On September 2, 1974, President Gerald Ford signed a bill that would have a profound impact on the administration and enforcement of employer-provided health insurance plans. As President Ford heralded "a brighter future for almost all the men and women of our labor force," the country celebrated the first major attempt to "bring some order and humanity" into the private pension system. Curiously, neither the title of the new law, the Employee Retirement Income Security Act of 1974 (ERISA), nor President Ford's remarks on that day hinted at the consequences of this legislation for the millions of Americans whose health insurance depended on their employers.

Twenty-six years later, President Ford's optimistic introduction of ERISA is more striking for what he did not say: nowhere did the President promise a brighter future for participants in employer-sponsored health insurance plans. In retrospect, perhaps that was wise, for the legacy of ERISA's first quarter century would have proved such optimism false. Through ERISA, Congress promised "to protect... the interests of participants in employee benefit plans and their beneficiaries." Yet in the

† Assistant Professor of Law, Duquesne University School of Law. J.D. 1989, Harvard Law School; M.A. in history, 1987, University of the Witwatersrand in Johannesburg, South Africa; A.B. in Social Studies, 1984, Harvard and Radcliffe Colleges. I am grateful to have received a summer writing grant from Duquesne University School of Law in support of this project. I thank Ken Gormley for his comments and Clara Montanari, Julie Freeman, Ryan Debski and Julie Gentry for their research assistance.

words of one judge who recently struggled with the statute's almost intractable influence on health insurance plans, ERISA must now be regarded as "a statute that, due to the changing realities of the modern health care system, has gone conspicuously awry from its original intent. Does anyone care? Do you?"

As ERISA celebrates its twenty-sixth anniversary and we mark its impact on employment-based health insurance, surely we must answer "yes." The majority of United States citizens now receive health insurance as part of their employment. In many cases, the promise of medical coverage extends through retirement. The promise of health insurance benefits may serve as the basis for an employee's personal and professional decisions. For this reason, it is all the more important that the employee


6. See, e.g., Dembski v. Fairchild Indus., Inc., No. 88 CV 2953, 1989 WL 15951, at *3 (E.D.N.Y. 1989) (exemplifying a class action in which the parties later settled their differences). Plaintiffs "asserted that they had worked until retirement in reliance upon the 'promise of retirement security,' and that they had further relied upon the promise of lifetime medical coverage in deciding whether to accept early retirement." Id. In 1988, however, the employer told early retirees that they would no longer receive free benefits. The employer offered them a choice of either continuing the current level of coverage by paying a monthly premium or of accepting a lower level of benefits at no cost. For a discussion of the impact of health benefits on "job lock," see generally Thomas C. Buchmueller & Robert G. Valletta, The Effects of Employer-Provided Health Insurance on Worker Mobility, 49 Indus. & Lab. Rel. Rev. 439, 453 (1996) (using data from the 1984
understand the limitations of that promise and the possibility that these limitations may include the employer's right to terminate or amend the plan. This Article explores the circumstances of law and jurisprudence that allow such promises to be so deftly constrained.

Federal legislation affords a participant in an employment-based health plan little protection from the employer's ability to amend or terminate health benefits at will. Together with the Internal Revenue Code of 1986, ERISA takes the leading role in governing employee benefit plans. These statutes provide the regulatory framework under which the nation's private employers may design and offer pension and welfare benefits to employees. Together, they give employers the freedom to decide most of the requirements for eligibility in an employee health plan, as well as the type and amount of covered benefits. With few exceptions,
Congress has not limited this freedom by mandating substantive provisions of health plans. Furthermore, freed by ERISA's powerful preemption clause, self-insured health plans are largely exempt from state insurance regulation. With few statutory protections for participants in employer-sponsored health insurance plans, ERISA, in many respects, has proven to be a failure.


In the shadow of such a legislative failure, courts have frequently resorted to federal common law to resolve disputes over employee benefits. However, the federal common law has often proved disappointing to employees who seek to enforce claims on the basis of promises that were unfavorably drafted or, perhaps, never memorialized in writing. Indeed, the federal common law of ERISA has frequently placed an unyielding emphasis on the importance of the statute's tersely stated mandate of a written plan document. In its zeal to uphold ERISA's "emphatic preference" for written plan documents, ERISA jurisprudence has diminished the importance of communications outside those documents. Plan participants often have been unable to rely on such

---


Unfortunately ERISA, a statute primarily concerned with guaranteeing pension benefits, has with little forethought as far as we can see taken a large class of simple contract cases, involving claims against unfunded employer-administered welfare plans, dumped them into federal court, and made their resolution complicated and uncertain by subjecting them to both federal statutory and federal common law.

Miller v. Taylor Insulation Co., 39 F.3d 755, 761 (7th Cir. 1994).


17. See, e.g., Degan v. Ford Motor Co., 869 F.2d 889, 895 (5th Cir. 1989).

18. Id.

evidence to support theories of promissory or equitable estoppel that might overcome the judiciary's requirement of written plan documents. They have been even less effective in combating the common belief that the statutory requirement of a written plan document holds sway in ERISA litigation as would a more conventionally worded statute of frauds. In an impassioned critique of judicial interpretations of ERISA, one federal judge has argued that

[w]hen an analysis is made of present controlling case law under ERISA in the field of health insurance, it seems that when most major provisions or terms have had to be interpreted, an interpretation has prevailed that provided less protection to "employees and their beneficiaries" than they had before ERISA was adopted.

In general, the federal common law of ERISA has been of little assistance to plaintiffs whose arguments are primarily based on extracational representations of benefits.

One specific way in which the focus on a written plan limits an employee's ability to challenge employers who break informal promises is by restricting the use of extrinsic or parol evidence to cases where the court

---


21. See, e.g., Cefalu v. B.F. Goodrich Co., 871 F.2d 1290, 1296 (5th Cir. 1989) ("The policy behind the 'written instrument' clause in ERISA is to prevent collusive or fraudulent side agreements between employers and employees."). See generally Conison, supra note 15, at 634; Richard, supra note 20, at 733; Roger C. Siske & Joni L. Andrioff, Selected Topics in ERISA Preemption, C758 ALI-ABA 45, 66-67 (1992) (emphasizing the fact that some courts allow statute of frauds or breach of contract claims).

has determined that the plan document is ambiguous.\footnote{23} Extrinsic evidence is rarely considered for the purpose of determining whether the plan document in fact correctly represents the terms of any promises made prior to execution or, in other words, whether the plan document was fully integrated.\footnote{24} Moreover, extrinsic evidence is seldom used to determine whether an ambiguity exists in a plan document that appears on its face to be plain.\footnote{25} The practical effect of this omission seems clear. Simply put, if extrinsic evidence is excluded at these crucial points in the analysis, then an employee can do little to combat an artfully worded plan document, regardless of whether that plan document accurately states the terms of the plan.

In this article, I suggest that the parol evidence rule offers a useful means of determining the nature and terms of an employee benefit plan.\footnote{26} The parol evidence rule has long guided judges in determining whether a written document contains the final expression of the parties' understanding of the terms of their agreement and the role that other evidence should play in the analysis of that agreement. Similarly, in the most traditional contract dispute, such allegations pit the written document against written or oral extrinsic evidence of extracontractual promises. The parol evidence rule

\begin{footnotes}
\footnote{23. See, e.g., Priority Solutions, Inc. v. CIGNA, No. 98 CIV. 4336 MBM, 1999 WL 1057202 (S.D.N.Y. Nov. 8, 1999).

24. An interesting explanation of this problem is suggested in dicta in In Re New Valley Corp., 89 F.3d 143, 149 (3d Cir. 1996) (holding that top hat plans not subject to writing requirement of ERISA), in which the requirement of a written plan document is likened to "a strong integration clause, statutorily inserted in every plan document covered by the fiduciary duty provisions."


26. For analysis of the parol evidence rule in ERISA litigation, see generally Fisk, supra note 15, at 205-209. Professor Fisk has examined the parol evidence rule in her article on the use of formalism in employee benefits litigation. I agree with much of Professor Fisk's analysis of the "mechanical formalism" that has marked ERISA jurisprudence. Her suggestions of the "alternative discourses" that should arise regarding contra proferentum, equitable estoppel, promissory estoppel and unjust enrichment offer much to a court interested in pursuing justice while dealing with ERISA litigation. See id. at 210-16.

In this Article, I hope to offer a doctrinal analysis that will demonstrate that even taking into account some of the fundamental critiques offered by the legal realist moment, the parol evidence rule could be a beneficial means of righting some of the wrongs that have been done in the name of ERISA. See generally William T. Payne, Lawsuits Challenging Termination or Modification of Retiree Welfare Benefits: A Plaintiff's Perspective, 10 LAB. LAW. 91, 107 (1994) (discussing which types of extrinsic evidence are relevant in ERISA claims); Steven J. Sacher & William Payne, Sixth Circuit Holds That a Reservation of Rights in the Plan and Some of the SPDs Trumps A Lifetime Statement in SPDs, 14 LAB. LAW. 475, 476 (1999) (stating that if documents are ambiguous, the court should examine extrinsic evidence); William T. Payne, Lawsuits Challenging Termination or Modification of Retiree Welfare Benefits, at ABA Center for Continuing Legal Education National Institute (October 22-23, 1998).}
thus offers useful and familiar analytical tools to judges who must balance an employee's claim that he was promised a certain type of benefits against an employer's interest in adhering to the terms of a written plan document.

This is precisely the inquiry that is needed in order to evaluate an employee's claim based on promises or communications that were made outside the language of the plan document. In the field of employee benefits, employers normally function as plan sponsors and often act as plan administrators and fiduciaries. Such an employer holds most, if not all, of the cards. Therefore, in judging a dispute over the promises that have been made between employer and employee, it is imperative for the court to examine each hand that has been played. Courts will find this a hopeless task unless they examine whether the employee benefit plan fully expresses the agreement between the employer and the employee. By extension, a court should base its evaluation of an employee benefit plan on a careful examination of the informal communications between the employer and the employee. In other words, a court should examine evidence that would normally be dismissed as extrinsic to a formal ERISA plan. The parol evidence rule provides the means for doing this in a way that effectively balances the employer's interest in preserving a written plan document against the employee's right to present evidence of other communications.

The deference which, by convention, is due to an employer's written plan document has plagued ERISA plaintiffs regardless of whether their claims deal with welfare or pension plans. For purposes of this article, however, I have elected to focus my analysis on retiree health benefit plans. Throughout the 1990s, employers struggled to come to terms not


only with the rising cost of health care, but also with a change in accounting standards that radically altered the manner in which retiree medical benefits were funded. In many cases, the temptation to reduce or eliminate retiree medical benefits proved too strong to resist. The resulting litigation has illustrated the courts' struggle in weighing the allegations of promises to provide a certain kind of employee benefit against plan documents worded in more guarded terms.

Part One describes the history and structure of employee health plans in general and retiree medical plans in particular. Part Two traces the development of the parol evidence rule in contract law and explores the role that Corbin and other legal scholars found proper for such evidence. Part Three traces the principal theories of litigation in disputes over retiree health benefits, examines the manner in which parol evidence is treated in these cases, and suggests an application of the parol evidence rule for future cases.

I have selected two specific applications of the parol evidence rule as the focus of this analysis. First, the use of extrinsic evidence in determining whether a contract is fully integrated and, second, the use of extrinsic evidence in determining whether a contract is ambiguous. Throughout the article, my principal concern is to bring together the guiding policy behind ERISA, the protection of promises of employee benefits, and the overriding purpose of the parol evidence rule—discerning which evidence most properly illuminates the intentions of the parties to a contract or the settlor of a trust.
I. EMPLOYEE HEALTH BENEFIT PLANS AND THE PROMISE OF RETIREMENT COVERAGE

"How will we pay the doctor's bill?" This question, for most Americans, is answered in part by an employer's promise to provide health insurance benefits. In the past, retirees often looked to the same source to answer this question. Today, the real question that retirees must ask is whether the promise of employer-sponsored retiree medical benefits continues to exist.

For better or worse, employers play a leading role in financing health care for most Americans. When Congress enacted ERISA in 1974, the importance of employment-based health insurance was already apparent. In the subsequent decades, participation in an employee health plan has become the most common means of financing health care, as well as a significant component of employee compensation. A United States citizen's access to health insurance thus depends in large part upon his

30. 1999 POPULATION SURVEY, supra note 4, at 3.
31. Retiree health benefits were first offered in the post World War II era, when there were few retirees relative to the number of active workers. See EMPLOYEE BENEFITS RESEARCH INSTITUTE, RETIREE HEALTH BENEFITS: WHAT THE CHANGES MAY MEAN FOR FUTURE BENEFITS 4 (1996).
32. The risk distribution principles that guide insurance theory are responsible for the popularity of employment-based health insurance. The high medical costs of one employee may be offset against the lower costs of others. Therefore, an insurer is able to prorate its risk of loss more efficiently across a group than if it were to sell insurance individually. See generally KEETON & WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES § 1.3 (1988).

The larger an employee population, the greater is the likelihood that the employer will be able to obtain favorable insurance premium rates or absorb the costs of self-insurance. Therefore, employees with the good fortune to obtain jobs that offer health benefits are concentrated among large employers. This observation is supported by the data prepared and/or analyzed by the insurance industry and by outside entities. See, e.g., CLARE LIPPERT & ELLIOT WICKS, HEALTH INS. ASS'T, CRITICAL DISTINCTIONS: How FIRMS THAT OFFER HEALTH BENEFITS DIFFER FROM THOSE THAT Do NOT 3 (1991) (observing that the proportion of firms offering coverage increases from 27% among firms with fewer than 10 employees to 98% among firms with 100 or more employees); 1999 POPULATION SURVEY, supra note 4, at 8.


For sources that present or examine the quantitative data regarding the importance of employer-based insurance, see supra note 4.
access to employment. Three in five Americans between the ages of eighteen and sixty-four receive health coverage through their own, or a family member's, employment. Conversely, the ranks of the uninsured are filled by the unemployed.

Employer-subsidized health insurance reflects and enhances personal wealth. Workers who participate in employee health plans currently

33. The Employee Benefits Research Institute, a nonprofit organization that has published annual reports on the sources of health insurance since 1988, reports that the "most important determinant" of a person's likelihood of having health insurance is his employment status. See 1999 POPULATION SURVEY, supra note 4, at 8; see also HEALTH INSURANCE COVERAGE 1998, supra note 4, at 4 (noting that among the general population of 18-64 year olds, workers were more likely to be insured than non-workers; however, workers who could be classified as poor were more likely to be uninsured than non-workers because they may qualify for Medicaid).

34. The significance of employment-based coverage has remained stable throughout the 1990s, despite reductions in coverage or changes in the nature of plans. In 1993, President Clinton reported to Congress that 59% of Americans received health insurance benefits through their employers. See ECONOMIC REPORT OF THE PRESIDENT 126 (Jan. 1993). The Employee Benefits Research Institute's analysis of the 1994 Current Population Survey put the figure at 60.8% of the non-elderly population. See EMPLOYEE BENEFITS RESEARCH INSTITUTE, SOURCES OF HEALTH INSURANCE AND CHARACTERISTICS OF THE UNINSURED: ANALYSIS OF THE MARCH 1994 CURRENT POPULATION SURVEY 7 (1995) [hereinafter 1994 POPULATION SURVEY]. Based on a survey of the same data, the General Accounting Office stated that the percentage of the population that received health coverage through private and public employers is 53.9%. See U.S. GEN ACCT. OFFICE, EMPLOYER-BASED HEALTH PLANS, ISSUES, TRENDS, AND CHALLENGES POSED BY ERISA GAO REP. 95-167, Appendix III, p.45 (1995) available at <www.gao.gov> (visited June 5, 2000). In 1998, the Employee Benefits Research Institute reported that 64.2% of the non-elderly population received insurance through an employment-based plan. See 1999 POPULATION SURVEY, supra note 4, at 1.

35. According to the U.S. Census Bureau, approximately 16.3% of the United States population, or 44.3 million people, were uninsured during 1998. The Census Bureau reported that workers were more likely to have health insurance than non-workers were. However, due to the influence of government programs such as Medicaid, workers who were poor were also less likely to be insured than non-workers within the same income range. See HEALTH INSURANCE COVERAGE 1998, supra note 4, at 1-4. Another Census Bureau study of data from a 36-month period beginning in early 1993 noted a correlation between unemployment and uninsured status on a short-term basis. For example, 44% of workers who experienced a job interruption went uninsured for at least one month. The impact of employment status on the duration of a period of the uninsurance was also notable. Full-time workers were far less likely to go without health insurance than part-time workers or the unemployed. When they did experience a period of non-coverage, it was usually of a much shorter duration than that of a part-time or unemployed person. See generally Robert L. Bennefield, Current Population Reports, U.S. Census Bureau, Househould Economic Studies, Dynamics of Economic Well-Being: Health Insurance, 1993 to 1995: Who Loses Coverage and for How Long? (visited Oct. 4, 1999) <http://www.census.gov/hhes/www/hith9394.html> (stating the relationship between employment status and health insurance coverage is important).

36. Recent studies by the U.S. Census Bureau found that in 1998, 8.3% of uninsured people were in households with income of $75,000 or more, while 25.2% of people with household incomes lower than $25,000 were uninsured. See HEALTH INSURANCE COVERAGE
receive a substantial portion of their compensation from employer
contributions to health insurance.\textsuperscript{37} Access to health insurance not only
provides added financial stability to workers and their families, but it also
factors into their decision to utilize health care services.\textsuperscript{38} Recent economic
analysis indicates that families who are fully or partially insured are more
likely to utilize medical services and supplies than families who are
uninsured.\textsuperscript{39}

Employer-provided medical coverage also plays a significant role in

\begin{footnotesize}

\begin{footnotes}
37. The Bureau of Labor Statistics reports that in March 1999, private industry
employers paid an average of $13.87 per hour in wages and an additional $5.13 in benefits.
Health benefit costs alone accounted on average for $1.03 per hour worked or 5.4% of total
compensation. The results of the statistical study suggest that employer spending on
benefits increases as employment status becomes more secure. Full-time workers enjoyed
higher wages and received a greater proportion of their total compensation from benefits
than part-time workers. On average, employers also paid a greater percentage of the
benefits as compensation to union employees then non-union employees. Moreover, the
average amount spent on health benefits for union workers ($2.02 per hour) was
substantially higher than that of non-union workers ($0.89). \textit{See} Bureau Lab. Stat.,
Employee Compensation]; see also Bureau Lab. Stat., New Survey Reports on Wages and
service agencies offer benefits to workers, the workers often do not meet eligibility
requirements or elect not to participate).

38. \textit{See generally} Gold, supra note 4, at 5-6 ("Research strongly supports the link
between insurance coverage and access to health care.").

with Children: Findings from the Consumer Expenditure Survey (visited June 1, 1999)<http://bils.gov/orest/st950150.htm> (concluding that families with full or partial coverage
request more services); Geoffrey D. Paulin & Wolf D. Weber, Bureau of Lab. Stat., The

The Surgeon General's recent report on the state of oral health in the United States
offers similar observations with respect to the consumption of dental services by uninsured
persons:

Uninsured children are 2.5 times less likely than insured children to receive
dental care. Children from families without dental insurance are 3 times more
likely to have dental needs than children with either public or private insurance.
For each child without medical insurance, there are at least 2.6 children without
dental insurance.

oralhealth.htm>. The Surgeon General reported that the number of adults who lack dental
insurance is three times greater than the number who lack medical insurance. \textit{See id.} at 3.
\end{footnotes}
\end{footnotesize}
PROMISES, PROMISES

retirement compensation. By some estimates, the present value of the medical insurance offered to a typical retiree upon retirement amounts to as much as $35,000.\textsuperscript{40} In 1997, the Government Accounting Office analyzed the costs that 750 retirees of Pabst Brewing Company in Milwaukee might face upon termination of their plan and reported that the annual cost of purchasing standard family coverage would be approximately $8,200.\textsuperscript{41} Thus, the ability to participate in a retiree medical plan is a significant financial boon to a person entering into retirement. Even when cost-sharing components are introduced, the recipient of retiree medical benefits is still able to take advantage of group insurance rates offered to employer-based groups.\textsuperscript{42} This is a particularly important feature to many early retirees who have not yet reached the age required to receive Medicare benefits.\textsuperscript{43} Even Medicare-eligible retirees can receive a benefit from participation in a retiree medical benefit plan by obtaining coverage for services that are not typically covered by Medicare.\textsuperscript{44}

Against this background, the contraction of employee health plans in general and retiree medical plans in particular can threaten the ability of individuals to obtain adequate insurance coverage and compromise the ability of the national health care system to absorb the cost of caring for the newly uninsured.\textsuperscript{45} Between 1987 and 1993 the percentage of the nonelderly population who received coverage through employment-based plans declined from 69.2 to 63.5, while the percentage of recipients of public health insurance rose from 13.3% to 16.7% and the percentage of uninsured


\textsuperscript{41.} See GAO REPORT 97-150, supra note 5, at 3.

\textsuperscript{42.} See id. at 11 (stating that retiree health insurance offers two advantages to retirees: (1) more affordable health benefits and (2) access to benefits for retirees whose health status might adversely affect their ability to obtain affordable coverage in the individual insurance market); accord GAO REPORT 98-133, supra note 5, at 4-5 (reporting that the premiums for popular health insurance in the individual markets of Colorado and Vermont are twice the average retiree contribution for employer subsidized family coverage).

\textsuperscript{43.} See GAO REPORT 97-150, supra note 5, at 4.

\textsuperscript{44.} See id. at Appendix II, 22 (describing Medicare benefits as "more convoluted" and containing "more gaps" than the plans generally offered by large employers).

rose from 14.8% to 17.3%. Although these percentages remained roughly stable between 1993 and 1996, the fact that employment-based insurance did not increase during a period of national prosperity suggests a reluctance among employers to continue to bear the burden of subsidizing health insurance. Since private employment-based health plans are the single most significant source of health care financing in the United States, even a gradual abatement of employment-based health insurance has a distressing impact on the national health care financing system. Whether the reduction in the overall rate of employment-based insurance stems from employers' responses to declining rates of industrialization or the rising costs of health care, the message remains clear: fewer individuals can rely on promises of employment-based insurance.


The decline in employment-based insurance and the corresponding rise in the rates of public insurance illustrate one way in which the cost of providing care is shifting to the public. Less easily documented is the manner in which health care providers shift the cost of uncompensated care to third-party payors, and indirectly, to those who purchase insurance from the third-party payors. For an interesting discussion of this issue based on an empirical study of a California hospital emergency room, see Erik Olsen, Note, No Room at the Inn: A Snapshot of an American Emergency Room, 46 STAN. L. REV. 449 (1994).

47. See 1999 POPULATION SURVEY, supra note 4, at table 1; CUSTER & KETSCH, supra note 45.


51. The Health Insurance Association of America (HIAA) reports that employers who elected not to offer health benefits cited the expense of premiums and concern over future health care costs as the most significant reasons for not providing health care. See CLARE LIPPERT & ELLIOT WICKS, HEALTH INSURANCE ASSOCIATION OF AMERICA, CRITICAL DISTINCTIONS: How FIRMS THAT OFFER HEALTH BENEFITS DIFFER FROM THOSE THAT DO NOT 14 (1991). A more recent study commissioned by the HIAA attributes the increase of health care costs relative to family income as the "primary reason" for the rise of uninsured Americans. See CUSTER & KETSCH, supra note 45, at 4.

52. Professor Mary O'Connell has analyzed the disproportionate impact of these reductions on part-time and low wage workers, the majority of whom are women and minorities. See On The Fringe, supra note 49, at 1422. The same point is made in less
This concern resounds even more clearly in the reduction of retiree medical plans. In the 1980s, sixty to seventy percent of large employers reportedly sponsored retiree medical plans. In the following decade, this number declined to fewer than 40 percent, a reduction that may have a significant impact on future retirees. During the 1990s, changes in accounting rules provoked some employers to amend or terminate their promises of retiree health benefits. In 1990, the Financial Accounting Standards Board approved a change in the method of accounting for retiree benefits, popularly known as FASB 106. Unlike the previous practice of deferring notation of a corporation's promise for retiree benefits until an employee is retired, the new rule requires employers to recognize the liability for future retiree health benefits on current balance sheets. In practical terms, FASB 106 requires a company to accrue anticipated future benefits from the date the employer grants credit for those benefits until the date of eligibility. Any shortfall in plan assets must be recorded as a liability. When the rule became effective for fiscal years beginning after December 15, 1992, many corporations that had promised retiree health benefits to their employees suddenly faced dramatic changes in their balance sheets. As a result, increasing numbers of employers reduced the

---

53. See GAO REPORT 98-133, supra note 5 at 7.

54. See id.

55. See generally John Mintz & Kathleen Day, Health Care's Painful Changes: More Retirees Are Left In the Lurch As Firms Slash Health Coverage, WASH. POST, Feb. 28, 1993, at H1 (affirming that staggering numbers of retirees are without adequate health coverage).


57. This requirement parallels the requirement, announced in FASB 87 and 88, that the future costs of defined benefit pension plans be accrued and reported. See Melbinger & Culver, supra note 56.

58. See EMPLOYEE BENEFITS RESEARCH INSTITUTE, supra note 31, at 5.

59. See id. at 3. When they calculated their liabilities for post-retirement health care benefits for the first time, some large corporations recognized significant charges. See
level of benefits provided under retiree health plans, increased cost-sharing requirements or terminated plans altogether.  

Even employees and retirees who still actively participate in employer-provided health plans may find that their plans' cost-containment features force them to confront medical expenses that exceed the level of their insurance protection. Much of the reduction in the value of medical benefits results from the increasing desire of employers to reduce the cost of providing employee health plans. In recent years, many employers have eschewed first-dollar indemnity insurance in favor of plans designed to promote one or more cost-containment strategies. In theory, the implementation of cost-containment methods both enhances the employee's understanding of health insurance as compensation and limits his incentive to utilize benefits. By declining or limiting medical care, an employee

generally LANGBEIN & Wulk, supra note 4, at 212-13 (discussing FASB 106 write-offs of $2.3 billion (IBM), $6.6 billion (AT&T) and $20.8 billion (General Motors)). These charges have been connected to an average decline of 4.6% in the annual pre-tax profits of 322 companies surveyed by Perrin Towers and an increase of 3% in payroll costs for those same companies. See id. at 213 (citing Employee Benefits Research Inst. Issue Brief 25 (June 1994)).

60. The Washington Post reported that a Foster Higgins survey revealed that as many as two-thirds of employers had recently altered their retiree medical plans or would do so during 1993. See Mintz & Day, supra note 55, at H1. A 1995 survey by Buck Consultants suggested that 51% of responding employers had modified or considered modifying existing post-retirement non-pension benefit programs. See Employee Benefits Research Inst., supra note 31, at 5 (citing Buck Consultants, Analysis of Post-retirement and Postemployment Benefit Disclosures from Corporate Financial Statements: FAS No. 106 and FAS No. 112 (1995) (reporting that the most common modification of 489 Fortune 1000 companies adopting FAS 106 was a change in cost-sharing (29%), caps on company contributions (22%), and adjustment to retiree contribution amounts (17%))).


62. See Mintz & Day, supra note 55.

63. Even when the statistics regarding overall employee participation in health insurance plans remain stable, changes in the quality or extent of coverage can occur. See generally Bureau of Lab. Statistics, Employee Benefits In Medium and Large Private Establishments, 1997 tbl. 5 (visited Oct. 4, 1999) <ftp://146.142.4.23/pub/news.release/history/eb3s.010799.news> [hereinafter Medium and Large Private Establishments] (citing an increase in managed care and fees). Many employers have adopted managed care strategies. According to the Employee Benefits Research Institute, the percentage of individuals with private insurance who participated in traditional indemnity insurance programs fell from 72.6% in 1988 to 33.3% in 1993. See 1994 Population Survey, supra note 34, at 6. Likewise, the General Accounting Office reported that between 1987 and 1996, enrollment in employment-based managed care plans increased from 27% to 74%. See GAO Report 97-150, supra note 5, at 14, n.16; see also Gold, supra note 4, at 8-10.

64. See generally Claude Havighurst Et Al., Health Care Law and Policy 187-88
not only saves cash wages or other resources that would be necessary to pay his deductible or co-payment, but also the amount that his employer would have to spend.\footnote{65}{See generally Gold, supra note 4, at 10. For a recent analysis of the role of copayments and other cost-containment measures in plans providing mental health coverage, see U.S. GEN. ACCT. OFFICE, MENTAL HEALTH PARITY ACT – DESPITE NEW FEDERAL STANDARDS, MENTAL HEALTH BENEFITS REMAIN LIMITED, GAO REP. 00-95, 6-7 (May 2000) (noting that employers and health insurance carriers "often limit mental health coverage through the use of plan design features that can be more restrictive for mental health benefits than for medical and surgical benefits[,]" including annual dollar limits, limits on the number of outpatient visits and higher deductibles, copayments or insurance).}

Cost-sharing directly reduces the value that an employee or retiree receives from his medical plan. For example, employee health plans now typically require an employee to pay premiums,\footnote{66}{In 1997, the Bureau of Labor Statistics reported that 69% of full-time employees participating in employer-sponsored health plans were required to contribute towards the cost of their own coverage. See Medium and Large Private Establishments, supra note 63. The Health Insurance Association of America reports that the average private firm employee is required to pay 15% of the premium for individual coverage under an employee health plan and 30% of the premium for family coverage. See MARIANNE MILLER & THOMAS DIAL, HEALTH INSURANCE ASSOCIATION OF AMERICA, EMPLOYER-SPONSORED HEALTH INSURANCE IN PRIVATE SECTOR FIRMS IN 1992 5 (1993); see also Gold, supra note 4, at 7-8.} deductibles,\footnote{67}{According to the Health Insurance Association of America, 95% of private sector employees in traditional indemnity plans, 33% of employees in POS plans, and 69% of employees who participate in a PPO plan pay a deductible. See MILLER & DIAL, supra note 66, at 5; see also Medium and Large Private Establishments, supra note 63.} and copayments.\footnote{68}{See generally id. (citing an increase in co-insurance).} Many plans now include maximum benefit levels, which limit the benefits for which an employee is eligible during a plan year or, in some cases, during the employee's lifetime.\footnote{69}{The Health Insurance Association of America reports that maximum lifetime benefit levels apply to all but 21% of employees in an indemnity plan, 22% of employees in a PPO arrangement and 43% of employees in a POS plan. See MILLER & DIAL, supra note 66, at 6, tbl. 4; see also Medium and Large Private Establishments, supra note 63, at tbl. 8.} Employee health plans frequently reduce the risk assumed by the employer or insurer by excluding a variety of specific conditions or procedures, including well-care,\footnote{70}{In a 1993 report to the Health Insurance Association of America, Miller and Dial observed the difficulty in describing a "typical health plan from the standpoint of services covered." Their research, based on a 1992 survey of 2,156 employers, suggests insured private sector employees received certain well-care services in the following percentages: adult routine physicals - 52%; routine mammography screening - 80%; routine pap smears - 73%; well baby care - 65%; well child care - 59%; childhood immunizations - 66%. See MILLER & DIAL, supra note 66, at 9-10.}
experimental treatments, and treatments categorized as unnecessary. Despite the changes enacted by the Health Insurance Portability and Accountability Act, limited exclusions of preexisting conditions continue to be permissible.

The amendment or termination of an employee health plan may jeopardize the financial security of employees and retirees. In 1977, 12.6% of non-elderly persons with private insurance risked a one in one-hundred chance of incurring out-of-pocket medical expenses that exceeded 10% of their income. Ten years later, this figure had risen to 18.9% of the population, an increase of 50%.

In Suggs v. Pan American Life Insurance

---

71. See generally Mark A. Hall & Gerard F. Anderson, Health Insurers' Assessment of Medical Necessity, 140 U. PA. L. REV. 1637, 1639 (1992) (stating that experimental procedures are not covered in order to maximize the health status of the overall population); Jennifer Belk, Comment, Undefined Experimental Treatment Exclusions in Health Insurance Contracts: A Proposal for Judicial Response, 66 WASH. L. REV. 809, 809 (1991) (discussing how insurers manipulate the often undefined "experimental treatments" exclusion to refuse treatments that are costly).

72. Managed care strategies increasingly burden an employee with the expense of medical care that falls outside strict interpretations of medical necessity. The increasingly common use of prospective utilization review, for example, limits the employee's access to insurance for approved procedures or treatments that do not meet with the reviewer's approval. Provider networks also limit the employee's ability to attend the health care provider of his choice. See generally Jeffrey Ralph Pettit, Help! We've Fallen and We Can't Get Up: The Problems Families Face Because of Employment-Based Health Insurance, 46 VAND. L. REV. 779, 789 (1993) (suggesting that insurance policies that utilize ambiguous exclusions may effectively deny payments for treatments that are too expensive rather than experimental).

73. According to the data collected in the 1987 National Medical Care Expenditure Survey, almost one third of privately insured persons were covered by plans that limited mental health coverage to 30 or fewer visits, while 86.8% of the persons who were insured did not receive full coverage of well-child visits. See Pamela Farley Short & Jessica Banthin, New Estimates of the Underinsured Younger than 65 Years, 274 JAMA 1302 (1995). While not necessarily inconsistent with the results reported by Miller and Dial, the comparison of these figures suggests that the mere fact of coverage is not evidence of the sufficiency of that coverage.

Before the enactment of HIPAA, which now limits the use and duration of pre-existing condition limitations, see 29 U.S.C. § 1181, pre-existing conditions were frequently the subject of blanket exclusions from coverage. By some reports, as many as 63% of participants in traditional indemnity insurance plans and 72% of participants in preferred provider networks lacked coverage for preexisting conditions for an average of nine months between 1988 and 1992. See Findlay, Is There a Crisis? Absolutely! 12(3) BUS. & HEALTH 50 (1994) (citing a study by John Gable, KPMG Peat Marwick research director). HIPAA now restricts the ability of employers and insurers to enact strict exclusions for pre-existing conditions, but it has not entirely abolished the practice.


75. See Short & Banthin, supra note 73. These results are consistent with the results of a study conducted by the University of Michigan School of Public Health, which demonstrated that 19% of the state's juvenile population were insured by plans that excluded coverage for physician outpatient fees, lacked coverage or participated in inadequate
Co., the court explained:

In most instances of health insurance coverage, for "employees and their beneficiaries," the plaintiff is extremely vulnerable. For a wage earner who is earning no more than enough to provide food, clothing and shelter, an unexpected large medical bill, not covered by insurance, although he felt confident he was covered, can be devastating. It can deprive an employee and his family of medical care, it can cause extreme hardship if he attempts to pay the medical expenses at the expense of other necessary living expenses, or it can force him into bankruptcy as plaintiff alleges happened in this case.  

It would be tempting and understandable to look to the major legislation that governs employee benefit plans in order to determine whether the reduction of health benefits for employees and retirees poses problems that Congress had tried to remedy. In the preamble to ERISA, Congress stated its concern for the "lack of employee information and adequate safeguards" prevalent among employee benefit plans. ERISA responded to these problems by requiring all employee benefit plans to report and disclose financial information as well as salient plan provisions and imposing standards of conduct for fiduciaries, as well as minimum enforcement provisions.

However, as its name suggests, the primary concern of the Employee Retirement Income Security Act of 1974 was the protection of pension benefits. Therefore, Congress placed additional regulations on pension plans covering vesting, funding and participation. In contrast, welfare plans, including employee health plans, operate free from similar requirements for vesting of benefits.

Congress' decision to exempt welfare plans from vesting requirements is a direct corollary of its decision to maintain a system which permits, but does not require, employers to provide employee benefit plans.  

78. See id. § 1001(b).
79. See id. § 1001(c).
81. Professor Catherine Fisk argues that "ERISA jurisprudence reflects the ideological operation of voluntarism (the idea that Congress did not mandate employee benefits but left
Employers may volunteer or bargain to provide pension and welfare benefits as employee compensation, but they are not required to do so. The arguments offered against establishing vesting standards for welfare plans emphasized the plan sponsor's inability to control costs that could rise due to outside factors. Unlike the cost of a pension plan, which could be predicted using actuarial calculations based on "fairly stable data," the cost of providing benefits under a health plan might be subject to variations in the cost of medical treatment or unforeseen advances in medical practice or technology. Persuaded by the suggestion that cost-sensitive employers might refrain from promising welfare benefits that they could not change, Congress exempted welfare plans from vesting requirements.

In the absence of specific statutorily imposed vesting requirements, sponsors of employee health plans have virtually free rein over the duration of benefits under health plans. Unless a sponsor waives its right to amend or modify the terms of a welfare plan or violates a specific statutory mandate for benefits, the sponsor may reduce or eliminate benefits employers free to volunteer benefits) within the constraints of "bounded obligations and federal common law." Fisk, supra note 15, at 153.

82. See, e.g., Curtiss-Wright, 514 U.S. at 78.
83. See, e.g., Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 492 (2d Cir. 1988) (holding that automatic vesting was rejected as an option because of fluctuation and unpredictable costs associated with them).
84. See id. Although generally presented as the rationale against vesting any welfare benefits, this argument is less persuasive with benefits outside the health area. Costs of life insurance and accidental death and dismemberment insurance can also be predicted using actuarial calculations that are just as stable as the data required for calculating pension costs. Furthermore, severance plans are simply contractual promises to pay income over a limited period of time.
85. See, e.g., Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1160 (3d Cir. 1990) (stating that Congress balanced its desire to extensively regulate existing plans against the possibility that employers would be deterred from establishing new plans if extensive regulation were implemented).
86. Congress' decision to permit employers to amend or terminate promised welfare benefits resonates throughout Circuit Court decisions in this area. See, e.g., Gable v. Sweetheart Cup Co., 35 F.3d 851, 860 (4th Cir. 1994) (observing that if employers were prohibited from making plan amendments they might not offer insurance at all); Owens v. Storehouse, Inc., 984 F.2d 394, 400 (11th Cir. 1993) (stating that ERISA does not prohibit a company from terminating previously offered benefits that are neither vested nor accrued); Wise v. El Paso Natural Gas Co., 986 F.2d 929, 940 (5th Cir. 1993) (holding that all circuit courts agree that ERISA does not prohibit a company from eliminating previously offered benefits that are neither vested nor accrued); see also Adams v. Avondale Indus., Inc., 905 F.2d 943, 947 (6th Cir. 1990); Sejman v. Warner-Lambert, 889 F.2d 1346 (4th Cir. 1990); Moore, 856 F.2d at 488.
87. Although ERISA does not require an employer to offer benefits or to vest an employee in those benefits, the parties may nonetheless agree that the benefits vest or that particular aspects of a plan will not be changed over a certain period of time. See, e.g., Gable, 35 F.3d at 851.
88. See 29 U.S.C § 1001(b)(1982).
offered without sanctions under ERISA.99 Courts have upheld an employer's decision to reduce or eliminate benefits or to terminate plans altogether.90 Only when an employer has actually made a decision to vest his employees' health benefits is this prerogative limited.91

The critical issue facing both administrators and beneficiaries of employee health benefit plans is how to determine whether an employer has in fact entered into a contractual obligation to vest benefits. In most cases, it is in the employer's best interest to offer health benefits that are clearly unvested and to retain the right to amend or terminate the plan.92 In order to underscore the employer's right to amend or terminate a plan, many health insurance plans now include what is commonly known as a reservation of rights clause.93 This is a provision that, in its most standard form, preserves the employer's ability to amend or change the plan at will.94

Nonetheless, there are circumstances in which employers have determined that it is in their best interest to override the presumption against vesting retirement benefits and limiting their right to amend plans.95 For example, negotiations between an employer and a union may result in the establishment of a collectively bargained agreement which clearly specifies that health benefits are vested.96

89. See, e.g., Curtiss-Wright, 514 U.S. at 78. The GAO REPORT 97-150, supra note 5, at 3, describes "an employer's freedom to modify the conditions of coverage or to terminate benefits" as a key characteristic of America's voluntary, employer-based system of health insurance.


91. See, e.g., Gable, 35 F.3d at 851.

92. See, e.g., McGann, 946 F.2d at 401.

93. See GAO-REPORT 97-150, supra note 5 (citing the U.S. Department of Labor, Pension and Welfare Benefits Administration, Division of Technical Assistance and Inquiries). An example of a typical reservation of rights clause is included in a question-and-answer brochure issued by the Department of Labor: "The company reserves the right to modify, revoke, suspend, terminate, or change the program, in whole or in part, at any time." Id. at 25.

94. See, e.g., McGann, 946 F.2d at 405 (stating that the employers reservation of the right to amend supports the contention that the employer never promised that benefits were permanent). See generally, Fisk, supra note 15, at 156-57.


96. See, e.g., Maurer v. Joy Technologies, Inc., 212 F.3d 907 (6th Cir. 2000) (stating collective bargaining agreement demonstrates that parties intended to vest retiree health benefits); Golden v. Kelsey-Hayes, 954 F. Supp. at 1187 (finding language in collective bargaining agreements "directly tie[s] retiree eligibility for health care coverage to pension entitlement and therefore is a clear indica that Kelsey-Hayes intended to provide lifetime health care coverage"); Jansen v. Greyhound Corp., 692 F. Supp. 1029, 1034 (N.D. Iowa 1987) (finding that "it was the parties' intent and understanding that the retiree medical insurance benefits provided under the 1979 agreement were to continue undiminished for
However, between these two unequivocal cases lie many more enigmatic patterns of communication between employers and employees. Are employees to regard their health benefits as vested when an employer says he will create a vested plan but writes a plan document with a reservation of rights clause? Should employees who read a plan document with a reservation of rights clause be able to rely on subsequent oral assurances that health benefits will be available for their lifetimes? What about employees who possess a summary plan description that refers to lifetime benefits, but makes no reference to the reservation of rights clause that appears in the formal plan document?

These questions suggest that the analysis of contractual promises regarding vesting or other benefit features is not a mechanical exercise. Indeed, a statutorily imposed vesting requirement seems a simple concept when balanced against the many nuances that exist in trying to discern and interpret contractual vesting rights. Yet, for all the complexity that arises in the absence of a statutory mandate, this is familiar territory. Disputes between employees and their employers about whether benefits are vested simply call us to examine whether promises have been made and, if so, whether they have been broken.

---

97. Compare, e.g., In re Unisys Corp., 58 F.3d 896, 903 (3d Cir. 1995) (holding that the fact that plans used terms such as "lifetime" to describe retiree medical benefits and contained a reservation of rights clause does not render a plan internally inconsistent and ambiguous) with Diehl v. Twin Disc, Inc., 102 F.3d 301, 307 (7th Cir. 1996) (stating that a layperson reading Unisys might view the case with a "quizzical expression").


100. The Supreme Court's opinion in Firestone Tire & Rubber Co. v. Bruch instructed courts to use the law of trusts and contracts to guide the development of a federal common law of ERISA. The Court stated:

As they do with contractual provisions, courts construe terms in trust agreements without deferring to either party's interpretation... The terms of trusts created by written instruments are determined by the provisions of the instrument as interpreted in light of all the circumstances and such other evidence of the intention of the settlor with respect to the trust as is not inadmissible.

The trust law de novo standard of review is consistent with the judicial interpretation of employee benefit plans prior to the enactment of ERISA. Actions challenging an employer's denial of benefits before enactment of ERISA were governed by principles of contract law. If the plan did not give the employer or administrator discretionary or final authority to construe uncertain terms, the court reviewed the employee's claim as it would have any other contract claim by looking to the terms of the plan and other manifestations of the parties' intent.
II. THE PAROL EVIDENCE RULE

Striking a balance between informal communications and written documents is hardly a novel undertaking for courts accustomed to interpreting contracts or trusts. The express terms of ERISA borrow from traditional doctrines of contract law in order to protect contractual promises of employee benefits and from the tenets of trust law to guide the


The Court's opinion in Firestone has come to stand for many principles other than those set out in the above words. But, Firestone does give life to the idea that traditional notions of trust and contract law should figure into the analysis of plan language.


behavior of plan fiduciaries. Thus, courts have recognized that many of the traditional canons of interpretation apply to the construction of ERISA plans under federal common law. While ERISA borrows from contract and trust common law, the loosely defined prescriptions for the development of federal common law have enabled courts to re-examine the maxims of traditional common law in light of the goals of ERISA. ERISA has thus often marked the common law and the canons of its interpretation with its own stamp. Yet a re-examination of the familiar and fundamental principles of the common law may yield helpful results in trying to understand ERISA jurisprudence.

The parol evidence rule and its role in contract interpretation have been the battlefield for many struggles between formalism and realism. Pitting formalists such as Samuel Williston against challengers led by Arthur Corbin, the battle over form versus substance commanded much of the legal community's attention during the middle of the century. Formalists, like Williston, sought the certainty and continuity of clearly defined legal rules. For example, if a contract contained an integration clause, then it was fully integrated and extrinsic evidence did not play a significant role in interpretation unless documentation was incomplete or there were issues of fraud or mistake. Challengers, such as Corbin, seemed to gain acceptance in later years as the legal community became suspicious of the ability of writings (and the language itself) to achieve the formalists' goal of certainty and continuity. While, in recent years,

---

102. See supra note 101 and accompanying text.
103. See, e.g., Smart v. Gillette Co. Long-Term Disability Plan, 70 F.3d 173, 178 (1st Cir. 1995); Brewer v. Protexall, Inc., 50 F.3d 453, 457 (7th Cir. 1995); Burnham v. Guardian Life Ins. Co. of America, 873 F.2d 486, 489 (1st Cir. 1989).
104. See, e.g., Jung v. FMC Corp., 755 F.2d 708, 714 (9th Cir. 1985) (stating that ERISA supersedes all state law, including decisional law relating to a plan and the court rejects state law contract interpretation in light of ERISA); Tinsley v. General Motors Corp., 622 F. Supp. 1547, 1550 (N.D. Ind. 1985) (stating that ERISA preempts all state law, including decisional law; therefore plaintiff's attempt to apply state common law principles of contract construction is inappropriate and the court must instead consider the claim in light of the principles of ERISA).
105. ERISA also borrows from the common law of trusts. Therefore, it is noteworthy that the Restatement (Third) of Trusts § 21, cmt. a, refers to Restatement (Second) of Contracts §§ 209, 210, 213-16 (1981) for an explanation of the parol evidence rule and its application to contracts.
107. See id.
108. See id. at 525.
109. See Calamari & Perillo, supra note 101, at 338 (citing 4 Samuel Williston, Contracts § 633 (3d ed. 1961)).
110. See Klau, supra note 106, at 528.
academic legal philosophers may have moved on to different battlegrounds, it is worth noting that the quarrel between formalism and realism has persisted in the field of contract interpretation. Judge Kozinski of the California Supreme Court, for example, mounted a serious formalistic challenge to the Corbinian paradigms of contract interpretation adopted long ago by California courts under the lead of Judge Traynor's opinion in Pacific Gas and Electric Company v. G.W. Thomas Drayage and Rigging Co.  

The federal common law of ERISA borrows from contract and trust law and is developed by judges with familiarity with the traditions of contract and trust interpretation. Therefore, it is not surprising that ERISA jurisprudence is replete with the same tensions that have erupted in the analysis of more traditional aspects of contract and trust law. ERISA, with its unique balancing of contract and trust precepts, has fashioned a legal tradition in which formalism has not gone out of style. In debates on the interpretation of the statute, formalist arguments frequently emerge as contributions to and, occasionally, as the solutions to the conundrums involved in discerning, understanding and interpreting documents that govern ERISA plans.

Therefore, in the field of employee benefits, the critique of formalist thinking offered by commentators such as Arthur Corbin remains highly appropriate. How do we know if an ERISA plan document is fully integrated? How is one to detect an ambiguity in the plan document itself? In contract law, Corbin argues that when such questions arise no relevant evidence, whether oral or informal, should be excluded from consideration. Corbin's challenge to the narrow use of extrinsic evidence in the interpretation of contracts should resound with clarity when the field of interpretation is narrowed to ERISA plans.

To hear the echoes of Corbin's questions in the adjudication of ERISA disputes, one must begin with the analysis of parol evidence under basic contracts law. An obvious problem in adjudicating disputes over the interpretation of a contract or trust document is how to dispose of evidence other than the simple written instrument. As a substantive rule of law, the parol evidence rule devalues evidence that contradicts an integrated


112. See generally, Fisk, supra note 15.

113. See id. at 184-188.

114. See CORBIN ON CONTRACTS, supra note 101, at § 573 (1960) ("On these issues, no relevant evidence, whether parol or otherwise, is excluded."); see also The Interpretation of Words, supra note 101, at 172-173.

115. See RESTATEMENT (SECOND) OF CONTRACTS § 213, cmt. a (1981) (stating that the parol evidence rule is not a rule of evidence but a rule of substantive law).
written contract. Corbin formulated the parol evidence rule as follows:

When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing.\(^1\)

In contrast, a contract that is not fully integrated does not receive the unqualified protection of the parol evidence rule.\(^2\) Similar principles apply to the evaluation of parol evidence in the interpretation of a trust document.\(^3\)

While the parol evidence rule itself is easy to describe, the difficulty comes in knowing when a document deserves such steadfast protection. Corbin took an expansive view of the role of extrinsic evidence. He envisioned three situations in which extrinsic evidence should be offered: first, in order to determine whether the written words in the contract were the complete and exclusive integration of the agreed terms; second, in order to determine whether the contract should be voided for reasons such as fraud, accident, or mistake; and third, in order to aid in the interpretation of the contract itself.\(^4\) Since fraud, accident and mistake are anomalies in the bargaining process, my discussion is confined to the first and third of these issues, which seem to me to be more likely to present themselves in ERISA jurisprudence.

\(^{116}\) See generally, Metzger, *The Parol Evidence Rule*, supra note 20, at 1383 (tracing the foundations of the parol evidence rule to (a) a belief that the written word protected parties against fraud or perjury more effectively than reliance on oral evidence; (b) an assumption that judges are better suited than juries to protect against perjured testimony; (c) a desire for predictability and certainty in the conduct of business; and (d) the basic contractual rule that later final expressions of intent should prevail over earlier tentative expressions).


\(^{118}\) See Doyle v. Northrop Corp., 455 F. Supp. 1318, 1332-33 (D.N.J. 1978); David Nassif Assoc. v. United States, 557 F.2d 249, 256 (Ct. Cl. 1977). See generally Murray, *supra* note 101, at 342 (stating that the purpose of the rule is to afford special protection to subsequent written expressions of agreement).

\(^{119}\) See generally *Restatement (Second) of Trusts* § 38 cmt. a (1959); *Restatement (Third) of Trusts* § 21 cmt. a (Tentative Draft No. 1 1996); *Scott, The Law of Trusts* Sec. 38 (4th ed. 2000).

\(^{120}\) See *Corbin on Contracts*, supra note 101, at § 573; *The Interpretation of Words*, supra note 101, at 172-173.
A. Integration

In its most simplistic manifestation, an integration is a writing to which the parties assent as the full statement of the terms of their agreement.\(^{121}\) The concept of integration assumes that a written document embraces all of the terms, conditions, and intentions of the parties who enter into the contract. It also admits, as both a theoretical possibility and an undeniable reality, that many writings do not achieve this goal. The dual paradigms of fully and partially integrated contracts reflect the difficulty that parties face in molding the written word of their agreement. A fully integrated contract is the complete and final expression of the entire agreement between the parties.\(^{122}\) A partially integrated contract completely expresses the parties' agreement on the issues addressed in the contract, but it is not the final integration of the parties' agreement on any other terms.\(^{123}\)

Thus, the working paradigms of parol evidence admit that parties to a contract may achieve full integration or, intentionally or not, they may fall short and execute a partially integrated contract. It is also possible that what appears to be a contract is in fact not integrated at all.\(^{124}\)

Therefore, from the outset complete integration is an elusive goal. Since, with few exceptions, parties are free to agree on a wide variety of terms,\(^ {125}\) drafting an integrated contract is a challenging mission.\(^ {126}\) The very fact that courts evaluate contracts to determine whether they are integrated testifies to the difficulties inherent in reducing agreements to writing.

The parol evidence rule operates differently depending on whether the writing is fully or partially integrated.\(^ {127}\) Initially the purpose of integration analysis is therefore to determine whether the rules of complete or partial integration govern the role of extrinsic evidence. While a fully integrated contract supersedes all prior arrangements between the parties, a partially

---

121. See id.
122. See id.
123. See generally Calamari & Perillo, supra note 101, at 335-37; Dow, supra note 101.
124. See generally CORBIN ON CONTRACTS, supra note 101, at §§ 577, 582; Calamari & Perillo, supra note 101, at 336 ("Writings that evidence a contract are not necessarily 'final' embodiments of the contract.").
125. See, e.g., Mellon Bank, N.A. v. Aetna Bus. Credit, Inc., 619 F.2d 1001, 1010 (3d Cir. 1980) (stating that "commercial parties are free to contract as they desire").
126. On this point, see Burnham, supra note 101, at 100-01.
127. See generally Dow, supra note 101. Dow criticizes Texas courts for failing to distinguish between the degrees of integration. He concludes that Texas courts use the term "integrated" to mean "completely integrated" at the initial stage of their analysis only to abandon the idea of complete integration when they actually apply the rule and therefore, they end up admitting evidence. See also Metzger, The Parol Evidence Rule, supra note 20, at 1393.
integrated contract may allow the introduction of certain extrinsic evidence. As an analytical tool then, the concept of integration itself neither condemns nor condones agreements that are extrinsic to the written document. Rather, the purpose of integration analysis is to define the scope of a writing in order to determine the role that such extrinsic agreements might play.

Depending on the result of this analysis, the doctrine of integration can either allow the parol evidence rule to bar or to enforce contemporaneous agreements. The protection afforded to an integrated document enables the parties to "rely on the enforcement of agreements that have been reduced to writing." However, equally significant is the assurance it provides to parties who are able to demonstrate that additional agreements must operate in harmony with those contained in an unintegrated or partially integrated document.

In practical terms, courts usually rule on issues of integration only when the contract has disappointed one or both of the parties' expectations. Therefore, from the perspective of the parties, the purpose of arguments about integration and interpretation is to advance the position that will favor their respective sides. However, it is critical to remember that a determination of integration is distinct from the process of interpretation or contract construction. Integration determines only whether parties have consented to a particular set of words; it does not provide those words with meaning or determine the legal effect of those words.

Exactly how a judge is to go about determining whether a contract is a "complete and accurate integration" of an agreement between parties is no small task. To resolve the question of whether a contract is integrated, a court must consider at least two issues: first, the nature and terms of the actual agreement between the parties and second, the extent to which the writing in question expresses those terms. To put it differently, a court first must determine whether a contract is integrated and then must evaluate

128. See generally Burnham, supra note 101, at 105.
129. See id.
130. See id. at 106.
132. See id.
133. See Corbin on Contracts, supra note 101, at § 539.
134. See id.
135. See generally Metzger, The Parol Evidence Rule, supra note 20, at 1393-94; Hadiyannakis, supra note 101, at 45-55 (describing the approaches of Williston, Wigmore, Corbin, the UCC, and the First and Second Restatements of Contracts to the issue of integration analysis).
136. See generally supra note 135.
whether the integration is full or partial.\textsuperscript{137}

During the first stage of the integration analysis, many formalistic-minded courts reject offers of extrinsic evidence and examine only the document itself in order to determine whether it is integrated.\textsuperscript{138} Williston, for one, espoused something similar to the 'four corners' approach.\textsuperscript{139} In other words, Williston and like-minded commentators ask whether a merger clause is present or whether the nature of the document itself (such as a will) is intended to be complete.\textsuperscript{140} After all, a merger or integration clause suggests that the parties intended to use the parol evidence rule in order to rule out other indications of what they might have said, done or meant when they entered into the contract.\textsuperscript{141} Extrinsic evidence need not be considered when these factors are present. The advantage to this approach is judicial economy, as well as encouraging parties to reduce their agreements to writing and discouraging fraudulent oral representations concerning those agreements.\textsuperscript{142} The writing says it all.

In contrast, Corbin took a narrow view regarding the probative worth of the written contract. A more liberal Corbinian court must first determine whether a written contract constitutes the complete integration of all of the terms to which the parties have agreed to under the contract.\textsuperscript{143} Corbin's

\textsuperscript{137} See generally Calamari & Perillo, supra note 101, at 337 ("Once it is determined that the writing is intended to be final and therefore an integration, it becomes necessary to ascertain whether the integration is complete (so that it cannot be contradicted or supplemented) or only partial (so that it cannot be contradicted but may be supplemented by evidence of consistent additional terms).").

\textsuperscript{138} Eric Posner has described this approach as "hard." He notes that such courts find a writing complete on its face if it is detailed, covers many contingencies, and contains a merger clause. See Posner, supra note 101, at 535.

\textsuperscript{139} See Calamari & Perillo, supra note 101, at 338, n.28-31; Murray, supra note 20, at 1360; see also Michael A. Lawrence, The Parol Evidence Rule in Wisconsin: Status in the Law of Contract Revisited, 1991 Wis. L. Rev. 1071, 1076-77 (1991) (stating that when parties have reduced their agreement to an integrated writing, extrinsic evidence should be excluded).

\textsuperscript{140} See Burnham, supra note 101, at 128; Calamari & Perillo, supra note 101, at 338. For a discussion of some of the difficulties in determining whether a writing is complete under the four corners analysis, see Hadjiyannakis, supra note 101, at 43-45.

\textsuperscript{141} See generally Dwight J. Davis & Courtland L. Reichman, Understanding the Value of Integration Clauses, 18SPG FRANCHISE L.J. 135, 136 (1999) (stating that integration clauses, while not determinative, suggest that a written agreement is fully integrated); R. Wayne Estes & Kirsten C. Love, The Ubiquitous Yet Illusive 'Merger' Clause in Labor Agreements: Semantics, Applications, and Effect on Past Practice, 87 KY. L. J. 1, 11-18 (1999) (stating that when an agreement is final and total it cannot be contradicted by contemporaneous agreements). But see Peter C. Lagarias, The Misuse of Integration, No Representation, and No Reliance Clauses in the Name of Contract Certainty, 18SPG FRANCHISE L. J. 3 (1998) (explaining that there is no such thing as certainty in American contract law and that the use of an integration clause to negate fraud and similar claims is against public policy).

\textsuperscript{142} See Posner, supra note 101, at 567-68 (criticizing these arguments).

\textsuperscript{143} See CORBIN ON CONTRACTS, supra note 101, at § 573.
analysis reflected an assumption that a written document was not a contract itself, but merely the written expression of an agreement made between parties. By parsing the notion of "contract" from that of a written document, Corbin argued that "mere inspection of the written document" is insufficient to determine the response to these issues.\textsuperscript{144}

This position assumes that it is impossible to conclude whether a writing expresses the agreement of the parties without the consideration of extrinsic evidence.\textsuperscript{145} Under Corbin's approach,\textsuperscript{146} the purpose of offering extrinsic evidence for integration analysis is to prove or disprove the ability of the contract to express completely the agreement between the parties.\textsuperscript{147} As the Fifth Circuit has suggested, a contract may be incomplete for one of two reasons: first, that the writing is "facially incomplete and requires extrinsic evidence to clarify, explain or give meaning to its terms," or second, that "when viewed in light of the circumstances surrounding its execution, the writing does not appear to be the complete embodiment of the terms relating to the subject matter of the writing."\textsuperscript{148} In \textit{Mellon Bank, N.A., v. Aetna Business Credit, Inc.}, the Third Circuit explained that

\begin{quote}
[T]he issue of 'integration' . . . arises when evidence is introduced to vary or add to the unambiguous written terms of a contract on the ground that the evidence is admissible because the written contract is not fully integrated. The issue becomes whether the
\end{quote}

\textsuperscript{144}. See id.

\textsuperscript{145}. This analysis corresponds to Eric Posner's description of the "soft" approach to the parol evidence rule, which determines that a writing is complete only when extrinsic evidence is consistent with that view. See Posner, supra note 101, at 535. For example, in \textit{Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctr., Inc.}, 993 F.2d 1178, 1183 (5th Cir. 1993), the Fifth Circuit ruled that a document for the sale of goods was integrated after considering and rejecting evidence such as complaints about the quality of the goods, information concerning trips that led to the signing of the document, and oral testimony concerning the negotiations and related correspondence. For a commentary on the Fifth Circuit's analysis of this problem, see Dow, supra note 101.

\textsuperscript{146}. See RESTATEMENT (SECOND) OF CONTRACTS § 214 (stating that "agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish (a) that the writing is or is not an integrated agreement"); see also JOHN EDWARD MURRAY JR., CONTRACTS § 105 (2d ed. 1974); Calamari & Perillo, supra note 101, at 343; Margaret N. Kniffin, \textit{A New Trend in Contract Interpretation: The Search for Reality as Opposed to Virtual Reality}, 74 OR. L. REV. 643, 648 (1995); Lawrence, supra note 139, at 1071; Metzger, \textit{The Parol Evidence Rule}, supra note 20, at 1396 (describing the clear influence of Corbin's thought on recent decisions). \textit{But see} Ralph James Mooney, \textit{The New Conceptualism in Contract Law}, 74 OR. L. REV. 1131, 1133 (1995) (arguing that during the late 1980s and 1990s, a return to classical conceptualist thinking emerged in parol evidence cases).

\textsuperscript{147}. See, e.g., Harden v. Warner AmEx Cable Communication Inc., No. 83 CIV. 91594PCL, 1985 WL 3402, at *2 (S.D.N.Y. Oct. 24, 1985) (stating that extrinsic evidence is also admissible to prove whether the parties assented to a particular writing as constituting the complete and accurate integration of their contract).

\textsuperscript{148}. Jack H. Brown & Co. v. Toys "R" Us, 906 F.2d 169, 174 (5th Cir. 1990).
proffered evidence is extrinsic to the integrated written contract, and thus inadmissible, or whether the proffered evidence is part and parcel of the entire contract of which the written document is only a part.\textsuperscript{149}

Corbin believed that courts often neglected to examine whether a written contract was integrated.\textsuperscript{150} Even when courts did consider the question of integration, they often failed to analyze whether the document was partially or fully integrated.\textsuperscript{151} Proceeding to contract interpretation without analyzing whether the contract is integrated or assuming a contract is integrated without analyzing available extrinsic evidence could lead to the enforcement of contracts that do not contain the correct expression of all of the terms of the parties' agreement.

B. Contract Interpretation

At the heart of many contract disputes lies the issue of contract interpretation. This is the second area in which courts must consider the role of extrinsic evidence.\textsuperscript{152} If integration answers the question, "[a]re we looking at the right words?" then contract interpretation responds to the question, "[w]hat do these words mean?"\textsuperscript{153} In resolving contract disputes, this is a much more difficult issue for a written opinion to dismiss than the explicit analysis of whether the contract is integrated.

On many points, there is sufficient agreement to offer, with

\textsuperscript{149} 619 F.2d 1001, 1010 n.9 (3d Cir. 1980) (emphasis added). Although the Mellon Bank court addressed a controversy arising out of the exchange of notes between commercial lenders rather than ERISA issues, the case has been cited with approval in numerous ERISA decisions in the Third Circuit.

\textsuperscript{150} See Corbin on Contracts, supra note 101, at § 573 (stating that "[i]n hundreds of cases stating and purporting to apply the 'parol evidence rule,' the reported opinion does not show the basis of the court's finding (or assumption) that the writing presented in court was in fact assented to as the complete and final integration of agreement"). The Fifth Circuit has held that a court must determine whether a document is integrated even if it contains an express integration clause. See Matthews v. Dow Chem. Corp., 475 F.2d 146, 148-49 (5th Cir. 1973) (holding that where the issue was raised by the evidence, the court must determine whether the writing was intended to constitute, and does constitute, a complete integration of the agreement between the parties; additionally, in so doing, the court may not apply the parol evidence rule).

\textsuperscript{151} See Dow, supra note 101, at 618-20.

\textsuperscript{152} Judge Posner, for example, has opined that in interpreting contractual obligations, it would be "passing odd" to prohibit the consultation of dictionaries, treatises, articles, and other published materials created by strangers to the dispute. Additionally, he advocates examining trade usage. See Envirodyne Indus., Inc. v. Unofficial Comm. of 13 1/2% Noteholders of Envirodyne Indus., Inc., (In re Envirodyne), 29 F.3d 301, 305 (7th Cir. 1994) (Posner, C.J.).

\textsuperscript{153} Murray, supra note 101, at 343 (stating that the parol evidence rule will determine whether the parties intended their final writings to be integrated).
confidence, some precepts reminiscent of hornbook law. Although the purpose of contract interpretation is to enforce the intent of the parties, the written contract, as the "strongest external sign of agreement between contracting parties," is the lodestar of contract interpretation.\(^{154}\) The courts commonly state that a document that is subject to more than one reasonable interpretation is ambiguous as a matter of law.\(^{155}\) It is well accepted that a party may offer extrinsic evidence to illustrate the meaning of ambiguous contract provisions.\(^{156}\) Additionally, extrinsic evidence may not contradict the plain terms of an unambiguous document.\(^{157}\)

However, of greater controversy is whether and to what extent a court should consider extrinsic evidence in making an initial determination of ambiguity.\(^{158}\) In order to introduce extrinsic evidence that may be useful in interpreting a contract, a litigant must first demonstrate that the contract at issue is ambiguous as a matter of law.\(^{159}\) Courts are again divided between whether this analysis should be based on the 'four corners' of the writing or

\(^{154}\) See generally Murray, supra note 101, at 1342 (stating that the written manifestation of assent is not the contract, but merely evidence of the contract). See, e.g., Mellon Bank, 619 F.2d at 1009 (stating that "courts must eschew the ideal of ascertaining the parties' subjective intent and instead bind parties by the objective manifestations of their intent"); Ortman v. Stanray Corp., 437 F.2d 231, 234 (7th Cir. 1971) (explaining that the function of contract interpretation is "to ascertain the intention of the parties as manifested by the words they used to evidence their agreement").


\(^{156}\) Some states recognize a distinction between "patent" and "latent" ambiguities. A patent ambiguity exists on the face of the contract, while a latent ambiguity emerges from examination of extrinsic evidence. See, e.g., Wiener v. East Arkansas Planting Co., 975 F.2d 1350, 1356 (8th Cir. 1992) (citing an Arkansas law recognizing the patent/latent distinction).

\(^{157}\) See, e.g., Matthews v. Dow Chem. Corp., 475 F.2d 146, 149 (5th Cir. 1973) (holding that although the introduction of parol evidence was appropriate to determine whether the document was integrated, it was error to allow parol evidence to alter the terms of or add inconsistent provisions to a written contract); In re Envirodyne 29 F.3d at 3015 (holding that the object of excluding extrinsic evidence when the contract is clear on its surface is "to prevent parties from trying to slip out of their clearly stated, explicitly assumed contractual obligations through self-serving testimony or documents ... purporting to show that the parties didn't mean what they said in the written contract").

It is worth noting that in Ortman, the Seventh Circuit interpreted Illinois law to permit the admission of extrinsic evidence in order to explain the meaning of a written instrument when there was no finding of ambiguity. See Ortman 437 F.2d at 235. However, in 1984, the Seventh Circuit noted that Illinois law had been clarified and that the holding of Ortman was no longer an accurate statement of the law. See Sunstream Jet Express, Inc. v. International Air Serv. Co., Ltd., 734 F.2d 1258 (7th Cir. 1984).

\(^{158}\) See generally The Interpretation of Words, supra note 101, at 164-70 (analyzing the possibility that the word "chicken" may be shown to be ambiguous if extrinsic evidence is considered).

\(^{159}\) See Taylor, 933 F.2d at 1234; Wulf v. Quantum Chem. Corp., 26 F.3d 1368, 1376 (6th Cir. 1994); Boyer v. Douglas Components Corp., 986 F.2d 999, 1005 (6th Cir. 1993).
PROMISES, PROMISES

on extrinsic evidence.\(^{160}\)

In many respects, the 'four corners' approach is advantageous in analyzing ambiguity because it facilitates judicial economy and clarity.\(^{161}\) Therefore, many courts require that a litigant demonstrate that a contract is ambiguous without the use of extrinsic evidence.\(^{162}\) However, for all its simplicity the 'four corners' approach has been criticized for its ingenuous assumption that words clearly express intent. As Wigmore stated:

The truth had finally to be recognized that words always need interpretation; that the process of interpretation inherently and invariably means the ascertainment of the association between words and external objects; and that this makes inevitable a free resort to extrinsic matters for applying and enforcing the document . . . . Once freed from the primitive formalism which views the document as a self-contained and self-operative formula, we can fully appreciate the modern principle that the words of a document are never anything but indices to extrinsic things, and that therefore all the circumstances must be considered which go to make clear the sense of the words—that is, their association with things.\(^{163}\)

Borrowing from criticisms voiced by legal realists earlier this century,\(^{164}\) the Third Circuit warned that judges who decline to admit extrinsic evidence may apply their own subjective experience to the 'four

---

\(^{160}\) Again, Eric Posner's delineation of the "hard" and "soft" approaches to the parol evidence rule are pertinent. A court that takes a "hard" approach to the analysis of parol evidence will generally decline to examine extrinsic evidence when determining whether an ambiguity is present. A court that takes a "soft" approach may decide that a document that does not contain an ambiguity on its face may nonetheless be ambiguous if the extrinsic evidence suggests that the parties agreed on terms that are inconsistent with the written document. See Posner, supra note 101, at 535. In its discussion of Pennsylvania law in Mellon Bank, N.A. v. Aetna Bus. Credit Corp., 619 F.2d 1001, 1011 (3d Cir. 1980), the Third Circuit drew a distinction between the 'four comers' approach and its preferred method of considering all relevant extrinsic evidence.

Under a 'four corners' approach, a judge sits in chambers and determines from his point of view whether the written words before him are ambiguous. An alternative approach is for the judge to hear the proffer of the parties and determine if there is objective indicia that, from the linguistic reference point of the parties, the terms of the contract are susceptible of differing meanings.

\(^{161}\) See Calamari & Perillo, supra note 101, at 353.

\(^{162}\) See, e.g., Schachner v. Blue Cross & Blue Shield of Ohio, 77 F.3d 889, 893 (6th Cir. 1996); Stewart v. KHD Deutz of Am. Corp., 980 F.2d 698, 702 (11th Cir. 1993). See generally Keith A. Rowley, Contract Construction and Interpretation: From the "Four Corners" to Parol Evidence (And Everything in Between), 69 Miss. L.J. 73, 87 (1999) (describing the use of the 'four comers' approach in Mississippi).

\(^{163}\) 9 RALPH J. WIGMORE, WIGMORE ON EVIDENCE § 2470 (3d ed. 1940), cited in Ortman v. Stanray Corp., 437 F.2d 231, 235 n.235 (7th Cir. 1971).

\(^{164}\) See Mellon Bank, 619 F.2d at 1011.
corners' interpretation. In his famous opinion in *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co., Inc.*, Chief Justice Traynor of the California Supreme Court argued that the fact that a judge perceives a document to have a certain meaning "does not preclude the possibility that the parties chose the language of the instrument to express different terms."

Likewise, Corbin argued that a court cannot possibly determine whether a particular provision of a contract is unambiguous without considering extrinsic evidence. The classic example of the importance of extrinsic evidence is, of course, the case of the contract for the shipment of goods on the vessel named *Peerless*. Although the contract appeared to be accurate, the extrinsic evidence unveiled the ambiguity when it became

---

165. See id. at 1010.
166. 442 P.2d 641 (Cal. 1968).
167. Id. at 645.
168. See *The Interpretation of Words*, supra note 101, at 161 ("When a court makes the often repeated statement that the written words are so plain and clear and unambiguous that they need no interpretation and that evidence is not admissible, it is making an interpretation on the sole basis of the extrinsic evidence of its own linguistic experience and education, of which it merely takes judicial notice."); Id. at 189.

The Seventh Circuit's opinion in *Ortman v. Stanray Corp.*, 437 F.2d 231 (7th Cir. 1971) is an excellent example of this approach. Citing Corbin, Wigmore on Evidence, and the Restatement of Contracts § 238, Chief Judge Swygert explains that the parol evidence rule does not require a court to make an initial determination that a contract is ambiguous before considering extrinsic evidence. The court notes the inconsistencies in the precedents interpreting Illinois state law (as the concurrence pointed out, particularly in the area of insurance law). The majority nonetheless concluded that:

[R]elavent parol evidence is always admissible to assist in the determination of what the words used in an integrated writing mean; and the parol evidence rule is placed in its proper role of focusing interpretation on the meaning of the terms embodied in the writing and of rendering all evidence inoperative to vary those terms once their meaning has been discovered.

437 F.2d at 235. Senior Circuit Judge Hastings' concurring opinion suggests that the effect of this broad statement of the parol evidence rule would be to "abrogate the parol evidence rule and proscribe the use of parol evidence only for the purpose of changing the writing." *Id.* at 237. In fact, this seems to be the very point that Corbin made in his treatise on contracts. *Ortman* was later overruled with respect to the idea that extrinsic evidence may always be admitted to interpret contracts regardless of ambiguity. *See Sunstream Jet Express v. International Air Serv.*, 734 F.2d 1258 (7th Cir. 1984).

This analysis has been adopted by a number of courts. See, e.g., *Sun Oil Co. v. Madeley*, 626 S.W.2d 726 (Tex. 1981) (determining that evidence of surrounding circumstances may be consulted in order to determine whether or not a contract is ambiguous). This case provides that a court may confine its inquiry to the written document itself "[i]f, in the light of surrounding circumstances, the language of the contract appears to be capable of only a single meaning." *Id.* at 731.

apparent that there were, in fact, two ships of the same name.\textsuperscript{170}

Led by criticisms like those made by Wigmore and Corbin, some courts have thus rejected the 'four corners' approach in favor of the liberal introduction of extrinsic evidence.\textsuperscript{171} The Seventh Circuit has noted that although extrinsic evidence may not be used to create an ambiguity, a litigant may rely on extrinsic evidence, such as books, treatises and other objective information to demonstrate that an ambiguity exists.\textsuperscript{172} Following this approach, evidence of prior communications between the parties may be admitted to shed light on whether a document is ambiguous.\textsuperscript{173} In \textit{Pacific Gas}, for example, the court determined that appropriate extrinsic evidence should include testimony as to circumstances surrounding the making of the agreement, including consideration of the object, the nature, and the subject matter of the writing.\textsuperscript{174}

Corbin's approach, however, is not without criticism. In particular, courts that are generous in their approach to extrinsic evidence may err in their determination concerning whether a particular provision really is part of the contract.\textsuperscript{175} David Charny has suggested, for example, that the Corbinian approach adopted by Justice Traynor in \textit{Pacific Gas} places too much faith in a judge's ability to sift through the meaning of the extrinsic evidence.\textsuperscript{176} Charny argues that there is no guarantee that the judge will have a greater insight into the meaning of the extrinsic evidence than she will into the meaning of the contractual terms themselves.\textsuperscript{177} In other words, the arguments offered against the 'four corners' approach may eventually and logically be extended as criticisms of the evaluation of the extrinsic evidence. Moreover, as Eric Posner has recently observed, it is conceivable that the parties to a contract may indeed have determined that extrinsic evidence should play no part in the interpretation of their agreement.\textsuperscript{178} Arguing that California had "turned its back on the notion that a contract can ever have a plain meaning discernible by a court without

\begin{itemize}

\item[170.] \textit{See id.}
\item[172.] \textit{See Murphy v. Keystone Steel & Wire Co., 61 F.3d 560, 565 (7th Cir. 1995) (suggesting that "although extrinsic evidence can be used to show that a contract is ambiguous, extrinsic evidence cannot be used to create an ambiguity").}
\item[173.] \textit{See, e.g., Pacific Gas and Elec. Co. v. G.W. Thomas Drayage & Rigging Co., Inc., 442 P.2d 641 (Cal. 1968).}
\item[174.] \textit{See id. at 645.}
\item[175.] \textit{See Posner, supra note 101, at 542.}
\item[177.] \textit{See id.}
\item[178.] \textit{See Posner, supra note 101, at 571.}
\end{itemize}
resort[ing] to extrinsic evidence," one federal judge has observed that "it matters not how clearly a contract is written, nor how completely it is integrated, nor how carefully it is negotiated, nor how squarely it addresses the issue before the court: the contract cannot be rendered impervious to attack by parol evidence." In other words, a permissive application of the parol evidence rule may ignore the fact that the parties themselves may have actually contracted for a narrow application of the parol evidence rule.

Regardless of whether one favors Corbin's flexible approach to extrinsic evidence or inclines toward a more formalistic approach, it is hard to ignore the impact that this debate has had on the development of contract law in the twentieth century. Reduced to its most basic elements, the debate simply asks whether the fact that a writing exists is enough to assume that the terms it contains are the terms of the contract. Professors Calamari and Perillo characterized the debate between Corbin and Williston and their contemporaries as follows:

[It]s the public better served by giving effect to the parties' entire agreement, written and oral, even at the risk of injustice caused by the possibility of perjury and the possibility that superseded documents will be treated as operative, or does the security of transactions require that, despite occasional injustices, persons adopting a formal writing be required, on the penalty of voidness of their oral and written side agreements, to put their entire agreement in the formal writing?

I suspect that few theorists would argue that our understanding of contract law is the worse for having engaged in this debate. It remains to be seen whether ERISA jurisprudence can sustain the same discussion.

III. USE OF PAROL EVIDENCE IN RETIREE HEALTH PLAN LITIGATION

Before considering the role that extrinsic evidence should play in the construction of a retiree health insurance plan, it seems prudent to examine some fundamental canons of ERISA law. First, as is well known, ERISA's broad preemption clause stymies most efforts to advance a theory of liability that is primarily based on state law. This is equally true with respect to theories of contract interpretation. Second, ERISA itself


181. For articles discussing the principles of ERISA preemption, see supra note 12.

182. See id.
contains few prescriptions with respect to welfare benefit plans. In particular, ERISA does not require welfare benefits, including retiree health benefits, to be vested.\textsuperscript{183} Thus, an employer can only be required to provide those benefits if he has promised to do so.

The combination of a broad preemption of state law and what may be described, in all generosity, as a fragmentary set of statutory directives has encouraged courts to develop federal common law to fill substantive and interpretive needs. Since the statute is vague, at best, on most of the obligations that might be regarded as essential components of an employer-sponsored health benefit plan, diligence and creativity are required in order to determine exactly what benefits an employer has agreed to provide to his employees and retirees and what limitations apply to those benefits. In this quest, courts have noted, with apparent relief, that ERISA requires promises of employee benefits to be memorialized in a written plan document.\textsuperscript{184} While the preemption of state law, the failure to mandate vested health benefits, and the development of the federal common law of ERISA may be murky, the requirement of a written plan document is clear.\textsuperscript{185} The construction of many retiree health plans turns on this point. The written plan document rule and its effect on the management of extrinsic evidence in litigation concerning retiree health benefits are thus the focus of the remainder of this article.\textsuperscript{186}

Section 402(a)(1) of ERISA provides that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument."\textsuperscript{187} The legislative history of Section 402(a)(1) indicates Congress' concern that unwritten promises were too difficult to enforce.\textsuperscript{188} Hence, Congress required employers to put the terms of their plan documents in writing.\textsuperscript{189}

The requirement of a written plan document has appeal for many reasons and ERISA's "emphatic preference" for written plan documents is

\textsuperscript{186} There are, of course, many other theories that address this problem, including, for example, arguments based on promissory or equitable estoppel. While these theories are related to the management of extrinsic evidence, this article does not attempt to deal with them except in so far as these claims depend upon evidence of an extrinsic nature.
\textsuperscript{188} See supra text (legislative history) accompanying note 186.
\textsuperscript{189} See Curtiss-Wright Corp., 514 U.S. at 83 (describing the written plan document rule as one of ERISA's "core functional requirements").
widely remarked.\textsuperscript{190} First, and foremost, in a statute that is at times opaque, the requirement of a written plan document is plain. Second, the focus on the writings that constitute a plan arguably fosters predictability in the relationship between plan sponsor and plan participant in a manner that jibes neatly with the statute's goal of protecting employee benefits.\textsuperscript{191} As the Joint Committee Report states:

[E]very covered employee benefit plan (both retirement and welfare plan) is to be established and maintained in writing. A written plan is to be required in order that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan. Also a written plan is required so the employees may know who is responsible for operating the plan.\textsuperscript{192}

This simple rule offers much protection to employees who can now see their promised employee benefits in writing. Promises that were once spoken are now written and employees can wave a plan document in the face of an employer who claims that the benefits it describes are not available.

Yet, twenty-six years after ERISA was enacted, it is also clear that the written plan document rule protects employers from an employee's claim that benefits were promised but never written down. According to conventional wisdom, ERISA's requirement of a written plan document means that a plan sponsor must memorialize commitments that exceed ERISA's minimum requirements in writing.\textsuperscript{193} In this vein, some courts have held that a plan document's silence on a particular issue is not by itself sufficient to bind the plan sponsor to commitments outside the scope of ERISA's minimum requirements.\textsuperscript{194} Courts have not had to stretch this

\textsuperscript{190} See, e.g., Degan v. Ford Motor Co., 869 F.2d 889, 895 (5th Cir. 1989) (recognizing that ERISA prefers written documents).
\textsuperscript{191} See, e.g., Nachwalter v. Christie, 805 F.2d 956, 960 (11th Cir. 1986) (discussing the idea that the goal of protecting employees would be undermined if oral modifications were permitted because employees would not be able to rely on plan documents).
\textsuperscript{192} See supra note 185.
\textsuperscript{193} For an example of a court's reliance on this proposition, see Wise v. El Paso Natural Gas Co., 986 F.2d 929 (5th Cir. 1993). See also Cinelli v. Security Pac. Co., 61 F.3d 1437, 1441 (9th Cir. 1995) (determining that contractual agreements for vesting of welfare benefits must be found in plan documents); Gable v. Sweetheart Cup Co., Inc., 35 F.3d 851, 857 (4th Cir. 1994) (stating that "[a]s a matter of statutory policy, ERISA places great weight on the written terms of the formal plan documents"); Alday v. Container Corp. of Am., 906 F.2d 660, 665 (11th Cir. 1990) (finding that a retiree's right to lifetime medical benefits can only be upheld if it is found in the terms of the written plan document).
\textsuperscript{194} See, e.g., Wise, 986 F.2d at 938 (5th Cir. 1993) (stating, "[w]hile clear and unambiguous statements in the summary plan description are binding, the same is not true of silence"). But see Murphy v. Keystone Steel and Wire Co., 61 F.3d 560, 565 (7th Cir. 1995) (finding that although courts presume that benefits do not vest if a contract is silent on the issue, the presumption can be rebutted by extrinsic evidence).
conclusion too far to conclude that promises that are not written in the plan
document itself are not valid components of the employee benefit plan.\textsuperscript{195}
Gradually, ERISA's mandate of a written plan document has come to
justify the assertion that the written plan document embodies the entire
plan.\textsuperscript{196} The judiciary's defense of ERISA's "emphatic preference" for
written plan documents clearly strives toward this end.\textsuperscript{197}

If written documents reliably marked the terms of ERISA plans, then
this analysis might be on target. In a perfect world, a plan document would
always clearly state the terms of an employee benefit plan. Yet courts
frequently face litigants who claim that the benefits they were promised are
not those that they received. In reality, employers also communicate
promises of benefits to employees through informal communications and
employees respond to and rely on these communications.\textsuperscript{198} It is a rare
occasion indeed when an employee has an opportunity to comment or
reflect upon a draft of a formal written plan document.\textsuperscript{199} Moreover, some
scholars have suggested that employees often do not know or do not
understand the written documentation of the terms of the benefits that are
offered to them.\textsuperscript{200} In the "real world," therefore, it seems to be simply
futile to try to determine whether any written document accurately
describes the terms and conditions of an ERISA plan without considering
extrinsic evidence of informal communications.

To date, ERISA jurisprudence lacks a workable and consistent method
to determine whether a plan document properly reflects an employer's
promises to vest retiree health benefits. It is my opinion that the theories
which Corbin advanced to explain the interpretation of parol evidence are
particularly apt tools for this analysis. In order to forward this view, I first

\textsuperscript{195} See, e.g., UAW Local No. 1697 v. Skinner Engine Co., 188 F.3d 130, 139 (3d Cir.
1999) (arguing that the vesting of welfare benefits should not be inferred lightly and must be
stated in clear and express language); Nachwalter, 805 F.2d at 960 (finding that ERISA's
requirement of a written plan document precludes oral modifications of employee benefit
plans and the use of estoppel theories of recovery).

\textsuperscript{196} See, e.g., Nachwalter, 805 F.2d at 960.

\textsuperscript{197} See, e.g., Degan, 869 F.2d at 895.


1994) (determining that the responsibility for reducing the plan to writing is not that of the
employee or beneficiary, but is rather the responsibility of the employer or insurance
company). See generally LANGBEIN AND WOLK, supra note 4, at 204 (noting that in plans
that are not the result of collective bargaining, employees are less likely to have input into
plan drafting).

The fact that an employee rarely is part of the drafting process has also contributed to
the adoption of the rule of \textit{contra proferentem} as part of the federal common law of ERISA
in some jurisdictions. See, e.g., Heasley v. Belden & Blake Corp., 2 F.3d 1249 (3d Cir.
1993); Smith v. Hartford Ins. Group, 6 F.3d 131 (3d Cir. 1993).

\textsuperscript{200} See generally Charny, \textit{The Employee Welfare State in Transition}, supra note 32, at
1618; Fisk, \textit{Lochner Redux}, supra note 15.
examine the role that the written plan document rule plays in cases in which there is no plan document in order to illuminate the role it should play when there is a written plan document. Next, I examine the meaning of the written plan document rule in the cases in which there is a written plan document and offer the suggestion that a flexible understanding of the concepts of integration and interpretation would enhance our ability to accurately assess the use of the written plan document.

A. The Written Plan Document Rule

By stating that an ERISA plan must be maintained pursuant to a written instrument, Section 402 of ERISA naturally invites comparison to the statute of frauds and its various statutory cousins.201 Indeed, on the surface, the goals of the common law statute of frauds seem somewhat similar to the stated purposes of ERISA. The statute of frauds was intended to clarify the nature of certain types of contracts202 and to prevent the enforcement of fraudulent allegations of an oral agreement.203 While courts have been troubled by the fact that the statute of frauds may cause "honest men [to] lose the benefit of their bargains because they neglected to reduce them to writing,"204 the statute of frauds imposes on both parties the burden to make the effort to memorialize the contract or to live with the consequences.

Any such characterization of Section 402 of ERISA, however, would ignore the fact that Section 402 is part of ERISA's fiduciary provisions.205 The fiduciary provisions of ERISA are designed to protect employees by requiring employers to maintain a plan document.206 They are not designed

---

201. For an example of state law statute of frauds, see U.C.C. § 2-201 (1999); CAL. CIV. CODE § 1624 (West 2000) (stating, "[t]he following contracts are invalid, unless the same...[is] in writing and subscribed by the party to be charged...."); N.J. STAT. ANN. § 25:1-5 (West 1999) ("No action shall be brought upon any of the following agreements or promises, unless the agreement or promise...shall be in writing....").

202. Note that the Restatement (Third) of Trusts, Tentative Draft No. 1, § 20, makes it clear that a writing is only necessary to enforce an inter vivos trust when it is required by a statute of frauds. Thus, the old saying, "get it in writing" only applies when the legislature has decided to make it so. Most states have enacted a statute of frauds with respect to inter vivos trusts holding interests in land. In a few states, a writing is also required in order to enforce an inter vivos trust for the transfer of personal property. See RESTATEMENT (THIRD) OF TRUSTS § 20 cmt. a (Tentative Draft No. 1, 1996). See, e.g., GA. CODE ANN. § 53-12-23 (West 2000).

203. See generally Metzger, The Parol Evidence Rule, supra note 20, at 1422-37 (noting that the statute of frauds managed to curb the power of juries).


205. The written plan document rule appears in the provisions setting forth the obligations of a fiduciary under ERISA.

206. See Donovan v. Dillingham, 688 F.2d 1367, 1372 (11th Cir. 1982) (stating that "it would be incongruous for persons establishing or maintaining informal or unwritten
to force employees to hold the employer's pen to paper to make sure that plan documents are written. Moreover, they should not be implemented in a manner that enables employers to back out of oral commitments that they have not bothered to memorialize in a plan document. Thus, the fiduciary character of Section 402 must overpower the temptation to characterize this provision as a mere statute of frauds.

The difference between contemporary legislative formulations of the statute of frauds in contract law and the language of Section 402 of ERISA highlights this point. The Restatement (Second) of Trusts defines a statute of frauds as a provision that states that "all declarations or creations of trusts of land shall be manifested and proved by some writing signed by the party who is by law enabled to declare such a trust . . . or else they shall be utterly void and of none effect." Inherent in this conception of the statute of frauds are two elements: the requirement of a writing and a statement that failure to comply with a writing will render the trust unenforceable. In other words, the statute of frauds commonly links the ability to enforce the contract to compliance with the writing requirement. When state legislatures draft a statute of frauds, they often state that a contract will not be valid or cannot be the basis of an action unless the contract is in writing. Consider, for example, Section 2-201 of the Uniform Commercial Code, which is surely one of the most permissive formulations of the statute of frauds in operation today. Section 2-201(1) states:

Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is

---

207. See, e.g., Dillingham, 688 F.2d at 1372 (discussing the idea that ERISA's coverage provision reaches any employee benefit plan, regardless of whether it is formal or written).

208. See id.


210. For a discussion of the effect of characterizing a trust or contract that fails to comply with the statute of frauds as unenforceable, rather than void, see RESTATEMENT (THIRD) OF TRUSTS § 24 cmt. A, illus. 18 (Tentative Draft No. 1, 1996); see also RESTATEMENT (SECOND) OF CONTRACTS § 146 cmt. b.
sought or by his authorized agent or broker.\textsuperscript{211}

Thus, the Uniform Commercial Code, which is willing to accept "lead pencil on a scratch pad"\textsuperscript{212} as the writing itself, clearly sets out the consequences for failing to produce a writing: the contract is "not enforceable by way of action or defense."\textsuperscript{213} The California Civil Code similarly explains in its statute of frauds that "[t]he following contracts are invalid, unless the same . . . is in writing and subscribed by the party to be charged . . . ."\textsuperscript{214} Likewise, New Jersey provides that "[n]o action shall be brought upon any of the following agreements or promises, unless the agreement or promise . . . shall be in writing . . . ."\textsuperscript{215} While there are many formulations of the statute of frauds, each of these examples illustrates the manner in which the legislature has gone beyond simply stating the requirement that a writing be used and instead stated the consequences of failing to comply with the requirement of a writing.

This is a very different approach from the requirements of Section 402(a)(1) of ERISA, which simply provides that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument."\textsuperscript{216} While this language does mandate the establishment of a written plan document, it does not by its terms state that an unwritten plan will be invalid or that an action cannot be brought on the basis of an unwritten plan.\textsuperscript{217} It simply says that a written instrument must be established.

If Section 402 were indeed to be considered a statute of frauds, then many of the seminal cases of ERISA jurisprudence that recognize unwritten or "informal" plans would have to be overturned and their participants cast adrift without the protections of the statute. That an ERISA plan can exist despite the absence of a formal plan document is widely accepted.\textsuperscript{218} In its seminal opinion in Donovan v. Dillingham, the

\begin{footnotesize}
\begin{enumerate}
\item U.C.C. § 2-201(1) (emphasis added).
\item U.C.C. § 2-201 cmt. 1.
\item U.C.C. § 2-201(1).
\item CAL. CIV. CODE § 1624 (West 1982).
\item N.J. STAT. ANN. § 25:1-5 (West 1999).
\item 29 U.S.C. § 1102(a)(1).
\item See generally Ford, Broken Promises, supra note 28, at 444 n.69 ("[A]lthough ERISA requires plans to be in writing, this is not part of the definition of the word 'plan'").
\item See Smith v. Hartford Ins. Group, 6 F.3d 131, 136 (3d Cir. 1993) (noting that a plan need not be written); Deibler v. United Food and Commercial Workers' Local Union 23, 973 F.2d 206, 209 (3d Cir. 1992) (deciding that the word plan does not imply a writing); Memorial Hosp. Sys. v. Northbrook Life Ins. Co., 904 F.2d 236, 241 (5th Cir. 1990) (finding that a formal document is not required to prove than an ERISA plan exists); Donovan v. Dillingham, 688 F.2d 1367, 1372 (11th Cir. 1982) (finding that ERISA does not require a formal written plan); see also Suggs v. Pan Am. Life Ins. Co., 847 F. Supp. 1324, 1330 (S.D. Miss. 1994) ("There need be no formal document designated as 'the Plan' to establish that an ERISA plan exists.").
\end{enumerate}
\end{footnotesize}
Eleventh Circuit distinguished the establishment of an employee benefit plan from the requirement that such a plan be maintained pursuant to a written instrument.\textsuperscript{219} According to \textit{Dillingham}, the establishment of an employee benefit plan is the act that decisively brings a plan within ERISA's purview, while Section 402(a)'s requirement that a plan document be established and maintained is simply a requirement imposed on the plan administrator and fiduciaries once ERISA claims the plan as within its coverage.\textsuperscript{220}

The \textit{Dillingham} facts furnish but one example of the circumstances in which an employer might find that it had established an employee plan without having complied with the formalities necessary to satisfy Congress' mandate that such a plan be maintained pursuant to a written instrument. In \textit{Dillingham}, for example, several small employers formed a multiple employer trust that negotiated for favorable group health insurance rates and purchased health insurance once those rates were established.\textsuperscript{221} Although the employers did not bother to draft a plan document or, apparently, to distribute a summary plan description, the court concluded that a plan existed.\textsuperscript{222} In some cases, the amount and the nature of written material that describes the plan may be very slight. For example, corporate memoranda describing an employer's expectations of management when describing and implementing severance policies have formed the basis of an ERISA plan.\textsuperscript{223} Another employer who memorialized a retirement arrangement in a letter to a former employee was also found to have established a plan.\textsuperscript{224} Courts have discerned the existence of a plan even when there is no written documentation at all. For instance, an employer who maintained an unwritten practice of continuing payments in lieu of salary for several weeks following an involuntary severance from employment was considered to be the sponsor of an employee benefit plan.\textsuperscript{225}

In marking the paradox of an unwritten or "informal" employee benefit plan, the \textit{Dillingham} decision and its progeny have endowed the

\textsuperscript{219} See \textit{Dillingham}, 688 F.2d at 1372.
\textsuperscript{220} See \textit{id.}
\textsuperscript{221} See \textit{id.} at 1370, 1373-75.
\textsuperscript{222} The subscribers apparently executed "participation agreements" that acknowledged their fulfillment of collectively bargained obligations. See \textit{id.} at 1374 n.13. In addition, the court noted that both the subscribers and the participants "looked to the group health insurance policy and insurer to determine the eligibility requirements to receive benefits and 'all other terms, conditions, limitations, restrictions, and provisions applicable to a policy of group insurance.'" Id. at 1374.
\textsuperscript{223} See Blau \textit{v.} Del Monte Corp., 748 F.2d 1348, 1352 (9th Cir. 1985) (subjecting a severance pay plan to ERISA's requirements).
\textsuperscript{224} See Williams \textit{v.} Wright, 927 F.2d 1540, 1547 (11th Cir. 1991).
\textsuperscript{225} See Scott \textit{v.} Gulf Oil Corp., 754 F.2d 1499, 1503-04 (9th Cir. 1986) (finding that existence of a written document is not a prerequisite for ERISA coverage).
written plan document rule with meaning. First, and most importantly, the *Dillingham* court was concerned with the reality of a plan's existence. Thus, an employer's mere intention to establish a plan, without the implementation of the plan itself, is not enough to determine that a plan exists. A similar theme emerges from the Supreme Court's opinion in *Fort Halifax Packing Co. v. Coyne*, which marked the presence of an ongoing administrative scheme as a critical element in establishing the existence of an ERISA plan. A desire to implement benefits or a statutory mandate to pay benefits, without the support of evidence of ongoing implementation, is not enough to establish that an employee benefit plan exists.

Second, it is not necessary for an employer to comply with a written plan document rule in order to maintain an employee benefit plan. Thus, for the *Dillingham* court, the written plan document rule plays a significant role in informing plan participants of their rights, but executing a written plan document is not the sole means of establishing such rights. The existence of a welfare plan depends on the presence of the now famous *Dillingham* factors: "[A] 'plan, fund, or program' under ERISA is established if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." These factors, and thus an employee benefit plan, may be present even when a written plan document is not.

Third, *Dillingham* suggests that compliance with the written plan document rule is an essential fiduciary function. When the *Dillingham* factors suggest the presence of an employee benefit plan, however, the absence of a written plan document indicates a failure to adhere to

---


227. *See Dillingham*, 688 F.2d at 1372-73; Cinelli v. Security Pac. Corp., 61 F.3d 1437, 1443-44 (9th Cir. 1995) (holding that a board resolution that enables the establishment of a plan, but does not undertake to authorize the creation of a plan, is not a plan amendment or a plan document and does not fit the *Dillingham* criteria for the establishment of an informal plan); Watkins v. Westinghouse Hanford Co., 12 F.3d 1517, 1523 (9th Cir. 1993) (finding that a letter from an employer did not constitute a plan within ERISA). Similarly, the lack of an intention to establish a plan does not necessarily mean that a plan does not exist if the requisite factors are present.


229. *See Dillingham*, 688 F.2d at 1372.

230. *See id.* at 1372-73.

231. *Id.* at 1373; *see also* Memorial Hosp. Sys. v. Northbrook Life Ins. Co., 904 F.2d 236, 241 (5th Cir. 1990) (applying the *Dillingham* rule); Suggs v. Pan Am. Life Ins., 847 F. Supp. 1324, 1330 (S.D. Miss. 1994) (adopting the *Dillingham* rule).

232. *See Dillingham*, 688 F.2d at 1372.
fiduciary standards.\textsuperscript{233} It does not indicate the absence of a plan.\textsuperscript{234} In marking the distinction between the establishment of a plan and the execution of a written plan document, the \textit{Dillingham} court stated:

[B]ecause the policy of ERISA is to safeguard the well-being and security of working men and women and to apprise them of their rights and obligations under any employee benefit plan . . . , it would be incongruous for persons establishing or maintaining informal or unwritten employee benefit plans, or assuming the responsibility of safeguarding plan assets, to circumvent the Act merely because an administrator or other fiduciary failed to satisfy reporting or fiduciary standards.\textsuperscript{235}

In this vein, the written plan document rule is a tool to insure that fiduciaries communicate the terms of the plan and to help fiduciaries and participants understand what it means to adhere to those terms.\textsuperscript{236}

These insights have obvious consequences for the analysis of the probative value of a plan document. In recognizing that a plan might exist even in the absence of a formal plan document, the \textit{Dillingham} court found it necessary to rely upon the evidence that was not incorporated in a written plan document.

In determining whether a plan, fund or program (pursuant to a writing or not) is a reality, a court must determine whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits.\textsuperscript{237}

Thus, the "surrounding circumstances" were of deep significance to the court's conclusion that a plan existed. Moreover, the \textit{Dillingham} court, and many others in the years since, have been more than willing to enforce a plan if these criteria were met.\textsuperscript{238} \textit{Dillingham} stands, therefore, as a fundamental critique of the equation of Section 402(a) with the common law statute of frauds. Clearly, if \textit{Dillingham} is correct, the existence of a written plan document is not a prerequisite to enforcement of an ERISA

\textsuperscript{233} See id.
\textsuperscript{234} See id.
\textsuperscript{235} Id.
\textsuperscript{236} See id.
\textsuperscript{237} See id. at 1373.
\textsuperscript{238} Many courts have adopted the \textit{Dillingham} factors as an indication of whether a plan exists. See, e.g., Smith v. Hartford Ins. Group, 6 F.3d 131, 136 (3d Cir. 1993); Memorial Hosp. System, 904 F.2d at 241; Suggs, 847 F. Supp. at 1330. However, there are some courts that have adopted different tests for the presence of an employee benefit plan. In Robertson v. Gen Ins. Co., 828 P.2d 496, 502 (Utah App. 1992), for example, the Court of Appeals of Utah declined to follow the \textit{Dillingham} test and instead concluded that the extent of employer involvement in the administration and maintenance of the plan is of critical importance in determining the existence of an employee benefit plan. However, it is noteworthy that the \textit{Robertson} court did not quarrel with \textit{Dillingham}'s assertion that a written plan document is not a prerequisite to finding the existence of a plan.
This line of reasoning is all the more compelling when one considers that employers often serve as the fiduciaries of their own employee benefit plans; in ERISA parlance, they "wear two hats." In many instances, particularly when the economy is booming, an employer may theoretically experience an identity of interests with his employees. The happier and more productive the employees, the happier and richer the employer. However, the fact that an employer may assume his fiduciary duty to act in the best interest of the participants with little difficulty during times of prosperity does not hide the potential for adversarial relations when the economic picture is not so rosy.

By making compliance with the written plan document rule an explicitly fiduciary function, Congress forestalled any query as to whether prudent fiduciaries would differ on the necessity of plan documentation. Congress did not state, however, that a writing was necessary to demonstrate the existence of an ERISA plan.

B. The Written Plan Document Rule and Extrinsic Evidence

_Dillingham_ allowed participants in an employee benefit plan to assert their rights under ERISA even though those rights were not incorporated into a written plan document. It is singularly ironic that this advantage has generally not been extended to participants in an employee benefit plan that actually is set forth in a plan document. This is not merely due to the

---

239. _But see_ Rockney v. Pako Corp., 734 F.Supp. 373, 383 (D. Minn. 1988) (stating that ERISA does not specifically bar the operation of the statute of frauds and therefore plaintiffs were barred by the statute of frauds when they sued trustees who did not agree, in writing, to be personally liable for top-hat plan benefits). This opinion can be distinguished from _Dillingham_ on a number of grounds: (a) in Rockney, unlike Dillingham, the court's analysis included a plan document; (b) top-hat plans are exempted from the fiduciary obligations of ERISA, including the written plan document rule; and (c) the issue in Rockney was the individual liability of nonsignatory trustees and not the liability of plan sponsors.

240. See, e.g., Amato v. Western Union Int'l, Inc., 773 F.2d 1402, 1416-17 (2d Cir. 1985) ("ERISA permits employers to wear 'two hats,' and that they assume fiduciary status 'only when and to the extent' that they function in their capacity as plan administrators, not when they conduct business that is not regulated by ERISA."). _abrogated on other grounds_ by Mead v. Tilley, 490 U.S. 714, 720 (1989); Sengpiel v. B.F. Goodrich, 156 F.3d 660, 665 (6th Cir. 1998).


242. See generally Charny, _The Employee Welfare State in Transition, supra_ note 32, at 1618-19; Vanderploeg, _supra_ note 241, at 279 ("The decision to terminate a plan . . . presents a clear conflict between the employer's interest and the participants' interests (which are normally assumed to favor the continuation of the plan).").

243. _See_ e.g., Nachwalter v. Christie, 805 F.2d 956, 960 (11th Cir. 1986) (noting the requirement of a written plan document precludes oral modifications).
simple equation of Section 402 with a statute of frauds, but also because courts have assumed that the requirement of a written plan document signifies the exclusion of parol evidence in a manner that goes far beyond the manner in which commentators such as Corbin prescribe for the common law. Stated differently, courts have characterized the written plan document rule as a statutorily imposed integration clause. Thus, courts have seldom examined a written plan document to determine whether it is, in fact, truly integrated. By extension, under the aegis of the federal common law of ERISA, courts have found it easy to exclude extrinsic evidence in many cases other than when ambiguity is patently evident on the face of the document.

Consider a plan that has actually been memorialized in a writing of some kind. To a veteran reader of ERISA decisional law, it is hardly surprising that some consideration must be due to the question of what actually constitutes a plan document. In many cases, the employer will have drafted a plan document that is clearly labeled as such. In some cases, a less zealous employer may rely on an insurance policy as his plan document. In other cases, the summary plan description is the closest approximation to a plan document. In yet another variation, many courts have begun to regard the "plan documents" as a collection of documents including the insurance policy (if any), the formal plan document, any trust instruments, and the summary plan description ("SPD"). The difficulty

244. Even if Section 402 were viewed as a statute of frauds, the concept that a contract must be in writing in order to be enforceable does not obviate the need for examination of the document to determine whether it is in fact integrated. A writing might satisfy the statute of frauds and yet still fail to attain the status of a complete integration. See The Interpretation of Words, supra note 101.

245. See, e.g., In re New Valley Corp., 89 F.3d 143, 149 (3d Cir. 1996) (finding that the written plan document rule acts as a strong integration clause).


247. But see Negrette v. Principal Mutual Life Ins. Co., 56 F.3d 72 (9th Cir. 1995) (finding that there is no requirement that a plan document be labeled as such in order to be recognized as controlling document) (citing Horn v. Berdon, Inc. Defined Benefit Pension Plan, 938 F.2d 125, 127 (9th Cir. 1991) (approving Board resolutions as an amendment to a defined benefit plan)).

248. See, e.g., Pisciotta v. Teledyne Indus., Inc., 91 F.3d 1326, 1331 (9th Cir. 1996) (deciding that in the absence of a formal plan document, insurance contract was the controlling document); Dague v. GenCorp, Inc., 875 F. Supp. 424, 429 (N.D. Ohio 1993) (using an insurance policy and certificates as the controlling plan documents), aff'd without op., 62 F.3d 1417 (6th Cir. 1995).

249. See, e.g., Alexander v. Primerica Holdings, Inc., 967 F.2d 90, 91 (3d Cir. 1992) ("Because a formal plan document does not exist, our knowledge of the Plan arises from three summary plan descriptions.").

250. See, e.g., Jensen v. Sipco, Inc., 38 F.3d 945, 949 (8th Cir. 1994) (finding that SPDs are to be considered part of the plan document); Eardman v. Bethlehem Steel Corp., 607 F. Supp. 196, 207 (W.D.N.Y. 1984) (noting that an employee benefit plan under ERISA can be
which courts face in identifying the plan document, however, does not necessarily dispose them to regard extrinsic evidence more sympathetically once they have resolved the question of what constitutes the plan document.

Once a plan document is determined to be in existence, the traditional questions of document interpretation must be answered, as well as questions concerning the role of information extrinsic to that document. This is as true in ERISA litigation as in any other litigation involving parol evidence in the interpretation of a contract or trust. In ERISA litigation, however, deference to the written plan document rule has twisted the way the issue is framed. In the words of the Third Circuit: "Like any common law integration clause, [Section 402(a)(1)] makes the plan document the entire agreement of the parties and bars the introduction of parol evidence to vary or contradict the written terms." Stated differently, by equating Section 402(a)(1) with a "strong integration clause," a court that deems a plan document unambiguous may dismiss parol evidence and refocus the analysis of the litigants' claims on the words contained in the plan document. Acknowledging the fiduciary character of the written plan document rule, however, invites a critical examination of the role that the rule has played and the role that it ought to play in a court's determination concerning whether the plan is integrated. Next, similar questions may be addressed in the context of the admission or exclusion of extrinsic evidence to determine the existence of an ambiguity. In each case, it is fruitful to draw a distinction between the manner in which courts have dealt with collectively bargained plans, which may reflect more traditional methods of negotiations, and with single-employer plans, which are usually presented to an employee as a fait accompli.

1. Integration

Integration is a term rarely used in ERISA litigation and even more rare are the instances in which a court self-consciously reflects upon or reports its analysis of whether a document is integrated. Of course, integration analysis is not foreign to the analysis of collective bargaining comprised of more than one document).

251. In re New Valley Corp., 89 F.3d at 149.
252. Id.
253. One striking exception is the district court's opinion in Sprague v. General Motors Corp., 843 F. Supp. 266 (E.D. Mich. 1994), aff'd, 92 F.3d 1425 (6th Cir.), vacated, 102 F.3d 204 (1996), aff'd in part, vacated in part, rev'd in part, 133 F.3d 388 (6th Cir. 1998). The court examined statements of agreement executed by the company and its early retirees and concluded that, under the federal common law of ERISA, the agreements were not integrated. See id. at 301-02. The rarity of this analysis is perhaps reflected in the fact that the opinion was at first affirmed by the Sixth Circuit, but later was vacated.
agreements, including those which incorporate references to retiree health benefit plans. This can perhaps be explained by the simple observation that collectively bargained plans easily permit a court to identify two parties who have agreed to the writing that the court is analyzing. Thus, the traditional questions posed by integration analysis in the common law setting are more easily translated to plans that are the result of negotiations between union and employer. Nonetheless, employee benefits that are not the subject of a collective bargaining agreement should also be considered as part of the compensation provided in exchange for an employee's labor, rather than as a gift from the employer to the employees.

In reality, however, many such plans are drafted and executed by the employer with little or no input from employees. Some courts have gone so far as to characterize certain ERISA plans as unilateral contracts. This does not mean, however, that integration analysis is inappropriate in the analysis of an unbargained plan, but merely that it is uncommon.

Whether one likens an ERISA plan to a contract or a trust, the first

---


256. See generally, Fisk, Lochner Redux, supra note 15 at 155; See Langbein, supra note 255, at 211-12.; Rossbacher et al., ERISA's Dark Side, supra note 14, at 316. On the characterization of plans as contracts, see Conison, supra note 15, at 590-97, 609-10, 632-33.

257. See, e.g., In re New Valley Corp., 89 F.3d at 149; Amatuzio v. Gandalf Sys. Corp., 994 F. Supp. 253 (D.N.J. 1998). See generally Langbein, supra note 255, at 226 ("Most pension and employee benefit plans are unilateral contracts offered on a take-it-or-leave-it basis"). Nor should one assume that an employer has not made representations to employees before the plan was drafted and that the employees have not relied on those representations in their continued employment at the company. Moreover, one would be ill-advised to assume that participants who enroll in a plan have not been induced to participate in the plan or even to accept employment on the basis of representations concerning the existence of a certain kind of benefit. Thus, even when an ERISA plan gives the appearance of being an employer-provided gratuity, to characterize it as a unilateral contract is an overly simplistic analysis. Moreover, even if this were the case, trust law operates in conjunction with contract law when matters of parol evidence are concerned, and there is ample reason to expect that the parol evidence rule, and integration analysis, are equally applicable in the case of true grantor trusts. See generally, Ethan Lipsig, Are Plan Documents Still King? A Survey of Recent Unilateral Contract and Inadequate Disclosure Fiduciary Breach Challenges to Plan Terms, 5 ERISA LIT. RPTR. 21 (1996).
logical step towards interpretation would seem to be the issue of integration. Likewise, the first step in contract interpretation is to determine whether a contract is fully integrated. In some cases, courts have attempted to ascertain whether a written plan document is fully integrated. In many cases, however, courts seem to assume that the written plan document rule is equivalent to a presumption of integration. Thus, because no integration analysis occurs, there is no opportunity for a participant to introduce evidence that suggests that the written document did not fully express the terms of the plan.

Collectively bargained plans bear the closest resemblance to fully bargained bilateral contracts. Normally, union trustees and employer representatives negotiate contracts that cover, among other things, a range of compensation issues. The fruit of these negotiations is usually a collective bargaining agreement, which is later supplemented by a formal plan document that expresses the terms of an employee benefit plan.

Now consider the position of an employee who claims that the written plan document does not adequately express a promise made in the course of negotiations. Should evidence of this problem be taken into consideration by the court? A recurring example of this type of dispute occurs in cases in which union representatives allege that a promise was made to provide health benefits to retirees for the remainder of their lives, and the employer counters that the written plan document includes a reservation of rights clause or other language authorizing it to modify or terminate the benefit plan. In cases involving collectively bargained for plans, the employer may also argue that the promise of lifetime benefits was intended to last only as long as the collective bargaining agreement.

258. See generally Restatement (Second) of Contracts §§ 209, 213 (1981) (defining an integrated agreement and explaining its effects on prior agreements).


260. See, e.g., Frank v. Colt Industries, Inc., 910 F.2d 90 (3d Cir. 1990) (in analyzing a severance plan, court concludes, "[w]here an employer has created an integrated document setting forth the terms of a benefit plan, as has happened in the present case, not every internal document containing a reference to management's interpretation of the plan should be regarded as a part of the plan itself").

261. See, e.g., Pabst Brewing Co., Inc. v. Corrao, 161 F.3d 434, 435 (7th Cir. 1998) (describing union negotiations for health and life insurance and pension benefits for employees of Pabst Brewing Company).


263. See, e.g., In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation, 58 F.3d 896, 904 (3d Cir. 1995) (finding that a plan can effectively use the word "lifetime" to describe the duration of benefits while, at the same time, reserving a right to terminate those benefits).

In some cases involving collectively bargained plans, some sort of integration analysis that considers extrinsic evidence occurs, at least with respect to the status of the collective bargaining agreement itself. At minimum, this is appropriate because there is an arms-length bargaining process between at least two parties; moreover, a merger clause is often present in such documents, indicating that the parties, or at the very least, their lawyers have given some thought to the issue.

In other cases, however, courts simply gloss over the issue. In Bidlack v. Wheelabrator Co., for example, the Seventh Circuit examined a collective bargaining agreement to determine whether the parties intended to vest retirees in their health benefits beyond the duration of the collective bargaining agreement. While Judge Posner's majority opinion noted that the collective bargaining agreement included an integration clause, his opinion did not examine whether the agreement truly was integrated and specifically chose instead to move forward by characterizing the issue as one of contract interpretation.

Similarly, in Pabst Brewing Co v. Corrao, the Seventh Circuit noted, but did not analyze, a severability clause that touched on the issue of integration.

Yet, as we have seen in traditional contract analysis, integration is an important first question in deciding how far the analysis of parol evidence may extend. In cases involving collectively bargained arrangements, it seems unfair to exclude extrinsic evidence from the integration analysis. It is important to observe that, in any single instance, the examination of extrinsic evidence during the course of integration analysis should

---

265. But see Bakery and Confectionary Union and Indus. Int'l Pension Fund v. Ralph's Grocery Co., 118 F.3d 1018, 1025 (4th Cir. 1997) (holding that integration analysis is not necessary with respect to contributions to multi-employer funds because of the presumption that collective bargaining agreements and plan documents govern in Section 515 of ERISA). See, e.g., Pabst Brewing Company, Inc., v. Corrao, 176 F.R.D. 552, 557 (E.D. Wisc. 1997) (pointing out that "each and every collective bargaining agreement between Pabst and the union between 1975 . . . through 1984 has contained a 'wholly integrated contract' clause which states that the current agreement 'cancels and takes the place of all previous agreements' . . . ").

266. See id.

267. 993 F.2d 603 (7th Cir. 1993).

268. See id.

269. See id. at 608.

270. See Pabst Brewing Co. v. Corrao, 161 F.3d 434, 436 (7th Cir. 1998).


theoretically be a neutral exercise that should favor neither plaintiff nor defendant. It is by no means clear that in the context of a fully bargained plan, employers will lose this argument on a regular basis, nor that plaintiff employees should consistently expect to win it. When great care has been taken in the drafting of a fully bargained document that contains an integration clause, there is every reason to hope that the integration clause is indeed valid and will hold up against examination. In some cases, a court may conclude that the document is not fully integrated. In some cases, however, a court may determine that the extrinsic evidence is consistent with a finding that the writing is integrated or, in other cases, that the evidence itself is not credible.

A court that passes extrinsic evidence through integration analysis before it decides to exclude that evidence from its analysis of the agreement may feel that the process did not advance judicial economy or that the parties have wasted resources in arguing over a point that seemed self-evident. However, an initial analysis of whether the agreement was truly integrated may forestall subsequent more spurious arguments over the impact of extrinsic evidence; more importantly, it will enable the court to proceed to the analysis of subsequent issues with the firm understanding that this document is indeed the full expression of the parties' agreement. When balanced against arguments of economy, principles of fairness ought to play a role in determining whether courts should decide, rather than assume, that a document is integrated.

Assuming, rather than deciding, that a plan document contains the entirety of the plan itself is even more dangerous to principles of fairness and accuracy when the benefits at issue are not the subject of collective bargaining. For example, examine the Second Circuit's seminal opinion in Moore v. Metropolitan Life Insurance Co., a case frequently cited as authority for the proposition that informal communications may not serve as the basis of a plan amendment. In Moore, the employer sponsored a medical benefit plan for its employees and retirees. It is not particularly

273. I acknowledge the many trenchant criticisms that have been made about the role that the legal system itself plays in upholding, if not favoring, the dominant power structures. See, e.g., Dalton, supra note 101. In making this statement, I do not mean to comment upon the prevailing legal structure, but limit my remarks to the theoretical advantages that may be gained or lost in a single case. A systematic, structural analysis of the process may reveal a different story or, perhaps, many different stories refracted through many different analytical concepts.

274. See, e.g., Bidlack, 993 F.2d at 608 (noting that the presence of an integration clause suggests that the parties want to limit further judicial inquiry).


276. 856 F.2d 488 (2d Cir. 1988).

277. See id. at 489.
surprising that the employer, a life insurance company, maintained plan documents which contained provisions that reserved its right to amend or terminate the plan and, after ERISA was enacted, issued summary plan descriptions that contained similar language. Despite the evident care with which its documents were drafted, Metropolitan slipped up in its communications to its employees. Company representatives conducted presentations and showed filmstrips which described benefits to employees as being for the employee's lifetime and free of charge. After a variety of plan amendments that raised deductibles, a class of retirees brought suit on the theory that Metropolitan had breached a unilateral contract with its employees, along with a variety of other charges.

The argument put forth by the plaintiffs in Moore did not, per se, articulate the issue of integration analysis. Their argument, however, stated that the contract "between themselves and Metropolitan 'consist[ed] of the totality of the representations made to the employees by the Company, and the actions of the employees in accepting those representations by remaining with the Company.'" In effect, then, the plaintiffs were charging that the amended plan document was not a total integration.

Two strains of argument were present in the court's response to this characterization. First, the court argued vigorously that ERISA's framework depends upon plan's being governed by written plan documents and summary plan descriptions. To justify its refusal to look outside the plan documents, the court used an argument based on the need for predictability in the calculation of future obligations and the specter that employers might cease to offer such plans. To put it more plainly, the court declined to consider plaintiff's evidence that promises were made in a form other than the written plan document. In other words, the court refused to examine those documents to make sure that they summarized the terms of the plan.

The second strain of argument, buried in a footnote, characterized the extrinsic evidence issue as a simple case of contract interpretation, rejecting extrinsic evidence in favor of a clause that seems, to the court, to be plainly unambiguous. Thus, in Moore, one may find the rejection of an offer of extrinsic evidence in both of its classic manifestations: in order to demonstrate whether the document is integrated and in order to

278. See id. at 489-90.
279. See id.
280. See id. at 491.
281. Id. at 491-92 (quoting plaintiffs' argument).
282. See id. at 492.
283. See id.
284. See id.
285. See id.
286. See id. at 492 n.1.
demonstrate whether an ambiguity is present.

Even without the direct reference to the term "integration," Moore is characteristic and clear in its rejection of this tool of contract interpretation and its cool assumption that Congress has determined that any writing was superior to the spoken word. Similarly, many ERISA cases seem to be litigated in the absence of integration analysis. As in Moore, the written plan document is presumed to be integrated simply because it is in writing. Moore itself states plainly that absent a showing of fraud, a plan that contains a reservation of rights clause will be invulnerable to challenges that the plan documents do not properly reflect the terms of the plan as communicated to the participants. Indeed, after perusing cases like Moore, one could easily conclude that a merger clause, however sincerely intended, would be superfluous; to paraphrase one ERISA commentator, Moore and its progeny crowned the plan document king, and an absolute monarch, at that.

The Sixth Circuit's struggle to reach a conclusion in the litigation over the allegations that General Motors had promised lifetime retiree medical coverage to its salaried retirees demonstrates that the disagreement over extrinsic evidence exists even within courts. In Sprague v. General Motors Corp., certain early retirees of General Motors claimed that they had entered into binding bilateral contracts that provided for the vesting of health care benefits. The early retirees tried to enforce the alleged contracts as modifications to the employer's general retiree medical plan as individual ERISA plans and under federal common law theories. The district court originally determined that these agreements were not fully integrated, and thus permitted the introduction of extrinsic evidence of General Motors' communications to the employees. Invoking the written plan document rule, the Sixth Circuit ultimately ruled that the oral statements did not modify the terms of the written plan. Judge Lively's opinion, which departed from the majority's analysis on this point, noted that the early retirees had effectively bargained for their enhanced benefits and that, under these circumstances, the district court had acted properly in considering evidence beyond the plan documents.

287. See, e.g., In re New Valley Corp., 89 F.3d 143, 149 (3d Cir. 1996) (dicta).
288. See Moore, 856 F.2d at 492.
290. 133 F.3d 388 (6th Cir. 1998).
291. See id. at 402.
292. See id.
293. See id. at 413.
294. See id. at 402.
295. See id. at 407 (Lively, J., concurring in part and dissenting in part); id. at 413
This assumption that the statutory requirement of a writing preempts the need for integration analysis should be evaluated on several grounds. First, the Joint Conference Report does not suggest that Congress intended courts to presume that a plan document was integrated merely because it was written down. In fact, it has long been apparent that the principles of trust law and contract law must be applied to the interpretation of employee plans. Integration analysis is no stranger to these disciplines, which have often demanded that a writing be examined to determine if it is indeed a true integration.

Second, the fact that the written plan document rule is part of ERISA's fiduciary provisions cannot be overlooked. Of course, ERISA cases have long held that fiduciary standards provide no assistance to the employee in matters of plan design are at issue. Although the employer is held to fiduciary standards in administering the plan, he is not held to them in establishing it. Yet the written plan document rule becomes applicable as a fiduciary standard once the plan is established. It seems fair to conclude that Congress, by expressing its desire for writings, was in fact concerned that some promises would not be written down. If this is so, it is logical to be concerned that what was in fact written down was an accurate representation of the plan. A proper application of the parol evidence rule would allow extrinsic evidence to determine whether that plan was in fact correctly documented.

Again, the neutrality of this point must be stressed. In Moore, for example, it is not self-evident that the result would have been different had the court actually examined the evidence to determine whether they properly represented an informal amendment to the plan. Indeed, the court did give some consideration to the evidence that it found to be so unworthy of its time and concluded that the filmstrips and presentations did not "purport to be complete binding statements of plan terms." There is no reason to suspect that the outcome in Moore would have been different had the court truly attempted to determine whether the plan documents accurately reflected the terms of the plan. But in some cases, it might. If Moore is followed, plaintiffs in such cases will find their accurate and damaging evidence disregarded simply because the employer chose not to

(Merritt, J., concurring in part and dissenting in part).
296. See supra note 185 and accompanying text.
298. See supra text accompanying notes 121-51.
300. See id.
301. See, e.g., Donovan v. Dillingham, 688 F.2d 1367, 1372 (11th Cir. 1982).
302. See Moore, 856 F.2d at 488.
303. See id. at 493.
put it into a document that he drafted.

Moreover, it is evident that in at least one significant respect, courts are uncomfortable with assuming that the plan document truly does represent the entire contract. One recent manifestation of this discomfort is the increasing tendency to incorporate summary plan descriptions into the working notion of a plan document, despite their very different purposes.304 In recent years, many circuit courts have stated that when the summary plan description conflicts with the plan document, the plan document must be disregarded.305 In Edwards v. State Farm Mutual Automobile Insurance Co.,306 for example, the Sixth Circuit explained: "It is of no effect to publish and distribute a plan summary booklet designed to simplify and explain a voluminous and complex document and then proclaim that any inconsistencies will be governed by the plan. Unfairness will flow to the employee for reasonably relying on the summary booklet."307 The summary plan description, in most cases, is by definition merely a description of the plan document.308 Yet, if representations in the summary plan description can outweigh the clear terms of the plan document, clearly the plan document is not necessarily integrated or, if the summary plan description is published after the plan document itself is executed, it is subject to some level of modification by the summary plan description.

2. Contract Interpretation

Even if the determination that a plan is fully integrated is explicitly addressed, the issue of what to do with extrinsic evidence does not disappear. Consider the case where plaintiff alleges that a plan promise has not been fulfilled. Should extrinsic evidence be considered in determining

304. See ERISA § 402(a)(1). For requirements regarding summary plan descriptions, see ERISA § 102(a)(1); ERISA § 104(b)(1); DOL Regulation § 2520.104b-1(a) (stating that updated summary plan descriptions to be furnished every five years); DOL Regulation § 2520.104b-3(a).


306. 851 F.2d 134 (6th Cir. 1988).

307. Id. at 136 (quoting McKnight v. Southern Life and Health Ins. Co., 758 F.2d 1566, 1570 (11th Cir. 1985)).

the existence of an ambiguity? How this question would be resolved under ERISA depends on the court's willingness to consider a more expansive role for extrinsic evidence in contract interpretation.

Collectively bargained plans offer a clear battleground for conflicts over interpretation. In recent years, much judicial attention has been lavished on the interpretation of provisions regarding the duration of retiree health benefits. The Sixth Circuit addressed the classic question in UAW Local No. 134 v. Yard-Man, the first and most influential of these decisions: in the absence of explicit vesting provisions, how is one to determine whether retiree benefits are intended to vest and to endure beyond the duration of the collective bargaining agreement? Yard-Man, which proposed a default presumption in favor of vesting, answered the question in one way. In the alternative, other courts have refused to infer a presumption of vesting and have instead maintained that retiree status cannot be deemed to confer lifetime benefits unless the plan document suggests a basis for concluding that vesting was intended. The issue has been addressed in most of the other circuits.

These cases have been characterized in a number of different ways. In one sense, following Yard-Man's lead, these cases raise the question of the default assumption regarding the vesting of retiree benefits. Courts which adopt this approach ask themselves whether they should presume, as a starting point, that retiree benefits do or do not extend beyond retirement. Judge Cudahy's concurring opinion in Bidlack offered six paradigms of contractual interpretation that addressed this dilemma: (1) a strong presumption against vesting the benefits would assume that silence on the

309. The precedent for the consideration of extrinsic evidence in collective bargaining cases extends beyond the disputes over retiree medical benefits. In Southeastern Pennsylvania Transportation Authority v. Brotherhood of Railway Signalmen, 882 F.2d 778 (3d Cir. 1989), the Third Circuit considered the role of extrinsic evidence in the interpretation of a dispute under the Railway Labor Act. The court rejected the union's contention that the district court violated principles of contract interpretation and the parties' agreed "zipper clause" when it considered extrinsic proof of the parties' intent regarding the collective bargaining agreement. See id. at 785. Citing Transportation-Communications Employees Union v. Union Pacific Railroad Co., 385 U.S. 157 (1966), the court stated that it was appropriate and proper to consider evidence "beyond the face of the collective bargaining agreement" because such an agreement might include the parties' practice, usage and custom and that such evidence could be considered without necessarily varying the terms of the collective bargaining agreement. See Southeastern Pennsylvania Transportation Authority, 882 F.2d at 784.

311. 716 F.2d 1476 (6th Cir. 1983).
312. See id. at 1482.
313. See, e.g., Skinner, 188 F.3d at 139 (explaining circuit approbation and rejection of Yard-Man inference).
314. See id.
315. See Yard-Man, 716 F.2d at 1479.
issue of vesting means no vesting; (2) a strong presumption in favor of
vesting the benefits would assume that silence on the issue of vesting
means vesting; (3) a weak presumption against vesting the benefits would
allow ambiguous language to be evaluated in light of extrinsic evidence;
(4) a weak presumption in favor of vesting; (5) a parol substitution rule
would permit the use of extrinsic evidence even when the collective
bargaining agreement is silent and would assume that any evidence means
no vesting; (6) a parol substitution rule permitting the use of extrinsic
evidence that assumes no evidence means vesting.316

Judge Cudahy saw an approach that emphasized parol evidence as an
alternative to a presumption of vesting. He also found it easy, however, to
dismiss what he termed the "parol substitution" arguments on the grounds
that they dismissed the value of the written
contract.317 If one assumes that
health benefits truly are discretionary benefits that are not mandated by
government fiat, though, a presumption for or against vesting is far more
troubling than a presumption that extrinsic evidence should be examined.
Whether or not one approves, the current system of providing health
insurance in the United States does not include a government mandate to
provide benefits.318 The creation of a judicial presumption for or against
the provision of these benefits tips the neutrality of the government toward
one party and away from the other.

The Yard-Man dilemma has forced courts to take a stand on whether a
presumption of vesting is appropriate or desirable. To the extent that courts
should be encouraged to articulate their unspoken assumptions in the
interest of clarity, it has doubtless served a useful, if limited, purpose.

Assume, however, that the Yard-Man inference is not adopted by a
circuit, as indeed it has not been in several jurisdictions.319 Another way to
conceptualize the common themes of these opinions, then, is to ask whether
extrinsic evidence should be examined to determine whether the collective
bargaining agreement is ambiguous with respect to the duration of retiree
health benefits. In a system which allows employers and employees to
determine whether health benefits will be provided, without the
intervention of a governmental body, it makes far more sense to weigh
parol evidence to determine whether the parties did indeed agree to this
provision. Once the question of vesting is characterized in this manner, the
traditional tools of analysis, including the parol evidence rule, may be used
without the bias that can be introduced by judicial presumptions for or
against vesting.

316. See Bidlack v. Wheelabrator Co., 993 F.2d 603, 610-11 (7th Cir. 1993) (Cudahy, J.,
concurring).
317. See id. at 611.
318. See id.
319. See Skinner, 188 F.3d at 139.
Even if one accepts the premise that an analysis of a collective bargaining agreement should proceed free from judicial presumptions regarding the nature of vesting, serious differences of approach between the circuits are evident in their approach to extrinsic evidence. Arguments against the introduction of such evidence frequently recite the mantra that extrinsic evidence may not be used to create an ambiguity.\textsuperscript{320} May it be used, however, to demonstrate that an ambiguity is present? For some courts, the clear answer is no. Consider, for example, the district court’s opinion in \textit{Arndt v. Wheelabrator Corp.},\textsuperscript{321} the case which ultimately gave rise to the famous opinion in \textit{Bidlack}.\textsuperscript{322} In \textit{Arndt}, the United Auto Workers, on behalf of production and maintenance employees, entered into a series of collective bargaining agreements with Wheelabrator Corporation.\textsuperscript{323} The collective bargaining agreements provided for retiree health benefits, but did not expressly specify whether those benefits would continue beyond the duration of the collective bargaining agreement.\textsuperscript{324} Plaintiffs offered extrinsic evidence in the form of a variety of letters to retirees and testimony of a union negotiator that suggested that the parties had intended that retirees would continue to receive the same level of benefits they did as active employees for the duration of their retirement.\textsuperscript{325} When Wheelabrator ultimately reduced the level of retiree benefits, the company’s retirees and their spouses brought a class action seeking a restoration of benefits and damages for lost benefits and a variety of other claims based on a breach of the LMRA (Labor Management Relations Act) and ERISA.\textsuperscript{326} The district court’s opinion, which was later reversed by the Seventh Circuit in \textit{Bidlack}, illustrated a particularly strict approach to extrinsic evidence that suggests a level of benefits more generous than the benefits described in the plan document. Borrowing from \textit{Moore}, the court began with the precept that "an ERISA welfare plan that is unambiguous is not subject to amendment by the informal communications between the employer and the beneficiaries."\textsuperscript{327} The court examined the plan documents (including the collective bargaining agreement, insurance policies, and a Master Operating Agreement) and concluded that there was no intention on the employer’s part to provide retirees with the same level of benefits, at no cost, for life.\textsuperscript{328} Moreover, the court ruled that extrinsic evidence of informal communications should play no part in this analysis

\textsuperscript{320} See, e.g., id. at 145.
\textsuperscript{321} 763 F. Supp. 396 (N.D. Ind. 1991).
\textsuperscript{322} 993 F.2d 603 (7th Cir. 1993).
\textsuperscript{323} See \textit{Arndt}, 763 F. Supp. at 398.
\textsuperscript{324} See \textit{id}.
\textsuperscript{325} See \textit{id}.
\textsuperscript{326} See \textit{id} at 400-01.
\textsuperscript{327} \textit{Id.} at 405.
\textsuperscript{328} See \textit{id} at 406.
because the plan documents were not ambiguous.329

Even when the extrinsic evidence strongly suggests that the plan document is ambiguous, there is a deep-rooted reluctance to acknowledge an ambiguity that is not patently obvious on the face of the document itself still remains. In American Federation of Grain Millers v. International Multifoods Corp.,330 for example, an employer continued to provide benefits beyond the expiration of a collective bargaining agreement. The plan document included a reservation of rights clause.331 The court held that in order to show ambiguity in a collective bargaining agreement, plaintiffs were obliged to point to some written language capable of suggesting that a vested right exists.332 The court determined that the ERISA plan document clearly reserved right to amend and, on the strength of that provision, the plaintiffs could not admit extrinsic evidence to demonstrate ambiguity in the collective bargaining agreement's approach to vesting.333 Similarly, in Senn v. United Dominion Industries, Inc.,334 which has been effectively overruled by Bidlack, the Seventh Circuit held that extrinsic evidence was not admissible to demonstrate that retiree benefits were vested, even when the plan document was silent with respect to this issue.335 The plan's silence was thus construed as a clear directive that the benefits were not vested.336 Even when extrinsic evidence was available to show an argument to the contrary, the absence of any plan language that suggested an ambiguity precluded the introduction of such evidence.337 In other words, extrinsic evidence was not admissible to demonstrate the existence of an ambiguity.

In contrast to Arndt and other more strict interpretations of the written plan document rule, Judge Posner's lead opinion in Bidlack contemplated the possibility that, in certain limited circumstances, extrinsic evidence could be introduced to demonstrate that the language of the agreement was ambiguous.338 Judge Posner envisioned at least three scenarios in which consideration of extrinsic evidence would be appropriate: first, to demonstrate that a written contract that appears to be clear is nonetheless ambiguous; second, to demonstrate that a term in the contract is

329. See id.
330. 116 F.3d 976 (2d Cir. 1997).
331. See id. at 982.
332. See id. at 980.
333. See id. at 982.
334. 951 F.2d 806 (7th Cir. 1992).
335. See Bidlack v. Wheelabrator Co., 993 F.2d 603, 610 (7th Cir. 1993), for Judge Cudahy's description of the Senn opinion; see also Diehl v. Twin Disc, Inc., 102 F.3d 301, 305 (7th Cir. 1996).
336. See Senn, 951 F.2d at 815.
337. See id.
338. See Bidlack, 993 F.2d at 608.
ambiguous; or, third, to clarify that there is "some yawning void . . . that cries out for an implied term."339

The dictum in Bidlack thus illustrates a perspective that is more accepting of extrinsic evidence than the case itself or its progeny have suggested.340 This approach to extrinsic evidence, which might be regarded as permissive in comparison to the district court's holding in Arndt, remained theoretical, as Judge Posner did not in fact find it necessary to resort to extrinsic evidence in order to conclude that the contract was ambiguous. Thus, there is nothing novel about Judge Posner's treatment of extrinsic evidence in the actual workings of this opinion: he examines the "language and logic" of the agreement, concludes that it is ambiguous, and rules that the parties should be able "to present testimony and documents that they claim will disambiguate it."341 Judge Posner's endorsement of the use of extrinsic evidence is limited by the precept that extrinsic evidence should not be used to add terms to a contract that is plausibly complete without them.342 Thus, the language of the agreement must be examined to determine whether an ambiguity is present. In fact, Judge Posner concludes that extrinsic evidence should not be admitted to determine whether benefits are vested when a contract is silent on the duration of health benefits and is not structured in a way that would require the perpetual duration of such benefits.343 Thus, most cases focus on contractual language in their analysis to determine whether an ambiguity exists, without referring to extrinsic evidence. Indeed, in Pabst Brewing Company, the court noted that decisions that have been handed down since Bidlack clearly focus on the importance of contractual language.344

In some cases, courts have expressed a willingness to entertain extrinsic evidence under limited circumstances. Several cases arising from disputes over contributions to multi-employer pension funds address this issue. In AM International, Inc. v. Graphic Management Associates, Inc., 345 for example, the Seventh Circuit reminded litigants that in the tradition of Raffles v. Wichelhaus, 346 extrinsic evidence was admissible to demonstrate that the meaning of a contract that appeared clear on its face was not always unambiguous. In Central States, Southeast & Southwest Areas Pension Fund v. Central Cartage Company, Judge Flaum's

339. Id.; see also Pabst Brewing Co., Inc. v. Corrao, 161 F.3d 434, 440 (7th Cir. 1998).
340. See generally Central States, Southeast & Southwest Areas Pension Fund v. Central Cartage Co., 69 F.3d 1312, 1318-19 (7th Cir. 1995) (Flaum, J., concurring) (arguing that the Bidlack opinion actually adopts a contract law approach to ambiguity).
341. Bidlack, 993 F.2d at 609.
342. See id. at 608.
343. See id.
344. See Pabst Brewing Co., 161 F.3d at 440.
345. 44 F.3d 572 (7th Cir. 1995).
concurrence noted that parties may attach an idiosyncratic meaning to a term that might appear plain to people who were not familiar with such a meaning. The consideration of objective extrinsic evidence is the only means that would enable a court to accurately interpret such a contract. While Judge Flaum is at pains to distinguish the facts that would evoke the necessity of using this principle from arguments based on flaws in the contract formation process, it is clear that under the proper circumstances he would indeed be willing to entertain extrinsic evidence to aid in determining whether certain contractual language was ambiguous.

In using extrinsic evidence in order to determine whether an ambiguity exists, a court need not necessarily venture into unfamiliar territory. Sometimes the sources of extrinsic inspiration are close at hand. In Alexander v. Primerica Holdings, Inc., for example, Judge Mansmann of the Third Circuit turned to her dictionary, to empirical research, and to an analysis of the defendants' past practices in order to conclude that a reservation of rights clause was ambiguous. These sources - extrinsic to the summary plan descriptions that she was examining - suggest a conscious effort to overcome her own sense of the meaning of the language, an endeavor reminiscent of the Third Circuit's admonition in Mellon Bank, N.A. v. Aetna Business Credit, Inc. for judges to be sensitive to the dangers of imposing their own linguistic experience on the interpretation of contracts. Indeed, Judge Mansmann's opinion expressly considered the possibility that a lawyer and a plan participant might attach different meanings to the same words. Another Third Circuit opinion, Smith v. Hartford Insurance Group, held that it was appropriate to examine evidence of the parties' performance in order to demonstrate a latent ambiguity in the contract. In that case, extrinsic evidence was admissible in order to determine whether the parties' use of the word "employ" in the summary plan description was ambiguous.

The main objection that is levied against the consideration of extrinsic

347. See 69 F.3d 1312, 1318 (7th Cir. 1995).
348. See id. Judge Flaum distinguishes the facts in Central Cartage Company from the case of Johnson v. Georgia-Pacific Corp., 19 F.3d 1184 (7th Cir. 1994).
349. See Central Cartage Co., 69 F.3d at 1318-19.
350. 967 F.2d 90 (3d Cir. 1992).
351. See id. at 92-93 (presenting Webster's Dictionary's definition of various terms to show that they are susceptible to different interpretations, and referring to the results of empirical research which suggested that readers could conclude that clause vested benefits for life).
352. See 619 F.2d 1001, 1011 n.12 (3d Cir. 1980), cited in Alexander, 967 F.2d at 95 n.1.
353. See Alexander, 967 F.2d at 94.
354. 6 F.3d 131 (3d Cir. 1993).
355. See id. at 138.
356. See id.
evidence is that it devalues the written document.\footnote{See generally Jenson V. Sipco, \textit{Eighth Circuit Opens the Door to Extrinsic Evidence in All Retiree Health Cases}, 3 ERISA LITIGATION REP. 13, 18 (1995).} A written document that is accurate, however, has nothing to fear from parol evidence. The court in \textit{Skinner Engine Co.}, for example, specifically considered deposition testimony of union officials regarding past practices and other extrinsic sources and concluded that the extrinsic evidence failed to demonstrate that an ambiguity existed in the collective bargaining agreement.\footnote{See UAW Local No. 1697 v. Skinner Engine Co., 188 F.3d 130, 145 (3d Cir. 1999).} On the other hand, a written document that is inaccurate should be subject to severe scrutiny.

A recent decision from the Third Circuit offers a clear illustration of this point. In \textit{In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation},\footnote{58 F.3d 896 (3d Cir. 1995).} the Third Circuit performed a traditional examination of the language of an ERISA plan and concluded that the fact that it contained both a reservation of rights clause and a promise of lifetime benefits did not render the plan language ambiguous as a matter of law.\footnote{See id. at 903-04.} The Third Circuit did not find it necessary to use extrinsic evidence to reach its determination and, in fact, its holding on this point was consistent with the lower court's ruling.\footnote{See id. at 904.} This opinion is unusual, however, in that despite its finding that the plan language unambiguously reserved the right to amend the plan, the district court had nonetheless performed an analysis of extrinsic evidence in order to determine whether the reservation of rights clause applied to the promise of lifetime benefits.\footnote{See id.} The analysis of the extrinsic evidence in the case led the district court to conclude that the benefits were not vested, and the Third Circuit did not find clear error in the analysis of the extrinsic evidence.\footnote{See id. at 904.} Thus, while it would be a mistake to construe \textit{In re Unisys} as supporting the use of extrinsic evidence to determine the presence of an ambiguity, it does offer an illustration of the hypothesis that extrinsic evidence will not always work to the disadvantage of a properly drafted document.

It is true that employees have much to gain by obtaining the opportunity to put forward extrinsic evidence of this nature. Although a court may examine extrinsic evidence regarding the promises that have been made, a court is not forced to conclude that the evidence is credible. Ignoring the evidence does, however, insure that no matter how credible or secure its substance might be, it will not play a part in the ultimate resolution of the issue at hand.
IV. CONCLUSION

The use of extrinsic evidence for the purposes of determining whether a plan document is properly integrated and for determining whether an ambiguity exists will not correct all of the evils that have befallen ERISA participants. Nor, however, will it vastly disadvantage employers. In the final analysis, the operation of this rule will do what the parol evidence rule was always intended to do: distinguish between writings that deserve the highest form of protection and those that do not. Surely this cannot be an unmeritorious goal in the interpretation of a statute which was intended to protect plan participants and the promises of benefits that were made to them.