UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7160

JIMMY F. TAYLOR, ET AL.,

Plaintiffs-Appellees,

BANK ONE TEXAS, N.A., ET AL.,

Defendants,

versus

BANK ONE TEXAS, N.A., ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CA H-90-3815)

April 22, 1993

Before HIGGINBOTHAM, JONES, and DeMOSS, Circuit Judges.[*]

EDITH H. JONES, Circuit Judge:

This is a contract interpretation case in which the terms of the contract seem to have been lost sight of. When the Texas MBank group failed in early 1989, FDIC arranged an overnight sale to a company later known as Bank One. The Purchase and Assumption Agreements executed between Bank One and FDIC covered enumerated

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

assets and liabilities of 20 of 26 MBanks. Among the questions presented to us are whether these agreements or the documents constituting the MBank employees' Welfare Plan and Trust Agreement fastened liability on Bank One for welfare benefits to retired and disabled employees of MBank who never worked for Bank One. The district court held that they did. The district court rested its holding alternatively on other legal theories, and it granted declaratory and injunctive relief supporting its decision. Upon the district court's refusal to stay its judgment pending appeal, this court issued a stay, see F. Rule App. Proc. 8, and having heard the case on the merits, we must reverse.

MCorp owned, directly or indirectly, twenty-six Texas banking associations whose names include "MBank" until March 28, 1989, when twenty of them were declared insolvent by the Office of the Comptroller of the Currency. FDIC, as receiver for each of the failed MBanks, immediately sold certain assets and transferred certain liabilities to the purchaser Deposit Insurance Bridge Bank, N.A. (Bridge Bank), pursuant to twenty separate but essentially identical purchase and assumption (P&A) agreements. The active employees of the failed MBanks went to work for Bridge Bank on the morning of March 29. This employee group obviously did not include the retired and disabled MBank employees who have filed this lawsuit.

Before its failure, MCorp was the sponsor of several welfare benefit plans, as defined by section 3(1) of ERISA, that are collectively known as the MEBA Welfare Plan. The failed MBanks

were participating employers in the MEBA Welfare Plan which, together with the MEBA Trust Agreement, provided the basic structure for the welfare benefits.

Upon opening for business, Bridge Bank established a benefit plan for the Bridge Bank employees, including new policies for life, business travel, accident, accidental death and dismemberment insurance and a benefit administration contract with Prudential. The retired and disabled employees of MBank (the "Subject Participants") were not designated as beneficiaries of these plans.

When, on May 5, 1989, the Bridge Bank Board of Directors retroactively adopted formal documentation of the Bridge Bank Welfare Plan and Trust, they specifically limited participation to Bridge Bank employees.

At the time of the MBank failures, the MEBA Trust held approximately $6.2 million in assets. Under Article 11 of the MEBA Trust, Bridge Bank sought a transfer of a share of its funds proportionate to the entitlement of the new Bridge Bank employees. MCorp, however, refused to recognize the Bridge Bank Trust as a successor trust, and no funds were transferred. MCorp consistently took the position that Bridge Bank was not and could not become a successor employer or establish a successor trust under the MEBA Plan and Trust without MCorp's approval, which it withheld. As a result, the MEBA Trust was instructed neither to accept trust contributions from Bridge Bank nor to pay claims of any active or former Bridge Bank employees accrued after March 31, 1989.

While Bridge Bank has provided no benefits to the Subject Participants, the MEBA Trust has continued to do so from its dwindling funds. Neither MCorp nor the MEBA Trust nor Bridge Bank Trust notified the Subject Participants of a termination of their benefits.

As of June 9, 1989, if Bridge Bank had ever been a participating employer in the MEBA Plan and Trust, it effected its withdrawal by notice given thirty days earlier.

COURSE OF PROCEEDINGS

This action was filed in December 1990 by the Administrative Committee of the MEBA Plan and the Trustee of the MEBA Trust, Jimmy Taylor, seeking a declaration that Bank One, the purchaser of Bridge Bank, was responsible for the provision of welfare benefits to the 900 Subject Participants, retired and disabled employees of the failed MBanks. Bank One argued to the district court that the contractual documents absolved it of responsibility for the payment of welfare benefits to the Subject Participants. Alternatively, Bank One contended that if such documents did initially transfer this liability to Bridge Bank under the MEBA Plan, it withdrew no later than June 9, 1989. Further, Bank One stated that it had no legal obligation under ERISA to continue paying benefits to MBank's retired employees.

After trial, the district court entered extensive findings of fact and conclusions of law holding that (1) Bank One elected to become a participating employer in the MEBA Plan and Trust as a successor to the failed banks as of March 29, 1989; (2)

by electing to become a successor under the MEBA Plan and Trust, Bridge Bank assumed the duties and responsibilities of those agreements and remains liable for benefits to the Subject Participants; and (3) those former employees should receive a perpetual right to the same benefits as similarly situated Bank One employees. The district court alternatively founded its declaration of liability on principles of corporate successorship, the purchase and assumption agreements between FDIC and Bridge Bank, section 510 of ERISA, and equitable estoppel.

Bank One timely appealed.[1]

STANDARD OF REVIEW

The district court's conclusions of law are reviewed de novo, and findings of fact are upheld unless they are clearly erroneous. Fed. R. Civ. Proc. 52. Contract interpretation is generally reviewed under a de novo standard, that is, the reviewing court does not defer to the district court's interpretation of the contract as long as the interpretation is within the four corners of the contract. Pierre v. Connecticut General Life Ins. Co., 932 F.2d 1552, 1561 (5th Cir. 1991). Gulf, Colorado & Santa Fe Railway Co. v. Coca Cola Bottling Co., 363 F.2d 465, 467 (5th Cir. 1966). If, however, the interpretation of the contract turns on the consideration of extrinsic evidence, such as evidence of the intent of the party, the standard review is the clearly erroneous one.

[1] MCorp has filed an appellee's brief avowing that it is not liable for anything and no claim was asserted against it. As far as we can tell Bank One still makes no claim against MCorp, and its response will not be further considered.

Carpenters Amended and Restated Health Benefit Fund v. Holleman Construction, Co., 751 F.2d 763, 766 (5th Cir. 1985).

DISCUSSION

A. The MEBA Plan and Trust Agreement.

In finding that Bridge Bank became a participating employer in the MEBA Plan and Trust Agreement, the district court equated that term with Bridge Bank's successorship to assets of the failed MBanks and to Bridge Bank's decision to form a successor welfare plan and trust for Bridge Bank employees. The district court also relied on what Bridge Bank allegedly did not do in trying to set up a successor welfare plan between March 29, 1989 and May 5, 1989, the date its Board of Directors formally authorized the Bridge Bank Welfare Plan and Trust. The district court firmly believed that Bridge Bank did nothing sufficient to disclaim responsibility for providing benefits to the Subject Participants, and while telling Bridge Bank employees that their welfare plan would continue unabated, Bridge Bank did not qualify that promise by expressly rejecting a continuation of rights for the Subject Participants.

The fundamental difficulty with the district court's characterization of Bridge Bank's actions rests in the court's equation between successorship and participating employer status under the MEBA Plan and Trust Agreement. This equation misreads those contracts. No party has argued that the MEBA Plan and Trust Agreement are ambiguous. Article XI of the MEBA Trust affords three options in the event of a change of control of a

participating "Employer": (1) the Trust may be dissolved under section 11.01 and the proceeds distributed pro rata to the participants and beneficiaries of that "employer"; (2) a successor "may elect to continue this trust by adopting this trust agreement . . ." (emphasis added); or (3) a successor may establish a separate plan and trust for continuation of benefits for its employees, triggering a transfer of trust assets to the trustee of the new trust.[2]

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[2] Art. XI states:

> 11.01 Termination of Trust Fund. This trust agreement and the trust created hereby may be terminated at any time by the Board of Directors or by the president or the chief personnel officer of the Company, or the trust may be terminated, with respect to any other Employer by its board of directors or its president or chief personnel officer, and upon such termination, or upon the dissolution or liquidation of any Employer in the event that a successor to the Employer by operation of law or by the acquisition of its business interests shall not elect to continue the Plan and this trust, the Trust Fund, with respect to such Employer, shall be paid out by the Trustee in the form of distributions to or for the benefit of Participants and Beneficiaries as and when directed by the Committee in accordance with the provisions of the Plan and Article III hereof.
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> 11.02 Continuation by Employer's Successor. Any corporation succeeding to the interest of an Employer by sale, transfer, consolidation, merger or bankruptcy, may elect to continue this trust by adopting this trust agreement or by otherwise assuming the duties and responsibilities of the Plan and trust in accordance with the provisions of Section 10.02 hereof, or such corporation may establish a separate plan and trust for the continuation of benefits for its employees,

Taylor has contended, and the district court agreed, that he was torn between performance under the first two options, while Bank One argues that Bridge Bank deliberately chose the third option.[3] Curiously, Taylor's briefs nowhere refer to the possibility that Bridge Bank could exercise the third listed option. The district court's opinion also fails to address this option specifically, although the court may have thought it was inferentially disposing of the third option by holding that Bridge Bank did not actually establish its own separate welfare plan and trust until it approved formal documents for those purposes on May 5, 1989. The district court erred as a matter of law, however, in concluding that Bank One, whether intentionally or not, elected under the second option to "adopt" the MEBA Plan and Trust Agreement. Under these documents, Bridge Bank could not have "adopted" the MEBA Plan and Trust, but it did establish a separate welfare plan and trust agreement providing coverage only to its employees as of March 29, 1989.

Contrary to the district court's findings and conclusions[4], the act of "adopting the trust agreement" could not

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> in which event the trust assets, held on behalf of the employees of the prior Employer, shall be transferred to the trustee of the new trust.

[3] Notwithstanding his "dilemma," Taylor continued to pay benefits from the MEBA Trust to Subject Participants during this litigation.

[4] The district court's holding that Bridge Bank adopted the MEBA Plan and Trust Agreement, whether denominated a finding of fact or conclusion of law, rests on the court's erroneous

be committed unilaterally by Bridge Bank. Instead, adoption of the Trust Agreement is governed by section 10.02 of the Trust in the following terms:

> Adoption by Other Employers. Any Employer which is eligible to and does in fact adopt the Plan, may adopt this trust by written instrument. . .

Further, "Employer" is defined in section 1.06 of the Trust Agreement to include "the successor of" Mercantile Texas Corporation (later MCorp, the "Company") and any "Affiliate" of the Company; an affiliate is defined under section 1.01 of the Trust Agreement as a company owned or controlled by the Company. The section 10.02 adoption procedure thus applied to Bridge Bank as a successor to the failed MBanks, and that section also requires as a pre-condition of adopting the Trust Agreement that the "Employer" is "eligible to and does in fact adopt the Plan." The "Plan" is the MEBA Welfare Plan.

Adoption of the MEBA Plan depends, in turn, upon the conditions set out in its section 10.2.[5] Section 10.2 permits the

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legal equation of "successorship" with "participating employer status" under the documents.

[5] Section 10.2 of the MEBA Plan provides in pertinent part:

> 10.2 Adoption of Plan by Employers. The Company and any corporation or business enterprise, now in existence or hereafter formed, which is or becomes affiliated with the Company may, with the consent and approval of the Compensation Committee of the Board of Directors of the Company, and through action of such corporation's or enterprise's Board of Directors or other governing authority (or through action of an

Company and any "affiliated" corporation, with the consent and approval of the Company's Compensation Committee of the Board of Directors, to adopt the Plan. To adopt the Trust Agreement, therefore, an "employer" must also have "adopted the Plan", which it could only do with the consent and approval of the Company as specified. Even if the requirement of affiliation with the Company is not an explicit requirement for adoption of the Plan and Trust Agreement,[6] there is no doubt that under section 10.02 of the Trust Agreement, which incorporates section 10.2 of the MEBA Plan, the Company's approval to adopt the plan is a prerequisite. At a minimum, MCorp (the Company) never approved Bridge Bank's actions vis-a-vis the MEBA Plan and Trust Agreement.

> officer or committee duly authorized or ratified by such corporation's or enterprise's Board of Directors or other governing authority), adopt this Plan or any Benefit Plan hereunder for its Employees. Adoption of this Plan shall constitute adoption of all Benefit Plans hereunder, unless resolutions of the Compensation Committee of the Board of Directors of the Company and of the Board of Directors or other governing authority of the Employer provide otherwise. Any such corporation or enterprise adopting this Plan shall be referred to as an "Employer".

[6] Taylor argues that § 11.01 of the MEBA Trust dispenses with the requirement of "affiliation", as it suggests that if a successor to the Employer "by operation of law" or by "acquisition of its business interests" "shall not elect to continue the Plan and this trust," the Trust shall be dissolved and proceeds distributed. That is a possible reading of the provision. A more likely interpretation would treat the "election" in § 11.01 as a shorthand reference to the options facing a successor employer in § 11.02, which, as seen, inevitably leads back to requirements of affiliation and approval by MCorp.

Having overlooked the requirement for Company approval, the district court's holding that Bridge Bank "adopted the Trust Agreement" is already flawed.

The court's opinion further misconstrues Bridge Bank's actions under section 11.02 of the MEBA Trust as a de facto "adoption" of the MEBA Plan and Trust Agreement. The district court cites Bridge Bank's May 5, 1989 Board of Directors resolution and the preambles to the Bridge Bank Welfare Plan and Trust Agreement as evidence that Bridge Bank adopted the MEBA Plan and Trust Agreement. In the resolution, however, the Board of Directors stated only:

> that "each of the Failed Banks was a participating employer" in the MEBA Plan;
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> that under section 10.4 of the MEBA Plan and section 11.02 of the Trust Agreement, a participating employer could withdraw from the welfare plans and establish a separate plan and trust;
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> and that accordingly, "it is in the best interest of the employees of Bridge Bank" to establish a successor plan and trust.

Several points should be noted about this resolution. First, it nowhere explicitly purports to "adopt" the MEBA Plan and Trust Agreement. It refers in general terms to section 11.02 of the Trust Agreement, which, as has been seen, afforded two distinct separation options for Bridge Bank other than outright liquidation of the Trust. The resolution was intended to set up Bridge Bank's own welfare plan and trust as contemplated by the third option in Article XI of the MEBA trust. Moreover, purporting to execute a withdrawal from the MEBA Plan and Trust on behalf of its employees

does not amount to an unequivocal admission by Bridge Bank that the MEBA Plan and Trust were "Adopted" to begin with. In the same corporate resolution, the Board specifically adopted the MCorp Pension Plan and the MCorp Moneymax Plan, actions that by negative inference disprove their intent to "adopt" the MEBA Plan and Trust Agreement in the same document without saying so.

Further, although the preambles to the Bridge Bank Plan and Trust describe Bridge Bank as having been a "participating employer" in MCorp's welfare benefit plans, we reiterate that Bridge Bank could not effectively unilaterally declare itself a participating employer. MCorp's approval was mandatory under the MEBA Plan and Trust, yet conspicuously lacking.[7]

The district court fortified its theory of Bridge Bank's implicit adoption of the MEBA Plan and Trust by reciting two lists of findings. In the first list, the district court emphasized the similarities and continuities between the MEBA Welfare Plan provisions and the provisions under which Bridge Bank's successor plan operated from March 29 thru May 5, 1989.[8] In the second list, the district court enumerated what Bridge Bank did not do to

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[7] The general confusion resulting from the MBanks' failure undoubtedly led to Bridge Bank's attempt to preserve its options with regard to the welfare benefit rights of its employees. Neither the act of describing itself as a "participating employer," however, nor of "withdrawing" from the MEBA Plan and Trust alter the controlling terms of those documents.

[8] No new deductibles were required; the lifetime medical limit was retained; the pricetags for coverage were identical; Bridge Bank continued to collect premiums from retired and disabled employees, until it finally arranged to turn those premiums over to the MEBA Trust.

formalize its successor welfare plan and trust agreement during that period.[9] These facts implied to the district court that Bridge Bank must have become or remained a participating employer under the MEBA Welfare Plan and Trust. Alternatively, the district court may have intended by means of these lists to demonstrate that, because Bridge Bank did not properly set up successor welfare plans and trusts before May 5, it could not have elected to proceed under the third option described by the MEBA Trust Agreement for disposing of trust assets on a change of corporate control.

Again, however, the district court premised its findings on an erroneous view of the law. Establishing a plan is not dependent upon meeting technical ERISA requirements as of the first day of its operation. Memorial Hospital, 904 F.2d at 241; Holcomb v. Pilot Life Insurance Co., 754 F. Supp. 524, 529 (N.D. Miss. 1991); Comprehensive Care Corp. v. Doughtry, 682 F. Supp. 516, 517 (S.D. Florida 1988); Blau v. Del Monte, 748 F.2d 1348, 1352 (9th Cir. 1985); Donovan v. Dillingham, 688 F.2d 1367, 1372 (11th Cir. 1982).

In determining whether a plan has been established under ERISA, a court should focus on the intent of the employer and its involvement with the administration of the plan. Hansen v. Continental Insurance Co., 940 F.2d 971, 978 (5th Cir. 1991); Gahn

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[9] Bridge Bank did not promptly file an IRS Form 1024 notice to qualify its plan for tax-exempt status; it did not require its employees to re-enroll in the plan; it did not communicate with the Subject Participants to inform them that the Bridge Bank plan would not cover them; it did not prepare new summary plan descriptions.

v. Allstate Life Insurance Co., 926 F.2d 1449, 1452 (5th Cir. 1991). When the evidence shows that (1) the employer had the intent to provide its employees with a welfare benefit plan and (2) carried out that intent by means of the purchase and maintenance of a group insurance policy, a plan has been established. Foxworth v. Durham Life Insurance Co., 745 F. Supp. 1227, 1230 (S.D. Miss.) (quoting Memorial Hospital). Thus, a welfare plan is established "if from the surrounding circumstances a reasonable person can ascertain that intended benefits, a class of beneficiaries, a source of financing, and procedures for welfare benefits." Memorial Hospital Systems v. The Northbrook Life Insurance Co., 904 F.2d 236, 240 (5th Cir. 1990).

Applying the test in Hansen and Memorial Hospital, Bridge Bank established a welfare plan of its own on the first day of Bridge Bank's operation. The overwhelming and uncontradicted evidence at trial shows that Bridge Bank, through its benefits administrator, intended to set up a plan new and distinct from the MEBA Welfare Plan. Taggart v. Life and Health Benefits Administration, 617 F.2d 1208, 1211 (5th Cir. 1980) (noting the importance of an independent benefit administrator). Bridge Bank carried out its intent to set up a new employee welfare plan for its 7,000 employees through the purchase and maintenance of new group insurance policy and through distinct administration of benefits commencing March 29, 1989.

That Bridge Bank elected to continue the scope of coverage and "price tags" and did not require its employees to re-

enroll, reaccumulate deductibles or commence new lifetime medical limits do not show, as the district court supposed, an intent to operate under the MEBA Plan. Nor does Bridge Bank's description of its plan as a "successor" to the MEBA Plan talismanically transform the later plan into a part of its predecessor. These facts are consistent with Bridge Bank's expressed intent to maintain continuity of coverage, and no more. They do not contradict Bridge Bank's having established its own welfare benefit plans, through independently secured insurance policies and an independent administrator, effective March 29.

To sum up, there are several critical deficiencies in the district court's application of the MEBA Plan and Trust Agreement in this case. The proper reading demonstrates that Bridge Bank could not have "adopted" the MEBA Plan documents without MCorp's consent, which was never given. Further, Bridge Bank did not fail to set up its own separate welfare plan and trust when it opened for business, and thus did not slide by accident into becoming or remaining a participating "Employer" in the MEBA Welfare Plan and Trust.

B. The Purchase and Assumption Agreements

The district court somewhat offhandedly held that the Purchase and Assumption Agreements whereby Bridge Bank acquired the failed MBanks also support his holding Bank One liable under the MEBA Plan and Trust Agreement. In determining the scope of the Purchase and Assumption Agreements, it is critical to remember the context in which they were executed. MBank had been placed in

receivership by FDIC. The controlling law on transfer of liabilities is 12 U.S.C. § 1821(i)(1)(B) (West Supp. 1989), which states that one acquiring a bank from the FDIC incurs "such other liabilities of the closed bank as the [FDIC] in the [FDIC's] discretion may determine to be appropriate."

In this case, the FDIC listed the liabilities that Bridge Bank would assume in § 2.1 of the P&A Agreements. Section 2.1 of the P&A Agreements lists specific liabilities to be assumed and "none other". Not only does this wording unambiguously convey the exclusive nature of liabilities assumed, but the comprehensive list of liabilities in section 2.1 makes no mention of a welfare benefit plan.[10] By omitting any reference to such plans in section 2.1,

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[10] Section 2.1 of the P&A Agreements provides in relevant part:

> 2.1 Liabilities Assumed. The Assuming Bank hereby expressly assumes at Book Value and agrees to pay, perform and discharge all of the following liabilities of the Failed Bank which, in normal commercial banking practice would be reflected on the books of the Failed Bank, whether or not they are reflected on the books of the Failed Bank as of Bank Closing, and none other:
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> * * *
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> (i). . . liabilities which have vested on or before Bank Closing under or with respect to the Failed Bank employees' pension, profit sharing or stock ownership plans, if any; liabilities for administration of any such plan in accordance with the terms of any such plan on or after Bank Closing, if any; provided, that liabilities described in this subparagraph (i) with respect to any such plans

while expressly including certain pension, profit sharing and stock ownership plans, the P&A Agreements clearly provided that no such liability would flow to Bridge Bank. One other provision of the P&A Agreements, section 4.8, relates to the assumption of liabilities for employee benefits, but it is expressly limited to pension, profit sharing and stock ownership plans. Therefore, the P&A Agreements did not pass to Bridge Bank the liability for welfare benefits under the MEBA Plan.

Taylor does not contradict the unambiguous provisions of section 2.1 but instead relies, as the district court did, on section 4.7(a) dealing with trust business. This section concerns the assumption of liabilities of trusts managed by the failed MBanks. Taylor's attempt to read it broadly to contradict the express provisions of section 2.1 and to impose fiduciary duties on Bank One to the retired and disabled MBank employees must fail. The liability in this case is sought to be imposed on Bank One directly as a matter of contract and not on Bank One in a fiduciary capacity.[11]

> shall not be assumed by the Assuming Bank in the event any such plan is determined by the Receiver, in its discretion, to be inadequately funded as of Bank Closing.

[11] Because the P&A Agreements do not impose contractual liability to the Subject Participants on Bank One, we need not reach the parties' arguments whether third parties have standing to enforce the P&A Agreements.

C. The Effect of ERISA Law on Bank One's Liability as a Successor Employer

The district court relied on several additional theories purporting to hold Bank One liable: corporate successorship liability by operation of law; equitable estoppel; and ERISA § 510. The first two of these theories clash headlong at the outset with Congressional intent that employee welfare plans are to be treated differently from pension plans.

ERISA draws a distinct line between employee welfare benefit plans and employee pension plans, specifically exempting welfare benefit plans from the participation, coverage, vesting and funding rules of ERISA. This exclusion was clearly deliberate, see e.g. H.R. Rep. No. 807, 93d Cong. 2d Sess. 60 (1974), and has been enforced in caselaw. There is little dispute that "ERISA imposes upon pension plans a variety of substantive requirements relating to participation, funding, investing . . . it also establishes various uniform procedural standards concerning reporting, disclosure and producer responsibility for both pension and welfare plans. It does not regulate the substantive content of welfare benefit plans." Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 731, 105 S. Ct. 2380, 2385, 85 L.Ed.2d 728 (1985); In re White Farm Equipment, 788 F.2d 1186, 1193 (6th Cir. 1986) (noting, "Congress recognized the differences between welfare benefit plans and pension plans, and we discern no basis for finding mandatory vesting in ERISA of retiree welfare benefits . . . we believe the legislature rather than the court should determine whether mandatory vesting of retirement benefits is appropriate."); Turner

v. Local Union No. 302, Intn'l Brotherhood of Teamsters, 604 F.2d 1219, 1225 (9th Cir. 1979) (court distinguishes between pension plans and health and welfare benefits in construing ambiguous languages limiting the contract term). Similarly, in Sutton v. Weirton Steel Division of National Steel Corp., 774 F.2d 406 (4th Cir. 1983), the Fourth Circuit found that ERISA's vesting rules do not encompass benefits other than pension benefits which commence after normal retirement age. The court stated that ERISA was not designed to protect such ancillary benefits because "vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income . . . an employer may change such benefits without violating ERISA." Id. at 410.

Based on this understanding of ERISA, White Farm held that "the parties may themselves set out by agreement or by private design, as set out in the plan documents, whether retiree welfare benefits vest, or whether they may be terminated." White Farm, 788 F.2d at 1193. Subsequently, the Sixth Circuit examined a corporation's establishment of an employee retirement benefits plan that provided an express reservation of the power to amend or terminate the plan at any time. When the defendant amended the plan to require partial payment of health premiums by retired employees, those employees sued, claiming a breach of fiduciary duty. The court held against them and explained that "the defendant had no fiduciary duty to establish any medical insurance plan, much less one that could never be amended without approval of

those to whom it applied." The court found it "hard to see how a company's express reservation of a right to amend the plan can be said to constitute overreaching" when a prudent employer . . . could well have decided . . . not to provide such coverage at all. . ." Musto v. American General Corp., 861 F.2d 897, 912 (6th Cir. 1988); Adams v. Avondale Industries, 905 F.2d 943, 949 (6th Cir. 1990).[12]

These principles overcome the district court's holding, drawn solely from analogy with labor law and Title VII cases, that corporate successorship or equitable estoppel theories conferred liability as a matter of law on Bank One for welfare benefits of the Subject Participants. ERISA does not so provide.

Taylor, however, deftly relies on that part of the district court's holding which seems to recognize that neither of those theories is alone sufficient to prevent an employer or successor to an employer from modifying an ERISA welfare benefits plan. Under ERISA, successorship or estoppel liability might result if the employer has acted contrary to the terms of the governing contracts or welfare plan documents. Taylor accordingly contends that because Bridge Bank "adopted" the MEBA Plan and Trust, it included the Subject Participants by virtue of being a

[12] District 17, District 29, Local Union 7113 and Local Union 6023 United Mine Workers of America v. Allied Corporation, 735 F.2d 121 (4th Cir. 1984) is also instructive, if not completely on point, in that it holds that a transferring company which purchased an employer's coal mining assets did not breach a wage agreement between employer and union by not assuming the employer's obligation toward retired employees to pay health benefits. Id. at 128.

"participating employer" from and after March 28, 1989, and it violated the Subject Participants' rights by purporting to exclude them later. Taylor uses successorship and estoppel cases to support these conclusions.

Our holding that Bridge Bank did not adopt the MEBA Plan and Trust Agreement vitiates this argument. Bridge Bank could only have acceded to liability for the Subject Participants' welfare benefits if it adopted the MEBA Plan and Trust, for it did not expressly cover them in its own welfare plan.[13] As Bridge Bank did not adopt the MEBA Plan, no extracontractual liability can attach on that basis.

Finally, ERISA section 510 cannot impose liability on Bank One for discriminatory treatment of the Subject Participants because, under the foregoing discussion, Bank One never assumed or acquired liability for providing them welfare benefits. They were neither employees of Bridge Bank nor participants in any Bridge Bank Welfare Plan and Trust. Taylor's arguments and the district court's holding on section 510 liability rest on incorrect premises.

CONCLUSION

Like the district court, we are touched by the plight of the Subject Participants. We cannot agree, however, that Bridge Bank legally bound itself to assume responsibility for their

[13] Bridge Bank also points out that even under the third option for withdrawal from the MEBA Trust, as earlier discussed in regard to section 11.02, it was entitled to set up a welfare benefit plan "for its employees", a term that appears to exclude participation by retirees of the predecessor entity.

welfare benefits or that such liability can be imposed here absent Bank One's knowing consent. Neither Bank One, the Bridge Bank Plan or the Bridge Bank Trust is liable to provide welfare benefits to the Subject Participants. The judgment of the district court, which declared rights and obligations among the parties and retained jurisdiction over the case, is therefore **REVERSED** and **REMANDED** with instructions to **DISMISS**.