

*INTER-MODAL RAIL:*  
WILL ERISA'S NEWLY DEFINED WELFARE BENEFIT  
NONINTERFERENCE CLAUSE CURB OUTSOURCING?

I. INTRODUCTION

Since the late 1980s, companies have practiced "outsourcing" as a means of controlling costs and bolstering the fiscal bottom-line.<sup>1</sup> Outsourcing typically involves subcontracting certain routine business functions to outside contractors specializing in these services, or seeking outside assistance when specialized expertise is needed.<sup>2</sup> By outsourcing, companies realize cost savings on salaries, employee benefit plans, and various other overhead costs which would otherwise be incurred if they maintained their own in-house staff to perform these tasks.<sup>3</sup> Not surprisingly, outsourcing is predicted to grow twenty-three percent in the next year into a \$180 billion global business,<sup>4</sup> with expansion not limited to magnitude, but including growth in the scope of services sought as well.<sup>5</sup>

Although the outsourcing juggernaut appeared to be unstoppable, the Supreme Court's decision in *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Railway*<sup>6</sup> may have shattered this illusion, at least temporarily, by raising some doubts about the legality of this increasingly popular business practice. Because pension and welfare benefit plan cost savings are often a significant consideration when a company decides to outsource, an employer's action affecting these benefits may come under the federal scrutiny of the Employee Retirement

---

<sup>1</sup>See Scott M. Riemer, *Corporate Outsourcing and ERISA § 510*, N.Y. L.J., June 27, 1997, at 1.

<sup>2</sup>Typical services that are outsourced include information technology, marketing and sales, financial/accounting, and administration. *First Outsourcing Index Predicts 35 Percent Outsourcing Growth*, Bus. Wire, Feb. 13, 1997, available in WESTLAW, BWIRE database. Other common outsourced functions include human resources, tax, and legal services. *Outsourcing Growing Rapidly into a \$180 Billion Global Business; Legal and Tax Services Get Highest Satisfaction Ratings from Top Executives, New Research Shows*, PR NEWSWIRE, Sept. 19, 1997, available in WESTLAW, PRWIRE database [hereinafter *Outsource Growing Rapidly*].

<sup>3</sup>One source estimates average cost savings to employers are between 12% to 22% for outsourcing. *Outsourcing's Second Wave*, INVESTOR'S BUS. DAILY, Oct. 19, 1995, at A4.

<sup>4</sup>*Outsourcing Growing Rapidly*, *supra* note 2. U.S. companies alone are predicted to spend more than \$100 billion this year in outsourcing. Del Jones, *Supreme Court Ruling May Stem Outsourcing*, USA TODAY, May 13, 1997, at 5B.

<sup>5</sup>*Outsourcing's Second Wave*, *supra* note 3, at A4.

<sup>6</sup>117 S. Ct. 1513 (1997).

Income Security Act (ERISA),<sup>7</sup> regulating employee benefits.<sup>8</sup> Section 510 of the Act specifically provides for an employee cause of action, making it unlawful for an employer to terminate workers with the intent of preventing them from making claims against existing benefit plans, or interfering with their attainment of future benefit rights.<sup>9</sup>

*Inter-Modal Rail* involved a railway that decided to outsource "inter-modal"<sup>10</sup> cargo handling services for one of its yards to a subcontractor. Affected railway employees were offered jobs with the new subcontractor to continue performing their same duties but with a drastically reduced pension and welfare benefit package.<sup>11</sup> Those declining the new positions were terminated and subsequently filed ERISA claims against both the railway and subcontractor for interference with their benefit rights.<sup>12</sup>

On appeal from the district court decision, the Ninth Circuit upheld the pension claim but dismissed the welfare benefit claim holding that section 510 does not state a cause of action for unvested benefits.<sup>13</sup> In the first case where an ERISA interference claim reached this country's highest tribunal,<sup>14</sup> the Supreme Court reversed the appellate court and held unanimously that section 510's purview is not limited to vested benefits,<sup>15</sup> but also encompasses unvested welfare benefits. This

---

<sup>7</sup>Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 832 (1974) (codified as amended at 29 U.S.C. § 1001 (1994)).

<sup>8</sup>See *infra* Part II.A.

<sup>9</sup>29 U.S.C. § 1140 (1994). See *infra* Part II.B.

<sup>10</sup>The services being provided in the railroad yard were the transfer of cargo to and from railcars to transport trucks. *Inter-Modal Rail*, 117 S. Ct. at 1514. Inter-Modal containers are shipping containers capable of being loaded on truck, train, or ship, as an integral unit, through the use of cranes and other apparatus.

<sup>11</sup>*Id.* Under the original employment arrangement, workers were entitled to retirement benefits under the Railroad Retirement Act of 1974, 88 Stat. 1312 (1974) (codified as amended at 45 U.S.C. § 231 (1994)), and to other benefits resulting from collective bargaining agreements (CBAs) with the Teamsters Union for pension, health, and welfare benefits. *Id.* Under the new In-Terminal Services (ITS) agreement with the Teamsters Union, the employees were permitted fewer pension and welfare benefits, and they lost their Railroad Retirement Act benefits. *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry.*, 80 F.3d 348, 350 (9th Cir. 1996) (per curiam), *vacated*, 117 S. Ct. 1513 (1997).

<sup>12</sup>*Inter-Modal Rail*, 117 S. Ct. at 1514.

<sup>13</sup>*Inter-Modal Rail*, 80 F.3d at 353. ERISA provides stringent participation, funding, and vesting requirements on pension plans; therefore, employer's have traditionally tread lightly when business decisions impact pension benefits. See *infra* Part II.A.

<sup>14</sup>Robert N. Eccles & David E. Gordon, *On a Roll*, 5 ERISA LITIG. REP. 1, 2 (Dec. 1996). The Court heard a total of four ERISA cases in the same term; the three others involved federal preemption issues. *Id.*

<sup>15</sup>*Inter-Modal Rail*, 117 S. Ct. at 1514.

sweeping decision by the Court, consistent with the broad remedial nature of the Act, resolved a split which had developed between the federal circuit courts over the breadth of section 510's employee benefit protection.<sup>16</sup> Also, the Court's opinion significantly clarified the vexing statutory tension existing between an employer's unilateral welfare benefit amendment right and section 510.<sup>17</sup>

This comment examines the impact of *Inter-Modal Rail* on current ERISA jurisprudence and the practice of outsourcing. Part II provides an overview of section 510 interpretation by the courts in case law preceding *Inter-Modal Rail*, including review of the doctrinal basis for the lower court controversy over vested and unvested rights. Part III examines the procedural history of *Inter-Modal Rail*, focusing primarily on the Supreme Court's decision and the basis for its holding. Part IV evaluates how *Inter-Modal Rail* fits within the current framework of section 510 decisions, its precedential significance for the lower courts, and possible business implications for the practice of outsourcing in the future.

## II. BACKGROUND

Prior to the Supreme Court's ruling in *Inter-Modal Rail*, the lower federal courts did not uniformly recognize a valid cause of action for an employer's violation of ERISA section 510 when nonvesting welfare benefit plans were at issue. To fully appreciate the context and import of the Court's decision clarifying section 510's protection of employee welfare benefits, an overview of that statute's historical underpinnings and relevant case law is presented in this section.

### A. ERISA Origins: Uniform Protection of Employee Benefits

The Employee Retirement Income Security Act of 1974 (ERISA) is a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans"<sup>18</sup> and "to protect contractually defined benefits."<sup>19</sup> Congress sought to "remedy a

---

<sup>16</sup>See *infra* Part II.G.

<sup>17</sup>See *infra* Part II.D.

<sup>18</sup>*Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983).

<sup>19</sup>*Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989) (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985)). Contractually defined benefits can include plans under a CBA. See, e.g., *American Fed'n of Grain Millers, AFL-CIO v. International Multifoods Corp.*, 116 F.3d 976, 978 (2d Cir. 1997) (concluding that medical insurance plan contained in a CBA was an ERISA welfare benefit plan).

ERISA was enacted in 1974 in response to public concern for thousands of

broad range of problems in the field of employee benefit[s]" with ERISA, which is meant to be "liberally construed in favor of employee benefit fund participants."<sup>20</sup>

Three kinds of "employee benefit plans" are covered by ERISA: welfare benefits, pension benefits, and plans representing a combination of both.<sup>21</sup> Employee pension benefit plans include programs providing retirement income to employees<sup>22</sup> or deferred income after termination of covered employment.<sup>23</sup> Employee welfare benefit plans include programs providing health and life insurance, disability and unemployment benefits, vacation, scholarship funds, prepaid legal services, as well as other benefits.<sup>24</sup> While pension benefits cover employees who retire or leave active employment, welfare benefit plans pertain to both active and retired employees.<sup>25</sup>

---

workers who were not receiving anticipated retirement and other benefits due to inadequate funding and unfair vesting requirements. Evidence of corruption and mismanagement of welfare and pension plans had existed for years, but until the enactment of ERISA, regulation at both the federal and state level was minimal.

Karen M. Sakanashi, *Unfunded Vacation Benefits: Determining the Scope of ERISA*, 87 COLUM. L. REV. 1702, 1704 (1987) (citations omitted). *Accord* *Simpson v. Ernst & Young*, 879 F. Supp. 802, 812 (S.D. Ohio 1994) (citing 29 U.S.C. § 1001(a) (1994)). To fulfill its intended purpose therefore, "Congress expressly included a broad preemption clause in ERISA, wherein it supersedes . . . any and all state laws insofar as they may now or hereafter relate to any employee benefit plan." *Id.* (quoting 29 U.S.C. § 1144). *See generally* Henry H. Rossbacher et al., *ERISA's Dark Side: Retiree Health Benefits, False Employer Promises and the Protective Judiciary*, 9 DEPAUL BUS. L.J. 305 (1997) (discussing in detail ERISA's preemption provision).

<sup>20</sup>*Kross v. Western Elec. Co.*, 701 F.2d 1238, 1242 (7th Cir. 1983). Congress found constitutional authority to promulgate ERISA under the interstate commerce and federal taxing powers. 29 U.S.C. § 1001(a) (1994).

<sup>21</sup>*Garratt v. Walker*, 121 F.3d 565, 569 (10th Cir. 1997) (citing 29 U.S.C. §§ 1003(a), 1002(3) (1994)).

<sup>22</sup>29 U.S.C. § 1002(2)(A)(i) (1994).

<sup>23</sup>*Id.* § 1002(2)(A)(ii).

<sup>24</sup>*Id.* § 1002(1). Generally, an ERISA qualifying plan requires an "administrative scheme." *Shahid v. Ford Motor Co.*, 76 F.3d 1404, 1409 (6th Cir. 1996) ("The hallmark of an ERISA benefit plan is that it requires an ongoing administrative program to meet the employer's obligation.") (internal quotation marks and citation omitted). Plans that do not require an administrative scheme such as "golden parachute" plans for executives or "one-time, lump-sum payment" plans are typically not covered by ERISA. *Id.* However, plans requiring that severance benefits be paid have been held to qualify as ERISA plans. *Id.* at 1409-10. Moreover, an employer may find itself within the ambit of ERISA if employee eligibility criteria for certain levels of benefits must be determined or if the employer assumes an obligation to pay benefits regularly. *Id.* at 1409. Both of these could trigger the need for administrative programs. *Id.* at 1409.

<sup>25</sup>Sakanashi, *supra* note 19, at 1705.

ERISA imposes "participation, funding, and vesting requirements on pension plans";<sup>26</sup> welfare benefits, however, are exempt from these strict conditions.<sup>27</sup> Despite these dissimilarities, the Act does establish "various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility, for *both* pension and welfare plans."<sup>28</sup>

To provide enforcement "teeth" for ERISA, Congress enacted both section 502(a),<sup>29</sup> creating a "comprehensive civil enforcement scheme,"<sup>30</sup> and section 510,<sup>31</sup> as a cause of action to protect employee use and attainment of their promised benefits.<sup>32</sup>

### B. Section 510 Statutory Language

Section 510 of ERISA, entitled "[i]nterference with protected rights," provides in pertinent part:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an *employee benefit plan* [or] this subchapter . . . or for the purpose of *interfering with the attainment of any right* to which such participant may become entitled under the plan [or] this subchapter . . . .<sup>33</sup>

---

<sup>26</sup>Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 91 (1983).

<sup>27</sup>Sakanashi, *supra* note 19, at 1705. *Accord* 29 U.S.C. § 1051(1) (1994) (stating that this section pertaining to participation and vesting does not apply to employee welfare benefit plans); *Shahid*, 76 F.3d at 1412 ("ERISA 'expressly exempts employee welfare benefit plans from the sections concerned with vesting and accrual.'") (quoting *West v. Greyhound Corp.*, 813 F.2d 951, 954 (9th Cir. 1987)).

<sup>28</sup>*Shaw*, 463 U.S. at 90 (emphasis added).

<sup>29</sup>29 U.S.C. § 1132(a) (1996). "Congress intended [section] 502(a) to be the exclusive remedy for rights guaranteed under ERISA, including those provided by [section] 510." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 144 (1990). *See generally* Terry Collingsworth, *ERISA Section 510—A Further Limitation On Arbitrary Discharges*, 10 INDUS. REL. L.J. 319, 343-49 (1988) (discussing remedies available for an unlawful discharge under section 510).

<sup>30</sup>*Ingersoll-Rand Co.*, 498 U.S. at 144 (internal quotation marks omitted) (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985)).

<sup>31</sup>29 U.S.C. § 1140 (1994).

<sup>32</sup>*See infra* Part II.B (discussing ERISA section 510).

<sup>33</sup>29 U.S.C. § 1140 (1994) (emphasis added). "ERISA does not define any of the verbs used in [section] 1140 ('discharge, fine, suspend, expel, discipline, or discriminate') to describe

Accordingly, section 510 can be construed to consist of two components: an anti-retaliatory and anti-interference provision.<sup>34</sup>

"Retaliatory" cases under section 510 typically arise when an employee is terminated for exercising a present right pursuant to eligibility under an existing welfare benefit plan.<sup>35</sup> In contrast, "interference" actions under section 510 are prospective in nature and commonly arise in a number of scenarios including: (1) cases where employees are terminated immediately before becoming eligible for benefits under an existing vested or nonvesting type plan,<sup>36</sup> and (2) cases where an employer makes a fundamental business decision which, as an indirect consequence, interferes with an employee's attainment of a right to receive benefits under a plan.<sup>37</sup>

---

illegal conduct," *Mattei v. Mattei*, 126 F.3d 794, 797 (6th Cir. 1997), thus leaving these terms to judicial interpretation. In *Mattei*, the court concluded that although Congress adopted section 510's verbs from labor law, thereby appearing to be applicable to only employer actions affecting an employment relationship, the legislative intent was to extend protection beyond this limit to include ERISA plan beneficiaries as well. *Id.* at 803-04. Collectively, section 510's terms have also been held to prohibit "adverse treatment of a particular employee which amounts to or threatens 'constructive discharge' . . . which is carried out for the purpose of interfering with the employee's attainment of future benefits or punishing the employee for the exercise of protected rights." *Phillips v. Amoco Oil Co.*, 614 F. Supp. 694, 721 (N.D. Ala. 1985) (citing *West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980), *aff'd*, 799 F.2d 1464 (11th Cir. 1986)). This type of harassment may fall short of an actual firing, "but makes living such a hell that a person wishes he did not have to hang on and endure." *Id.* at 721-22 (emphasis omitted).

<sup>34</sup>Michael A. Lawson, *Employee Benefits: Significant Recent Developments in ERISA Litigation*, in 25TH ANNUAL INSTITUTE ON EMPL. L. 1996, at 641, 669 (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5237, 1996). The anti-retaliatory clause has also been referred to as the "exercise clause" whereby an employee is discharged for exercising his benefit rights. *Furcini v. Equibank, NA*, 660 F. Supp. 1436, 1439 (W.D. Pa. 1987) (Aldisert, Circuit J., sitting by designation).

<sup>35</sup>*See, e.g., Kowalski v. L & F Prods.*, 82 F.3d 1283, 1286 (3d Cir. 1996) (claiming that plaintiff was fired for receiving full medical benefits under company's short-term disability plan following corrective surgery). Claims where an employer terminates the employee to prevent a pension from vesting are "prototypical of the kind Congress intended to cover under [section] 510." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 143 (1990). Since section 510 retaliatory actions are not pertinent to the focus of this comment, a more in-depth discussion will not be undertaken. *See generally* Dana M. Muir, *Plant Closings and ERISA's Noninterference Provision*, 36 B.C. L. REV. 201, 223-24 (1995) (discussing section 510's retaliatory or exercise clause).

<sup>36</sup>*See, e.g., Ingersoll-Rand Co.*, 498 U.S. at 135 (involving salesman terminated four months before his pension vested); *Heath v. Varsity Corp.*, 71 F.3d 256, 257 (7th Cir. 1995) (involving employee discharged shortly before becoming eligible for nonvesting early retirement benefits).

<sup>37</sup>*See, e.g., Andes v. Ford Motor Co.*, 70 F.3d 1332, 1333 (D.C. Cir. 1995) (involving sale of corporate subsidiary resulting in employee terminations); *Phillips v. Amoco Oil Co.*,

Although it is often quoted in ERISA case law that section 510's prohibitions were "aimed *primarily* at preventing unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights,"<sup>38</sup> the courts have recognized that both the statute's interference and retaliatory provisions can also apply to nonvesting welfare benefits.<sup>39</sup> Not all courts, however, have agreed on section 510's protection of nonvested pension or welfare benefits.<sup>40</sup>

The reach of section 510 is not without limits, however, and "[f]here is a point where an employee's possible attainment of a 'right' is so speculative and contingent that it falls outside the bulwark of [section] 510."<sup>41</sup> For example, section 510 does not generally apply to either discretionary<sup>42</sup> or gratuitous<sup>43</sup> employee benefits which, lacking a contractual agreement to the contrary, an employer is not obligated to provide.<sup>44</sup> ERISA places no requirements on employers to offer "any particular benefits nor does it forbid discrimination in the provision of employee benefits."<sup>45</sup> Also, "ERISA does not prohibit a company from

---

614 F. Supp. 694 (N.D. Ala. 1985) (involving sale of division resulting in loss of employee benefits).

<sup>38</sup>*West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980) (emphasis added). *See, e.g.*, *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988) (citing *West*, 621 F.2d at 245); *Clark v. Resistoflex Co., A Div. of Unidynamics Corp.*, 854 F.2d 762, 770 (5th Cir. 1988) (same); *Gavalik v. Continental Can Co.*, 812 F.2d 834, 851 (3d Cir. 1987) (same); *Simpson v. Ernst & Young*, 879 F. Supp. 802, 813 (S.D. Ohio 1994) (same).

<sup>39</sup>*See infra* Part II.G.1 (discussing and listing courts that recognize section 510's application to nonvesting welfare benefit interference claims). Courts have also recognized section 510's application to welfare benefit retaliation claims. *See, e.g.*, *Kowalski*, 82 F.3d at 1288 (recognizing section 510 cause of action for retaliatory discharge of employee using disability benefits); *Owens v. Storehouse, Inc.*, 984 F.2d 394, 398 (11th Cir. 1993) (holding employer did not violate section 510's retaliatory provision by placing cap on health care insurance pertaining to AIDS); *McGann v. H & H Music Co.*, 946 F.2d 401, 404-05 (5th Cir. 1991) (reaching merits on medical insurance section 501 retaliation action); *Rath v. Selection Research, Inc.*, 978 F.2d 1087, 1089 (8th Cir. 1992) (holding that employee adduced insufficient evidence to support claim that he was discharged for questioning proposed changes to an employee stock ownership plan).

<sup>40</sup>*See infra* Part II.G.

<sup>41</sup>*Garratt v. Walker*, 121 F.3d 565, 570 (10th Cir. 1997). In *Garratt*, the court held that an employer's discretionary contributions to a simplified employee retirement account fell outside the ambit of section 510's protection. *Id.*

<sup>42</sup>*Id.*

<sup>43</sup>*See, e.g.*, *Stiltner v. Beretta U.S.A. Corp.*, 74 F.3d 1473, 1484 (4th Cir. 1996) (holding that employer's lack of obligation to continue paying "gratuitous benefits" to disabled employee is not actionable under section 510 when such payments are revoked).

<sup>44</sup>*Owens v. Storehouse, Inc.*, 984 F.2d 394, 399 (11th Cir. 1993) ("ERISA does not confer a right to particular [welfare] benefits.").

<sup>45</sup>*Id.* at 400 (citing *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 283 (3d Cir.

terminating previously offered benefits that are neither vested nor accrued,"<sup>46</sup> nor is it intended to interfere with an employer's right to make legitimate business transactions.<sup>47</sup>

Even though the language of section 510 appears on its face to pertain to only adverse employer actions directed against a single employee,<sup>48</sup> the legislative history of the statute supports a broad construction to encompass groups of employees as well.<sup>49</sup> Some courts have concurred with this broad interpretation and have recognized section 510 in the context of class action suits involving mass employment decisions that adversely impact ERISA benefits on a plant-wide basis.<sup>50</sup>

---

1988)).

<sup>46</sup>*Id.* at 397 (citing *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986)).

<sup>47</sup>*Seaman v. Arvida Realty Sales*, 985 F.2d 543, 545 (11th Cir. 1993). In the sale of a business context, section 510 does not impose a fiduciary obligation on an employer to act in a plan participant's interest, nor does it require a successor company to credit an employee's service with its successor for purposes of its benefit plans. *Phillips v. Amoco Oil Co.*, 614 F. Supp. 694, 721 (N.D. Ala. 1985), *aff'd*, 799 F.2d 1464 (11th Cir. 1986).

<sup>48</sup>*See Andes v. Ford Motor Co.*, 70 F.3d 1332, 1337 (D.C. Cir. 1995) (noting that section 510's terms including "discharge, fine, suspend, expel, discipline, or discriminate," typically refer to actions targeted at individual employees).

<sup>49</sup>*Muir*, *supra* note 35, at 212-15 (discussing the statutory language and legislative history support for section 510's applicability to groups of employees).

<sup>50</sup>*See, e.g., Gavalik v. Continental Can Co.*, 812 F.2d 834, 857 (3d Cir. 1987) (recognizing section 510 class action suit against employer that based permanent layoffs on a secret list identifying those employees about to become eligible for enhanced benefits); *Kross v. Western Elec. Co.*, 701 F.2d 1238, 1243 (7th Cir. 1983) (recognizing section 510 class action claim by employees terminated during plant-wide layoffs due to decline in market); *Nemeth v. Clark Equip. Co.*, 677 F. Supp. 899, 907 (W.D. Mich. 1987) (recognizing section 510 class action and holding that "[c]lass-based discrimination . . . under ERISA . . . is every bit as illegal as individualized discrimination").

In *Nemeth*, former employees alleged that the company violated section 510 by impermissibly considering pension plan savings in its decision to close an entire plant because they would have otherwise become eligible for enhanced benefits upon reaching full retirement age. *Id.* at 902-04. Evidence showed that it would have cost the company approximately \$6 million more in pension benefits to keep the plaintiff's plant open as opposed to another similar facility which was not closed. *Id.* at 903-04. The court rejected the company's argument that section 510 does not apply to plant closures or rising economic losses holding that the ERISA statute is violated if an employment decision is based "solely, or even substantially . . . [on] avoiding pension liability." *Id.* at 905. The court also rejected the company's argument that section 510 applies only to adverse action directed at individual employees, and not groups. *Id.* at 907 ("ERISA does not distinguish between the termination of one employee and the termination of 100 employees."). The plaintiffs ultimately lost the battle because the court found that pension benefit savings represented only 20% of the total cost savings to be realized by closing the plant; therefore, the closure decision would have been made regardless of pension benefit considerations. *Id.* at 910. *But see Andes*, 70 F.3d at 1338 (noting that section 510 only applies to plant sales or closures if there is some special class distinction of the subsidiary which implicates ERISA benefits). *See also Muir*, *supra* note 35, at 218-22

Jurisprudence surrounding the "anti-interference" provision of section 510 has become confused among the lower federal courts because it conflicts, in theory, with an employer's unilateral right under ERISA to amend or terminate nonvesting welfare benefit plans.<sup>51</sup> This conflict was the ultimate precursor to the Supreme Court's decision in *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Railway*.<sup>52</sup>

### C. Section 510 Standing: Plan Participant

After meeting the threshold requirement that the welfare benefit plan in question falls within the ambit of an ERISA statutory plan,<sup>53</sup> plaintiffs must show "standing" to bring a section 510 action.<sup>54</sup> Standing requires that the plaintiff be a plan "participant" which ERISA defines as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer . . . ."<sup>55</sup> With respect to former employees, the Supreme Court has interpreted "participant" to mean "former employees who 'have . . . a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to vested benefits."<sup>56</sup> Therefore, claimants must establish that "(1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future."<sup>57</sup> Although the focus of a section 510 action is on interference with a plan *participant's* attainment of future benefit

---

(discussing policy considerations in applying section 510 to plant closing and noting need for courts to employ the specific intent proof requirement in these actions to prevent section 510 from infringing on an employer's legitimate economic business decisions).

<sup>51</sup>See *infra* Part II.F.

<sup>52</sup>117 S. Ct. 1513 (1997).

<sup>53</sup>See *supra* Part II.A (defining ERISA benefit plans).

<sup>54</sup>*Shahid v. Ford Motor Co.*, 76 F.3d 1404, 1410 (6th Cir. 1996). An appellate court may raise this issue *sua sponte* on appeal because standing is necessary for federal jurisdiction under ERISA's preemption provision. *Id.*

<sup>55</sup>29 U.S.C. § 1002(7) (1994).

<sup>56</sup>*Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989) (quoting *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir. 1986)).

<sup>57</sup>*Firestone Tire & Rubber Co.*, 489 U.S. at 117-18. In breach of fiduciary duty claims under ERISA, the Sixth Circuit expanded the number of former employees who can claim standing as a "participant" if they can show that "*but for* the alleged misrepresentations or breaches of duty by fiduciaries, the employee would have been in a class eligible to become a member of the plan." *Shahid*, 76 F.3d at 1410 (internal citation and quotation marks omitted) (emphasis added). In *Shahid*, the court held that a former employee who was terminated, allegedly for theft, had standing under ERISA because the discharge occurred during the "open window" in which the employer offered participation in a voluntary termination plan. *Id.* at 1411.

rights,<sup>58</sup> the *beneficiary* of a participant can also have standing to bring an ERISA claim.<sup>59</sup>

#### D. *Specific Intent: Section 510's State of Mind Requirement*

In order to prevail on a section 510 claim, a plaintiff must prove that an employer acted with the *specific intent* to interfere with their ERISA plan benefits.<sup>60</sup> Courts have derived this requisite "state of mind" from the statutory language itself<sup>61</sup> which requires that the employer's interference with benefit rights be a "motivating factor" in its employment action.<sup>62</sup> No cause of action lies "where the loss of benefits was a mere consequence of, but not a motivating factor behind, a termination of employment."<sup>63</sup> Otherwise, every employee who is discharged "could have a potential [section 510] claim against his or her employer."<sup>64</sup>

An employer classically violates section 510 when it threatens to terminate employees who refuse to continue performing the same job as "independent contractors," thereby making them ineligible to receive the

---

<sup>58</sup>Collingsworth, *supra* note 29, at 322.

<sup>59</sup>*See, e.g.,* Mattei v. Mattei, 126 F.3d 794, 796 (6th Cir. 1997) (holding that widow of plan participant had standing to bring ERISA claim against decedent's estate executor for pension benefits).

<sup>60</sup>*Shahid*, 76 F.3d at 1411 (holding that to state a *prima facie* case under ERISA's provision prohibiting interference with plan participant's rights under the plan, the employee must show that there was prohibited employer conduct, taken for the purpose of interfering with the attainment of any entitled right); Little v. Cox's Supermarkets, 71 F.3d 637, 642 & n.3 (7th Cir. 1995) (holding that to establish *prima facie* case, employee must show discharge or denial of employment under circumstances that provide some basis for believing that the prohibited intent was present); Barbour v. Dynamics Research Corp., 63 F.3d 32, 37 (1st Cir. 1995) (holding that plaintiff must present sufficient evidence from which employer's specific intent to interfere with plaintiff's benefits can be inferred); Seaman v. Arvida Realty Sales, 985 F.2d 543, 546 (11th Cir. 1993) (same); Conkwright v. Westinghouse Elec. Corp., 933 F.2d 231, 238 (4th Cir. 1991) (stating that plaintiff must prove that, but for his employer's discriminatory intent, plaintiff would not have been fired or laid off); Gavalik v. Continental Can Co., 812 F.2d 834, 851 (3d Cir. 1987) (same).

<sup>61</sup>*See supra* Part II.B.

<sup>62</sup>*Barbour*, 63 F.3d at 37.

<sup>63</sup>*Id.*

<sup>64</sup>*Id.* *See also* Conkwright, 933 F.2d at 238 (noting that without the specific intent requirement a negligently discharged employee could sue an employer). "ERISA guarantees that no employee will be terminated where the purpose of the discharge is the interference with one's pension rights." *Id.* "ERISA does not guarantee every employee a job until he or she has fully vested into a company's benefit plan." *Id.* *See also* Gavalik, 812 F.2d at 851 (stating that "incidental loss of benefits result[ing from employment] termination [does not] constitute a violation of [section] 510").

same welfare benefits they would have otherwise enjoyed.<sup>65</sup> Conversely, an employer does not infringe upon section 510 by selling an unprofitable subsidiary, which indirectly interferes with plan benefit rights, as long as the employer is not motivated by illicit section 510 purposes.<sup>66</sup>

However, a claimant need not establish that an employer's "sole purpose" for its actions was to interfere with an employee's rights to entitled benefits.<sup>67</sup> The claimant must only prove that the proscribed behavior was "a motivating factor" in the decision which resulted in interference with the employee's benefit rights.<sup>68</sup> Whether an employer has interfered with an employee's attainment of a "right to future benefits is a factual inquiry to be answered on a case-by-case basis."<sup>69</sup> An employee alleging lost opportunity to accrue additional benefits,<sup>70</sup> cost savings to an employer by eliminating benefits,<sup>71</sup> or proximity in time of discharge to benefits vesting will not alone suffice to establish the requisite specific intent.<sup>72</sup>

### E. Evidentiary Burden Considerations

Obtaining direct evidence that an employer acted with a "specific intent" that violates section 510 is a difficult, if not impossible, task for a plaintiff.<sup>73</sup> Employers rarely leave visible or explicit traces of their

---

<sup>65</sup>*Seaman v. Arvida Realty Sales*, 985 F.2d 543, 547 (11th Cir. 1993). The Eleventh Circuit noted that Arvida, the employer, could have lawfully deprived employees of benefits by amending its plan; but it could not continue to offer benefits as a pretext and deny employees access to those benefits under penalty of termination. *Id.*

<sup>66</sup>*Phillips v. Amoco Oil Co.*, 614 F. Supp. 694, 723 (N.D. Ala. 1985), *aff'd*, 799 F.2d 1464 (11th Cir. 1986).

<sup>67</sup>*See Seaman*, 985 F.2d at 546; *Gavalik*, 812 F.2d at 851.

<sup>68</sup>*Shahid v. Ford Motor Co.*, 76 F.3d 1404, 1411 (6th Cir. 1996) (quoting *Humphreys v. Bellaire Corp.*, 966 F.2d 1037, 1043 (6th Cir. 1992)). *See also Gavalik*, 812 F.2d at 851; *Titsch v. Reliance Group Inc.*, 548 F. Supp 983, 985 (S.D.N.Y. 1982), *aff'd*, 742 F.2d 1441 (2d Cir. 1983) (stating that "[n]o ERISA cause of action lies where the loss of pension benefits was a mere consequence of, but not a motivating factor behind, a termination of employment").

<sup>69</sup>*Seaman*, 985 F.2d at 546.

<sup>70</sup>*Humes v. McDonnell Douglas Corp.*, 922 F. Supp. 229, 233 (E.D. Mo. 1996).

<sup>71</sup>*Poff v. Chattanooga Group, Inc.*, 912 F. Supp. 298, 306 (E.D. Tenn. 1996).

<sup>72</sup>*Id.* *But see Humphreys*, 966 F.2d at 1044 (noting proximity of discharge to vesting may create an inference of specific intent to violate section 510 sufficient to survive motion for summary judgment).

<sup>73</sup>*Little v. Cox's Supermarkets*, 71 F.3d 637, 642 & n.3 (7th Cir. 1995). *See also DeWitt v. Penn-Del Directory Corp.*, 106 F.3d 514, 523 (3d Cir. 1997) ("[W]e have recognized that in most [section 510] cases . . . 'smoking gun' evidence of specific intent to discriminate does not exist.").

actual unlawful intentions.<sup>74</sup> Recognizing this dilemma, some courts have allowed the plaintiff's evidentiary burden to be satisfied with circumstantial evidence.<sup>75</sup> Accordingly, to aid the analysis, the three-step *McDonnell Douglas*<sup>76</sup> framework of presumptions and burden-shifting employed in Title VII<sup>77</sup> employment discrimination cases has been adopted for proving "specific intent" with inferential evidence.<sup>78</sup>

Under the *McDonnell Douglas* analysis, the plaintiff must first establish a *prima facie* case of discriminatory discharge, thereby creating a presumption of discriminatory intent by the employer.<sup>79</sup> If the plaintiff meets this initial burden, "the defendant must articulate a legitimate, nondiscriminatory reason for the [employee's] discharge."<sup>80</sup> If the

---

<sup>74</sup>*See, e.g.,* Conkwright v. Westinghouse Elec. Corp., 933 F.2d 231, 239 (4th Cir. 1991) (stating that "employers rarely, if ever, memorialize their specific intent to act unlawfully"); *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1112 (2d Cir. 1988) (noting evidence of discrimination is difficult to find because "practitioners deliberately try to hide it"); *Gavalik v. Continental Can Co.*, 812 F.2d 834, 852 (3d Cir. 1987) (noting that "[i]n most cases . . . specific intent to discriminate will not be demonstrated by 'smoking gun' evidence").

<sup>75</sup>*See, e.g.,* Shahid v. Ford Motor Co., 76 F.3d 1404, 1411 (6th Cir. 1996) (allowing inference of intentional discrimination to establish *prima facie* case); *Little*, 71 F.3d at 643 (recognizing that an inference of intentional discrimination can establish a *prima facie* case, but failing to find a basis for such an inference under the facts); *Gavalik*, 812 F.2d at 852 (stating that evidentiary burden in discrimination cases may be met with circumstantial evidence).

<sup>76</sup>*McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *But see Gavalik*, 812 F.2d at 853 (observing that *McDonnell Douglas*'s shifting burdens framework is inapplicable where direct "smoking gun" evidence is available) (citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985)).

<sup>77</sup>Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1994).

<sup>78</sup>*See, e.g.,* Kowalski v. L & F Prods., 82 F.3d 1283, 1288-89 (3d Cir. 1996) (holding that *McDonnell Douglas* "presumptions and shifting burdens of production used in employment discrimination cases are equally appropriate in the context of discriminatory discharge cases brought under [section] 510 of ERISA"); *Dister*, 859 F.2d at 1112 (same); *Gavalik*, 812 F.2d at 852 (same); *Conkwright*, 933 F.2d at 239 (same); *Barbour v. Dynamics Research Corp.*, 63 F.3d 32, 37-38 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 914 (1996). *See generally* Collingsworth, *supra* note 29, at 331-43 (reviewing historical development of burden of proof in section 510 case law and adoption of the *McDonnell Douglas* test). The lower federal courts have taken various approaches to an employee's burden of proof under section 510. *Id.* at 331. In fact, some courts in the past have dismissed claims in the absence of direct evidence of specific intent. *Id.* at 332 (discussing *Shipper v. Avon Products, Inc.*, 605 F. Supp. 701 (S.D.N.Y. 1985)). Some courts have also adopted the Title VII burden shifting approach for analyzing violations of the Age Discrimination in Employment Act (ADEA) of 1967. *See, e.g.,* *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 342 (3d Cir. 1990); *Dister*, 859 F.2d at 1112.

<sup>79</sup>*Kowalski*, 82 F.3d at 1289; *Dister*, 859 F.2d at 1111-12 (noting that "[u]pon proof of a *prima facie* case of discrimination, a presumption arises that the employer unlawfully discriminated against the employee") (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981)).

<sup>80</sup>*Kowalski*, 82 F.3d at 1289. The employer's burden of proving a legitimate,

defendant meets its burden, "the plaintiff must point to some evidence, direct or circumstantial, from which a factfinder could either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an individual's discriminatory reason was more likely than not reason for the discharge" in order to withstand summary judgment.<sup>81</sup>

Courts have varied on the showing necessary to establish a *prima facie* case.<sup>82</sup> Two formulations commonly appear in current case law. The Third Circuit's decision in *Gavalik v. Continental Can Co.*<sup>83</sup> provides the foundation for the more rigorous approach. Establishing a *prima facie* case under *Gavalik* and its progeny essentially requires a plaintiff to show, by direct or circumstantial evidence, an employer's "specific intent" to engage in proscribed section 510 behavior in order to withstand summary judgment.<sup>84</sup> "[A]n employee must demonstrate (1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled."<sup>85</sup> This approach does little to further the very reason for following the

---

nondiscriminatory motive for its employment decision is "relatively light" and can be satisfied by "introducing evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the discharge." *Id.* Thus, the Third Circuit in *Kowalski* viewed this burden as one of production only, which comports with the Second Circuit's decision in *Dister*, which noted that the defendant "need not persuade the court that it was actually motivated by the proffered reasons." *Dister*, 859 F.2d at 1112 (quoting *Texas Dep't of Community Affairs*, 450 U.S. at 254). By contrast, the Third Circuit, in a decision preceding *Kowalski*, found the burden to be one of production and persuasion, noting that a defendant must prove that "it would have reached the same decisions in the absence of the illegal motivation." *Gavalik*, 812 F.2d at 863. *Accord* *Nemeth v. Clark Equip. Co.*, 677 F. Supp. 899, 903 (W.D. Mich. 1987) (citing *Gavalik*, 812 F.2d at 863). Therefore, the Third Circuit has adopted in *Kowalski* the less stringent standard adopted by the Second Circuit.

<sup>81</sup>*Kowalski*, 82 F.3d at 1289. Thus, the "plaintiff's ultimate burden of persuading the trier of fact . . . merges with the plaintiff's burden of proving that the employer's [proffered] reason is pretextual." *Dister*, 859 F.2d at 1112 (emphasis added). This can be shown "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* (quoting *Burdine*, 450 U.S. at 256). The Supreme Court refined the original *McDonnell Douglas* framework in *Burdine* wherein it added the "merger" concept. Muir, *supra* note 35, at 244.

<sup>82</sup>*Little v. Cox's Supermarkets*, 71 F.3d 637, 642 (7th Cir. 1995). See generally Collingsworth, *supra* note 29, at 333-38 (discussing and critiquing various court requirements for establishing a section 510 *prima facie* case).

<sup>83</sup>812 F.2d 834, 852 (3d Cir. 1987).

<sup>84</sup>*Id.*

<sup>85</sup>*Id.* *Accord* *Humphreys v. Bellaire Corp.*, 966 F.2d 1037, 1043 (6th Cir. 1992); *Poff v. Chattanooga Group, Inc.*, 912 F. Supp. 298, 305 (E.D. Tenn. 1996); *Simpson v. Ernst & Young*, 879 F. Supp. 802, 813 (S.D. Ohio 1994).

inferential evidentiary framework of *McDonnell Douglas* in the first place.<sup>86</sup>

Conversely, the more liberal *Turner-Dister* approach<sup>87</sup> tracks the intent and standard of *McDonnell Douglas* more closely and places a less onerous burden on a plaintiff to make a *prima facie* case.<sup>88</sup> Since employees do not ordinarily have ready access to evidence demonstrating that an employer consciously decided to violate section 510, this formulation places a "very low threshold [for] establishing a *prima facie* case"<sup>89</sup> on a potential claimant. In jurisdictions following *Turner-Dister*, "[a]ll that the plaintiff must show is that he (1) belongs to the protected class, (2) was qualified for the position involved, and (3) was discharged or denied employment under circumstances that provide some basis for believing that the prohibited intent was present."<sup>90</sup> This latter *prima facie* standard appears to be the current trend,<sup>91</sup> although various appellate and district courts continue to subscribe to *Gavalik's* stringent standard.<sup>92</sup>

---

<sup>86</sup>See Collingsworth, *supra* note 29, at 336-37 (discussing *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987), and the failing of the *Gavalik* standard). Interestingly in the same year *Gavalik* was decided, a Third Circuit district court eschewed the *prima facie* case test of that decision by factually distinguishing the mandatory precedent on grounds that the test only applied to section 510 cases where direct evidence of discriminatory conduct existed. See *Furcini v. Equibank, NA*, 660 F. Supp. 1436, 1441-42 (W.D. Pa. 1987) (Aldisert, Circuit J., sitting by designation) (discussing direct evidence found in *Gavalik*). Therefore, the district court did not violate *stare decisis* by adopting a *McDonnell Douglas* analysis test that closely tracks the three-prong *Turner-Dister* standard. *Id.* at 1442.

<sup>87</sup>*Little v. Cox's Supermarkets*, 71 F.3d 637, 642 (7th Cir. 1995) (citing *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 347 (3d Cir. 1990)). The court in *Little* coined this term which derives from the Third Circuit's decision in *Turner*, which adopted the *prima facie case* standard forwarded by *Dister*. *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1114-15 (2d Cir. 1988). Interestingly, without any discussion, the *Turner* court did not follow the *Gavalik prima facie* case standard decided by that court three years earlier.

<sup>88</sup>*DeVOLL v. Burdick Painting, Inc.*, 35 F.3d 408, 411 (9th Cir. 1994). See also *Turner*, 901 F.2d at 347 (noting that employee's threshold requirement of establishing a *prima facie* case is "not a stringent one"); *Dister*, 859 F.2d at 1114 (stating that "plaintiff's burden of proof at the *prima facie* stage is *de minimis*").

<sup>89</sup>*DeVOLL*, 35 F.3d at 411.

<sup>90</sup>*Turner*, 901 F.2d at 347 (citing *Dister*, 859 F.2d at 1115). Accord *Little*, 71 F.3d at 642. Although an inference will suffice to establish a *prima facie* case, more than "mere subjective belief or debatable assertions" are required. *Id.* at 643.

<sup>91</sup>Muir, *supra* note 35, at 245 (discussing refinement of the *prima facie* case standard since *Gavalik*). A *prima facie* case must be proven by a preponderance of the evidence under Title VII. *Id.* at 244.

<sup>92</sup>See, e.g., *Humphreys v. Bellaire Corp.*, 966 F.2d 1037, 1043 (6th Cir. 1992) (citing *Gavalik* standard for *prima facie* case); *Simpson v. Ernst & Young*, 879 F. Supp. 802, 813 (S.D. Ohio 1994) (citing *Humphreys'* standard for *prima facie* case).

F. *Section 510 Legislative History: Balancing Employer Rights to Amend Welfare Benefit Plans*

Since welfare benefit plans do not vest automatically pursuant to ERISA, "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans."<sup>93</sup> Such welfare plan alterations, however, must still follow formal procedures set forth in the plan.<sup>94</sup> This unilateral amendment provision reflects Congress' recognition that if welfare benefit plans were subject to vesting like pensions, their administration would be seriously complicated, thus resulting in increased costs to employers.<sup>95</sup> Accordingly, the grant to employers of flexible amendment rights was intended to encourage more generosity toward employees in initial development of nonvesting plans, because they could be readily modified in light of changing economic conditions.<sup>96</sup>

Congress recognized the dangers inherent in granting unilateral welfare benefit plan amendment rights and built various safeguards into ERISA to protect against potential abuses by employers.<sup>97</sup> Since ERISA

---

<sup>93</sup>*Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) (interpreting section 402(b)(3) of ERISA).

<sup>94</sup>*Devlin v. Transportation Communications Int'l Union*, No. 95 Civ. 0742 (JFK), 1997 WL 570512, at \*4 (S.D.N.Y. Sept. 15, 1997). ERISA § 402(b)(3) requires that "[e]very employee benefit plan shall provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." 29 U.S.C. § 1102(b)(3) (1994). Despite the fact that welfare benefits do not vest automatically, employers may make enforceable promises by contract, *Devlin*, 1997 WL 570512, at \*4, and welfare benefit plans may vest contractually under certain circumstances. *Adcox v. Teledyne, Inc.*, 21 F.3d 1381, 1389 (6th Cir. 1994). However, "[e]xtra-ERISA commitments, such as the right to receive free lifetime coverage, must be found in the plan documents and stated in clear and express language." *Devlin*, 1997 WL 570512, at \*4 (quoting *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 58 F.3d 896, 902 (3d Cir. 1995)). Furthermore, ERISA "does not regulate the substantive content of welfare-benefit plans," *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985), nor does it "create any substantive entitlement to employer-provided . . . welfare benefits." *Curtiss-Wright Corp.*, 514 U.S. at 78.

<sup>95</sup>*Owens v. Storehouse, Inc.*, 984 F.2d 394, 398 (11th Cir. 1993) (citing H.R. REP. NO. 93-807, at 60 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4670, 4726; S. REP. NO. 93-383, at 51 (1974), reprinted in 1974 U.S.C.C.A.N. 4890, 4935).

<sup>96</sup>*Heath v. Varsity Corp.*, 71 F.3d 256, 258 (7th Cir. 1995). "If firms were stuck with terms that in retrospect proved to be excessively costly, they would err initially on the side of omission." *Id.* See also *Owens*, 984 F.2d at 398 n.5 ("Congress feared that the imposition of vesting requirements on welfare benefit plans might discourage employers from offering any [benefits] at all.").

<sup>97</sup>*Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990). The Congressional safeguards include: "[section] 514(a), 29 U.S.C. § 1144(a) [(1996)], ERISA's broad pre-emption provision; [section] 510, 29 U.S.C. § 1140 [(1994)], which proscribes interference with

was intended to "promote the interests of employees and their beneficiaries in employee benefit plans,"<sup>98</sup> Congress added section 510 to counterbalance the flexibility an employer enjoys to amend or eliminate its welfare plans with measures to ensure that employers do not "circumvent the provision of promised benefits."<sup>99</sup> Thus, Congress struck an intentional legislative balance in promulgating section 510 and it "upsets the . . . balance to push the outcome farther in either direction" than intended.<sup>100</sup> Therefore, section 510 should be interpreted to play the dual role of protecting an employee's right to benefits under an ERISA-qualifying welfare benefit plan and preserving an employer's right to change such plan.<sup>101</sup> Section 510 should not be viewed as restricting an employer's right to amend benefit plans, even if the amendment has disparate effects on employees.<sup>102</sup> However, once an "employer decides to offer benefits," section 510 ensures that it "allow[s] its employees to take advantage of the plan and . . . administer[s] the plan in a nondiscriminatory fashion."<sup>103</sup>

ERISA's flexible welfare benefit amendment provision is necessarily at odds with the language of section 510, because amending or terminating a plan could readily be interpreted as "interference" with an employee's attainment of a plan right.<sup>104</sup> Some courts have resolved

---

rights protected by ERISA; and [section] 502(a), 29 U.S.C. § 1132(a) [(1996)], a carefully integrated civil enforcement scheme." *Ingersoll-Rand Co.*, 498 U.S. at 137 (internal quotation marks and citation omitted).

<sup>98</sup>*Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983).

<sup>99</sup>*Ingersoll-Rand Co.*, 498 U.S. at 143. *Accord Heath*, 71 F.3d at 258 ("[Section] 510 helps to make promises credible."); *Seaman v. Arvida Realty Sales*, 985 F.2d 543, 547 (11th Cir. 1993) (stating that Congress intended to ensure that "once an employer decides to offer [welfare] benefits . . . [it will] be bound by the terms of its plan.>").

<sup>100</sup>*Heath*, 71 F.3d at 258.

<sup>101</sup>*Seaman*, 985 F.2d at 546.

<sup>102</sup>*Id.* at 547 (citing *Deeming v. American Standard, Inc.*, 905 F.2d 1124, 1127 (7th Cir. 1990)). In fact, some courts have allowed plan amendments even though it affected only a single employee. See *Mattei v. Mattei*, 126 F.3d 794, 800-01 (6th Cir. 1997) (discussing *Haberern v. Kaupp Vascular Surgeons Ltd.*, 24 F.3d 1491, 1502 (3d Cir. 1994), which recognized an employer's right to amend plan for purpose of affecting a single employee; and *McGath v. Auto-Body N. Shore, Inc.*, 7 F.3d 665, 668 (7th Cir. 1993), which allowed an employer to amend plan twice before same employee became eligible for benefits). Presumably, these decisions can be reconciled by interpreting section 510 to prohibit discrimination aimed only at the employment relationship, and not amendment of the plan itself, albeit accomplishing the same result. *Mattei*, 126 F.3d at 801 (citing *Aronson v. Servus Rubber, Div. of Chromalloy*, 730 F.2d 12, 16 (1st Cir. 1984), which noted possibility that such acts could be viewed as pretextual and may violate section 510).

<sup>103</sup>*Seaman*, 985 F.2d at 547.

<sup>104</sup>See generally *Recent § 510 Cases Continue to Probe the Boundaries of This Elusive*

this dichotomy by construing section 510 to "only proscribe[ ] interference with the *employment relationship* for the purpose of denying a participant benefits,"<sup>105</sup> not to "proscribe discrimination in the provision of employee benefits."<sup>106</sup> Thus, the concept that "discrimination, to violate section 510, must affect the individual's employment relationship in some substantial way [has become] thoroughly embedded in [section] 510 jurisprudence."<sup>107</sup> Nonetheless, some courts have still encountered difficulties reconciling an employer's freedom to amend welfare benefit plans with Congress' concomitant section 510 restrictions.<sup>108</sup>

Section 510's protection, however, has not been limited only to employer actions affecting the "employment relationship," but also encompasses a cause of action for plan beneficiaries.<sup>109</sup>

---

*Statute*, 5 ERISA LITIG. REP., June 1996, at 26, 32-33 (discussing courts' confusion in applying section 510 to plan amendments).

<sup>105</sup>*Devlin v. Transportation Communications Int'l Union*, No. 95 Civ. 0742 (JFK), 1997 WL 570512, at \*6 (S.D.N.Y. Sept. 15, 1997) (emphasis added). "It is 'a fundamental prerequisite to [a] [section] 510 action . . . that the employer-employee relationship, and not merely the plan, was changed in some discriminatory or wrongful way.'" *Id.* (quoting *Deeming*, 905 F.2d at 1127). The majority of "reported decisions under section 510 involve an employer-employee relationship." *Blake v. H-2A & H-2B Voluntary Employees' Beneficiary Ass'n*, 952 F. Supp. 927, 932 (D. Conn. 1997).

<sup>106</sup>*Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983).

<sup>107</sup>*Mattei v. Mattei*, 126 F.3d 794, 799 (6th Cir. 1997) (citation and internal quotation marks omitted). The court discusses the employment relationship nexus to section 510 violation as originated in *West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980), as well as citing numerous cases holding the same. *Mattei*, 126 F.3d at 799. *See, e.g., Devlin*, 1997 WL 570512 at \*6 (finding labor union that amended welfare plan to require retired participants to contribute \$100 per month as a condition of continued eligibility for health insurance did not interfere with the employment relationship within the meaning of section 510). Despite the well-established employment relationship requirement of section 510 jurisprudence, confusion still plagues the lower federal courts on occasion in attempting to reconcile the inherent tension represented by section 510 interference claims in the context of plan amendment cases. *See generally* Rossbacher et al., *supra* note 19.

<sup>108</sup>*See, e.g., Heath v. Varsity Corp.*, 71 F.3d 256, 257-58 (7th Cir. 1995) (discussing district court's improper reconciliation of ERISA's plan amendment right with section 510). The district court had erroneously concluded that there was no difference between firing the plaintiff employee or abolishing the welfare benefit plan in its entirety to prevent an employee from becoming eligible for benefits. *Id.* at 257.

<sup>109</sup>*Mattei*, 126 F.3d at 799-800 (noting that the legislative history revealing Congress' intent to "primarily" protect the employment relationship does not necessarily restrict section 510's reach to such cases alone). In *Mattei*, the court recognized a section 510 action that allowed a beneficiary to bring suit against the decedent's estate for interference with pension fund payments. *Id.* at 804.

### G. *Split Among the Lower Courts: Section 510 and Welfare Benefits*

Prior to the Supreme Court's decision in *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Railway*,<sup>110</sup> the courts of appeal differed on whether section 510's reach was limited to vesting benefits only, thereby excluding nonvesting welfare benefits from its protective sphere. The split of authority can be traced to the differing statutory treatment of ERISA's plan amendment provision for employers, and its inherent tension with section 510's proscription against interference with employee benefit rights.

#### 1. Courts That Recognize Protection of Welfare Benefits

A majority of appellate courts, including the First,<sup>111</sup> Fourth,<sup>112</sup> Fifth,<sup>113</sup> Sixth,<sup>114</sup> Seventh,<sup>115</sup> Eleventh,<sup>116</sup> and District of Columbia<sup>117</sup> Circuits, have held or implied that section 510's protection of employee interests in benefit plans extends to both vested and nonvesting benefits.<sup>118</sup> Some of these courts cite the proposition that section 510's unambiguous language draws no distinction between "vested" and "unvested" benefits, and that ERISA defines "plan" to encompass both.<sup>119</sup> According to this interpretation, therefore, section 510 should not be narrowly construed to limit its protection to vested benefits only.<sup>120</sup> In

---

<sup>110</sup>117 S. Ct. 1513 (1997).

<sup>111</sup>*Barbour v. Dynamics Research Corp.*, 63 F.3d 32, 38 (1st Cir. 1995), *cert. denied*, 516 U.S. 1113 (1996) (implying no distinction between vesting and nonvesting benefit plans by recognizing section 510 claim for nonvesting early retirement benefits).

<sup>112</sup>*Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 236-37 (4th Cir. 1991) (recognizing section 510 claim for additional nonvesting benefits accruing in the future).

<sup>113</sup>*McGann v. H & H Music Co.*, 946 F.2d 401, 408 (5th Cir. 1991) (reaching merits of section 510 medical benefits discrimination).

<sup>114</sup>*Shahid v. Ford Motor Co.*, 76 F.3d 1404, 1411 (6th Cir. 1996) (recognizing that section 510 is not limited in application to only benefits that are capable of vesting).

<sup>115</sup>*Heath v. Varsity Corp.*, 71 F.3d 256, 257 (7th Cir. 1995) (rejecting district court's holding that section 510 protects *only* vested benefits).

<sup>116</sup>*Seaman v. Arvida Realty Sales*, 985 F.2d 543, 546 (11th Cir. 1993) (noting that section 510 is not limited necessarily to vested benefit rights).

<sup>117</sup>*Andes v. Ford Motor Co.*, 70 F.3d 1332, 1336 (D.C. Cir. 1995) (discussing merits of section 510 claim for interference with nonvested early retirement benefits eliminated by plant sale).

<sup>118</sup>The Second Circuit has not ruled on this issue. *Riemer*, *supra* note 1, at 1 n.3.

<sup>119</sup>*Shahid v. Ford Motor Co.*, 76 F.3d 1404, 1412 (6th Cir. 1996); *Heath*, 71 F.3d at 258.

<sup>120</sup>*Shahid*, 76 F.3d at 1411. *Accord* *Kross v. Western Elec. Co.*, 701 F.2d 1238, 1242 (7th Cir. 1983) ("ERISA is thus a remedial statute, the coverage of which should be liberally

addition, some of these courts reconcile the dichotomy between employers' ERISA plan amendment rights and section 510's proscription on interfering with employees' benefit rights<sup>121</sup> by noting that ERISA's legislative history reveals Congress' intent to strike a careful balance between these provisions.<sup>122</sup> An employer's right to amend or terminate its welfare benefit plans is not necessarily abridged by section 510, but merely requires that the proper plan protocol be followed in making benefit changes.<sup>123</sup> An employer may not, of course, discharge an employee as a means of denying eligibility to participate in existing benefit plans, this being precisely the conduct that section 510 proscribes.<sup>124</sup>

The Seventh Circuit's decision in *Heath v. Varsity Corp.*<sup>125</sup> is typical of cases recognizing section 510 interference claims for welfare benefits. In *Heath*, an employee with vested pension rights, terminated shortly before becoming eligible for nonvesting early retirement benefits, brought a section 510 action against his employer claiming unlawful interference with his benefit rights.<sup>126</sup> Although the district court granted summary judgment for the defendant finding that section 510 only protects vested benefit rights,<sup>127</sup> the appellate court reversed, holding that section 510 also protects nonvesting welfare benefits.<sup>128</sup> The court rejected the district court's narrow reading of section 510 which stemmed from its attempt to reconcile ERISA's inherent contradiction between section 510's noninterference provision and an employer's unilateral plan amendment rights.<sup>129</sup> The Seventh Circuit concluded that section 510's unambiguous

---

construed, and exemptions from which should be confined to their narrow purpose.") (citation omitted).

<sup>121</sup>See *supra* Part II.F (discussing inherent tension created by section 510 with ERISA plan amendment rights).

<sup>122</sup>*Seaman v. Arvida Realty Sales*, 985 F.2d 543, 546-47 (11th Cir. 1993).

<sup>123</sup>*Id.* at 547.

<sup>124</sup>*Id.* at 546. *Accord* *Aronson v. Servus Rubber, Div. of Chromalloy*, 730 F.2d 12, 16 (1st Cir. 1984) (noting that [section] 510 "relates to discriminatory conduct directed against individuals, not to actions involving the plan in general").

<sup>125</sup>71 F.3d 256 (7th Cir. 1995).

<sup>126</sup>*Id.* at 257.

<sup>127</sup>*Id.*

<sup>128</sup>*Id.* at 257-58.

<sup>129</sup>*Heath*, 71 F.3d at 257-58. The district court found no distinction between amending a plan to deny benefits and terminating an employee to accomplish the same end holding that "[t]he greater power to abolish the plan entails the lesser power to deny benefits to particular persons." *Id.* at 257. Therefore, the district court resolved the contradiction by limiting section 510 to only vested benefits which are not implicated by an employer's freedom to unilaterally amend benefit plans. *Id.* at 258. See also *supra* Part II.F (discussing ERISA's inherent conflict

language and legislative history support a broad interpretation that included nonvesting welfare benefits.<sup>130</sup>

Similarly, in *Seaman v. Arvida Realty Sales*,<sup>131</sup> the Eleventh Circuit rejected arguments that section 510's anti-interference provisions were limited to vested rights.<sup>132</sup> The court stated that the "validity of a . . . [section] 510 claim does not hinge upon whether the benefits involved are vested[,] but upon the purpose of the discharge."<sup>133</sup> Recognizing section 510's conflict with an employer's ERISA plan amendment rights, the court clarified that its holding should not be construed as a limitation on those rights.<sup>134</sup>

## 2. Courts That Do Not Recognize Protection of Welfare Benefits

Both the Ninth<sup>135</sup> and Tenth<sup>136</sup> Circuits have held that section 510 does not protect unvested welfare benefits. Prior to the Supreme Court's reversal of its decision in *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Railway*,<sup>137</sup> the Ninth Circuit had limited section 510 to protecting only those benefit rights that are capable of vesting.<sup>138</sup> In *Inter-Modal Rail*, the court held that section 510 "does not prohibit an employer from altering the package of [welfare] benefits that it provides its employees, but only from interfering with an employee's use of the benefits provided."<sup>139</sup> Since welfare benefits do not vest like pensions under ERISA, an employer can amend or eliminate welfare benefit plans at any time, thereby precluding the application of section 510.<sup>140</sup> The Ninth Circuit relied heavily on its prior holdings in *DeVOLL v. Burdick*

---

between plan amendment rights and section 510's anti-interference clause).

<sup>130</sup>*Heath*, 71 F.3d at 258.

<sup>131</sup>985 F.2d 543 (11th Cir. 1993).

<sup>132</sup>*Id.* at 545-46. In *Seaman*, the court found an employer violated the express terms of section 510 when it threatened to terminate employees who refused to accept their same positions as independent contractors, but without the benefits they previously enjoyed. *Id.* at 547.

<sup>133</sup>*Id.* at 546.

<sup>134</sup>*Id.* at 547.

<sup>135</sup>See *DeVOLL v. Burdick Painting, Inc.*, 35 F.3d 408 (9th Cir. 1994); *West v. Greyhound Corp.*, 813 F.2d 951 (9th Cir. 1987).

<sup>136</sup>*Woolsey v. Marion Lab., Inc.*, 934 F.2d 1452 (10th Cir. 1991).

<sup>137</sup>80 F.3d 348 (9th Cir. 1996), *vacated*, 117 S. Ct. 1513 (1997).

<sup>138</sup>*Id.* at 351.

<sup>139</sup>*DeVOLL v. Burdick Painting, Inc.*, 35 F.3d 408, 411 (9th Cir. 1994). See *infra* Part III.A for particulars of the case.

<sup>140</sup>*Inter-Modal Rail*, 80 F.3d at 351.

*Painting, Inc.*<sup>141</sup> and *West v. Greyhound Corp.*<sup>142</sup> to support its position.<sup>143</sup> Both of these decisions found as dispositive the existence of a present or vested right to receive benefits as a prerequisite for section 510 relief, and furthermore, that ERISA's purpose was primarily to protect vested pension benefits.<sup>144</sup>

In its holding in *Inter-Modal Rail*, the Ninth Circuit confused ERISA's flexible welfare benefit amendment right with section 510's noninterference provision. The court, in essence, incorrectly reconciled the inherent statutory tension<sup>145</sup> by excluding application of section 510 to nonvesting welfare benefits, rationalizing that the two provisions must be mutually exclusive. This approach, however, largely misconstrues the broad remedial nature of ERISA and its plain statutory language.<sup>146</sup>

Some courts have simply denied the actionability of section 510 claims for unvested benefits without any resort to ERISA's welfare benefit plan amendment provisions as justification. In *Woolsey v. Marion Lab., Inc.*,<sup>147</sup> the Tenth Circuit addressed an appeal from a plaintiff claiming his employer impermissibly interfered with his ERISA right to nonvested welfare benefits by denying him continued participation in an employee profit-sharing plan following his resignation.<sup>148</sup> The court held that the plaintiff did not state an actionable claim under section 510 because he was not denied any "vested right" which was a prerequisite to finding an interference action under ERISA.<sup>149</sup>

---

<sup>141</sup>35 F.3d 408, 411 (9th Cir. 1994) (holding that employer did not interfere with section 510 by amending its medical benefit plan).

<sup>142</sup>813 F.2d 951, 955 (9th Cir. 1987) (finding in retaliation case that employees claiming section 510 violation failed because they had no unaccrued or vested rights which were adversely affected).

<sup>143</sup>*Inter-Modal Rail*, 80 F.3d at 351.

<sup>144</sup>*See DeVOLL*, 35 F.3d at 411; *West*, 813 F.2d at 954-55.

<sup>145</sup>*See supra* Part ILF (discussing ERISA's inherent welfare benefit plan amendment rights conflict with section 510).

<sup>146</sup>*See supra* Part IIA.

<sup>147</sup>934 F.2d 1452 (10th Cir. 1991).

<sup>148</sup>*Id.* at 1454-56. Following his resignation, Woolsey was paid his vested benefit under the profit-sharing plan in all cash, contrary to his request that half of his disbursement be made in company stock. *Id.* Shortly thereafter, a stock split occurred which would have increased the value of Woolsey's benefit significantly had he been paid in the manner requested. He brought suit for the amount of the unrealized gain. *Id.*

<sup>149</sup>*Id.* at 1461. The court also held that another fundamental prerequisite of a section 510 action was that the employment relationship must be affected in some "discriminatory or wrongful way." *Id.* Since Woolsey had resigned, the employer's denial of requested payment method did not adversely affect the employment relationship and the section 510 claim similarly failed to state a claim on this basis. *Id.* at 1461-62. *See also Kincaid v. Harcourt Brace Jovanovich, Inc.*, 863 F. Supp. 1471, 1479 (D. Kan. 1994) (citing *Woolsey* for

III. DECISIONAL ANALYSIS OF *INTER-MODAL RAIL*A. *Facts*

Petitioners were former employees of Santa Fe Terminal Services, Inc. (SFTS), a wholly-owned subsidiary of The Atchison, Topeka and Santa Fe Railway Co. (ATSF).<sup>150</sup> In their capacity as "inter-modal" workers at ATSF's Hobart Yard in Los Angeles, California, they were employed to transfer cargo between railcars and freight trucks.<sup>151</sup> Under a collective bargaining agreement (CBA) between SFTS and the Teamsters Union, they enjoyed "pension, health, and welfare benefits through employee benefit plans subject to ERISA's comprehensive regulations."<sup>152</sup>

SFTS had performed services for ATSF at the Hobart Yard for fifteen years without a contract until spring 1990 when a formal service agreement was entered into by the parties.<sup>153</sup> Seven weeks later, pursuant to the agreement, ATSF terminated the contract with SFTS and competitively bid the yard work.<sup>154</sup> In-Terminal Services (ITS) won the inter-modal contract for Hobart Yard, but unlike SFTS, offered a substantially reduced pension and welfare benefit package to the former SFTS employees.<sup>155</sup> Workers who refused to accept employment with ITS were subsequently terminated.<sup>156</sup>

The former SFTS employees sued ATSF, ITS, and SFTS in federal district court claiming that the respondents had violated ERISA section 510 in terminating them "for the purpose of interfering with the attainment of . . . right[s] to which they would have become entitled under the ERISA pension and welfare plans adopted pursuant to the SFTS-Teamsters collective bargaining agreement."<sup>157</sup> The petitioners

---

proposition that a "violation of [section 510] requires proof that an employer deprived the plaintiff of a vested right").

<sup>150</sup>*Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry.*, 117 S. Ct. 1513, 1514 (1997).

<sup>151</sup>*Id.*

<sup>152</sup>*Id.*

<sup>153</sup>*Id.*

<sup>154</sup>*Inter-Modal Rail*, 117 S. Ct. at 1514.

<sup>155</sup>*Id.*

<sup>156</sup>*Id.* at 1514-15.

<sup>157</sup>*Id.* at 1515 (internal quotation marks omitted) (alteration in original). The former rail employees also claimed that the defendant companies violated ERISA section 510 by interfering with their pension benefit eligibility under the Railroad Retirement Act of 1974. *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Railway*, 80 F.3d 348, 350

asserted that the substitution of ITS for SFTS precluded them from filing claims which they would have enjoyed under their more generous former benefit package at least for the remainder of their CBA, had SFTS remained their employer.<sup>158</sup>

### B. District and Circuit Court

The district court granted the respondent's subsequent motion for failure to state a claim upon which relief can be granted, and dismissed both the ERISA section 510 pension and welfare benefits interference claims.<sup>159</sup> On appeal, the Ninth Circuit affirmed in part and reversed in part.<sup>160</sup> Citing *Ingersoll-Rand Co. v. McClendon*,<sup>161</sup> the court reinstated the plaintiffs' pension benefit interference claim holding that "section 510 . . . 'protects plan participants from termination motivated by an employer's desire to prevent a pension from vesting.'<sup>162</sup> However, the court affirmed the dismissal of the claim relating to welfare benefits stating that "[u]nlike pension benefits, welfare benefits do not vest . . . [and] 'employers remain free to unilaterally *amend* or *eliminate* . . . [welfare] plans.'<sup>163</sup> The court concluded that "employees have no present 'right' to future, anticipated . . . benefits" and the "existence of a present 'right' is [a] prerequisite to section 510 relief."<sup>164</sup> In sum, the

---

(9th Cir. 1996), *vacated*, 117 S. Ct. 1513 (1997). Pursuant to ERISA § 1003(b), the Ninth Circuit concluded that pension coverage under the Railroad Act is excluded from ERISA's purview and ultimately held the district court properly dismissed this claim. *Id.* at 351. Plaintiffs also filed a concurrent negligence claim for work related injuries under the Federal Employer's Liability Act, 45 U.S.C. § 51 (1994). *Inter-Modal Rail*, 80 F.3d at 352-53. This claim, however, is beyond the scope of this article and will not be addressed.

<sup>158</sup>*Inter-Modal Rail*, 117 S. Ct. at 1515.

<sup>159</sup>*Inter-Modal Rail*, 80 F.3d at 349.

<sup>160</sup>*Id.* at 353.

<sup>161</sup>498 U.S. 133 (1990).

<sup>162</sup>*Inter-Modal Rail*, 80 F.3d at 350-51 (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 143 (1990)).

<sup>163</sup>*Id.* at 351 (citations omitted).

<sup>164</sup>*Id.* (citing *West v. Greyhound Corp.*, 813 F.2d 951, 954 (9th Cir. 1987)). The Ninth Circuit's language seemed to indicate that it would recognize a section 510 "retaliation" action involving welfare benefits. *See id.* (noting that section 510 only prohibits an employer from "interfering with an employee's use of the [welfare] benefits provided") (emphasis added) (quoting *DeVOLL v. Burdick Painting, Inc.*, 35 F.3d 408, 411 (9th Cir. 1994)). The court did acknowledge that other jurisdictions have recognized section 510 actions involving nonvested welfare benefits. *Id.* at 351 n.6 (citing *Seaman v. Arvida Realty Sales*, 985 F.2d 543 (11th Cir. 1993); *Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129 (7th Cir. 1992)).

court held that "[section] 510 [does] not state a cause of action for interference with [nonvesting] welfare benefits."<sup>165</sup>

### C. Supreme Court

The Supreme Court granted *certiorari* to "resolve a conflict among the Courts of Appeals" on the issue of whether interference with attainment of welfare benefits states a valid cause of action under ERISA section 510.<sup>166</sup> Writing an opinion for a *unanimous* Court, Justice O'Connor held that section 510's proscription against interference with protected rights *does* apply to welfare benefit plans and is not limited to interference with vested rights.<sup>167</sup> The Court vacated the Ninth Circuit's judgment on the welfare benefit issue and remanded the case for further proceedings.<sup>168</sup>

In reconciling the lower court controversy, the Supreme Court relied heavily on both the statutory language and the Congressional intent of section 510.<sup>169</sup> Justice O'Connor noted that the Ninth Circuit's interpretation of section 510 as only protecting vested rights from interference was "contradicted by the plain language" of the statute.<sup>170</sup> Section 510 makes it "unlawful to 'discharge . . . a [plan] participant or beneficiary . . . for the purpose of interfering with the *attainment of any right* to which such participant may become entitled under *the plan*.'"<sup>171</sup> Because ERISA defines "plan" to include welfare benefit plans, *and* such plans are exempt from its "stringent vesting requirements,"<sup>172</sup> Congress' intent forecloses the narrow interpretation given by the Ninth Circuit that "[section] 510's interference clause applies only to 'vested' rights."<sup>173</sup> If Congress intended section 510 to protect vested rights alone, it could

---

<sup>165</sup>*Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry.*, 117 S. Ct. 1513, 1515 (1997).

<sup>166</sup>*Id.*

<sup>167</sup>*Id.* at 1514. The Court cited several circuit court decisions recognizing interference with welfare benefit rights as actionable under section 510 including: *Shahid v. Ford Motor Co.*, 76 F.3d 1404, 1411 (6th Cir. 1996); *Heath v. Varsity Corp.*, 71 F.3d 256, 258 (7th Cir. 1995); *Andes v. Ford Motor Co.*, 70 F.3d 1332, 1336 (D.C. Cir. 1995); *Seaman*, 985 F.2d at 546; *McGann v. H & H Music Co.*, 946 F.2d 401, 408 (5th Cir. 1991).

<sup>168</sup>*Inter-Modal Rail*, 117 S. Ct. at 1517. *See infra* text accompanying notes 188-90 (discussing the remand issue).

<sup>169</sup>*Inter-Modal Rail*, 117 S. Ct. at 1515-16.

<sup>170</sup>*Id.* at 1515.

<sup>171</sup>*Id.* (alteration in original) (quoting 29 U.S.C. § 1140 (1994)).

<sup>172</sup>*Id.*

<sup>173</sup>*Inter-Modal Rail*, 117 S. Ct. at 1515.

have expressly limited the statutory language accordingly. However, "[section] 510 draws no distinction between those rights that 'vest' under ERISA and those that do not."<sup>174</sup>

The Court next addressed the Ninth Circuit's reliance on an employer's ERISA right to unilaterally amend welfare benefit plans as justification to limit section 510's protection to "vested" benefits only.<sup>175</sup> Affirming its prior holding in *Curtiss-Wright Corp. v. Schoonejongen*,<sup>176</sup> the Court acknowledged that an employer is "generally free under ERISA, for any reason at any time, to adopt, modify, or terminate [its] welfare [plan]."<sup>177</sup> Justice O'Connor noted that this amendment right "does not, as the Court of Appeals apparently thought, justify a departure from [section] 510's plain language."<sup>178</sup> Congress intentionally created the conflict between the freedom an employer enjoys to amend its welfare benefit plans with section 510's noninterference provision as a compromise.<sup>179</sup> The Court found that section 510 counterbalances this amendment flexibility by "ensuring that employers do not 'circumvent the provision of promised benefits.'"<sup>180</sup> The amendment power does not confer a license on employers to take adverse actions against plan participants or beneficiaries with the intended purpose of interfering with their attainment of welfare benefit plan rights. Rather, the inherent statutory tension represents a "careful balance of competing interests, and is most surely not the type of 'absurd or glaringly unjust' result . . . that would warrant departure from the plain language of . . . [section] 510."<sup>181</sup>

The Court also declared that although an employer retains the "unfettered right" to amend welfare benefit plans, it must strictly follow

---

<sup>174</sup>*Id.*

<sup>175</sup>*Id.* at 1516.

<sup>176</sup>514 U.S. 73 (1995).

<sup>177</sup>*Inter-Modal Rail*, 117 S. Ct. at 1516 (alteration in original) (quoting *Curtiss-Wright*, 514 U.S. at 78). The freedom to amend a welfare benefit plan only pertains if this right has not been ceded by contract. *Id.*

<sup>178</sup>*Id.*

<sup>179</sup>*Id.* (noting that "[t]he flexibility an employer enjoys to amend or eliminate its welfare plan is not an accident"). The Court noted that Congress intended the flexible welfare benefit amendment right to encourage an employer to be more generous with their initial benefit package offerings, if they could easily modify these plans to reflect changing business conditions. *Id.* (citing *Heath v. Varsity Corp.*, 71 F.3d 256, 258 (7th Cir. 1995)). See also *supra* Part II.F (discussing Congressional intent and legislative history of section 510 and employer benefit amendment rights).

<sup>180</sup>*Inter-Modal Rail*, 117 S. Ct. at 1516 (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 143 (1990)).

<sup>181</sup>*Id.* (quoting *Ingalls Shipbuilding Inc. v. Director, Office of Workers' Compensation Programs*, 117 S. Ct. 796, 804 (1997)).

the formal procedures delineated in the plan.<sup>182</sup> When an employer follows this course of action in making fundamental business decisions, the section is not violated.<sup>183</sup> Without section 510's enforced adherence to formal amendment procedures however, an employer could alter welfare benefit plans informally "one participant at a time."<sup>184</sup> This would contravene ERISA's fundamental mission to promote and protect the interests of employees and beneficiaries in benefit plans.<sup>185</sup>

Finally, the Court addressed the respondents' argument that even if section 510 encompasses nonvesting benefits, it "only protects an employee's right to cross the 'threshold of eligibility' for welfare benefits,"<sup>186</sup> not those who have already attained rights under a plan. Therefore, as in this case, an employer's post-eligibility actions that adversely affect employment are permissible, since they cannot be said to interfere with the "attainment of right[s] under the plan" as defined by section 510.<sup>187</sup> Because the Ninth Circuit did not reach this issue in its analysis, the Court remanded this decision to the appellate court without any instruction.<sup>188</sup>

#### IV. EVALUATION

The Supreme Court's decision in *Inter-Modal Rail* resolved only one narrow ERISA issue: whether section 510 protects both vested and *unvested* employee benefit rights.<sup>189</sup> Although other major questions involving section 510 jurisprudence and its implications for outsourcing are left unresolved, the significance of the Court's holding is not diminished and establishes a clear direction for the continued evolution of ERISA's noninterference doctrine. It will have profound and far reaching effects on future employment law decisions by the lower courts and on business practices well into the next century. This section

---

<sup>182</sup>*Id.* (citing 29 U.S.C. § 1102(b)(3) (1994), for the requirement that an ERISA welfare benefit plan provides a procedure for amending the plan).

<sup>183</sup>*Id.* Section 510 is only violated when a welfare benefit plan is not amended in a permissible way according to the procedure identified in the plan. *Id.* (citing *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995)).

<sup>184</sup>*Inter-Modal Rail*, 117 S. Ct. at 1516.

<sup>185</sup>See *supra* Part II.A.

<sup>186</sup>*Inter-Modal Rail*, 117 S. Ct. at 1516.

<sup>187</sup>*Id.* (alteration in original).

<sup>188</sup>*Id.* at 1517.

<sup>189</sup>*Id.* at 1514.

explores the contours of *Inter-Modal Rail*'s potential impact and its place in section 510 jurisprudence.

### A. *Precedential Significance of Inter-Modal Rail*

From a precedential standpoint, *Inter-Modal Rail* has laid the groundwork for future lower court decisions by clarifying several aspects of section 510 jurisprudence. Foremost, the opinion unequivocally resolved the sole issue addressed by the Court in holding that section 510 protects not only vested benefit rights, but also *unvested* welfare benefit rights.<sup>190</sup> In this respect, *Inter-Modal Rail* was an affirmation of the lower court decisions which recognized that the broad remedial nature of ERISA intended by Congress did not limit the purview of section 510 to vested benefits alone.<sup>191</sup> In somewhat terse fashion, the Court gave short shrift to the Ninth Circuit's narrow interpretation of section 510 and pointed to the legislative history and plain language of the statute to support its broad holding.<sup>192</sup>

The Court also reaffirmed that the original statutory balance struck by Congress between ERISA's plan amendment rights and section 510 is still in full force.<sup>193</sup> This clarified the critical relationship between both provisions thereby enhancing the prospects for consistency in future decisions among the lower courts.<sup>194</sup> Reconciling this inherent, albeit intentional, statutory tension<sup>195</sup> had been problematic for some lower courts contributing to the split of authority over section 510's reach relative to vested and unvested rights.<sup>196</sup>

*Inter-Modal Rail* also demonstrated that section 510 applies not only to interference with individual welfare benefit rights,<sup>197</sup> but that it is

---

<sup>190</sup>See *supra* Part III.C.

<sup>191</sup>These courts included the First, Fourth, Fifth, Sixth, Seventh, Eleventh, and District of Columbia Circuit Courts of Appeals. See *supra* Part II.G.1.

<sup>192</sup>*Inter-Modal Rail*, 117 S. Ct. at 1516. See also *supra* Part II.G.2 (finding that the Ninth Circuit incorrectly reconciled ERISA's flexible benefit amendment right with section 510's noninterference provision).

<sup>193</sup>"Section 510 has not been amended since it was enacted as part of the original version of ERISA in 1974 . . . [and] Congress did not change the Interference Clause significantly during the legislative process." Muir, *supra* note 35, at 231.

<sup>194</sup>See Riemer, *supra* note 1, at 1.

<sup>195</sup>See *supra* Part II.F (discussing plan amendment rights).

<sup>196</sup>See *supra* Part II.G (discussing the split among the lower courts on vested and unvested rights).

<sup>197</sup>Section 510's applicability is not necessarily limited to actions directed at a single individual since the courts have long recognized actions brought by groups of employees whose benefits were adversely affected by an employer. See, e.g., *Kross v. Western Elec. Co.*, 701

also a pertinent inquiry in the context of decisions involving the business entity itself.<sup>198</sup> Before *Inter-Modal Rail*, some courts were not particularly receptive to section 510 challenges involving the sale of an entire company or a corporate subsidiary in which the effect on individual employee benefits was merely incidental to the business decision.<sup>199</sup> Future courts may now be more predisposed to consider claims involving fundamental business transactions wherein section 510 may be implicated.

Also noteworthy is the fact that the Court's opinion in *Inter-Modal Rail* was unanimous and plainly represented an issue on which both sides of the bench could strongly agree.<sup>200</sup> Therefore, the holding that section 510's noninterference provision applies to nonvesting welfare benefits appears to be firmly rooted in ERISA jurisprudence for the foreseeable future unless amended by the legislature.<sup>201</sup>

### B. *The Remand Issue: Clarifying The Meaning of Section 510's Attainment Language*

The Supreme Court declined to interpret the meaning of the "attainment of any [plan] right"<sup>202</sup> phrase in the statute's anti-interference clause and remanded that task to the Ninth Circuit for resolution.<sup>203</sup> The lower federal courts are divided over whether this phrase limits

---

F.2d 1238, 1243 (7th Cir. 1983) (finding group of employees terminated as a result of work force reduction by employer had cognizable section 510 claim).

<sup>198</sup>See Riemer, *supra* note 1, at 1.

<sup>199</sup>*Id.* See also *Andes v. Ford Motor Co.*, 70 F.3d 1332, 1337 (D.C. Cir. 1995) (noting in context of business sale that "organizational change . . . is really not a prototype of the sort of action that section 510 was primarily designed to cover").

<sup>200</sup>Undoubtedly, a common ground was found upon which Justices of either the interpretivist or noninterpretivist schools of statutory interpretation could agree, largely because the Court adopted a noninterpretivist construction of section 510. See THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 436-37. (Kermit L. Hall et al. eds., 1992) (discussing interpretivist and noninterpretivist methods of statutory interpretation). This is evidenced by the Court's discussion of the "plain language of [section] 510" and remarks that "[h]ad Congress intended to confine [section] 510's protection to 'vested' rights, it could have easily substituted the term 'pension plan' . . . for 'plan,' or the term 'nonforfeitable right' for 'any right'." *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry.*, 117 S. Ct. 1513, 1515 (1997).

<sup>201</sup>Congress has not amended section 510 since its passage in 1974 and it has remained relatively unchanged throughout the legislative process. Muir, *supra* note 35, at 231. It seems unlikely that Congress will be inclined to contravene the Supreme Court's recognition of unvested benefit rights' protection and deny their constituents the fruits of the *Inter-Modal Rail* decision.

<sup>202</sup>29 U.S.C. § 1140 (1994).

<sup>203</sup>*Inter-Modal Rail*, 117 S. Ct. at 1517. See *supra* Part III.C.

interference actions to those employees who are not vested or eligible for benefits under an existing plan, or whether employees already vested or eligible are also afforded protection within the ambit of section 510.<sup>204</sup> The Court's decision in *Inter-Modal Rail* nevertheless failed to resolve this crucial facet of section 510 jurisprudence.<sup>205</sup>

In jurisdictions that construe section 510 narrowly and decline to recognize a cause of action for employees already vested in a retirement plan or eligible to receive welfare benefits, *Inter-Modal Rail* may prove ineffectual as precedent against employers who wait until an employee's pension vests, or they become eligible for welfare benefits, and then immediately terminate them to avoid benefit liability.<sup>206</sup> Such an action, however, would appear to violate the legislative intent of section 510, as noted by the Court, which was to "make [employers'] promises credible"<sup>207</sup> and prevent employers from "informally" amend[ing] their plans one participant at a time.<sup>208</sup> Therefore, *Inter-Modal Rail* may

---

<sup>204</sup>Compare *Heath v. Varsity Corp.*, 71 F.3d 256, 258 (7th Cir. 1995) (holding that section 510 encompasses claims by vested employees for interference with attainment of unvested benefits); *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 238 (4th Cir. 1991) (recognizing that "[section] 510 extends to claims by vested employees for intentional interference with their ability to accrue additional benefits"); *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988) (same); *Clark v. Resistoflex Co., A Div. of Unidynamics Corp.*, 854 F.2d 762, 770 (5th Cir. 1988) (same); *Kross v. Western Elec. Co.*, 701 F.2d 1238, 1242 (7th Cir. 1983) (same); *with Newell v. McDonnell Douglas Corp.*, No. 4:92CV2239SNL, 1994 U.S. Dist. LEXIS 20951, at \*26 (E.D. Mo. Aug. 31, 1994) (holding that the language of section 510 precludes a cause of action by a plaintiff already fully vested in the pension plan); *Donohue v. Custom Mgmt. Corp.*, 634 F. Supp. 1190, 1197-98 (W.D. Pa. 1986) (noting that section 510's scope does not include claims by employees already fully vested in a retirement program); *Corum v. Farm Credit Servs.*, 628 F. Supp. 707, 717 (D. Minn. 1986) (same); *Baker v. Kaiser Alum. & Chem. Corp.*, 608 F. Supp. 1315, 1319 (N.D. Cal. 1984) (same).

<sup>205</sup>See *Outsourcing Work to Reduce Benefit Costs: Is It Legal?*, 4 KAN. EMPL. L. LETTER, Sept. 1997, at 8 [hereinafter *Outsourcing Work*] (noting that the Court's opinion is not clear on "what it means to interfere with an employee's attainment of rights under a welfare plan"). See generally *Muir, supra* note 35, at 225-29 (providing in-depth analysis of courts recognizing and not recognizing a section 510 action for employees already vested or eligible to receive welfare benefits).

<sup>206</sup>See *Buchanan Ingersoll, ERISA Protections Not Limited to Pension Plans*, 7 PA. EMPL. L. LETTER, Sept. 1997 (noting that the remaining issue could "eliminate Section 510 protection in many, if not most, of the cases in which participants claim interference with attainment of welfare benefits").

<sup>207</sup>*Inter-Modal Rail*, 117 S. Ct. at 1516.

<sup>208</sup>*Id.* See also *Kross*, 701 F.2d at 1243 (reversing district court holding that plaintiff failed to state section 510 action for interference with insurance benefits since he was already a participant and had attained his right to benefits). In *Kross*, the court noted that "[t]here is no evidence that Congress intended ERISA to afford less protection to senior employees than that enjoyed by probationary or junior employees who have not qualified for coverage." *Id.*

cause courts inclined to narrowly construe section 510 to rethink their position for fear of being overruled if this issue were to reach the Supreme Court in the future.<sup>209</sup> Conversely, those courts broadly defining section 510's reach may take solace in the fact that the Supreme Court appears to support their more liberal jurisprudence. For the present, the lower courts will be left to fashion their own statutory interpretation of section 510 on the remand controversy.

*C. Outsourcing in the Aftermath of Inter-Modal Rail:  
Will It Chill Corporate America's Favorite Pastime?*

The Supreme Court delivered a clear message in *Inter-Modal Rail*: employers may freely amend welfare benefit plans to reduce costs, but they may not circumvent existing plans and forego plan amendment procedures by relying on outsourcing to achieve those goals in a manner proscribed by section 510.

Some legal and business commentators have suggested that *Inter-Modal Rail* may have a "chilling effect" on business outsourcing decisions<sup>210</sup> since the Supreme Court's opinion does not specifically clarify whether reducing benefit costs through outsourcing is legal, or to what extent an employer can permissibly consider benefit costs in making outsourcing decisions.<sup>211</sup> This view presumes that any time an employer makes an outsourcing decision that results in either terminated or reduced welfare benefits, employees may bring suit for unlawful interference under section 510.<sup>212</sup> This, in turn, may cause employers to eschew

---

<sup>209</sup>One could construe the Supreme Court's remand of the "attainment" clause issue as a challenge to the Ninth Circuit. Speculatively, if it continues their narrow interpretation of ERISA and hold that only employees who are unvested or ineligible for benefits have a section 510 cause of action, the Ninth Circuit may find itself on the wrong side of the Court again. This would be an unattractive proposition following the reversal of the Ninth Circuit's decision in *Inter-Modal Rail*.

<sup>210</sup>See, e.g., Riemer, *supra* note 1, at 1 (noting that the "Supreme Court may have put a brake on this [outsourcing] practice"); Jones, *supra* note 4, at 5B (noting that the Supreme Court's decision "could throw a wrench into corporate America's growing appetite for eliminating jobs and giving the work to outside contractors — called outsourcing").

<sup>211</sup>*Outsourcing Work*, *supra* note 205, at 8. In fact, the Supreme Court's decision in *Inter-Modal Rail* does not even mention the specific intent requirement imposed by many lower courts, see *supra* Part II.D, nor the *prima facie* case requirements or burden shifting technique employed with inferential evidence of section 510 violations. See *supra* Part II.E. If a deterrent exists at all on the number of potentially frivolous lawsuits resulting from *Inter-Modal Rail*, it most likely will stem from the section 510 evidentiary requirements.

<sup>212</sup>See *supra* Part III. "Corporate executives think the high cost of civil justice is a drag on U.S. business and the economy. Fully 83% [of those polled] say their decisions are

outsourcing for fear of becoming embroiled in costly litigation, thereby offsetting any economic savings that might have been realized.

Logically, the "chilling effect" argument has merit, although the fear may be somewhat overstated and may fail to come to fruition for several reasons. First, although more potential claimants may now have a cause of action resulting in increased litigation, there is no reason to believe these suits will ultimately be more successful than before. Even in jurisdictions that previously declined to recognize welfare benefit claims as actionable under section 510,<sup>213</sup> the practical effect of the Court's decision is that more claimants may now have their day in court. There is no indication that a plaintiff's litigation will be more successful now, since *Inter-Modal Rail* has not rendered the formidable burden of proof under section 510 any less arduous.<sup>214</sup> Proof of an employer's "specific intent" to interfere with welfare benefits is still required in most jurisdictions to prevail on the merits.<sup>215</sup> Furthermore, where direct evidence of specific intent is lacking, and claimants must rely on circumstantial evidence, which is typically the case, the modified *McDonnell Douglas Corp. v. Green*<sup>216</sup> scheme of proof and burden-shifting still creates substantial obstacles for litigants, except in the most clearly egregious instances of benefit interference.<sup>217</sup> In indirect evidence cases, plaintiffs in jurisdictions following *Gavalik's prima facie* case

---

increasingly affected by the fear of lawsuits, and a 62% majority say the legal system significantly hampers U.S. competitiveness." *Business Week/Harris Executive Poll, The Verdict from the Corner Office*, BUS. WK., Apr. 13, 1992, at 66. From a retrospective legal action standpoint, one commentator has suggested that *Inter-Modal Rail* may create a "backlash" of class action suits brought by employees terminated as a result of previous outsourcing decisions. Riemer, *supra* note 1, at 1. Companies that outsourced services provided by an entire department may be particularly vulnerable if they left their benefit plans intact after outsourcing for remaining employees. Whether this prediction comes to fruition remains to be seen. The number of possible class claims, however, will be limited by the applicable statute of limitations in each jurisdiction. *Id.* Since Congress has not provided a statute of limitations for section 510 of ERISA, federal courts have generally adopted statutes of limitations from analogous areas of the state law in which they sit. *Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1137 (7th Cir. 1992).

<sup>213</sup>See *supra* Part II.G.2 (noting that Ninth and Tenth Circuit Courts of Appeals did not recognize welfare benefits prior to *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry.*, 117 S. Ct. 1513 (1997)).

<sup>214</sup>See *supra* Part II.E (discussing section 510 *prima facie* case requirements and burden shifting).

<sup>215</sup>See *supra* Part II.D (discussing section 510 specific intent evidentiary requirement). See, e.g., *Shahid v. Ford Motor Co.*, 76 F.3d 1404, 1411 (6th Cir. 1996).

<sup>216</sup>411 U.S. 792 (1973).

<sup>217</sup>See *supra* Part II.E (discussing section 510 burden of proof and the *McDonnell Douglas* framework in general).

standard<sup>218</sup> still bear a heightened burden since they must, essentially, prove specific intent merely to survive summary judgment.<sup>219</sup> The courts may also actively intercede by applying section 510 proof standards more rigorously, if they perceive an influx of frivolous suits.

Another important reason mitigating against decreased outsourcing is that the attractive cost-savings to be realized will unlikely dampen corporate appetites for this business practice, at least for large corporations that can afford the potential increased costs of defending against ERISA claims.<sup>220</sup> Increased litigation costs will be counter-balanced by outsourcing savings, in many instances resulting in a net positive effect on the fiscal bottom line.<sup>221</sup> Also, benefit savings are only one consideration in outsourcing that creates other advantages for employers, such as allowing them to focus energies on their core business competencies or leveling peak workloads without hiring and laying off in-house employees on a recurring basis. Given all these considerations, it is unlikely that large employers will drastically reduce outsourcing; rather, they will probably respond to *Inter-Modal Rail* by approaching outsourcing in a more calculated manner, seeking primarily to avoid liability.

*Inter-Modal Rail* may have a disparate impact on smaller businesses, however, who can ill afford the potential increased cost of defending ERISA claims spawned by outsourcing decisions. These small employers, who are aware of the Court's latest ERISA decision, may eschew outsourcing existing in-house functions to avoid potential litigation. This may place them at a competitive disadvantage with those larger companies that are better equipped to handle higher legal fees and continue outsourcing practices. Moreover, many smaller businesses who cannot afford the luxury of in-house counsel may be "blind-sided" by section 510 claims unless they prudently seek outside legal advice before

---

<sup>218</sup>Recall *Gavalik*'s requirement that the employee demonstrate "(1) prohibited employer conduct (2) taken for the purpose of interfering (3) with attainment of any right to which the employee may become entitled." *Gavalik v. Continental Can Co.*, 812 F.2d 834, 852 (3d Cir. 1987). See *supra* Part II.D.

<sup>219</sup>See *supra* Part II.E (discussing *Gavalik* and the burden of proof standards under ERISA).

<sup>220</sup>One estimate is that outsourcing saves on average between 12 to 22% of the cost of performing similar services in-house. *Outsourcing's Second Wave*, *supra* note 3, at A4. If outsourcing grows into a \$180 billion global business in the next year, as one source predicts, \$21.6 billion could be saved annually by employers through outsourcing based conservatively on an annual savings of 12%. See *Outsource Growing Rapidly*, *supra* note 2 (citation omitted).

<sup>221</sup>If savings are not sufficient to offset increased litigation costs, this could translate into higher consumer prices as businesses will try to pass on litigation costs to the extent the market will bear.

any outsourcing decisions are made. Although smaller employers who offer pension benefits are often keenly aware of ERISA's stringent procedural requirements and protections governing retirement plans, those unwary and less sophisticated than their larger counterparts may not realize that *Inter-Modal Rail* now requires them to tread lightly when nonvesting welfare benefit plans are implicated by outsourcing decisions.

Despite these caveats, the good news for both large and small employers is that *Inter-Modal Rail* clearly confirms their freedom under ERISA to amend or even terminate welfare benefit plans, unless that right has been voluntarily relinquished by contract.<sup>222</sup> The Supreme Court decision in *Inter-Modal Rail* follows numerous lower court decisions that have recognized this well-established ERISA right.<sup>223</sup> That these decisions were sometimes detrimental to litigants by confusing amendment right limits is evidenced by the Ninth Circuit's decision in *Inter-Modal Rail*.<sup>224</sup>

One commentator has also suggested that *Inter-Modal Rail* will complicate a traditional defense used by employers in workforce reduction-related age discrimination claims.<sup>225</sup> Employers typically point to the nondiscriminatory business reason of reducing costs, including welfare benefit plan costs, as a justification for downsizing.<sup>226</sup> This age discrimination defense could constitute an ERISA section 510 violation because plaintiffs need only show that reducing welfare benefits was one factor, not the sole factor, motivating an employer's action.<sup>227</sup> If a terminated employee brings both an age discrimination and an ERISA claim, it appears that a defense of the former claim could result in liability for the latter.

D. *Fundamental Business Decisions and Outsourcing:  
To What Extent May Companies Legally  
Consider Benefit Cost Savings?*

---

<sup>222</sup>*Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry.*, 117 S. Ct. 1513, 1516 (1997). This does not mean that courts might not find that certain plan amendments were pretextual and merely an attempt to circumvent illicitly section 510. For example, an employer might eliminate plan benefits prior to outsourcing to avoid a conflict with section 510, and subsequently reinstate those benefits a short time afterwards.

<sup>223</sup>See *supra* Part II.F (examining section 510's background and employers' right to amend welfare benefit plans).

<sup>224</sup>80 F.3d 348, 351 (9th Cir. 1996), *vacated*, 117 S. Ct. 1513 (1997).

<sup>225</sup>See *Supreme Court Holds Welfare Benefits Enjoy ERISA Protection from Employer Interference*, 8 MASS. EMPL. L. LETTER, June 1997, at 7.

<sup>226</sup>*Id.*

<sup>227</sup>See *supra* Part II.D (discussing section 510 "specific intent" proof requirements).

The Supreme Court's decision in *Inter-Modal Rail* provides little, if any, guidance to employers regarding the extent to which they may legally consider benefit cost savings when deciding to outsource without violating section 510.<sup>228</sup> The Court affirmed that employers retain their fundamental ERISA right to amend or terminate welfare benefit plans, and that section 510 does not prevent them from making legitimate fundamental business decisions.<sup>229</sup> Beyond that, however, both employers and the lower courts are left without guidance to sort out the intricacies of section 510's interplay with an employer's right to make legitimate business decisions that can peripherally impact the provision of welfare benefits. This unresolved issue is significant because a section 510 violation does not require that the intent to reduce or eliminate benefits be the *sole* reason for outsourcing, only that it be part of the overall consideration.<sup>230</sup> Where an employer's goal is solely to reduce its benefit liability in a manner proscribed by section 510,<sup>231</sup> the statutory violation is clear. When benefit cost considerations are only *part* of the motivation in an outsourcing decision, however, *Inter-Modal Rail* does not enable an employer to predict the dollar value, percentage of the total anticipated savings, or other measures attributable to outsourcing cost-savings that will trigger a section 510 violation.<sup>232</sup> This situation occurs often in

---

<sup>228</sup>*Outsourcing Work*, *supra* note 205, at 8 (noting Court's opinion in *Inter-Modal Rail* does not clarify extent to which employers can take benefit costs into consideration when contemplating downsizing); Kenneth S. Weinstock, *Contingent Workers May Be Costly*, 5 CONN. EMPL. L. LETTER, Sept. 1997, at 3 (noting that *Inter-Modal Rail* did not address whether an employer can take benefit costs into consideration when downsizing). Kathy Bergen, *Justices Reinforce Benefits Protection*, CHI. TRIB., May 13, 1997, at 1 (Bus. Sec.) ("The issue of whether employers can take into account the cost of health and welfare benefits when making a decision to outsource work' remains unresolved.") (quoting James Holzhauser, attorney for railroad in *Inter-Modal Rail*).

<sup>229</sup>*Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry.*, 117 S. Ct. 1513, 1516 (1997). *See supra* Part III.C.

<sup>230</sup>*Shahid v. Ford Motor Co.*, 76 F.3d 1404, 1411 (6th Cir. 1996) (citing *Humphreys v. Bellaire Corp.*, 966 F.2d 1037, 1043 (6th Cir. 1992)). *See also supra* Part II.D (discussing section 510's "specific intent" requirement).

<sup>231</sup>*See supra* Part II.D. An employer may alter its benefit plan at any time under ERISA, *Inter-Modal Rail*, 117 S. Ct. at 1516, but may not take specific adverse action directed at the employment situation as a means of reducing benefits in contravention to section 510. *Id.* *See also supra* Part II.F (discussing ERISA plan amendment rights of employers).

<sup>232</sup>*See Nemeth v. Clark Equip. Co.*, 677 F. Supp. 899 (W.D. Mich. 1987). Here, the court held that while pension benefit savings of approximately \$7 million for a five year period were not insubstantial since they accounted for almost 22% of the total anticipated savings from a plant closure, *id.* at 903-04, this alone was insufficient to violate section 510. *Id.* at 910 (noting that the company had met its burden of proving a legitimate nondiscriminatory purpose). Notwithstanding the benefit cost savings, the court concluded that the company would have still made the closure decision because it would have realized nearly \$20 million

business decisions to divest an entire corporate subsidiary, an especially prevalent practice today as companies shuffle assets in search of their most profitable market niches.<sup>233</sup> For the present, employers who contemplate outsourcing or other business decisions which implicate ERISA benefits must do so at their peril.

## V. CONCLUSION

The Supreme Court's ruling in *Inter-Modal Rail* has been treated as a landmark decision in ERISA jurisprudence by some legal commentators.<sup>234</sup> It has also garnered media attention in which it has been described as a "slight" victory for employee benefit rights.<sup>235</sup> Whether this is an accurate characterization will be foretold by future court decisions. Unmistakably, the Court's expansive interpretation of ERISA in recognizing section 510 actions for unvested welfare benefit rights cannot be viewed as anything less than a pro-employee decision, albeit a partial employee victory considering the formidable burden of proof challenges still faced by claimants. However, claimants will now be guaranteed their day in court when an employer takes action adverse

---

additional savings from other factors. *Id.* The issue remains, however, in defining the magic number that companies anticipating sales of subsidiaries, plant closures, or partial outsourcing of services can rely on as a benchmark to avoiding section 510 liability.

<sup>233</sup>In defense of the Court, perhaps it abstained from venturing into this morass, even in *dicta*, because there are numerous permutations possible in structuring outsourcing and often considerations beyond benefits which might drive an employer to ultimately outsource services. Black letter rules appear ill-suited to section 510 interference actions involving outsourcing and an inquiry which takes into account all the circumstances in each case seems better suited for these analyses.

<sup>234</sup>*See, e.g., Outsourcing Work, supra* note 205, at 8 (discussing numerous possible ramifications of *Inter-Modal Rail* on employer actions involving benefits); Riemer, *supra* note 1, at 1 (characterizing *Inter-Modal Rail* as a "landmark case" because of its potential impacts on outsourcing).

<sup>235</sup>Bergen, *supra* note 228, at 1 ("U.S. Supreme Court . . . gave American workers a slightly stronger leg to stand on when employers decide to transfer operations to outside companies."). *Accord Courts Swats Strategy to Cut Benefits*, SALT LAKE CITY TRIB., May 13, 1997, at A1 (same). Perhaps the perception of *Inter-Modal Rail* as only a slight victory by the media is attributable to the narrow issue decided by the Court on vested and unvested benefit rights under section 510, and the big issue left unresolved on remand which was whether the outsourcing decision was a lawful business transaction. *But see* Edward Felsenthal, *High Court Backs Workers On Benefits*, WALL ST. J., May 13, 1997, at A3 ("From the employee and participant point of view, [the ruling] was very important[ ]' . . . [because otherwise] 'there would be the potential for employers and plan sponsors to discriminate against people' by discharging employees whose medical benefits are high.") (alteration in original) (quoting Mary Ellen Signorille, lawyer for American Association of Retired Persons filing *amicus curiae* brief for the rail workers).

to the employment relationship by interfering with employee welfare benefit rights.

Conversely, employers contemplating outsourcing that implicates welfare benefits as part of the cost-savings equation would be well advised to carefully structure those transactions if they want to minimize section 510 interference claims. The Court did reemphasize that an employer's welfare benefit amendment rights under ERISA remain intact after *Inter-Modal Rail*, but no specific guidance was forthcoming on how outsourcing might be accomplished without incurring section 510 liability. Companies seeking to outsource will be forced to play Russian roulette in structuring their outsourcing deals in the hope of finding those deals that avoid ERISA liability.<sup>236</sup>

Two things appear likely for the future as a result of *Inter-Modal Rail*. First, Corporate America will not abandon outsourcing anytime soon, as this business management practice represents tremendous potential cost benefits. Directors will be inclined to play the game smarter and will continue to gamble with liability when shareholder dividends are at stake. Second, *Inter-Modal Rail* is not the last word from the Supreme Court on this issue; rather, it is the proverbial tip of the section 510 iceberg.

*Frank J. Spanitz*

---

<sup>236</sup>*Cf.* Weinstock, *supra* note 228, at 3 (explaining that "questions remain regarding whether reductions in force violate ERISA and whether using the employees who used to be full-time employees as temporary agency employees leaves an employer open to a potential violation of ERISA").