ATTORNEYS FOR APPELLANT
Kent M. Frandsen
Katherine M. Moore
Parr Richey Frandsen Patterson Kruse LLP
Lebanon, Indiana

David A. Lewis
Jeffersonville, Indiana

ATTORNEY FOR APPELLEES
Mark R. Waterfill
Mark R. Waterfill, Attorney at Law PC
Plainfield, Indiana

IN THE COURT OF APPEALS OF INDIANA

Clark County REMC,
Appellant-Defendant,

v.

Glenn Reis,
Dale Bottorff,
Jimmie Sanders, and
Steve Stumler,
Appellees-Plaintiffs

March 30, 2021

Court of Appeals Case No. 20A-CT-622

Appeal from the Clark Circuit Court

The Honorable Maria D. Granger, Special Judge

Trial Court Cause No. 10C01-1808-CT-143

Vaidik, Judge.

Case Summary

[1] The plaintiffs in this case—Glenn Reis, Dale Bottorff, Jimmie Sanders, and Steve Stumler ("Plaintiffs")—are former members of the board of directors of the Clark County Rural Electric Membership Corporation ("the REMC"). In 2018, after Plaintiffs had left the board, the REMC revoked a policy granting health-insurance benefits to certain former directors, including Plaintiffs. Plaintiffs sued the REMC for breach of contract, and the trial court granted them summary judgment. The REMC appeals, arguing the policy did not constitute a contract. We disagree and affirm.[1]

Facts and Procedural History

[2] The policy at issue in this case ("the Policy") originated in 1972. At that time, the REMC had elected to participate in the "Indiana Statewide Plan for Sickness and Accident Insurance" through Indiana Statewide Rural Electric Cooperative, Inc. Appellant's App. Vol. III p. 35. The REMC's board of directors ("the Board") adopted a resolution allowing former directors to participate in the plan, with the cost paid by the REMC if certain years-of-service requirements were met. The resolution provided, in part:

> All costs for participation in the plan for an exdirector and family or spouse and/or family shall be born[e] by the participant except

[1] We held a remote oral argument in this matter on January 27, 2021. We thank counsel for their helpful presentations.

> that whereas in the opinion of this board of directors there should be some consideration for long and faithful service to the cooperative as a director and whereas directors of this cooperative are by board resolution August 9, 1969 required to retire from the board at the end of the term when age sixty-five is reached prior to the Annual Meeting upon which they are to be reconsidered for election.
>
> Therefore be it resolved that **all directors having not less than twelve years service at the end of term when they must retire from the board shall continue to participate in the plan with full cost paid by the R.E.M.C. for the director and spouse as long as the retired director shall live**. The retiring director may elect, if so desired, to pay the difference for the full family policy. All others who leave the board for any reason prior to retirement as required by board resolution August 9, 1969 or with less than twenty years accumulated service prior to retirement as required by board resolution August 9, 1969 shall continue to participate if they so elect at their own cost. **Any director having accumulated service of twenty years shall participate in the plan with full cost paid by the R.E.M.C. for the director and spouse as long as the director shall live.**

Id. at 35-36 (emphases added).

[3] By 2000, Plaintiffs had been elected to the Board—Reis in 1984, Bottorff in 1992, Stumler in 1994, and Sanders in 1997—and the REMC had elected to participate in the "NRECA Benefit Plan" through the National Rural Electric Cooperative Association. *Id.* at 37. That year, the Board, including Plaintiffs, amended the Policy to provide that directors elected after July 5, 2000, would not be eligible for paid post-service coverage. Directors on the Board as of that date (including Plaintiffs) would still be eligible.

[4] Reis retired from the Board in 2005 and continued participating in the NRECA plan under the 2000 version of the Policy. Bottorff did the same in early 2014. Later in 2014, the Board—including Stumler and Sanders—learned that beginning in 2015 retirees age sixty-five and older would no longer be eligible to participate in the NRECA plan. As such, the Board amended the Policy to allow eligible past directors to obtain their own insurance and be reimbursed by the REMC, up to a certain amount:

> If permitted by prevailing law, all **eligible** active and past directors who were elected to the Board before January 1, 2000 shall, at such time when he or she stops serving on the Board of Directors, have the option to participate in the Cooperative's family health and hospitalization plan or such substitute health plan acquired through an exchange as dictated by the Affordable Care Act or other prevailing law at the Cooperative's expense. A Director is not eligible for past director coverage under this subsection unless: (A) the Director has served on the Board no less than twelve (12) full years and has reached the full age of 65 years when s/he leaves the Board, or (B) the Director has served on the Board no less than twenty (20) full years and has not reached the full age of 65 years when s/he leaves the Board. **HOWEVER** the amount of health insurance premiums payable by the Cooperative for past director coverage shall not exceed the rates established in 2014 as follows: [reimbursement caps omitted].

Id. at 45.

[5] Because Reis and Bottorff were no longer eligible to participate in the NRECA plan, they obtained their own insurance and began receiving reimbursement under the Policy as amended. Stumler and Sanders continued serving on the

Board until January 2018, when they resigned and began receiving premium reimbursement under the 2014 version of the Policy. That May, however, the newly constituted Board voted to revoke the Policy, and the REMC immediately stopped reimbursing Plaintiffs.

[6] In September 2018, Plaintiffs sued the REMC, claiming breach of contract, promissory estoppel, unjust enrichment, breach of fiduciary duty, and constructive fraud. The parties filed cross-motions for summary judgment. After hearing oral argument, the trial court granted Plaintiffs partial summary judgment on their breach-of-contract claim, finding a breach of contract but leaving the remedy to be determined. The court denied both parties' motions on the promissory-estoppel claim and granted the REMC summary judgment on the unjust-enrichment, breach-of-fiduciary-duty, and constructive-fraud claims. The parties then agreed to the entry of a final judgment that reserved the REMC's right to appeal the summary-judgment ruling on the breach-of-contract claim, established the relief to which Plaintiffs would be entitled if they prevailed on appeal, and dismissed the other four claims.

[7] The REMC now appeals.

Discussion and Decision

[8] The REMC contends the trial court erred by granting partial summary judgment for Plaintiffs on their breach-of-contract claim. We review motions for summary judgment de novo, applying the same standard as the trial court.

Hughley v. State, 15 N.E.3d 1000, 1003 (Ind. 2014). That is, "The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C).

[9] The REMC first argues there was no "mutuality of obligation" under the Policy and therefore the trial court erred by concluding it was a contract. Appellant's Br. p. 23. It also asserts, more generally, the trial court's ruling is contrary to public policy. The REMC asks us to reverse summary judgment for Plaintiffs and to order the entry of summary judgment for it instead.[2]

I. Mutuality of Obligation

[10] "[T]he existence of a valid contract depends upon mutuality of obligation." *Rogier v. Am. Testing and Eng'g Corp.*, 734 N.E.2d 606, 618 (Ind. Ct. App. 2000), *reh'g denied*, *trans. denied*. "Mutuality of obligations is the doctrine requiring both parties to a contract to be bound to perform." *OVRS Acquisition Corp. v. Cmty. Health Servs., Inc.*, 657 N.E.2d 117, 127 (Ind. Ct. App. 1995), *reh'g denied*, *trans. denied*.

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[2] The REMC addresses a third issue on appeal. The trial court, after finding the existence of a contract, went on to hold that Plaintiffs' benefits have "vested." Appellant's App. Vol. II pp. 15-17. In doing so, the court relied on several federal cases that discuss the "vesting" of retired-employee benefits under collective-bargaining agreements and ERISA welfare plans, including *Stone v. Signode Industrial Group LLC*, 943 F.3d 381 (7th Cir. 2019), *cert. denied*. The REMC contends such cases are irrelevant here because this case does not involve a collective-bargaining agreement or an ERISA welfare plan. We agree and will focus our discussion on Indiana contract law.

[11] Plaintiffs argue there was mutuality of obligation under the Policy because they were bound to serve as directors for a certain number of years in order to qualify for lifetime health-insurance benefits, and the REMC was bound to provide Plaintiffs lifetime health-insurance benefits if they served the requisite number of years. The REMC, on the other hand, asserts the Policy was "revocable" and could be "changed at any time" and therefore the REMC was not bound to do anything. Appellant's Br. p. 24. The REMC contends:

> While the REMC must fulfill the terms of a policy while it is in effect, the board remains free to change that policy in the future. Thus, because the REMC is not bound to perform in the future, there is insufficient consideration to support a contract requiring it to provide lifetime future reimbursement benefits. Any obligation to pay for former director health insurance lasted only while the policy was in force, and plaintiffs were reimbursed during that time.

Id. The REMC cites no authority supporting this argument, and we see two significant problems with it.

[12] First, while the Policy may have been revocable at any time, the fact is it was not revoked until 2018, after Plaintiffs had already served the requisite number of years. Where one party to an agreement "acts upon the promise of the other party and performs his part of the agreement, the contract is not unenforceable for lack of mutuality." *Rogier*, 734 N.E.2d at 618. In other words, "there is no mutuality deficiency where one party to an agreement acts upon the promises of the other party and performs his part of the agreement—because the other party becomes bound by that performance." *Seco Chems., Inc., Div. of Stan Sax*

Corp. v. Stewart, 169 Ind. App. 624, 632, 349 N.E.2d 733, 738 (1976), *reh'g denied*. Therefore, once Plaintiffs served the number of years called for by the Policy, the REMC became bound to provide the promised benefits.[3]

[13] Second, none of the versions of the Policy said it was revocable as to directors, like Plaintiffs, who had already served the requisite number of years. The REMC notes that the 2014 version of the Policy included the following provision: "**Policy Review.** This policy will be reviewed periodically." Appellant's App. Vol. III p. 46. Setting aside the fact that this provision did not exist until after three of the plaintiffs (Reis, Bottorff, and Stumler) had served the number of years called for by the Policy and the fourth (Sanders) had served seventeen years, simply stating the Policy "will be reviewed periodically" did not make clear it could be revoked entirely, let alone that any revocation would be applicable to directors who had already served the requisite number of years.

[14] On this point, a case cited by the REMC—*Blue Cross/Blue Shield of Rhode Island v. State Department of Business Regulation*, 2005 WL 1530449 (R.I. Super. Ct. June 23, 2005)—though non-citable under Rhode Island Rule of Appellate Procedure 18(l) and non-binding on us, is instructive. There, a board policy

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[3] Plaintiffs do not contend the Policy was a "unilateral contract," but it could be characterized that way. "Ordinarily, in a unilateral contract, there is no bargaining process or exchange of promises by the parties as in a bilateral contract. Only one party makes an offer (or promise) which invites performance by another, and the performance constitutes both the acceptance of that offer and consideration." *Orr v. Westminster Vill. N., Inc.*, 689 N.E.2d 712, 719 n.11 (Ind. 1997); *see also* 17A Am. Jur. 2d Contracts § 7 ("An offer for a unilateral contract invites the other party to accept with performance, that is, by actually doing the performance that the offering party seeks."). Here, the Policy invited performance by another—serve as a director for a certain number of years—and Plaintiffs performed accordingly.

providing for health-insurance coverage for directors during their time on the board and for the rest of their lives explicitly provided that BCBS "has the right, subject to the terms of any Policy, to make any amendment to this Plan **at any time** and retains the right to terminate this Plan **at any time**." *Id.* at *6 (emphases added). Based on that provision, the court stated, "BCBS's reservation of the right to unilaterally terminate its obligation to provide health insurance at its sole will and discretion belies mutuality of obligation and consequently, the existence of a binding contract." *Id.* Here, the Policy never included such a reservation of rights, or anything like it.

[15] It is true the Policy was amended significantly in 2014—from a policy allowing former directors to participate in the REMC's health-insurance plan through NRECA to a policy allowing former directors to obtain their own insurance and be reimbursed by the REMC. This fact does not alter our view of the case. The amendment was necessary, and Plaintiffs acquiesced to it, because beginning in 2015 retirees age sixty-five and older would no longer be eligible to participate in the NRECA plan. And even as amended, the Policy still imposed the same core obligation on the REMC—to provide lifetime health-insurance benefits to eligible former directors who had served the requisite number of years.

[16] Because there was mutuality of obligation under the Policy, the trial court did not err by finding the Policy to be a contract.

II. Public Policy

[17] The REMC also contends the trial court's ruling is "contrary to public policy":

> The trial court's ruling is contrary to public policy and principles of sound corporate governance because it impairs the ability of the REMC board to amend board compensation policies consistent with the best interests of the cooperative and its membership. The idea that a board could impose upon future boards and the cooperative itself an irrevocable obligation to continue funding a current or former director benefit is anathema to sound governance and the cooperative business model.

Appellant's Br. p. 37. The REMC cites no authority in support of this argument, and we fail to see how a policy rewarding lengthy board service—service that can greatly benefit a corporation—is against public policy.

[18] As an initial matter, it is not true that finding the Policy to be an enforceable contract "impairs the ability of the REMC board to amend board compensation policies." The Board can amend its compensation policies whenever it wants. The narrow issue here is whether, under Indiana contract law, the Board's revocation of the Policy can be applied retroactively to former directors who have already satisfied the years-of-service requirement and begun receiving benefits under the Policy. As Plaintiffs put it, "the REMC was free to change its mind and was free to change its policies, but the REMC was not free to change its mind to the extent that doing so caused it to breach its agreement with the Appellees." Appellees' Br. p. 20.

[19] Furthermore, the right of REMC boards to establish their own compensation—which the REMC derides as "self-dealing"—is built into the REMC statutes. The Rural Electric Membership Corporation Act explicitly gives an REMC board the power to "do all things necessary or convenient in conducting the business of the corporation," including "[t]he power to make, alter, amend or repeal by-laws for the regulation and management of the affairs of the corporation not inconsistent with law or with the articles of incorporation." Ind. Code § 8-1-13-7(a). The Act also provides, "The bylaws may specify a fair remuneration for the time actually spent by its officers, directors, and members of its executive committee in the performance of their duties and provide that the remuneration be paid to the officers, directors, and members of the executive committee." Ind. Code § 8-1-13-6(c).[4] These statutes constitute the public policy of Indiana, and they grant REMC boards the authority to determine what is "fair remuneration" for directors. It may be that an REMC's members disagree with that determination, but they have a remedy: elect different directors who will set different compensation for directors. Here, the REMC's members eventually elected directors willing to do away with the Policy, but only after it had been on the books for forty-six years, and after

[4] The REMC's bylaws, as amended in September 2017, provide, in Section 4.10:

> Directors shall, as determined by a resolution of the Board of Directors, receive on a per diem basis a fixed fee, **which may include insurance benefits**, (a) for attending meeting of the Board of Directors and (b) for the performance of other director duties when such has had prior approval of the Board of Directors.

Appellant's App. Vol. III p. 15 (emphasis added). The REMC does not contend that former-director health-insurance benefits are impermissible under this provision or any previous version of the bylaws.

Plaintiffs had served the requisite number of years. Requiring the REMC to honor its longstanding obligation is not contrary to public policy.

[20] Affirmed.

Weissmann, J., concurs.

Bailey, J., dissents with opinion

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Clark County REMC,
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Bailey, Judge, dissenting.

[21] Despite the general malleability of corporate governing documents, the majority concludes that simply by adopting a certain corporate policy (the "Policy"), the Clark County REMC (the "REMC") contracted with its board of directors to provide lifetime insurance benefits to former directors who met certain years-of-service criteria. Eventually, the Policy was eliminated, which led several former directors (the "Plaintiffs") to file a multi-count lawsuit alleging, among other legal theories, breach of contract.

[22] The central question in this case is whether, despite having repealed the Policy, the REMC was nevertheless obligated to continue providing these benefits to the Plaintiffs. I believe the answer is a simple "no." Yet, the majority concludes that the Policy has morphed into a binding contract obligating the REMC to continue providing benefits to former directors and their spouses. Because I take

issue with the majority's conclusion that a contract was formed from the Policy, I dissent.

[23] Furthermore, it appears to me that, without saying so, the majority comes up with an unwritten "vesting" provision by applying, not contract principles, but, rather, equitable principles of promissory estoppel. It must be emphasized that the parties in this case entered mediation and settled the Plaintiffs' equitable claim of promissory estoppel. Therefore, the issues before this Court are quite narrow. That is, this Court is being asked to resolve, under pure principles of contract law, whether (1) the REMC had a contractual duty to provide lifetime insurance benefits to the Plaintiffs and, if so, (2) whether the REMC breached the contract by eliminating the Policy. Equity follows the law. *Noble v. Davison*, 96 N.E. 325, 330 (Ind. 1911). Therefore, even if one assumes that a contract was formed, to identify a breach, one must still undertake the "demanding analysis" implicated when an instrument is silent as to a critical point. *Abbott v. State*, No. 19A-PL-1635, 2021 WL 560286 at *10 (Ind. Ct. App. Feb. 21, 2021) (Vaidik, J. dissenting) (asserting that "equity cannot be used by the judiciary to bypass inconvenient" law). In my opinion, had this analysis been done, a similar fate would have been uncovered; that is, there was no contract, but if there was, there was no breach.

Corporate Governance

[24] It is a well-established principle of corporate governance that an entity has flexibility in conducting its affairs. Indeed, an entity may adopt bylaws and, in

general, may change its bylaws at any time. *See* I.C. § 8-1-13-7(a). If an entity adopts a bylaw and does not state that the bylaw is subject to change, Indiana law does not assume the bylaw is immutable and therefore binding on the entity in perpetuity. *See id.* Rather, the default position is that the bylaw is malleable.

[25] It is also a well-established principle of corporate governance that an entity may adopt policies, which express a "standard course of action" as to a particular matter. *Policy*, Black's Law Dictionary (11th ed. 2019) (hereinafter Black's). Generally, an entity adopts policies with even less formality than it adopts bylaws or other governing documents, such as its articles of incorporation.

[26] Because of the inherently flexible nature of policies, in my view, there is no need to delve deeply into contract principles to resolve this case. Simply put, the REMC had the inherent power to eliminate the Policy. It did so. Thus, the Plaintiffs cannot show that the REMC breached a contract. *Cf., e.g.*, *Supreme Lodge K.P. of the World v. Knight*, 20 N.E. 479, 483 (Ind. 1889) ("No one has a right to presume that by-laws will remain unchanged. Associations and corporations have a right to change their by-laws when the welfare of the corporation or association requires it, and it is not forbidden by the organic law."); 1 Williston on Contracts § 4:9 (4th ed.) ("[A]n ordinance or resolution of a municipality does not amount to an offer [because] it merely evidences the [public body's] intent to do something in the future, but does not thereby make a promise that it shall be done. **Nor does a vote by the directors of a private corporation itself amount to an offer**[.]" (emphasis added, footnote omitted)).

Interpretation

[27] Although I cannot say that the Policy resembles anything close to a contract, assuming *arguendo* that this case warrants a deeper analysis of contractual issues, applying well-established rules of interpretation leads one to conclude that the REMC had the implied power to eliminate the Policy at any time.

[28] In interpreting a written instrument, our objective is "to ascertain the meaning and intent of the parties as expressed in the language used." *Allen v. Clarian Health Partners, Inc.*, 980 N.E.2d 306, 309 (Ind. 2012) (quoting *Evansville-Vanderburgh Sch. Corp. v. Moll*, 344 N.E.2d 831, 837 (Ind. 1976)). To ascertain the parties' intent, we consider the instrument in light of the "surrounding circumstances existing at the time [the instrument] was made," taking into account—*inter alia*—the nature of the instrument, the relationship of the parties, the nature of the subject matter, and the apparent purpose of drafting the instrument. *Id.* (quoting *Coleman v. Chapman*, 220 N.E.2d 285, 288 (Ind. 1968)).

[29] It is well-settled that a writing may contain less than all material terms; indeed, "most contracts include implied terms that are indispensable in effectuating the intentions of the parties." 11 Williston on Contracts § 31:7 (4th ed.). Furthermore, "in some cases the implied term will be crucial and will greatly affect liability[.]" 6 Peter Linzer, Corbin on Contracts § 26.1 (Joseph M. Perillo ed. 2010). If a court determines that the instrument is "silent regarding the matter in question" and the material facts are undisputed, the court should proceed to examine whether a term is nevertheless implied as a matter of law.

11 Williston on Contracts § 31:7 (4th ed.). Indeed, "a contract may be implemented beyond its express language when [doing so] is indispensable in order to effectuate the intentions of the parties[.]" *Id.*; *see Allen*, 980 N.E.2d at 309 (noting that "if a contract is uncertain as to a material term such as price then Indiana courts may impute a reasonable price" (emphasis removed)).

[30] "[O]nly reasonable terms will be implied." 11 Williston on Contracts § 31:7 (4th ed.). However, terms are not implied just "*because* they are reasonable[.]" *Id.* Rather, terms may be implied only if "it may be said that the parties must have intended [the terms] and failed to express them only because of sheer inadvertence or because they are too obvious to have needed expression." *Id. Cf. Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214-15 (N.Y. 1917) (determining that, where an agreement created an exclusive right to market products, contract formation did not fail merely because the contract did not expressly require the marketer to market the products; there was an implied term requiring the marketer to "use reasonable efforts" to do so). Moreover, as to implied terms, unless otherwise specified, "'all applicable law in force at the time the agreement is made impliedly forms part of the agreement,' because 'the parties are presumed to have had the law in mind.'" *Schwartz v. Heeter*, 994 N.E.2d 1102, 1106 (Ind. 2013) (quoting *Ethyl Corp. v. Forcum-Lannom Assocs., Inc.*, 433 N.E.2d 1214, 1220 (Ind. Ct. App. 1982)); *see also Falmouth & L. T. Co. v. Shawhan*, 5 N.E. 408, 409-10 (Ind. 1886) (determining that the terms of a statute regarding the authority of a board of directors "entered as a silent factor into and became a part of the contract between [a shareholder] and the

corporation," such that the shareholder was impliedly "as much bound" by the terms of the statute as he would have been "had [the] terms been written out").

The Policy

[31] Here, the REMC—through its board—adopted the Policy, which provided lifetime health insurance to eligible former directors and their spouses. Each board member who voted to adopt the Policy owed a fiduciary duty to the REMC. *See G & N Aircraft, Inc. v. Boehm*, 743 N.E.2d 227, 240 (Ind. 2001) (explaining that a director owes a fiduciary duty to the entity served). At no point did the Policy state that the REMC intended to create decades-long contractual obligations without regard to the financial health of the REMC, potentially exposing the REMC to ever-increasing liability upon the rising cost of insurance. Moreover, at no point did the Policy indicate that it was anything other than a typical policy subject to modification or elimination at any time.

[32] At all pertinent times, Indiana law permitted the board "to make, alter, amend or repeal by-laws for the regulation and management of the affairs of the corporation[.]" I.C. § 8-1-13-7(a). Moreover, the bylaws in effect when the Policy was eliminated specified that the bylaws "may be altered, amended or repealed by resolution of the Board of Directors[.]" App. Vol. 3 at 30. Although corporate policies are not the same as bylaws, both flow from corporate power and relate to the official governance of corporate affairs. *Compare Bylaw*, Black's (defining "bylaw" as a "rule or administrative provision adopted by an organization for its internal governance and its external dealings") *with Policy*,

Black's (defining "policy" as a "standard course of action that has been officially established by an organization"). Furthermore, in this case, there appears to be no dispute that, in general, the REMC could amend or eliminate its policies just as it could generally amend or eliminate its bylaws.

Silence

[33] The Policy is silent regarding (1) whether the REMC could eliminate the Policy and, if so, (2) upon what conditions (if any). Without acknowledging this silence, the majority identifies an elaborate "vesting" term: "[O]nce [the] Plaintiffs served the number of years called for by the Policy, the REMC became bound to provide the promised benefits." Slip op. at ¶ 12. In other words, under the majority's term, the REMC could eliminate the Policy at any time before a director became eligible for the benefit, at which point the REMC lacked the power to eliminate the Policy as to the "vested" director. *See id.*

[34] The majority concludes that the Policy was not subject to repeal largely because the Policy did not contain a provision stating as much. In my view, the majority has embraced the logical fallacy "known as 'denying the antecedent of a conditional statement,'" where "a statement in the conditional form of 'if P then Q' is taken to imply 'If not P, then not Q.'" *French v. State*, 362 N.E.2d 834, 843 n.1 (De Bruler, J., concurring and dissenting). That is, the majority appears to begin with the following statement: If there is a clause allowing elimination of the Policy (if P), then the Policy is subject to elimination (then Q). The majority then infers that if there is no clause allowing elimination (not

P), the Policy is not subject to elimination (then not Q). *See* Slip op. at ¶¶ 13 (noting that "none of the versions of the Policy said it was revocable as to directors . . . who had already served the requisite number of years") & 14 ("[T]he Policy never included . . . a reservation of rights, or anything like it.").

[35] Putting aside the way the majority went about finding an implied provision, the provision is neither reasonable nor obvious under the circumstances. Thus, the provision cannot be implied. *See* 11 Williston on Contracts § 31:7 (4th ed.). In my opinion, considering the inherent malleability of policies, the only reasonable interpretation of the Policy is that there is an implied term allowing the REMC to eliminate the Policy at any time. That is, the Policy impliedly provided that the REMC would comply with its terms and pay for insurance while the Policy was in effect, but at all times the REMC could—at the discretion of its board—revisit the Policy and eliminate it. Ultimately, stating that the REMC could eliminate its own policy was "too obvious to have needed expression[.]" *Id.*[5]

[36] All in all, I cannot join the majority in concluding that the Policy impliedly contained a non-obvious, elaborate "vesting" provision. Rather, in my view, the REMC always had the implied power to eliminate the Policy, which it did.

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[5] Even if one were persuaded that it was reasonable under the circumstances to identify some form of implied limitation on the REMC's power to eliminate the Policy, there would be no need to go so far as the majority. That is, although I would conclude that the REMC had the unfettered power to eliminate the Policy, in my view, the next degree of potential limitation would be to identify an implied term allowing the REMC to eliminate the Policy upon reasonable notice to the Plaintiffs.

Thus, although the REMC kept the Policy in place for a number of years—and paid for health insurance while the Policy was in place—the REMC is under no obligation to keep paying for insurance now that it has repealed the Policy. Therefore, the REMC is entitled to summary judgment on the claim of breach.[6]

Public Policy

[37] As initially discussed, Indiana entities have flexibility in governing their affairs. As an extension of this well-established principle of corporate governance, I believe that Indiana law already recognizes a gap-filling default rule providing that, without more, the adoption of a policy does not amount to a binding contractual obligation. However, assuming *arguendo* that Indiana law does not recognize this default rule, public policy strongly favors its adoption. *See generally* Linzer, *supra* at § 26.4[C] (discussing circumstances where a court fills a gap with default rules instead of deriving implied terms from the intentions of the parties, noting that "if a court is faced with [an instrument] that is silent on a point that is likely to reoccur . . . it should recognize that its role is different from the reconstructive surgery that a court engages in when it merely fills a

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[6] The majority discusses the issue of mutuality of obligation as well as principles of unilateral contracts, ultimately concluding that a contract formed under the circumstances. I do not necessarily agree that the majority properly decided those issues. In any case, although the majority analyzes whether a contract formed, it does not proceed to analyze the critical issue at hand, which is that the Policy does not state, one way or the other, whether the REMC had the power to repeal the Policy at any time. Ultimately, the majority's analysis of contract formation provides no support for identifying an implied "vesting" provision. In my view, the majority's limited analysis is telling. Indeed, it seems that the majority has taken a quasi-equitable approach, finding a "vesting" provision by applying equitable principles of promissory estoppel rather than principles of pure contract law. *See, e.g.*, Slip op. at ¶ 12. ("[O]nce [the] Plaintiffs served the number of years called for by the Policy, the REMC became bound to provide the promised benefits.").

gap" with an implied term). Indeed, in the context of corporate resolutions—especially those involving benefits—it best serves public policy for the default position to be that an entity does not create a contractual obligation by adopting a policy unless the entity adopts clear language expressing the intent to do so. Requiring clear language would ensure that voting board members understand the ramifications of their votes and do not inadvertently create contractual obligations when believing that they are adopting a malleable policy. Further, insisting on this type of definite language avoids injecting uncertainty into corporate actions, ensuring that an entity has a clear understanding of its contractual obligations as the composition of the board changes over time.

[38] Finally, it should be noted that insisting on clear language would not affect the availability of equitable remedies, which are designed to address situations where no enforceable contract exists. *See* Restatement (Second) of Contracts § 90 (1981). Here, the Plaintiffs chose to settle their equitable claims; Indiana contract law should not be contorted to resurrect them.

[39] For all the foregoing reasons, I respectfully dissent.