Howe, 116 S. Ct. 1065, 1074-75 (1996) (holding that a company's failure to disclose accurate financial information on the status of its subsidiary was a breach of a fiduciary duty under 29 U.S.C. § 1104(a)(1)). In *Curtiss-Wright*, the Court also noted that plan administrators may have a statutory responsibility to operate the plan in accordance with valid plan documents and instruments. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1230 (citing 29 U.S.C. § 1104(a)(1)(D)). The Court found that such responsibility was an incentive for plan administrators to sort out bona fide amendments among occasional corporate communications, "weeding out defective . . . [amendments]," and "obtaining new amendments as quickly as possible." *Id.* at 1231.

131. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231.

132. *See id.* at 1230. In *Varity*, the Court held that an employer was subject to fiduciary duty under 29 U.S.C. § 1104(a)(1), even though it did not intend to act as a plan administrator. Varity Corp. v. Howe, 116 S. Ct. at 1073.

133. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231.

134. *Id.* at 1230-31.

135. *Id.* at 1228. Plan sponsors and companies generally do not have fiduciary responsibilities in amending and terminating the plans. *Id.* (citing Adams v. Avondale Indus., 905 F.2d at 947). *But see* Varity Corp. v. Howe, 116 S. Ct. at 1073 (holding that an employer could be a fiduciary in the administration of an employee benefits plan even though the employer did not intend to be a fiduciary).

136. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231.

change the plan unless it was later ratified ex post.[137] In *Curtiss-Wright*, the Court could not determine on the facts of the case which person(s) within Curtiss-Wright possessed authority and exercised the authority to amend the Plan and whether Curtiss-Wright actually followed its plan amendment procedure in amending the Plan when it made clarifications.[138]

C. *Approval of an Unauthorized Plan Amendment*

The Court reversed and remanded to the Third Circuit the most problematic issue. Most certainly, it will breed litigation by retirees in their efforts to prevent the unilateral termination of postretirement welfare benefits by companies.[139] The Court thought it best that the Third Circuit decide the issue that was at the heart of the case, "whether Curtiss-Wright's valid amendment procedure—amendment 'by the Company'—was complied with in this case."[140] The Court concluded that such a question would be highly factual, stating that the court of appeals must conduct a "fact-intensive inquiry, under applicable corporate law principles."[141] Furthermore, it also stated that the delegation of plan amendment authority could be either expressed or implied.[142] The Court noted that this authority could be delegated to "persons or committees within Curtiss-Wright."[143] The Court also noted that persons to whom this authority was

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137. *Id.* at 1230-31.

138. *Id.* at 1231.

139. *See id.*

140. *Id.*

141. *Id.*

142. *Id.* Who retains authority to amend benefits plan varies from company to company. Companies can authorize committees that consist of officers of the company. *See* Siskind v. Sperry Retirement Program, 795 F. Supp. 614, 615 (S.D.N.Y. 1992), *rev'd*, 47 F.3d 498 (2d Cir. 1995). Other companies did not know or identify who possessed authority to amend the plan among their corporate officers. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231; Ackerman v. Warnaco, Inc., 55 F.3d 117, 121 (3d Cir. 1995). Yet as a company either merges or creates a spin-off, the authority to amend and follow an amendment procedure could in some instances become more difficult to ascertain. *See infra* notes 154-55 and accompanying text.

Such uncertainty regarding authority identification and amendment procedures is greatly reduced when benefits or human resources managers have access to corporate executives and officers. This access helps to draw the line between routine day-to-day operations, tactical measures, and strategic planning decisions. Clearly, amendments can be either routine or strategic, but defining duties and responsibilities along the lines of routine administration and planning actions establishes who initiates particular changes to employee benefit plans. *See infra* note 147 and accompanying text.

143. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231. The Court noted that the Third Circuit believed the board of directors or other persons had not expressly ratified the new provision of the SPD. *Id.* at 1227-28.

In *Siskind*, the Sperry Retirement Program delegated authority to amend the plan to the Sperry Corporation Employee Benefits Executive Committee that consisted of corporate officers. Siskind v. Sperry Retirement Program, 47 F.3d at 506. Although the Employee Benefits Executive Committee adopted amendments recommended by the Unisys Board of Directors, the Second

delegated had to exercise it for Curtiss-Wright to make a valid amendment to its Plan.[144] In fact, the Court required on remand that the Third Circuit determine "whether those persons or committees actually approved the new plan provision contained in the revised SPD."[145]

The Supreme Court added a caveat. The Court permitted ratification if the company had engaged in subsequent activities or actions that were consistent with the nature of the reservation clause.[146] The Court observed that if the new provision was not properly authorized when issued, then "subsequent actions" could later ratify the unauthorized amendment.[147] The Supreme Court instructed

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Circuit concluded that such an adoption was not a violation of fiduciary duties. *Id.* at 506-07; *see also* Melbinger, *supra* note 13, at 48-49 (reviewing the holding of the Second Circuit in *Siskind*).

144. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231.

145. *Id.*

146. *Id.* In the absence of expressed or implied authority, the unauthorized acts of corporate officers and senior managers may still be valid and effective to amend, terminate, and modify pension and welfare benefit plans. *See id.* The corporation and its board of directors can ratify unauthorized acts of its officers and senior managers if the board of directors can legally approve those acts without shareholder approval. *See id.*; FREDERICK G. KEMPIN, JR., ET AL., LEGAL ASPECTS OF THE MANAGEMENT PROCESS: CASES AND MATERIALS 397 (1990). In *Curtiss-Wright*, the Court instructed that ratification could be considered on remand if the "new plan provision is found not to have been properly authorized." Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231. Specifically, on remand the Third Circuit must determine whether those actions that were implemented to terminate the Curtiss-Wright Plan would ratify an unauthorized amendment. *See id.* at 1227, 1231. Curtiss-Wright amended its plan, but in the same year, its "executive vice president wrote respondents [Curtiss-Wright retirees] a series of letters informing them that their post-retirement health benefits were being terminated." *Id.* at 1227. This act by the vice president to terminate the plan under the new SPD provision could also ratify this provision (the contested amendment) if the vice president, as a corporate officer or senior manager, had either the expressed or implied authority to amend. *Id.* at 1231. On the facts of *Curtiss-Wright*, the Court could not determine whether the executive vice president was assigned management authority or reported to an officer with this authority that would permit it to amend the employee benefit plan. *See id.* at 1231; *see also infra* note 147 and accompanying text.

147. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231. The president and general manager possess implied authority to make contracts in the ordinary course of business. *See* KEMPIN ET AL., *supra* note 146, at 392 (citing Lee v. Jenkins, 268 F.2d 357 (2d Cir. 1959)). These officers and managers delegate authority for functions, such as benefit administration and compensation management, that are administrative functions in support of the employment contract. *See* HENDERSON, *supra* note 114, at 411-14. It is then reasonable to consider whether a vice president could have had either expressed or implied authority to amend or even terminate compensation and fringe benefits under the general reservation clause when Curtiss-Wright's plant closed in 1983. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231. Furthermore, it is well-settled that when a plant ceases to operate, the company can generally terminate wages and other benefits of the compensation package and then grant, if available, severance benefits. For suits involving companies that terminated postretirement welfare benefits at the expiration of the collective bargaining agreement, transfer of assets, and closing of the plant, see *supra* note 17 and accompanying text. Employee benefits are a standard part of compensation packages for employees. HENDERSON, *supra* note 114, at 2-7, 412-13. Managing these benefits is an administrative

the Third Circuit to consider whether letters by the executive vice president, stating that the plan was being terminated, served to ratify this amendment if it was proven to be unauthorized under Curtiss-Wright's procedure for amending its Plan.[148] One could conclude that ratification reflects, under limited circumstances,[149] that the plan sponsor's right to terminate permits nonfraudulent procedural violations of ERISA when a plan sponsor amends the reservation clause, but is not subject to ERISA claims and equitable relief for unathorized amendments.[150] Therefore, ratification legitimizes unauthorized actions that were substantially consistent with the purpose of the reservation clause.

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function of one or more officers, senior managers, and their staff. *Id.* at 411-14. In *Compensation Management*, Richard Henderson stated:

> In large organizations, the benefits manager may report to the vice president or director of compensation and benefits. In smaller organizations, the manager of compensation and benefits is responsible for practically all items identified and described in this book. However, in some organizations, benefits responsibility is fragmented. Pension, life insurance, and disability programs may be assigned to the Finance Department, and medical insurance, claims processing, and the completion of government reports related to mandated benefits to the Accounting Department, while top management retains authority for the entire time-off-with-pay program.

Id. Thus, benefit plan management is an administrative responsibility of one or more corporate officers and senior managers. *Id.* Those officers and managers are fulfilling part of the corporation's obligations under ERISA and employment contracts. If these officers and managers could not perform these contractual obligations that include the provision of compensation and benefits, the corporation would not be able to establish and maintain a stable employment relationship.

The board of directors and corporate officers can ratify many types of agreements, actions, and contracts. KEMPIN ET AL., *supra* note 146, at 392-97. They can not ratify the contracts of corporate officers and senior managers who engage in "extraordinary or fundamental acts," such as the mortgaging of corporate assets that require the approval of shareholders. *Id.* (citing Lee v. Jenkins, 268 F.2d 357 (2d Cir. 1959)); *see also* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1228-29. Obviously, amending an employee benefit plan is not an extraordinary or fundamental act requiring shareholder approval when compared to mortgaging corporate assets. *Id.* The Court held that "by the Company" reserved for Curtiss-Wright's board of directors the authority to amend the plan. The Court did not conclude, however, that this authority could only be exercised if the amendment was approved by the board of directors. *Id.* The Court only required that Curtiss-Wright delegate the authority to individuals or committees that would make a decision to amend the plan. *Id.* at 1229, 1231. Thus, the Court made ratification a viable alternative if a Curtiss-Wright officer or the Curtiss-Wright board of directors had the power to authorize and did authorize the amendment. *See id.* at 1228.

148. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct at 1231.

149. *See supra* notes 146-47 and accompanying text.

150. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231.

D. *Following a Procedure to Amend the Plan*

The Court required that federal courts determine whether the procedure to amend the plan was followed by the company.[151] Whoever has the burden of proof to substantiate who possessed identification authority, may find it difficult to trace the course of an amendment decision.[152] Therefore, it would be difficult to identify the possessor of authority and their execution of the amendment.[153]

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151. *Id.* It must be decided whether a technical violation of ERISA makes the plan unamendable or the amendment null and void. Some federal courts have addressed this issue, though the Supreme Court has remained silent. In *Murphy*, the Seventh Circuit addressed whether a technical violation of ERISA made the plan unamendable or the amendment null and void under trust law principles. Murphy v. Keystone Steel & Wire Co., 61 F.3d 560, 569 (7th Cir. 1995). The court explicitly noted that in *Schoonejongen*, the Third Circuit did not address this question. *Id.* at 569. The Seventh Circuit stated that "while addressing these claims we note that Congress and Supreme Court have instructed us to develop a federal common law to implement ERISA . . . and that principles of trust law have been developing in undertaking this task." *Id.* (citing Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989)). The court then concluded that a technical violation of 29 U.S.C. § 1102(b)(3) does not make the plan unamendable or the amendment null and void under trust law principles. *Id.* at 569 (citing Aldridge v. Lily-Tulip, Inc., 40 F.3d 1202 (11th Cir. 1994)); Biggers v. Wittek Indus., 4 F.3d 291 (4th Cir. 1993); Adams v. Avondale Indus., 905 F.2d 943, 949 (6th Cir. 1990)). *But see* Scheonmaker v. Employee Sav. Plan, 987 F.2d 410 (7th Cir. 1993) (finding that unwritten practices were substantial modification of written procedures, thus, the amendment failed to comply with 29 U.S.C. § 1102 (b)(3)).

152. KEMPIN ET AL., *supra* note 146, at 388. In *Curtiss-Wright Corp.*, the Court concluded that it could not determine on the record whether Curtiss-Wright's board of directors had delegated the authority, either expressed or implied, to amend its Plan to a corporate officer or senior manager. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231. Corporate officers are expressly or implicitly authorized to act on behalf of the corporation. *See* KEMPIN ET AL., *supra* note 146, at 388. Generally, a bylaw provision or board resolution is proof that the corporate officer, such as the vice president, was authorized to act, for example, to amend an ERISA plan, on behalf of the corporation. *Id.* When direct proof is not available, circumstantial evidence "may be admissible to show that the corporation cloaked an officer with a particular type of authority." *Id.*

The Court noted that authority may be "inferred from circumstances or implied from the acquiescence of the corporation or its agents in a general course of business." Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231 (citing 2 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 444, at 397-98 (1990)). Consequently, expressed authority to perform or engage in an employment activity or practice may also include implied authority to implement the activity or practice consistent with corporate policy. *See id.* As business circumstances and economic conditions negatively influence the financial health of the corporation, the authority to grant and administer welfare benefit plans may include, arguably, the lesser authority to amend or modify plans so that they could be implemented consistent with corporate policy.

153. *See infra* notes 154-55 and accompanying text. Corporate structure for employee benefit management, including administration and planning, starts at the top with the board of directors. BAROCAS, *supra* note 59, at 25; HENDERSON, *supra* note 114, at 41-45. The *Revised Model Business Corporation Act* defines the authority of the board of directors as follows:

> All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its

Tracing the course of such a decision is difficult because companies undergo organizational changes. In the 1980s and 1990s, many companies reduced the number of managers and levels of management[154] and engaged in mergers to increase competitiveness.[155] Such structural changes within companies and

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> board of directors, subject to any limitation set forth in the articles of incorporation.

REVISED MODEL BUS. CORP. ACT § 8.01 (1984). With this power, the board of directors establishes business or corporate policy and defines tasks for officers and management. *See* HENDERSON, *supra* note 114, at 38-48; KEMPIN ET AL., *supra* note 146, at 372-74. The board of directors can also create committees unless prohibited by the articles of incorporation. REVISED MODEL BUS. CORP. ACT § 8.25. These committees may exercise the authority of the board of directors, with some exceptions. *Id.* § 8.25(d)-(e). Thus, these committees could be delegated authority by the board of directors to modify and amend pension and welfare benefit plans. *See id.* Appendix shows the relationship between the board of directors and other levels within the corporation.

The senior management, consisting of the chief operating officer (CEO), president, vice president, and other executive managers, implement corporate policies of the board of directors. *See id.* § 8.41. These officers and managers are appointed by the board of directors or described in the bylaws. *Id.* The board of directors, bylaws, and articles of incorporation define the duties and authority of these officers and managers. *Id.* Corporate officers are granted authority to implement board of director's business policies and other corporate tasks, including establishing employee benefits and other compensation plans. *See id.* Corporate officers can be granted authority, either expressed or implied, to amend, modify, or terminate employee pension and welfare benefit plans. *Id.* § 8.41 cmt.; *see also* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1229; *see also* Schoonejongen v. Curtiss-Wright Corp., 18 F.3d 1034, 1039 n.3 (3d Cir. 1994), *rev'd*, 115 S. Ct. 1223 (1995). Although the board of directors delegates its authority to amend pension and welfare benefit plans, it still retains management discretion and fiduciary duties for corporate management. KEMPIN ET AL., *supra* note 146, at 380.

154. BAROCAS, *supra* note 59, at 9; *see also* John J. Keller, *High Anxiety: AT&T Breakup Jolts Managers*, WALL ST. J., Nov. 21, 1995, at B1 . Layoffs, downsizing, or furloughs can affect all levels of the business organization including managers. *Id.* Keller stated that:

> Last week, the task grew even tougher, as the managers themselves learned that they, too, are at risk. AT&T set a buyout offer for more than 77,000 managers, or more than half of its world-wide supervisory staff, giving them until year end to take it or leave it. Some of those who stay face dismissal after Jan. 13.

Id. Years or months later it will be difficult to determine who made what decisions and how they made those decisions within the organization. Furthermore, entire divisions, units, and activities within companies will disappear. *Id.* "Within AT&T's massive corporate staff of 28,000 workers, thousands of jobs are devoted to tracking 25 separate business units and coordinating their operations with sister departments. After the breakups, such a system will be largely superfluous. 'While activities go away here,' says Mr. Burlingame, the human resources chief." *Id.* The restructuring and downsizing taking place at AT&T are typical of American organizational changes and management activities of the 1990s. We do not expect corporate human resources and legal staffs to be exempt from restructuring and downsizing. *Id.*

155. BAROCAS, *supra* note 59, at 11; *see also* Howard Chua-Eoan, *Too Big or Not Too Big? A Merger and a Divestiture Stir the Debate over the Right Size of All Things*, TIME, Oct. 2, 1995, at 32, 33; Joann S. Luldin, *Spinoffs May Establish New Companies, But They Often Spell the End of Jobs*, WALL ST. J., Nov. 21, 1995, at B1.

industries strongly support the need for "fact-intensive inquiry" to determine the origin, nature, and course of company decisions to amend, starting with which person(s) possessed the authority to amend.[156]

Many companies, including Curtiss-Wright considered changes to their plans to simply be a change in language that did not effect a change in the terms of the plan.[157] This belief complicates the factual inquiry of determining whether a company followed its own procedure to amend a plan or whether the

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> Melbinger states:
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> After the merger of Sperry Corp. and Burroughs Corp. in 1986, management of the new entity, Unisys developed an early retirement incentive program to be funded from surplus assets under the Sperry Retirement Plan. . . . They [former employees] sued Sperry and the committee for amending the plan in a manner that excluded them from the early retirement program.

Melbinger, *supra* note 13, at 49 (citing Siskind v. Sperry Retirement Program, 795 F. Supp. 614, 615 (S.D.N.Y. 1992), *rev'd*, 47 F.2d 498 (2d Cir. 1995)); *see also* Algie v. RCA Global Communications, Inc., 60 F.3d 956, 960 (2d Cir. 1995) (involving a board of directors that never approved the termination of the severance plan before or after the merger of the two companies).

Mergers and acquisitions are external influences in strategic benefit planning that create the need for companies to rethink benefit management. *See* BAROCAS, *supra* note 59, at 26. Victor Barocas, Senior Research Associate of the Conference Board stated: "Several companies—many of which are the most successful in planning—perceive the external influences as 'windows of opportunity.' These 'windows,' such as FASB 106 or corporate mergers, represent opportunities for benefit executives to look critically at existing plans and engage in planning." *Id.* This critical look can result in revisions to employee welfare benefit plans. *See generally* Mary A. Brauer, *Welfare Plan Mergers and Spin-Offs: Many Rules, Little Guidance*, 8 BENEFITS L.J. 59 (1995) (describing the difficulty in applying ERISA to determine obligations and liabilities in mergers and acquisitions); Edward G. Pringle, *supra* note 59, at 61 ("Mergers and acquisitions have created their own administrative nightmares for human resources departments forced to grandfather in, combine or absorb various benefits plans.").

Retirees and employees who are shareholders may bring claims under section 14(a) of the Securities and Exchange Act of 1934, where a company promises in merger documents to continue providing welfare benefits but later breached this promise. Ford, *supra* note 1, at 455-57, 456 n.114 (citing Mills v. Electric Auto-Lite Co., 396 U.S. 375, 389 (1970); J. I. Case Co. v. Borak, 377 U.S. 426, 432 (1964); Bell v. Hood, 327 U.S. 678, 684 (1946)).

Some companies seek the protection of the Bankruptcy Code to restructure their financial liabilities, and bankruptcy reorganization can often lead to the elimination and modification of some welfare benefits. J. Keith Bryan, Comment, *Expiration of Retiree Benefit Plans During Reorganization: A Bitter Pill for Employees*, 9 BANKR. DEV. J. 539, 541 (1993) (examining the effect of bankruptcy reorganization on postretirement welfare benefit plans); *see* In re White Farm Equip. Co., 788 F.2d 1186, 1187 (6th Cir. 1988) (reviewing the actions of a company terminating its postretirement welfare benefit plan upon filing for bankruptcy). For a discussion of the modification and termination of postretirement welfare benefit plans under ERISA, see *supra* note 17 and accompanying text.

156. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231.

157. *See* BAROCAS, *supra* note 59, at 11.

company's actions justify ratification of an unathorized decision.[158] Curtiss-Wright only added language that it believed did not effect the substantive contents of its Plan.[159] A company can err in believing it was only changing the language of its plan and thus not effecting the substantive contents.[160] It is not known whether the same procedure applies to editorial and substantive changes that are later held to be amendments, but plan administrators have some statutory responsibility to know the nature of the change.[161] If these procedures do not apply to all changes, the kind and level of the authority to amend would be determined by the nature of the change.[162] For example, editorial changes would rest mainly with benefits managers and corporate counselors.[163] In *Curtiss-Wright*, the benefits manager and legal counselor were authors of what they believed was a clarification of the reservation clause, merely an editorial change.[164] The Court found, however, that it could not determine whether they possessed authority to amend the Plan or that they even followed the Plan amendment procedure.[165] A company decision to make substantive changes that would alter the kinds and amounts of welfare benefits would be significant and thus should rest with the board of directors or senior officers, who are company

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158. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1230; *see also infra* notes 159-66 and accompanying text.

159. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227. Curtiss-Wright's amendment—new SPD provision—was intended to be an interpretive clarification of the Plan's reservation clause. *Id.*

160. *Id.* at 1230.

161. *Id.* at 1230-31.

162. *See* Appendix; *see supra* notes 152-53 and accompanying text.

163. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227. The Court tacitly recognized that some plan communication will not be an amendment and that such communication must be identified in plan administration. *Id.* at 1223.

164. *See id.* at 1227.

165. *Id.* at 1231; *see also supra* notes 139-47 and accompanying text. The board of directors can delegate the authority to modify, terminate, and amend welfare and pension benefit plans to board committees, officers, benefits committees, and administrators. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1229. The courts in *Siskind* and *Huber* show that the board of directors or its executive or compensation committees will eventually know of the decision to modify or amend an employee benefits plan. Siskind v. Sperry Retirement Program, 47 F.3d 498, 506 (2d Cir. 1995); Huber v. Casablanca Indus., 916 F.2d 85, 106 (3d Cir. 1990).

However, the board of directors does not necessarily have to formulate, promulgate, or even participate in implementing the amendment. In *Siskind*, the board of directors made recommendations to the Sperry Retirement Program Committee that were eventually adopted. Siskind v. Sperry Retirement Program, 47 F.2d at 506. In *Huber*, the trustee promulgated amendments that were adopted or approved by the board of directors. Huber v. Casablanca Indus., 916 F.2d at 106. The board of directors can delegate this authority to corporate welfare and pension benefit committees. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227 (corporate officers, managers, committee or staff); Ackerman v. Warnaco, Inc., 55 F.3d 117, 122 (3d Cir. 1995) (corporate officers and senior managers); Siskind v. Sperry Retirement Program, 47 F.2d at 506 (corporate welfare and pension benefit committees); Huber v. Casablanca Indus., 916 F.2d at 106 (administrators and trustees); *see infra* note 167 and accompanying text.

policy-makers.[166] Notwithstanding the economic effects, the Court stated that whatever the procedures of Curtiss-Wright and other companies, the companies are bound by these procedures in future benefit plan actions.[167]

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166. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227, 1229; *see also supra* notes 152-53 and accompanying text.

167. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1230. *Curtiss-Wright*, *Siskind*, *Huber*, and *Ackerman* show that corporations and other organizations may delegate amendment authority to a position or group within the organization. *Id.* at 1227; Ackerman v. Warnaco, Inc., 55 F.3d at 122; Siskind v. Sperry Retirement Program, 47 F.3d at 506; Huber v. Casablanca Indus., 916 F.2d at 106. One should then not expect the application of corporate law principles to show exactly where this authority rests or did rest within the organization. To illustrate, in *Siskind*, Unisys used a committee that considered recommendations of the board of directors in deciding whether or not to amend the pension plan. Siskind v. Sperry Retirement Program, 47 F.3d at 506. In *Curtiss-Wright*, the company used a general delegation, "to company." Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1228. In *Ackerman*, the company used the delegation "to management." Ackerman v. Warnaco, Inc., 55 F.3d at 122. These general delegations are made by companies in benefit plan management, which includes benefit administration and planning, where the organizational structure varies among corporations and other business organizations. HENDERSON, *supra* note 114, at 41-45.

The management level within the organization of the person or committee to whom authority is delegated effects benefit plan management, including communication, administration, and planning. This person or committee addresses or implements changes in plans and the amount of employee benefits; thus, these individuals are readily involved in plan amendments and changes. *See id.* at 413-18; BAROCAS, *supra* note 59, at 25; Appendix. Different persons exercise organizational authority to perform and conduct numerous administrative, planning, and communication activities and practices at all levels of the organization. HENDERSON, *supra* note 114, at 38-54; BAROCAS, *supra* note 59, at 22-26. Plan amendments are not the only concern of benefit managers. Benefit administration includes providing plan revisions and announcements, establishing benefit plan methods and procedures, and performing ERISA and Internal Revenue Service filings. BAROCAS, *supra* note 59, at 25.

In *Curtiss-Wright*, the Supreme Court explicitly noted that benefit administration includes sorting out corporate communication that would conflict with plan terms. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1230. The Court explicitly stated that the board of directors of the corporation possess the authority to amend. *See id.* at 1229. Justice O'Connor, writing for the unanimous Court, stated, "As Judge Roth suggested, however, principles of corporate law provide a ready-made set of rules for determining, in whatever context, who has authority to make decisions on behalf of a company." *Id.* Judge Roth of the Third Circuit would have found that, under Delaware Corporation Law, "by the Company" equates to Curtiss-Wright's board of directors. Schoonejongen v. Curtiss-Wright Corp., 18 F.3d 1034, 1039 n.3 (3d Cir. 1994), *rev'd*, 115 S. Ct. 1223 (1995). The court stated:

> Judge Roth would consider action by "the Company" to be action by the board of directors pursuant to 8 Del. C. § 141(a): "The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."

Id. at 1039 n.3. The Supreme Court could not find that the Curtiss-Wright's board of directors did or did not delegate authority and thus remanded the case to the Third Circuit. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231.

If the company did not follow its amendment procedure, a court could impose a substantive remedy.[168] Until that determination is made by a court, disputes raising this issue create a loss contingency under *FASB Statement No. 5*.[169] Undoubtedly, a genuine issue of legal liability faces many companies that have made substantial changes to the terms of their plans.[170]

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168. *See supra* notes 100-01 and accompanying text. In *Murphy*, the terms of Keystone Steel & Wire Co.'s (Keystone) welfare benefits plan were changed by creating an entirely new plan for Keystone's retirees. Murphy v. Keystone Steel & Wire Co., 61 F.3d 560, 564 (7th Cir. 1995). Under its new plan, Keystone changed the amount of deductibles and co-payments. *Id.* at 564. The district court had concluded that Keystone's earlier plan facially violated ERISA § 402(b)(3). Murphy v. Keystone Steel & Wire Co., 850 F. Supp. 1367, 1378 (C.D. Ill. 1994). The Seventh Circuit affirmed. Murphy v. Keystone Steel & Wire Co., 61 F.3d at 569. The Seventh Circuit concluded that although Keystone violated ERISA by changing the terms of its health care plan, its procedural violation of ERISA did not justify awarding retirees a substantive remedy. *Id.* (relying on precedent from the Fourth, Sixth, and Eleventh Circuits). Finally, the Seventh Circuit reasoned that Keystone's conduct was neither unethical nor a breach of a fiduciary duty. *Id.*

The retirees attempted to show substantive harm but the Seventh Circuit was scarcely moved by their argument. *Id.* at 568. The retirees argued that the "exit agreements" were amendments to the plan, and that they relied to their detriment on these agreements when they decided to retire under Keystone's benefit plan. *Id.* The court concluded that the retirees had failed to put forth a claim grounded on detrimental reliance. *Id.* The court concluded that the plaintiff's theory of estoppel, "[a]lthough there were cases that might have supported it," was "totally undeveloped" and it was, therefore, waived. *Id.*

The court addressed whether a technical violation of ERISA makes the plan unamendable or the amendment null and void under trust law principles. *Id.* at 569. The court explicitly noted that in *Curtiss-Wright* the Supreme Court had left this question open. *Id.* (citing Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231). The court concluded that the plan was not unamendable and the amendment was not void. *Id.* The Seventh Circuit found support in the decisions of the Fourth, Sixth, and Eleventh Circuits. *Id.* (citing Aldridge v. Lily-Tulip, Inc., 40 F.3d 1202, 1211-12 (11th Cir. 1994); Biggers v. Wittek Indus., 4 F.3d 291, 295-96 (4th Cir. 1993); Adams v. Avondale Indus., 905 F.2d 943, 949 (6th Cir. 1990)). *Id.* The court noted that these circuits agreed that in the absence of a showing of bad faith, active concealment, or detrimental reliance, the settlor retained the right to amend or terminate the plan at will, so long as the settlor or trustee has manifested an intent to amend the plan. *Id.* In *Murphy*, Keystone had informed its retirees about the amendment four months before the amendment became effective. *Id.* The court concluded that Keystone's notice was a manifestation of Keystone's intent to amend the plan. *Id.*

Thus, the court found that Keystone's violation of 29 U.S.C. § 1102(b)(3) had not caused the plaintiff any substantive harm. *Id.* The notification of a future change "clearly manifested [a settlor's] intent to amend the Plan," and thus, the plaintiffs were not prejudiced by Keystone's violation of 29 U.S.C. § 1102(b)(3). *Id.* In addition, the court concluded that the plaintiff's estoppel claim was undeveloped and was also waived. *Id.* at 568. Thus, the plaintiffs had not shown the kinds of conduct that "would justify granting a substantive remedy" for Keystone's violation of 29 U.S.C. § 1102(b)(3). *Id.* at 569.

169. *See* FASB STATEMENT NO. 5, *supra* note 16, ¶ 4. In *Murphy*, the court concluded that plaintiffs had failed to put forth a claim grounded on detrimental reliance. Murphy v. Keystone Steel & Wire Co., 61 F.3d at 564; *see supra* note 168 and accompanying text. The court observed that this claim would be estopped and that an estoppel claim, if one could exist on the facts of

IV. ECONOMIC, SOCIAL, AND ETHICAL CONCERNS OF BENEFIT PLANNING

Curtiss-Wright terminated its Plan and thus should have no costs. But these costs may still exist.[171] Consequently, companies now need to review internal procedures that authorize changes to clarify terms and provisions of their plans. Companies need to do so to avoid making unlawful amendments to these plans that could subject them to litigation, a loss contingency. Plan changes that add statements that help retirees understand plan provisions and terms could prove both costly and litigious when companies later seek to terminate or modify

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Murphy, it could be supported by Seventh Circuit precedent. Murphy v. Keystone Steel & Wire Co., 61 F.3d at 564 (citing Miller v. Taylor Insulation Co., 39 F.3d 755, 758 (7th Cir. 1994); Black v. TIC Investment Corp., 900 F.2d 112, 115 (7th Cir. 1990)). A successful estoppel claim by retirees would prevent Keystone from denying a fraudulent act or promise that retirees had relied on in accepting retirement coverage under Keystone's benefit plan. *See id.* at 568 n.4; *see also* 31 C.J.S., *Estoppel and Waiver* §§ 59-80 (1996) (analyzing claims under estoppel theory). An estoppel claim would have effectively denied Keystone the right to retract the exit agreements that the plaintiffs alleged were amendments to its plan. Murphy v. Keystone Steel & Wire Co., 61 F.3d at 568. The court concluded, however, that the plaintiff's theory of the estoppel claim "was totally undeveloped, "and even though case law to support it existed, the claim was waived. *Id.*; *see also* Synder v. Elloit W. Dann Co., 854 F. Supp. 264, 273-74 (S.D.N.Y. 1994) (holding that claims can not lie for promissory estoppel under oral representations and informal statements).

Although the Seventh Circuit concluded that claims would not lie for estoppel, it outlined the elements of an estoppel claim and found that the plaintiffs, based on the record before it would likely not have such a claim. Murphy v. Keystone Steel & Wire, 61 F.3d at 568 n.4. The court of appeals stated that:

> For this same reason, no doubt, the record is devoid of the evidence needed to prove the elements of estoppel. In order to establish estoppel, Murphy needed to produce evidence from which a reasonable person could find that Keystone misrepresented or concealed the scope of retiree coverage, that Murphy reasonably relied on that misrepresentation or concealment, and that he had no knowledge or convenient means of ascertaining the true facts which would have prompted him to act otherwise. On the record before us, Murphy could not have reasonably believed that one sentence from one page of several documents distributed to him upon retirement totally displaced the elaborate negotiations and contractual framework that guaranteed benefits, including retiree benefits, for the past 30 years. Such reliance would be patently unreasonable. And given Murphy's emphasis on the important role that the [Joint Insurance Commission] played in negotiating and supervising the Plan, at least vis a vis Union employees, he certainly could not show that he did not have a convenient means of ascertaining the truth.

Id. at 568 n.4 (citations omitted). Thus, an estoppel claim grounded on detrimental reliance will not lie for a few administrative inconsistencies in the management of the welfare benefit plan.

170. *See* Schoonejongen v. Curtiss-Wright, 115 S. Ct. at 1231; *supra* notes 78, 168 and accompanying text.

171. *See supra* notes 78, 168 and accompanying text.

plan benefits.[172] When a change that discloses additional information is a plan amendment, the company or sponsor must comply with section 402(b)(3) by providing a procedure to amend the plan.[173] Moreover, the company must have followed its plan amendment procedure.[174] Under the Court's interpretation of ERISA, contingent liability exists for a company that fails to comply with section 402(b)(3) or that fails to follow its amendment procedure, which was provided in compling with section 402(b)(3).[175]

Under section 402(b)(3), the plan amendment procedure is a highly general and less detailed part of an elaborate informational scheme.[176] *Curtiss-Wright* shows that the plan amendment procedure is consistent with the ethical, economic, and social realities of the at will employment contract.[177] In *Curtiss-Wright*, the Court's interpretation of section 402(b)(3) remains consistent with the broad discretion of the at will doctrine, which gave employers the right to freely allocate their financial, human, and other resources.[178]

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172. *See, e.g.*, Schoonejongen v. Curtiss-Wright Corp., 18 F.3d at 1039-40. In *Curtiss-Wright*, the Supreme Court did not reach the question of the appropriate remedy for a procedural violation because it could not find a procedural violation. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231.

The Third Circuit found a procedural violation and thus concluded that it must strike the amendment implemented under this violation. Schoonejongen v. Curtiss-Wright Corp., 18 F.3d at 1039-40. The court concluded that a substantive remedy that had been awarded by the district court was appropriate for this kind of procedural violation. *See id.* On remand from the Supreme Court, the court could award a substantive remedy if it finds that Curtiss-Wright failed to follow its procedures for amending the Plan. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231; *see also supra* notes 78, 168 and accompanying text. The Third Circuit stated that:

> Unless and until the written plan is altered in a manner, and by a person or persons authorized in the plan, neither the plan administrator nor a court is free to deviate from the terms of the original plan. It is in this way that ERISA provides certainty and protects participants against frustration of their legitimate expectations.

Schoonejongen v. Curtiss-Wright Corp., 18 F.3d at 1040. The Supreme Court did not reach the question of remedy. Under the Supreme Court's holding, the court of appeals is free to fashion a remedy consistent with Supreme Court precedents and ERISA common law, if it holds that Curtiss-Wright did not follow its procedure to amend its Plan. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231.

173. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1230.

174. *Id.* at 1231.

175. *Id.*

176. *Id.* at 1229-31.

177. *See infra* notes 179-217 and accompanying text.

178. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1228. The Court made abundantly clear that its review was limited to statutory and plan procedures and not the substantive contents of employee benefit plans. *Id.* The Court stated, "In interpreting § 402(b)(3), we are mindful that ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits. Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Id.* "[A] company does not act in a fiduciary capacity when deciding to amend or terminate a welfare

A. *The Economic Realities of Gratuitous Benefits*

In *Curtiss-Wright*, the Third Circuit concluded that Curtiss-Wright had reserved the right to terminate benefits under the terms and conditions of its Plan.[179] Moreover, the court observed that Curtiss-Wright could terminate its Plan at will.[180] Most significantly, ERISA does not create substantive rights to benefits under these plans, nor can a retiree sue to recover benefits that have been terminated by companies.[181] Under American common law, employers generally have always had the discretion to establish and terminate postretirement welfare benefit plans.[182] In *Curtiss-Wright*, the Supreme Court did not create substantive rights to benefits by concluding that a procedure to amend a plan requires the fewest of detail and thus, leaves unaltered a companies' right to terminate welfare benefits at will.[183]

Unlike an ambiguous reservation clause that had failed to reserve the right to terminate the plan,[184] an unacceptable procedure to amend does not create a question regarding the provision of welfare benefits.[185] It is one thing to fail to reserve the right to terminate or modify the plan and another thing to say that "the Company"[186] is not a detailed enough procedure to identify who has the authority to amend the plan.[187] If a company is sponsoring the plan, ERISA should rely on corporate law to determine who possessed authority to amend the plan.[188] The application of corporate law, even though it may be common law, is not inconsistent with the interpretation of ERISA.[189] The Supreme Court held that Congress intended for federal courts to develop "a body of federal substantive law" to implement ERISA where ERISA is silent.[190] Undoubtedly,

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benefits plan." *Id.* (quoting Adams v. Avondale Indus., 905 F.2d 943, 947 (6th Cir. 1990)) (internal quotations omitted).

179. Schoonejongen v. Curtiss-Wright Corp., 18 F.3d at 1040-41.

180. *Id.*

181. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1228; *see supra* note 17 and accompanying text.

182. *See infra* note 206 and accompanying text.

183. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231.

184. *See supra* note 17 and accompanying text; *see also infra* note 194 and accompanying text.

185. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1228.

186. *Id.* at 1228-29.

187. *Id.* at 1228.

188. *Id.* at 1229-30. The Supreme Court and the Third Circuit reached the same conclusion on the application of corporate law. *Id.*; Schoonejongen v. Curtiss-Wright Corp., 18 F.3d 1034, 1039 n.3 (3d Cir. 1994), *rev'd*, 115 S. Ct. 1223 (1995). The Third Circuit concluded, however, that Curtiss-Wright had violated 29 U.S.C. § 1102(b)(3). *Id.* at 1040.

189. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987).

190. *Id.*

this application, which federalized state corporate law,[191] provides much insight in determining who possesses authority to make the decision to amend a plan.[192]

Applying new federal corporate law, the threshold question that federal courts need to consider in regard to the company's decision to amend is whether the decision to amend is company policy or a delegated routine operation.[193] We suspect that the decision to amend a plan is not a routine administrative matter left to the lowest level of the company,[194] though a plan termination is well set-

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191. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231. ERISA creates a body of federal corporate law that controls decisionmaking in the management of employee benefit plans. Thus, the federal corporate law of business decisionmaking at the close of the 21st century, has begun to show that some business decisionmaking has been, and perhaps still is done by mostly guesswork, largely speculation, or purely costs. *See generally* Howe v. Varity Corp., 36 F.3d 746, 753-57 (8th Cir. 1994) (holding that employees who were terminated as a result of employer failing were not entitled to postretirement benefits under ERISA), *aff'd*, 116 S. Ct. 1065 (1996).

192. *See supra* notes 123, 147 and accompanying text.

193. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1229, 1231.

194. *Id.* at 1227-28; *see* Appendix; *see also supra* notes 123, 153 and accompanying text. Curtiss-Wright's decision to amend its Plan was made by its director of benefits and labor counsel, and thus, one could conclude that a Curtiss-Wrightexecutive with the authority to amend would have approved the amendment if he or she had known of it. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227. After the changes were made to Curtiss-Wright's Plan, the officer or manager with the authority to amend could still ratify it. *Id.* at 1231. The Court probably would have approved this change because plan terminations are well-settled law under most circumstances. *See supra* note 17. In *Curtiss-Wright*, the director of benefits and labor counsel were the authors of the new SPD provision that was an unintended amendment of Curtiss-Wright's Plan. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227. It is possible to understand why the counselor and director would intend this provision to be a change.

The specific event identified by the change to the plan is an established conclusion of labor law. *See supra* note 17. The event clearly permits contemplation of the action—termination of benefits—at the cessation of operations. *See* UAW, Local 134 v. Yard-man, Inc., 716 F.2d 1476, 1480-81 (6th Cir. 1983) (holding that welfare benefits vest under ambiguous terms of a benefit plan at the closing of the plant). Federal and state courts have generally concluded that unambiguous reservation clauses permit the unilateral termination of postretirement welfare benefits at plant closings and other circumstances under legal actions brought under ERISA, 29 U.S.C. § 1132(a)(1)(B), and the Labor Management Relations Act, 29 U.S.C. § 185(a). *See* Ryan v. Chromally Am. Corp., 877 F.2d 598, 604 (7th Cir. 1989); *In re* White Farm Equip. Co., 788 F.2d 1186, 1191-92 (6th Cir. 1986); UAW, Local 134 v. Yard-man, Inc., 716 F.2d at 1479. However, postretirement welfare benefits that have vested under the terms and conditions of a postretirement welfare benefit plan do not terminate at plant closings or other circumstances. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227; Allied Chem. & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 181 n.20 (1971). At the least, this well-settled law would lead one to believe that adding such language—termination of welfare benefits under certain circumstances—to an existing reservation clauses would not violate ERISA. Obviously, this belief was overly presumptive. One could thus conclude that adding language to a reservation clause that states well settled conclusions of law regarding plan termination, would be a significant change to the plan, constituting an amendment. *See, e.g.*, Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227 (stating that a welfare benefit plan would terminate on merger of the company); Algie v.

tled law under ERISA.[195] Plan termination may clearly not be a business policy decision,[196] but the termination may require the involvement of higher level management and even the approval or consent of the board of directors.[197] In short, knowledge of changing economic or business needs that require the company to amend the plan greatly affect who within the business organization makes the decision to amend and terminate the plan.

Economic and business needs are apparent in the operation of the reservation clause in a competitive environment.[198] The reservation clause serves a

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RCA Global Comms., Inc., 60 F.3d 956, 960 (2d Cir. 1995) (stating that a welfare benefit plan would terminate or change upon merging with another company); Ackerman v. Warnaco, Inc., 55 F.3d 117, 121 (3d Cir. 1995) (stating that a welfare benefit plan would terminate or change upon closing of the plant); Ryan v. Chromally Am. Corp., 877 F.2d 598, 603 (7th Cir. 1989) (stating that a welfare benefit plan would terminate or change upon selling of company's assets); *In re* White Farm Equip. Co. v. White Motor Corp., 788 F.2d 1186, 1189 (6th Cir. 1986) (stating that a welfare benefit plan would terminate or change upon filing for bankruptcy). These events have occurred numerous times and changing the plan to forewarn of their occurrences may lead to litigation. For a case on point, see Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223 (1995).

See *supra* note 17 and accompanying text for a discussion of the impact of *Curtiss-Wright* on employers' unilateral decisions to terminate and modify postretirement welfare benefit plans without the consent of retirees.

195. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1226. But see *supra* note 12 and accompanying text, discussing the requirement of the application of 29 U.S.C. § 1102(b)(3) to a plan termination.

196. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227.

197. *Id.* at 1229. Curtiss-Wright's executive vice president terminated its Plan in the same year that the amendment (new provision of the SPD) was added to the Plan. *Id.* at 1227. The vice president terminated the Plan under the new amendment, showing the definite intent to change the Plan under the newly added terms. *See id.* at 1231; *see also supra* note 126 and accompanying text.

198. *See infra* notes 199-215 and accompanying text. Many companies engage in long-term strategic planning for plan administration. The Conference Board, Inc. conducted a "mailed survey of mid-and large-sized employers; in-depth individual and group interviews with employee benefit, human resource and consulting executives; and analyses of corporate strategic planning documents." BAROCAS, *supra* note 59, at 6. The study was based on interviews and a survey of 183 corporations. *Id.* The study found that corporations engaged in strategic benefit planning to achieve long-term goals. *Id.* at 7.

Strategic benefit planning uses an organization's political and legal environments to develop strategic benefit plans, including "information gathered about the organization and its environment." *Id.* The outcomes of strategic benefit planning may include, most notably, "revisions in existing plans . . . [and] modification[s] in administration and financial accounting." *Id.* at 11. This planning affects "the design, management and communication of benefits." *Id.* Strategic benefit planning is a dynamic process that considers the provision of employee benefits under the organization's goals and external environment. *Id.* As changes occur in social, legal, and political conditions, strategic benefit planning that identifies new measures for reducing benefit costs and improving administrative operations will point out the need to amend or change the terms and conditions of an employee benefit plan. *See id.* at 17-18, 26-27. Therefore, strategic benefit planning has a definite impact on authority identification and amendment procedures required by ERISA section 402(b)(3). *See supra* note 199 and accompanying text.

strategic function in gratuitous benefit planning, giving companies organizational flexibility that preserves management discretion to control financial, human, and other resources.[199] Such flexibility permits companies to respond more quickly

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In *Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996) and *Lockheed Corp. v. Spink*, 116 S. Ct. 1783 (1996), the Court provided some strategic economic advantages that are similar to common law advantages. Justice Thomas, writing for the dissent in *Varity* and the majority in *Lockheed*, observed that managerial decisionmaking falls short of the accuracy of a science but its need for flexibility and discretion remains a vital staple of business. Varity Corp. v. Howe, 116 S. Ct. at 1086-87 (Thomas, J., dissenting) (recognizing that management decisionmaking includes less than accurate information though not always fraudulent decisionmaking); Lockheed Corp. v. Spink, 116 S. Ct. at 1790-92 (observing that pension and welfare benefits are given to accomplish the economic objectives and needs of the employer). Both *Varity* and *Lockheed* sought to limit social advantages and benefits gained by employees, and thus, are imposing less favorable conditions on the promise of secured retirement. *See* Varity Corp. v. Howe, 116 S. Ct. at 1068-70 (involving postretirement welfare benefits); Lockheed Corp. v. Spink, 116 S. Ct. at 1791 (involving employment-related claims). In conclusion, *Varity* and *Lockheed* leave retirees with fewer mechanisms, both legal and market, to challenge the companies' actions to terminate and amend employee and pension welfare plans.

199. *See* James E. Holloway, *A Primer on Employment Policy for Contingent Work: Less Employment Regulation Through Fewer Employer-Employee Relations*, 20 T. MARSHALL L. REV. 27, 27-29 (1994) [hereinafter Holloway, *Less Employment Regulation*]. Federal courts perhaps do consider the broader public policy and legal consequences of judicial decisions that disturb the at will employment doctrine, a doctrine frequently reformulated or retailored by courts and legislatures. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1229. ("[A] textual reading of § 402(b)(3) . . . might lead to the invalidation of myriad amendment procedures that no one would think violate § 402(b)(3), especially those multi-employer plans—which, as we said, § 402(b)(3) covers as well . . . . Congress could not have intended such a result."). These courts, however, need to consider the strategic or long-term managerial consequences that result when companies prematurely modify or change the terms and conditions of employment relations, such as the terms and conditions of postretirement welfare benefit plans. BAROCAS, *supra* note 59, at 17, 26-27. State and federal courts that invalidate general reservation clauses deny companies human resource and managerial flexibility in the national and global economy. *Id.* at 10. In the global marketplace, employee benefit planning is unlike anything common-law courts could have imagined—varieties of cultures, changing governments, and changing policies. *See id.* Making courts, legislatures, and governmental agencies aware of the need for human resource and other managerial flexibility in domestic and global markets is essential to stability and certainty in benefit planning. *Id.* at 26-27. Barocas stated, "To ensure that corporations' long-range benefit plans are flexible, executives build in appropriate contingencies to protect both the company and its employees. Companies also report that legislation and regulatory decisions can be the impetus for strategic decisions about benefit plan administration or designs." *Id.* at 26. This awareness includes that the government understand how law and public policy effect business planning for the long-term in a dynamic global economy. *Id.* at 26-27. Undoubtedly, the need to preserve more management discretion is justified when the exercise of discretion is based on sound management principles and theories to make decisions and plans. *See id.* at 5, 26-27 (explaining the impact of federal and state public policy on employee benefit planning); Holloway, *Less Employment Regulation*, *supra*, at 27-29 (examining the impact of the use of contingent work on law and public policy). For other commentary on contingent work and its impact on and implications for health care and other social policy goals, see Richard S. Belous, *The Rise of the Contingent Work Force:*

to the occurrence or nonoccurrence of certain events or activities. These events or activities are contingencies that are not always listed in employee benefit plans.[200] The reservation clause permits responsive decisions that avoid unnecessary delays in implementing or adjusting strategies. In *Curtiss-Wright*, the Third Circuit's holding would expose companies to less flexibility. The court found imperfections in the design of a legal mechanism, the language of the reservation clause, and not the mechanism's operation, of cutting off benefits to reduce costs.[201] The court considered only the common law or perhaps the short-term effects that would involve the local or most immediate consequences of a company's actions.[202] The court failed to consider that the reservation clause may have taken on a greater strategic significance in business strategies of the global economy.[203] No doubt, contract rights that provide flexibility for the management of human and other resources will take on new roles in the global economy.[204] At the same time, employees and retirees will still have less compensation, fewer rights, and fewer benefits under more flexible human resources management.[205]

B. *The Social Realities of Gratuitous Benefits*

The employment at will contract is ripe with hardships that have always been borne by employees and retirees.[206] As they bear their hardships, poor benefit plan management may not create enough risks for companies to relieve these hardships.[207] Specifically, the labor market has yet to force companies to

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The Key Challenges and Opportunities, 52 WASH. & LEE L. REV. 863 (1995) and Gwen Thayer Handelman, *On Our Own: Strategies for Securing Health and Retirement Benefits in Contingent Employment*, 52 WASH. & LEE L. REV. 815 (1995).

200. *See* Howe v. Varity Corp., 36 F.3d 746, 748-51 (8th Cir. 1994), *aff'd*, 116 S. Ct. 1065 (1996).

201. Schoonejongen v. Curtiss-Wright Corp., 18 F.3d 1034, 1040 (3d Cir. 1994), *rev'd*, 115 S. Ct. 1223 (1995).

202. *Id.* at 1041; *see also* BAROCAS, *supra* note 59, at 11 (discussing strategic employee benefit management).

203. For a discussion of the Third Circuit's analysis, see *supra* notes 198-99 and accompanying text.

204. *See* Holloway, *Less Employment Regulation*, *supra* note 199, at 27-29.

205. *See id.*

206. *See generally* Diane M. Cornell, *Employee Benefits and the Employment-At Will Rule*, 8 LAW & INEQ. J. 355 (1990); Catherine L. Fisk, Lochner *Redux: The Renaissance of Laissez-Faire Contract in the Federal Common Law of Employee Benefits*, 56 OHIO ST. L.J. 153 (1995); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1990).

207. For a discussion of how companies can terminate at will and thus, avoid the costs of poor decisionmaking and planning, see *supra* notes 17, 194 and accompanying text. *But see* Varity Corp. v. Howe, 116 S.Ct. 1065, 1073-74 (1996) (holding that an employer should not confuse the actions of a plan administrator and an employer in making either a plan amendment or a plan termination because when the employer does, it could violate fiduciary duties if employees can not distinguish between the actions of the employer and plan administrator).

internalize the costs of poor plan management, which end in these hardships.[208] Likewise, *FASB Statement No. 106* will not directly cause financial markets to impose more accountability on companies for poor benefit plan management.[209] *FASB Statement No. 106* protects the interest of investors, creditors, and stockholders.[210] Retirees are noticeably absent. Financial and labor markets do not give much support to nonunion retirees or union retirees.[211] These markets do not impose on companies any discernible costs for terminating these benefits where companies clearly reserved the right to terminate their plans.[212] Financial and labor markets are greatly affected by reducing benefit plan costs, costs that are reduced by terminating benefits.[213]

Regulation and adjudication are also of little help. ERISA is absolutely clear, and the courts are following it to the letter.[214] Federal courts do not force companies to internalize the costs of poor benefit management and planning.[215] Congress, which is often greatly concerned with social welfare, likely did not intend to correct this labor market failure.[216] ERISA did put some equity in gratuitous benefit planning; however, terminating welfare benefits at will does not seem equitable. It is thoroughly common law, with its traditional postretirement and employment social hardships.[217]

Employment contracts are still at will contracts for nonunion employees and retirees. ERISA has few lasting effects on the hardships caused by terminating and modifying welfare benefit losses.[218] ERISA protects welfare benefits but does not mandate benefits.[219] Perhaps, retirees should not be left at the mercy of financial and labor markets. But in granting employee welfare benefits, companies operate under ERISA, free of many market risks.[220]

ERISA is clear—provide a plan amendment procedure to identify the persons who have authority to amend and a procedure to amend the plan.[221] Companies rushed to comply with ERISA and *FASB Statement No. 106*.[222] Later

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208. For a discussion of how ERISA establishes procedural requirements and thus limits the type and amount of damages for violations, see *supra* note 78 and accompanying text.

209. For a list of the justifications and purposes of *FASB Statement No. 106* that found postretirement welfare benefits to be deferred compensation, see *supra* note 62 and accompanying text.

210. *See supra* note 62 and accompanying text.

211. *See supra* notes 78, 168 and accompanying text.

212. *See supra* notes 17, 194 and accompanying text.

213. *See supra* notes 52-59 and accompanying text.

214. *Supra* notes 17, 194 and accompanying text.

215. *See id.*

216. *See* 29 U.S.C. § 1051(1) (1994); *see also supra* note 17 and accompanying text.

217. *See supra* note 17 and accompanying text.

218. *See supra* note 47 and accompanying text.

219. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223, 1228 (1995); *see also supra* note 17 and accompanying text.

220. *See supra* notes 17, 194 and accompanying text.

221. 29 U.S.C. § 1102(b)(1) (1994).

222. *See supra* notes 52-65 and accompanying text.

they found that they had not complied.[223] They failed to establish, and perhaps follow, plan amendment procedures.[224] They caused their own problems in amending plans to reduce liabilities under ERISA and *FASB Statement No. 106*.[225] Thus, ERISA should neither penalize nor save them.

ERISA section 402(b)(3) is not a labor market savior for poor benefit management and planning. Thus, the Supreme Court was most equitable in concluding that a "fact-intensive inquiry" must be applied to determine if Curtiss-Wright followed its procedure for amending the plan.[226] Companies should have a decisionmaking process or operating procedures for benefit management and planning.[227] If companies did not follow this process or procedure, then federal courts are left to decide whether the company should pay for such failures in business decisionmaking that has previously been almost risk-free or somewhat certain under American capitalism and law.[228] Federal courts should be cautious in relying entirely on financial and labor markets that have a less effective mechanism for addressing benefit promises.[229] Thus, less reliance means that a loss contingency would be more likely for poor benefit management and planning under ERISA and *FASB Statement No. 106*.[230]

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223. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231; *see also supra* notes 106-31 and accompanying text.

224. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231; *see also supra* notes 139-70 and accompanying text.

225. *See supra* Part III.

226. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1231.

227. *See supra* note 198 and accompanying text.

228. *See infra* notes 239-54 and accompanying text.

229. *See supra* notes 206-17 and accompanying text.

230. The *Curtiss-Wright* decision could create more uncertainty in plan changes that affect the terms and conditions of employee benefit plans. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227. Uncertainty regarding plan changes would tend to delay the making of strategic decisions that eventually could be found to be plan amendments by federal courts. In *Curtiss-Wright*, the district court concluded that a SPD provision that listed specific events, a contingency affecting the termination of an employee welfare benefit plan, was a "significant change in the plan's terms and thus constituted an 'amendment' to the plan." *Id.* The specific event was listed under the reservation clause, which reserved for Curtiss-Wright the right to do in general what was set forth in this new SPD provision. *Id.* The district court still found this kind of specificity a "significant change." *Id.* If identifying with particularity what one has a right to do changes the "general rights" of the reservation clause, then companies should be on notice that any changes to terms, conditions, and benefit levels effectively alter employee benefit plans.

The Supreme Court agreed that a new SPD provision is a significant change when it provides specifics under a general reservation clause, creating additional obligations for employers. ERISA requires employers to provide beneficiaries with summaries of new amendments within 210 days of the close of the year in which the amendment was made. 29 U.S.C. § 1024(b)(1) (1994); *see also supra* note 106 and accompanying text. The lengthy duration of the disclosure requirements means that retirees and employees may have to wait seven or more months before they are notified of changes that have already taken effect. Changes that affect the termination provisions are mere superfluous procedural rubric under federal employment policy. Why? The Worker's Adjustment and Retraining Notification Act (WARN), 29 U.S.C. § 2101, requires

C. *The Ethics of Gratuitous Welfare Benefits*

The ethical question is whether the elimination and reduction of retiree welfare benefits is a morally sound business decision, even though companies have not agreed to provide lifetime health care and other benefits.[231] Under ERISA and *FASB Statement No. 106*, the answer is most likely yes. ERISA and *FASB Statement No. 106* do not require the vesting of postretirement welfare benefits, leaving companies with broad discretion over the allocation of financial and human resources, including labor.[232] Company decisions to terminate and modify benefit plans are justified by financial and other economic needs to survive and make profits. Although companies gave promises of lifetime welfare benefits,[233] these promises were conditioned on each company's economic success in national and regional markets.[234] One could truly believe that companies never foresaw the tremendous changes in economic conditions and public interests.[235] As these changes occurred, companies terminated and reduced retiree and employee welfare benefits to reduce labor costs in order to remain competitive.[236] Now welfare benefit costs accrue as liabilities and expenses under *FASB Statement No. 106*.[237] These liabilities and expenses accumulate as health care costs continue to increase, leading to decisions that will either amend, terminate, or modify benefit plans.[238]

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employers to give workers notification of a plant closing long before ERISA makes them aware of an amendment that actually result in a material modification under ERISA, section 104(b)(1). In many instances, WARN requires employers to give employees a 60 day notification of plant closings. 29 U.S.C. § 2102(a). ERISA's minimum is a 210 day notification requirement for an amendment to employee benefit plan. *Id.* § 1024(b)(1). Therefore, strictly construing revisions of and changes to plans as amendments, provides no discernible protection against plant closings that terminate employee benefit plans unless employees are able to establish that the employer closed the plant to retaliate against exercising employee benefit rights. *See* Dana M. Muir, *Plant Closings and ERISA's Noninterference Provision*, 36 B.C. L. REV. 201, 203 (1995).

One might argue that the Supreme Court concluded that Congress identified which types of information would be reported and disclosed under ERISA, and that companies that chose to report or disclose specifics—such as plant closings—of reservation clauses do so at their own peril. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1230-31. These companies may run afoul of ERISA procedural requirements for which extracontractual damages are not yet available to employees and retirees and thus, imposing limited liability for procedural errors. *See* Mertens v. Hewitt Assoc., 508 U.S. 248, 260-63 (1993); Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 144 (1985). This interpretation seems like nonsense in our economic system.

231. The right to postretirement welfare benefits is not enforceable under ERISA. ERISA mandates that welfare benefits do not vest under employee benefit plans. *See* 29 U.S.C. § 1051(1); *see also supra* note 17 and accompanying text.

232. *See supra* notes 17, 194 and accompanying text.

233. *See supra* note 17 and accompanying text.

234. *See supra* notes 17, 194 and accompanying text.

235. *See id.*

236. *See supra* notes 52-73 and accompanying text.

237. *See supra* note 62 and accompanying text.

238. *See supra* note 17 and accompanying text.

Some federal courts would award restitution if a company's conduct in amending an employee or retiree welfare benefit plan was unethical and in violation of ERISA.[239] These courts would determine whether a company's amendment that violated ERISA section 402(b)(3) was also unethical.[240] If the amendment "was done in bad faith, was actively concealed, or was administered unfairly, courts would award a substantive remedy."[241] It is highly unlikely,

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239. *See supra* note 78 and accompanying text.

240. *See id.*

241. Murphy v. Keystone Steel & Wire Co., 850 F. Supp. 1367, 1381 (C.D. Ill. 1994). In *Murphy*, the court rejected the reasoning and holding of the Third Circuit's holding in *Curtiss-Wright*, on the issue of the substantive remedy. *Id.*

In *Blau v. Del Monte Corp.*, the Ninth Circuit concluded that evidence of active concealment, in addition to other procedural violations, raised an inference of substantive harm that the district court should address at trial in ascertaining whether a substantive remedy should be awarded to retirees and employees. Blau v. Del Monte Corp., 748 F.2d 1348, 1353 (9th Cir. 1985). In *Blau*, an employer actively concealed its severance pay policy by keeping it a secret. *Id.* at 1351. The employer also did not have a claims procedure by which an employee could request severance pay as required by 29 U.S.C. § 1022(a). *Id.* at 1352-56. The Ninth Circuit was also informed that severance pay was available to company executives but not to nonunion, salaried employees. *Id.* at 1356. The court concluded that the availability and distribution of severance pay was an inequitable treatment of employees. *Id.* The court stated, "The quantity of defendants' procedural violations may then work a substantive harm." *Id.* at 1354.

In *Ackerman v. Warnaco, Inc.*, the Third Circuit remanded the issue "whether Warnaco acted in bad faith, or actively concealed the rescission of the termination allowance policy." Ackerman v. Warnaco, Inc., 55 F.3d 117, 125 (3d Cir. 1995). The court reversed the summary judgment granted by the district court, finding a disputed factual issue on the conduct of Warnaco. *Id.* Specifically, the court concluded that Warnaco failed to distribute its 1991 Handbook, failed to hold scheduled meetings with employees, and failed to issue a letter describing changes in its severance policy. *Id.* On the record, the Third Circuit could not determine whether or not these omissions were either administrative errors or an active concealment of changes to the severance policy. *Id.*

The Sixth Circuit also refused to find detrimental reliance for an amendment to an unwritten plan that did not contain reserve power. Adams v. Avondale Indus., 905 F.2d 943, 949 (6th Cir. 1990). In *Adams*, the court held that the defendant's failure to comply with 29 U.S.C. § 1102(b) in amending an unwritten severance plan, which did not contain a reserve power to amend, did not justify granting a substantive remedy. *Id.* Thus, the court of appeals permitted the defendant's amendment to stand, concluding that Congress did not intend for the plan to be unamendable. *Id.* *But see* Sandler v. Marconi Circuit Tech. Corp, 814 F. Supp. 263, 265 (E.D.N.Y. 1993) ("Oral agreements or modifications to a retirement plan are insufficient to support a claim to recovery under ERISA."). In *Adams*, the court recognized that "unanticipated amendment[s]" could seriously undermine the personal security insured by 29 U.S.C. § 1102(b). Adams v. Avondale Indus., 905 F.2d at 949. The court observed that 29 U.S.C. § 1102(b) "serves the important purpose of insuring 'against the possibility that the employee's expectation of the benefit would be defeated,' by an unanticipated amendment of a welfare plan, whose benefits employees may come to take for granted." *Id.* (quoting Massachusetts v. Morash, 490 U.S. 107, 115 (1989)). Notwithstanding the fact that an employee's expectations could be fatally jolted by an unexpected loss of severance benefits on which they had placed great hopes, the Sixth Circuit still

however, that companies would need to engage in such grossly unethical conduct for several reasons.[242] First, ERISA requires employee benefit plans to be in writing[243] and to fully report and disclose plan terms and conditions.[244] Specifically ERISA requires that employers establish a procedure for amending or making changes to employee benefit plan provisions.[245] Second, *FASB Statement No. 106* requires that companies disclose and report financial information on postretirement welfare benefit plans.[246] It makes financial information readily available to investors, creditors, and stockholders.[247] Third, the exclusion of welfare benefits from vesting under ERISA and its enforcement under the highly flexible reservation clause of these plans permits companies broad discretion in benefit plan management.[248] They do not need a valid reason to eliminate or reduce retiree welfare benefits.[249] Such broad discretion alone permits few ethical questions to be legitimately pursued by retirees. But welfare benefit management permits such broad latitude that few companies will tread where angels do not dare to go—totally forsaking morals to accumulate wealth.[250] When absolute discretion is coupled with *FASB Statement No. 106* and ERISA disclosure and reporting requirements, not much can be said that is not already known.

Of course, it is not known when termination and modification will occur. In *Curtiss-Wright*, this occurred when the plant ceased to operate, and it was explicitly stated in the reservation clause of Curtiss-Wright's Plan.[251] It must be

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did not find detrimental reliance caused by the defendant's failure to comply with 29 U.S.C. § 1102(b), which would have resulted in the award of a substantive remedy. *Id.*

For scholarly articles and commentary on estoppel and other common-law claims that are permissible under the ERISA civil enforcement provision, namely 29 U.S.C. § 1132(a)(1)(B), see Kimberly A. Kralawiec, *Estoppel Claims Against Employee Benefit Plans*, 25 U.C. DAVIS L. REV. 487 (1992); Loretta R. Richard, *Enforcing Oral Promises to Pay Employee Benefits*, 28 B.C. L. REV. 723 (1987); Steven L. Brown, Note, *ERISA's Preemption of Estoppel Claims Relating to Employee Benefit Plans*, 30 B.C. L. REV. 1391 (1989).

For cases addressing the same issue, see Moore v. Metropolitan Life Ins. Co., 856 F.2d 488 (2d Cir. 1988); Straub v. Western Union Tel. Co., 851 F.2d 1262 (10th Cir. 1988).

242. *But cf.* Howe v. Varity Corp., 36 F.3d 746, 753 (8th Cir. 1994) (holding that the company breached a fiduciary duty by failing to disclose information even though it retained the rights to terminate the plan at will), *aff'd*, 116 S. Ct. 1065 (1996).

243. 29 U.S.C. § 1102(a)(1) (1994).

244. *Id.* §§ 1021-1031.

245. *Id.* § 1102(b)(3).

246. FASB STATEMENT NO. 106, *supra* note 2, ¶ 74; *see also supra* note 62 and accompanying text.

247. FASB STATEMENT NO. 106, *supra* note 2, ¶ 74; *see also supra* note 17 and accompanying text.

248. *See supra* note 17 and accompanying text.

249. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223, 1228 (1995); *see also supra* notes 17, 194 and accompanying text.

250. Companies retain the right to terminate at will and thus should not need to commit unethical or unlawful acts. *See supra* notes 17, 194 and accompanying text.

251. Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1227-28.

noted that employee and retiree hardships that occur when management reduces labor and other costs are old happenings under at will employment.[252] The resolution of these hardships renews a genuine public policy concern for policy-makers and markets, and not federal courts. ERISA and *FASB Statement No. 106* do not address this public policy concern.[253]

IV. CONCLUSION

Curtiss-Wright and other companies believed that they were in compliance with the letter of ERISA section 402(b)(3), if not the spirit. The Court agreed only with the latter. At most, they must follow plan amendment procedures that are not required to be in detail under section 402(b)(3). In following a plan amendment procedure, companies are bound by the level of authority exercised to amend their benefit plans. If the companies followed or are guided by their earlier exercises and actions, they greatly reduce the risk of incurring a loss contingency for failing to follow their plan amendment procedure. Company personnel that exercise this authority and perform those actions generally manifest the intent to amend the plan, and thus, companies can validly terminate and modify their welfare benefit plans at will.

Curtiss-Wright retirees and many others believed that they had been promised lifetime health care and other welfare benefits. This was not so. These retirees had fewer benefits and more costs for health and medical care, leaving companies with fewer liabilities and expenses for health care and other benefits. There was never an enforceable promise. In *Curtiss-Wright*, the Court's interpretation of ERISA section 402(b)(3) brings some harsh social realities for employees and retirees. In the past, retirees have received the greater share of hardships. Today, the employees still live with the threat of termination or modification. This fact of life was changed little by *Curtiss-Wright*. Companies that closely scrutinize changes to their welfare benefits plans can avoid unethical conduct in making changes that could violate ERISA. Moreover, they can give less information on events that trigger the elimination and reduction of health care and other welfare benefits. Yet *FASB Statement No. 106* gives financial markets more information for investment and credit decisions.

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252. *See supra* notes 206-17 and accompanying text.

253. *See* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. at 1229-30; *see also supra* notes 41-73 and accompanying text.

APPENDIX

ORGANIZATIONAL STRUCTURE AND EMPLOYEE BENEFIT MANAGEMENT, INCLUDING ADMINISTRATION, COMMUNICATION, AND PLANNING[a]

AUTHORITY AND ITS PURPOSE	LEVEL OF POSITION	POSITION OF PERSON(S)	EMPLOYEE BENEFIT DUTIES
Business Policy Making	Board of Directors	Chairman Executive Committee Other Committees Board Members	Establishing Policies Selecting Strategies
Long-, Mid- to Short-Term Managment & Planning	Senior Management	President Chief Executive Officer Executive Vice President Vice President	Establishing Objectives Identifying Strategies
Routine (day-to-day) General Operations and Administration	Middle Level Managment, Including Professionals and Clerical Staff	Human Resources Manager Benefits Manager Attorney-at-Law Compensation Managers Outsourcing Advisory Committees	Execute Plan Execute Strategies Conduct Planning

a. *See* RICHARD I. HENDERSON, COMPENSATION MANAGEMENT 38-54 (5th ed. 1989) (discussing the approach to distributing rewards in a business organization); *see also* VICTOR S. BARACOS, STRATEGIC BENEFIT PLANNING: MANAGING BENEFITS IN A CHANGING BUSINESS ENVIRONMENT 22-26 (The Conference Bd. ed., 1992) (discussing the approaches, benefits, and effects of strategic benefit planning in a corporation).