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## COMMENT

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### *BINS v. EXXON*: AFFIRMATIVE DUTIES TO DISCLOSE PROPOSED BENEFIT CHANGES IN THE ABSENCE OF EMPLOYEE INQUIRY

*Joseph E. Czerniawski\**

#### INTRODUCTION

The Employee Retirement Income Securities Act of 1974 (ERISA)<sup>1</sup> was enacted amidst concern in Congress about reported abuse and mismanagement of private pension plans.<sup>2</sup> Prior to the en-

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\* Notre Dame Law School, J.D. Candidate, 2001; Franklin and Marshall College, B.A. 1998. This Comment is dedicated to my parents, who gave me the faith, values, and work ethic that are at the center of my life. I would like to thank Professor Gunn, Ed Caspar, Christine Gould Hamm, Eric Hall, and Mike Chaplin for their comments and assistance with this Comment. Thanks also to Professor Rice for all his help throughout law school and to everyone involved in the Notre Dame Bengal Bouts.

1 Employee Retirement Income Securities Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (1994).

2 See *id.* § 1001(a) (citing Congressional findings about the need to protect promised pensions for employees); see also Jeffrey A. Brauch, *The Danger of Ignoring Plain Meaning: Individual Relief for Breach of Fiduciary Duty Under ERISA*, 41 WAYNE L. REV. 1233, 1237-38 (1995) (giving a general background of the legislative history of ERISA). In discussing important events that led to comprehensive federal regulation of private pension plans, Brauch recounts the closing of the Studebaker automobile plant in South Bend, Indiana, which garnered tremendous publicity with the termination of its pension plan, which covered 11,000 workers. See *id.* at 1238. The pension plan was so underfunded that 4000 employees with vested pensions and ten years of service received only fifteen cents on the dollar of their accrued benefits. See *id.* (quoting JOHN H. LANGBEIN & BRUCE WOLK, PENSION AND EMPLOYEE BENEFIT LAW 62 (2d ed. 1995)); see also H.R. REP. NO. 93-807 (1974), reprinted in 1974 U.S.C.C.A.N. 4670, 4676-77.

The statements in the "findings" section of ERISA, 29 U.S.C. § 1001(b), reflect this congressional purpose:

[T]o protect . . . the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by

actment of ERISA, pension and welfare benefit plans were subject to the Welfare and Pension Plans Disclosure Act,<sup>3</sup> which required substantial disclosure and imposed publication requirements for private pension plans covering more than twenty-five employees.<sup>4</sup> While ERISA also provides disclosure and publication requirements,<sup>5</sup> it serves the broader purpose of creating general fiduciary responsibilities among those who administer pension and other welfare benefits. The overall scheme of ERISA reflects a simple intent—to ensure that employees receive the pension and other benefits that they were promised.<sup>6</sup> While this broad goal of ERISA is made explicit in the text of the statute,<sup>7</sup> Congress also expressed the desire to encourage the development of private pension plans, without placing an excessive burden upon the system.<sup>8</sup> This secondary goal of ERISA often seems overshadowed in both the case law and legal commentary about fiduciary duties under ERISA.<sup>9</sup>

This Comment examines the scope of duties owed by an ERISA fiduciary, particularly in the disclosure of information about benefit plan changes. In a recent *en banc* decision of the Ninth Circuit, *Bins v. Exxon Co.*,<sup>10</sup> the court reversed a panel decision that held that

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establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

*Id.*

3 See Welfare and Pension Plans Disclosure Act, Pub. L. No. 85-836, 72 Stat. 997 (1958), *repealed by* ERISA, 29 U.S.C. §§ 1001–1461 (1975).

4 See Edward E. Bintz, *Fiduciary Responsibility Under ERISA: Is There Ever a Fiduciary Duty to Disclose?*, 54 U. PITT. L. REV. 979, 985 n.21 (1993) (citing the provisions of the Welfare and Pension Plans Disclosure Act).

5 29 U.S.C. §§ 1021–1031 (1994 & Supp. IV 1998).

6 See Ryan P. Barry, Comment, *ERISA's Purpose: The Conveyance of Information from Trustee to Beneficiary*, 31 CONN. L. REV. 735, 735 (1999) (citing *Welfare and Pension Plan Legislation, 1973: Hearings on H.R. 2 Before the Subcomm. on Labor of the Comm. on Educ. and Labor*, 93d Cong. 1 (1973) (statement of Rep. Dent, Chairman of the Subcommittee on Labor)).

7 See *supra* note 2.

8 See 120 CONG. REC. 29, 198 (statement of Rep. Ullman) (finding that “these new requirements have been carefully designed to provide adequate protection for employees, and, at the same time, provide a favorable setting for the growth and development of private pension plans”); *id.* at 949 (statement of Sen. Bentsen) (noting that “it is important to recognize that if minimum standards are set too high, we would discourage the creation of new plans”); see also Brauch, *supra* note 2, at 1239.

9 Concern about ignoring this goal was one of the motivations prompting Judge Fernandez’s dissent in *Bins*. See *Bins v. Exxon Co.*, 189 F.3d 929, 941 (9th Cir. 1999) (Fernandez, J., dissenting); see also *Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1102–03 (9th Cir. 1999) (Fernandez, J., dissenting).

10 No. 98-55662, 2000 U.S. App. LEXIS 19080 (9th Cir. Aug. 10, 2000) (*en banc*).

ERISA fiduciaries have the affirmative duty to disclose proposed benefit changes, regardless of whether the particular employee had inquired about the subject.<sup>11</sup> This panel decision conflicted with decisions of two other circuits holding that the employer has no duty to voluntarily disclose proposed benefit changes.<sup>12</sup> This Comment argues that the *Bins* panel decision inappropriately extended ERISA fiduciary disclosure duties, creating practical problems for employers and violating the secondary ERISA goal of encouraging the development of private pension plans. The reversal *en banc* by the Ninth Circuit recognized the practical and theoretical problems of the *Bins* decision and correctly limited disclosure duties of proposed benefit changes.

Part I of this Comment will provide a background of the structure of ERISA and detail its provisions about fiduciary duties, interpreted through the common law of trusts. Part II examines the explicit statutory standards of disclosure provided by ERISA, as well as the disclosure standards which are imposed upon fiduciaries through the fiduciary provisions of ERISA. Part III provides the general guidelines given by the Supreme Court in *Varity Corp. v. Howe*<sup>13</sup> in interpreting these fiduciary provisions of ERISA. Then, the Comment examines current disputes involving the interpretation and application of fiduciary disclosure duties in Part IV. The Comment looks at the facts, decisions, and reasoning of the *Bins* court in finding that there is an affirmative duty to disclose proposed benefit changes even in the absence of employee inquiry (Part V) and the contrary rulings by the *en banc* panel and other circuits (Part VI). Finally, the Comment analyzes and rejects affirmative disclosure as impractical and creating heavy burdens upon the employer, having no precedential support, and being contrary to the legislative intent of Congress in enacting ERISA.

## I. THE STRUCTURE OF ERISA AND IMPOSITION OF FIDUCIARY DUTIES

ERISA, as suggested earlier,<sup>14</sup> broadly regulates and provides employee safeguards in the area of private pension and other benefits.<sup>15</sup>

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11 *Id.* at \*28 (*en banc*).

12 *See infra* note 261.

13 516 U.S. 489 (1996).

14 *See supra* notes 5–6 and accompanying text.

15 There are two basic types of plans covered by ERISA. One type is defined by the statute as an "employee welfare benefit plan" or "welfare plan" which provides "(A) medical, surgical, or hospital care or benefits, or benefits in the events of sickness, accident, disability, death or unemployment, or vacation benefits . . . or (B) any benefit described in Section 186 (c) of this title (other than pensions on retirement

For instance, the aforementioned comprehensive mandatory reporting and disclosure rules<sup>16</sup> are designed to provide plan participants with complete information concerning their rights under the plan.<sup>17</sup> ERISA creates an extensive framework of rules that regulates participation in pension and other benefit plans, as well as regulations governing the vesting of such plans.<sup>18</sup> ERISA also contains various provisions governing the administration and enforcement of these provisions,<sup>19</sup> as well as specific provisions for plan termination insurance<sup>20</sup> and various regulations for multi-employer plans.<sup>21</sup> A frequently litigated aspect of ERISA is the statutory fiduciary provisions, which govern the conduct of plan administrators toward beneficiaries.<sup>22</sup> These provisions are the analytical starting point for examining whether ERISA's fiduciary provisions mandate affirmative disclosure duties to plan beneficiaries.

#### A. *Fiduciary Duties Imposed Under ERISA*

ERISA designates "fiduciary status" upon a person with respect to welfare or benefit plans

to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such a plan.<sup>23</sup>

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or death, and insurance to provide such pensions)." 29 U.S.C. § 1002(1) (1994). The second type of plan is defined as an "employee pension benefit plan" or "pension plan" which "(i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond . . . ." *Id.* § 1002(2)(A).

16 See *supra* note 5.

17 See Shelley L. Ward, Note, *Enlarging an Employer's Fiduciary Hat: Varity Corp. v. Howe Increases Employers' Exposure to Liability When They Act Under ERISA*, 34 Hous. L. Rev. 1195, 1199 (1997).

18 See 29 U.S.C. §§ 1051-1061 (1994 & Supp. IV 1998). For an extensive discussion of the problematic nature of standards and regulations regarding vesting, see Peter Van Zante, *Mandated Vesting: Suppression of Voluntary Retirement Benefits*, 75 NOTRE DAME L. REV. 125, 177-200 (1999).

19 See 29 U.S.C. §§ 1131-1145 (1994 & Supp. IV 1998).

20 See *id.* §§ 1301-1371.

21 See *id.* §§ 1381-1461.

22 See *id.* §§ 1101-1114. As will be discussed *infra* in Part I.A, the reason for the amount of litigation is the broad and ambiguous standards given by the provision.

23 *Id.* § 1002(21)(A).

This broad definition emphasizes that fiduciary status is a functional rather than a designated position. Companies or individuals who fall within this broad definition do not evade ERISA-imposed requirements simply because others are officially designated as "trustee" or "fiduciary."<sup>24</sup>

Similarly, ERISA imposes affirmative fiduciary duties in the relevant section in broad and generalized language.<sup>25</sup> For instance, ERISA requires a fiduciary to "discharge his duties solely in the interests of the participants and beneficiaries"<sup>26</sup> and "for the exclusive purpose of . . . providing benefits to participants and their beneficiaries."<sup>27</sup> ERISA limits the self-interested manipulation of plan assets, both by requiring the fiduciary to discharge his duties solely for the interest of the beneficiaries and by providing that "the assets of a plan shall not be held for the benefit of any employer . . ."<sup>28</sup> The fiduciary duty of absolute loyalty towards beneficiaries is buttressed by specific prohibitions on self-interested transactions,<sup>29</sup> as well as those that involve conflicts of interest.<sup>30</sup> All of these provisions are enforced by statutory language providing that fiduciaries are personally liable to the plan for breaches of duty.<sup>31</sup>

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24 See Brauch, *supra* note 2, at 1239.

25 See generally 29 U.S.C. §§ 1101-1114 (1994 & Supp. IV 1998).

26 *Id.* § 1104(a)(1). The strict interpretation of this language often leads to results that seem to forego the alternative intent of ERISA: to avoid undue hardships on the private pension plan system. See Steven Davi, Note, *To Tell the Truth: An Analysis of Fiduciary Disclosure Duties and Employee Standing to Assert Claims Under ERISA*, 10 ST. JOHN'S J. LEGAL COMMENT. 625, 626 (1995).

27 29 U.S.C. § 1104(a)(1)(A)(i) (1994).

28 *Id.* § 1103(c)(1).

29 See *id.* § 1106(a).

30 See *id.* § 1106(b). For an analysis of the various statutory and administrative exceptions to these prohibited transaction rules, see generally Arthur H. Kroll & Yale D. Tauber, *Fiduciary Responsibility and Prohibited Transactions Under ERISA*, 14 REAL PROP. PROB. & TR. J. 657 (1979).

31 See 29 U.S.C. § 1109(a) (1994), which provides:

[A]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses from the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

While this section authorizes relief on behalf of the plan and other equitable remedies, the question of whether individuals can seek relief on behalf of themselves for breaches of fiduciary duty has generated significant controversy. See generally *Varity Corp. v. Howe*, 516 U.S. 489 (1996) (allowing individual beneficiaries to seek equita-

The generalized language depicting fiduciary duties under ERISA is evidenced as well by the statutory guidance for how a fiduciary must perform his duties. A fiduciary must discharge his duties "with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise and with like aims . . . ."<sup>32</sup> This standard uses language reminiscent of negligence standards in tort law and, standing alone as a statutory guideline, would appear to be too vague to serve as the federal guideline for the administration of all ERISA-covered pension and welfare benefit plans. The failure of ERISA to elucidate specific guidelines of fiduciary duties, however, reflects the general reliance on common law trust relationships as an interpretive guide. The Congressional intent that traditional trust law would provide guidelines for limiting and regulating fiduciary conduct is clearly reflected in legislative proceedings.<sup>33</sup>

### B. Common Law Trust Principles as Guidelines for Fiduciaries

While providing broad language that gives general principles rather than specific fiduciary duties, "ERISA's fiduciary provisions and protections must be read to best effectuate the statute's fundamental purpose, which is the 'enforcement of strict fiduciary standards of care in the administration of all aspects of pension plans.'"<sup>34</sup> How

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ble relief where the employer/plan administrator violates fiduciary duties by deliberating misleading beneficiaries); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) (discussing private rights of action implied under ERISA). This question assumes more importance because of the general consensus that Congress intended the set of federal remedies (which are the six types of available civil actions identified at 29 U.S.C. § 1132(a) (1994)) to be exclusive and did not adopt every state remedy that existed prior to ERISA. See also Brauch, *supra* note 2, at 1241 (discussing conflicts over available remedies under ERISA).

32 29 U.S.C. § 1104(a)(1)(B) (1994).

33 See H.R. REP. NO. 93-1280, at 298 (1974) (stating that fiduciary responsibility should be informed by the law of trusts), reprinted in 1974 U.S.C.C.A.N. 5038, 5076; see also 120 CONG. REC. 29, 932 (1974) (statement of Sen. Williams, Chairman of the Senate Comm. on Labor and Public Welfare) (noting that trust law informs fiduciary responsibility).

34 Bryan J. Globes, *In the Wake of Varity Corp. v. Howe: An Affirmative Fiduciary Duty to Disclose Under ERISA*, 9 DEPAUL BUS. L.J. 221, 223 (1997) (quoting *Mass. Mut. Life*, 473 U.S. at 158 (Brennan, J., concurring); *Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1299 (3d Cir. 1993)); see also 29 U.S.C. § 1001(b) (1994 & Supp. IV 1998) (giving the legislative purposes of ERISA). Enforcing such strict fiduciary standards becomes more important in light of the fact that ERISA regulation of private pension plans preempts state regulation of such plans and thus leaves enforcement of such standards solely within the statute. See Mathew S. Roten-

does one enforce "strict fiduciary standards of care" with the broad principles given for fiduciary conduct in the statutory language of ERISA?

The Congressional answer to this problem was that the common law of trusts would provide the guidance for enforcing and regulating specific fiduciary standards under ERISA.<sup>35</sup> In explicitly endorsing the analogy between the fiduciary/beneficiary relationship under ERISA and the trustee/beneficiary relationship in the common law of trusts, Congress created an interpretive scheme which imposes from trust law the high standards of loyalty and care in the administration of a trust.<sup>36</sup>

ERISA itself codifies three common law trust principles: the duties to act (1) as a "prudent person" in administering benefit plans, (2) solely for the interests of the plan's participants and beneficiaries, and (3) for the exclusive purpose of providing plan benefits to plan participants and beneficiaries.<sup>37</sup> Rather than list specific fiduciary responsibilities, ERISA gives these three general principles and evokes the common law of trusts in applying these broad duties to the various situations and conflicts that occur in the administration of pension and benefit plans.<sup>38</sup>

Most courts have endorsed the relationships from the common law of trusts providing the guidance and standards by which to enforce the fiduciary provisions of ERISA.<sup>39</sup> As the Supreme Court remarked, "Rather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and

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berg, Note, *Fischer v. Philadelphia Electric Co.: The Third Circuit 'Seriously Considers' the Fiduciary Duty to Disclose Potential Changes to an Employee Benefit Plan Under ERISA*, 42 VILL. L. REV. 1915, 1918 (citing 29 U.S.C. § 1144(a) (1994)).

35 See *supra* note 33 and accompanying text.

36 See RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. d (1959); see also Bintz, *supra* note 4, at 989 ("The legislative history of ERISA . . . reflects that ERISA's fiduciary duty rules are based upon common law trust principles.").

37 See *supra* notes 25-32 and accompanying text.

38 See Daniel M. Nimtz, *Tenth Circuit Survey: ERISA Plan Changes*, 75 U. DENV. L. REV. 891, 893 (1998).

39 See Ward, *supra* note 17, at 1198. But see *Porto v. Armco Inc.*, 825 F.2d 1274, 1276 (8th Cir. 1987) (noting that administrators do not need to provide disclosure earlier than ERISA requires by its statutory disclosure standards in order to meet their fiduciary obligations); *Kyle v. Stewart Co.*, 788 F. Supp. 321, 323 (S.D. Tex. 1992) (deciding that a fiduciary fulfilled his duties simply by complying with the minimal reporting requirements of ERISA).



responsibility.”<sup>40</sup> Courts are expected to utilize the common law of trusts to analyze and provide interpretive guidance for the broad fiduciary standards expressed by ERISA. By using these common law principles to interpret ERISA’s fiduciary standards, courts will develop a “federal common law of rights and obligations under ERISA-regulated plans.”<sup>41</sup> This dependence on the common law of trusts as an interpretive aid led the Supreme Court to refer to trust law as the “starting point” in interpreting ERISA’s fiduciary duties.<sup>42</sup>

However, this general reliance on the common law of trusts to interpret the broad fiduciary provisions of ERISA has some drawbacks. The first and foremost problem, as noted earlier,<sup>43</sup> is that both courts and legal commentators emphasize trust law relationships to the exclusion of ERISA’s purpose of encouraging the formation of em-

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40 Cent. States, S.E. & S.W. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 570 (1985).

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

42 Varsity Corp. v. Howe, 516 U.S. 489, 497 (1996). While there is a general consensus that the common law of trusts informs the interpretation of fiduciary duties in ERISA, this particular statement by the Court drew sharp criticism from the dissent in *Varsity*. The dissent noted, “This is a novel approach to statutory construction, one that stands our traditional approach on its head.” *Id.* at 528 (Thomas, J., dissenting). The dissent felt that “we must not forget that ERISA is a statute, and in ‘every case involving a statute, the starting point is the language itself.’” *Id.* (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976)). However, even the dissent also explicitly endorsed the notion that the common law of trusts plays a role in the interpretation of fiduciary duties under ERISA. *See id.*

However, the reference by the majority to the common law of trusts as the “starting point” of ERISA interpretation is often taken out of context. The majority’s actual reference was that

the law of trusts will often inform, but will not necessarily determine the outcome of, an effort to interpret ERISA’s fiduciary duties . . . . [T]rust law will offer only a starting point after which courts might go on to ask whether . . . the language of the statute, its structure, or its purposes require departing from common-law trust requirements.

*Id.* at 497.

The emphasis on trust law as the basis of interpretation of ERISA’s fiduciary standards is emphasized by both courts and legal commentators, often to the extent of perhaps giving lesser attention to the secondary purpose of ERISA. *See supra* note 26. As even *Varsity* recognized, “Congress expected that the courts will interpret this prudent man rule [and the other fiduciary standards] bearing in mind the special nature and purpose of employee benefit plans.” *Varsity*, 516 U.S. at 497 (citing H.R. REP. NO. 93-1280, at 295, 302 (1974)). The lack of emphasis both on the special and distinctive nature of employee benefit plans as opposed to general trust law relationships and on the importance of making compliance with ERISA fiduciary standards ameliorative to the formation and strengthening of the private pension plan system will be discussed later in this Comment. *See infra* Part VII.

43 *See supra* notes 26, 42.

ployee benefit plans, and often ignore the special circumstances and peculiar problems that arise from private pension and welfare benefit plans provided by employers. Another problem involves the application by courts of the common law of trusts to interpret the fiduciary provisions of ERISA. This process necessarily leads to inconsistent judicial interpretations,<sup>44</sup> which provoke further litigation over fiduciary standards, create inefficiency, and *lessen* the incentives to encourage or expand employee benefit plans.

## II. STATUTORY AND FIDUCIARY STANDARDS OF DISCLOSURE UNDER ERISA

What effect do ambiguous fiduciary standards have upon disputes over disclosure duties of employer-fiduciaries? The disputes involve fiduciary standards because courts have found that there are various disclosure duties implied through the fiduciary duties section of ERISA. While ERISA provides specific information-disclosure-requirements within the statute itself, fiduciary disclosure standards are also imposed simply because the plan administrator is also a fiduciary.

### A. *Statutory Standards of Disclosure Under ERISA*

What levels of disclosure, then, are fiduciaries required to maintain with respect to a beneficiary of an ERISA-regulated plan? The ERISA statute gives minimum disclosure and reporting requirements,<sup>45</sup> which are "designed to provide plan participants with complete information concerning their rights under the plan."<sup>46</sup> Under ERISA, every plan must designate a fiduciary to manage the plan.<sup>47</sup> As noted earlier, the fiduciary definition is functional and includes trustees, plan administrators with discretionary authority over the plan, investment committees and advisors, and any individuals who select the

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44 See Nimtz, *supra* note 38, at 892. There has certainly been no shortage of varying interpretations of ERISA fiduciary requirements. For some of the issues that are under dispute, see *id.* at 892 n.5.

45 See 29 U.S.C. §§ 1021-1031 (1994 & Supp. IV 1998). For a summary description of the basic reporting obligations of the ERISA fiduciary, see Rotenberg, *supra* note 34, at 1920-21 nn.24-25.

46 Ward, *supra* note 17, at 1200.

47 29 U.S.C. § 1022 (1994 & Supp. IV 1998). For the broad definition of "fiduciary" under ERISA, see *supra* text accompanying note 23. One must also remember that this broad "functional" definition of fiduciary means that one cannot escape such duties by designating another party as the fiduciary of a particular plan, if that person's activities towards the plan fall within the fiduciary definition. See *supra* note 24 and accompanying text.

people in these positions.<sup>48</sup> Even more important, employers are also considered fiduciaries when they act as plan administrators with discretionary control over the plan<sup>49</sup>—a common situation with such benefits as early retirement incentives.<sup>50</sup>

There are minimal disclosure requirements given by the statutory language of ERISA for such fiduciaries. In order to ensure effective regulation of the administration of private pension plans, ERISA requires that certain information regarding the plan terms and finances be filed with the Department of Labor, the Pension Benefit Guaranty Corporation, and the Internal Revenue Service.<sup>51</sup> ERISA mandates not only disclosure and reporting of information to government regulatory agencies, however, but also the provision of certain information to plan participants themselves.

Besides a summary plan description, a plan administrator must also provide a "summary annual report," within seven months of the close of the plan year, that summarizes the financial status of the plan.<sup>52</sup> The report must include the amount of administrative expenses incurred, the benefits paid to participants and beneficiaries, the value of plan assets and income or loss for the year, and the net unrealized appreciation in plan assets during the year.<sup>53</sup> For defined pension benefit plans, this summary report must also provide a statement regarding compliance with ERISA minimum funding standards.<sup>54</sup>

ERISA also gives plan participants other informational rights. Plan participants and beneficiaries must be provided, upon request, with a statement of their total accrued benefits, non-forfeitable benefits, and the earliest date on which benefits will become non-forfeita-

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48 See Ward, *supra* note 17, at 1200 (citing 29 C.F.R. § 2510.3-21 (1996)).

49 29 U.S.C. § 1002(21)(B) (1994).

50 See *infra* notes 84–87 and accompanying text.

51 29 U.S.C. §§ 1021–1025 (1994 & Supp. IV 1998). For instance, the summary plan description must be filed with the Department of Labor within 120 days of the date on which the plan becomes subject to ERISA's reporting and disclosure requirements. See *id.* § 1024(a)(1)(B); 29 C.F.R. § 2520.102-3 (1999).

52 29 U.S.C. § 1024(b)(3) (1994). A participant is entitled to request a copy of the full annual report, which contains detailed information regarding the financial condition of the plan. This report is filed each year with the Internal Revenue Service, the Department of Labor, and the Pension Benefit Guaranty Corporation. See *id.* § 1024(b)(4).

53 Bintz, *supra* note 4, at 982 n.10 (citing 29 C.F.R. § 2520.104(b)-10(d) (1996)).

54 *Id.* at 982–83 (citing 29 C.F.R. § 2520.104(b)-10(d) (1996)). ERISA also requires notification to plan participants of failures to satisfy ERISA's minimum funding standards. See 29 U.S.C. § 1021(d) (1994).

ble.<sup>55</sup> Plan participants must be notified by the plan administrator at least fifteen days prior to any amendment of a defined benefit plan or individual account plan that significantly reduces the rate of future benefit accruals.<sup>56</sup>

All of these statutory reporting and disclosure requirements are aimed to provide information to participants (as well as government regulators) about the administration of employee benefit plans. While these statutory requirements impose certain duties upon employers and other plan fiduciaries, do they constitute the sum total of disclosure duties owed by ERISA fiduciaries? While some courts have attempted to limit disclosure duties to those defined by statute,<sup>57</sup> most courts instead interpret the general fiduciary duty provisions of ERISA<sup>58</sup> to require more than simply the statutory reporting and disclosure provisions.

### *B. Common Law Fiduciary Standards of Disclosure Under ERISA*

As noted earlier,<sup>59</sup> courts refer to the common law of trusts in order to interpret the general fiduciary standards provided by ERISA. While ERISA provides fairly detailed requirements regarding reporting and disclosure,<sup>60</sup> courts examine the common law of trusts to re-

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55 29 U.S.C. § 1025(a) (1994). A plan administrator is also required to provide to a participant who separated from service during the plan year and has a deferred vested benefit a statement reflecting the nature, amount, and form of the participant's benefit and other information. Statements must be provided to all participants who terminate employment before becoming vested. *See id.* § 1059.

56 *Id.* § 1054(h). ERISA also provides for certain notices to be given to participants in connection with the termination of a plan governed by Title IV of ERISA. *Id.* § 1341. There are various notice requirements required by the Internal Revenue Code relating to employee benefit plans. *See* I.R.C. §§ 402(f) (requiring notice explaining special tax treatment of distributions qualifying for rollover and lump sum treatment); 412(f)(4) (requiring notice of filing of a funding waiver request); 417 (requiring notices relating to survivor annuity rates) (1994 & Supp. IV 1998).

57 *E.g.*, *Kyle v. Stewart Co.*, 788 F. Supp. 321, 323 (S.D. Tex. 1992) (deciding that a fiduciary fulfilled his duties simply by complying with the minimal reporting requirements of ERISA); *see also* *Porto v. Armco Inc.*, 825 F.2d 1274, 1276 (8th Cir. 1987) (holding that administrators do not need to provide disclosure earlier than required by ERISA's statutory disclosure standards to meet their fiduciary duty).

58 Courts interpret these fiduciary provisions by applying the common law of trusts. *See supra* notes 35–42 and accompanying text.

59 *See id.*

60 *See supra* Part II.A (discussing the reporting and disclosure provisions of 29 U.S.C. §§ 1021–1031 (1994)).

solve situations where a fiduciary's disclosure duties under ERISA might extend beyond those required by statute.<sup>61</sup>

Because the common law of trusts is an interpretive guide, "the scope of a fiduciary's duty to disclose at common law is highly relevant to the existence and scope of such a duty under ERISA."<sup>62</sup> At common law, the trustee has a duty of disclosure that requires him to "communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person with respect to his interest."<sup>63</sup> The common law rules were designed to protect the interests of the beneficiaries—who are "always entitled to such information as is reasonably necessary to enable them to enforce their rights under the trust or to prevent or redress a breach of trust."<sup>64</sup> Applying these general principles from trust law creates a broader disclosure obligation for ERISA fiduciaries, but courts have recognized that these obligations reflect the special character and intent of ERISA.<sup>65</sup>

Prior to the enactment of ERISA, many state courts applied an obligation of general disclosure for fiduciaries of employee benefits.<sup>66</sup> For instance, the New Jersey Superior Court in *Branch v. White*<sup>67</sup> found the trustees of a pension plan had a fiduciary duty to disclose the plan's eligibility requirements to all potential participants.<sup>68</sup> This particular plan had been established through a collective bargaining agreement between a union and an association of contractors and re-

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61 See Davi, *supra* note 26, at 643 n.101, discussing *Palinov v. Casey*, 664 F.2d 854 (1st Cir. 1981), as one of the first cases that found obligations for a fiduciary to disclose plan amendments prior to the date required by express ERISA reporting and disclosure provisions. The court reasoned the trustee was governed by a "fairness" criterion in communicating plan changes, which was violated when participants, with minimal effort after receiving such information, could have avoided the loss of their pension plans. *Id.* For other early cases imposing fiduciary disclosure duties beyond express requirements, see *Agro v. Joint Plumbing Industrial Building*, 623 F.2d 207, 211 (2d Cir. 1980), and *Valle v. Joint Plumbing Industrial Building*, 623 F.2d 196, 203 (2d Cir. 1980).

62 Bintz, *supra* note 4, at 985.

63 RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. d (1959).

64 *Id.*

65 See *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) ("Trust law will offer a starting point, after which courts must go on to ask whether . . . the language of the statute, its structure, or its purposes require departing from common law trust requirements.").

66 See Rotenberg, *supra* note 34, at 1924. For a discussion of federal regulation of private pension plans, see *supra* note 3 and accompanying text.

67 239 A.2d 665 (N.J. Super. Ct. App. Div. 1968).

68 *Id.* at 671.

quired participating employees to contribute two dollars each month to fund the plan.<sup>69</sup> The plaintiffs were non-union members, who claimed that they were not informed about the plan or its eligibility requirements, but that members of the union had been provided such information.<sup>70</sup> The disclosure obligation found by the court mirrored the broader obligation of trustees under the *Restatement* to provide all information necessary for beneficiaries to enforce their rights, as well as the common law duty of loyalty imposed on trustees.<sup>71</sup> Several other state courts also imposed broad fiduciary duties upon trustees before the advent of ERISA,<sup>72</sup> reflecting the *Restatement* language about providing beneficiaries all material information that is necessary to enforce their rights.<sup>73</sup>

Since the common law before ERISA recognized a fiduciary duty of disclosure to beneficiaries in certain circumstances, "there is no 'well-grounded basis on which wholly to exclude a duty to disclose from ERISA's fiduciary requirements.'"<sup>74</sup> These disclosure duties stem from the interpretation of the fiduciary provisions of ERISA,<sup>75</sup> in light of the common law, as opposed to the specific disclosure and reporting standards of ERISA.<sup>76</sup>

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69 *Id.* at 668.

70 *Id.*

71 These broad disclosure obligations based on common law trust obligations formed the basis of other pre-ERISA holdings in New Jersey about disclosure obligations. See *Shallcross Express, Inc. v. Local 478 Trucking & Allied Indus. Pension Fund*, 290 A.2d 744, 751-52 (N.J. Super. Ct. Law Div. 1972) (requiring trustees to disclose all facts within their knowledge that are material to the protection of beneficiaries' interests).

72 E.g., *Lix v. Edwards*, 147 Cal. Rptr. 294, 299-300 (Cal. Ct. App. 1978); *Erion v. Timken Co.*, 368 N.E.2d 312, 313-14 (Ohio Ct. App. 1976). In *Lix*, the California Court of Appeals held trustees of a pension fund had a fiduciary duty to disclose the manner in which they were interpreting a short-term contribution provision, when such interpretation resulted in adverse consequences to the beneficiaries. *Lix*, 147 Cal. Rptr. at 299-300. The court estopped the trustees from terminating the plaintiffs' benefits because the trustees failed to provide such notice. *Id.* In *Erion*, the surviving spouse of a retiree claimed her husband's former employer negligently failed to inform him that delaying his retirement would entitle him to a survivor death benefit. *Erion*, 368 N.E.2d at 313-14. The Ohio Court of Appeals concluded that a fiduciary relationship existed between the employer and employees regarding discussions with prospective retirees. *Id.* Although the employer was not obligated to explain "every legal ramification" of the pension plan, the obvious and more pertinent points should have been brought to the attention of the employee without a specific question. *Id.* at 317.

73 See *RESTATEMENT (SECOND) OF TRUSTS* § 173 cmt. d (1959).

74 Rotenberg, *supra* note 34, at 1926 (quoting Bintz, *supra* note 4, at 989).

75 See *supra* notes 23-33 and accompanying text.

76 See *supra* Part II.A.

Certainly, the acceptance of disclosure standards for fiduciaries beyond the minimum specific requirements of ERISA has not been universal.<sup>77</sup> As some commentators have noted, however, decisions attempting to limit disclosure duties to the statutory disclosure standards have failed to reconcile the minimum reporting and disclosure duties of ERISA with the statute's broad language about the scope of fiduciary duty.<sup>78</sup> Supporters of broad disclosure duties based on the fiduciary language in ERISA do not think the extent of disclosure requirements is unlimited. As always, the specific purpose and nature of ERISA should always be kept in mind—protecting employees' rights to pension and welfare benefits,<sup>79</sup> as well as encouraging the development of the private pension and welfare benefit system without burdening it.<sup>80</sup>

In their application to ERISA fiduciary standards, the common law disclosure duties should extend beyond minimum statutory requirements only in particular situations where disclosure duties clearly advance the aforementioned goals of ERISA.<sup>81</sup> Furthermore, there is a presumption against imposing a fiduciary duty to disclose when the duty would contradict or supplant an express reporting and disclosure requirement.<sup>82</sup> The Supreme Court in *Varity* stated that fiduciary du-

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<sup>77</sup> See Bintz, *supra* note 4, at 990 (describing a case that limited disclosure to the statutory requirements); see also *supra* note 37.

<sup>78</sup> See Davi, *supra* note 26, at 642-43 (citing 29 U.S.C. § 1002(21) (1994)). Davi also cites Bintz's argument that the simple expression of minimum reporting and disclosure standards should not bar disclosure obligations from the fiduciary provisions, because "the maxim of *expressio unius est exclusio alterius* . . . does not apply when there is evidence of contrary legislative policy or intent." Bintz, *supra* note 4, at 988, cited in Davi, *supra* note 26, at 644.

<sup>79</sup> See 29 U.S.C. § 1001 (1994 & Supp. IV 1998); H.R. REP. NO. 93-533, at 1-5 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4639-43; H.R. REP. NO. 93-807, at 8-9 (1974), reprinted in 1974 U.S.C.C.A.N. 4670, 4676-77; S. REP. NO. 93-127, at 15-16 (1974), reprinted in 1974 U.S.C.C.A.N. 4838, 4851; S. REP. NO. 93-383, at 11-13 (1974), reprinted in 1974 U.S.C.C.A.N. 4890, 4898-99.

<sup>80</sup> See *supra* note 8.

<sup>81</sup> See Bintz, *supra* note 4, at 989-90.

<sup>82</sup> *Id.* at 990. This method of applying the fiduciary duty to disclose seems to have been endorsed by the Supreme Court in *Varity*, where the Court noted:

[C]ourts must go on to ask whether . . . the language of the statute, its structure, or its purposes require departing from common law trust requirements . . . . [C]ourts may have to take account of competing congressional purposes, such as Congress' desire to offer employees enhanced protection for their benefits, . . . [and] its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place.

*Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

ties under ERISA, *at the minimum*, require disclosures to beneficiaries to be accurate, not misleading, and must be consistent with the duty of loyalty owed by all fiduciaries.<sup>83</sup>

While some case law dealing with fiduciary disclosure duties emerged before the statute was enacted,<sup>84</sup> numerous conflicts involving fiduciary duties to disclose information have arisen in the era of corporate downsizing. Companies seeking to downsize often offer various financially advantageous methods of lowering the size of their workforce.<sup>85</sup> One method is the voluntary severance package, which induces employees to sever before retirement to reduce restructuring costs.<sup>86</sup> The severance package typically adds additional years to an employee's age and years of service with the company, allowing the employee to retire early with more benefits, while eliminating the overall cost of employment to the employer.<sup>87</sup> The introduction of these plans has raised several questions about fiduciary duties of disclosure—including when or whether employees must be informed about proposed severance packages, or whether an employer could use misleading phrases or remain silent about such packages upon inquiry from the employee. Applying fiduciary duties of disclosure in these situations is more problematic, because such duties may hinder the ERISA objectives of encouraging the development of the private pension system without placing an undue burden upon the system. *Bins* followed a string of several cases—all involving the central issue of the fiduciary disclosure duties an employer has towards employees with regard to these types of severance packages.

### III. *VARITY CORP. V. HOWE*: FIDUCIARY STANDARDS OF DISCLOSURE

While *Varity* does not address several of the main fiduciary disclosure issues, the Supreme Court provided several general statements about the broad scope of the fiduciary disclosure duty,<sup>88</sup> which are starting points for the fiduciary disclosure of retirement package offerings. While much of the opinion (as well as the dissent) deals with issues involving appropriate ERISA remedies for injured benefi-

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83 See *Varity*, 516 U.S. at 506. The impact of *Varity* on the standards of fiduciary duties is discussed in Part III of this Comment.

84 See *supra* notes 67–71 and accompanying text.

85 See Barry, *supra* note 6, at 751 n.92 (“It has become commonplace for employers seeking to reduce their work forces to offer substantial early retirement packages as an inducement for employees to voluntarily terminate their employment with the company.”).

86 See *id.*

87 See *id.*

88 See Rotenberg, *supra* note 34, at 1926–27.



ciaries,<sup>89</sup> *Varity* provides clear guidance about the application of common law standards to the fiduciary duties under ERISA.<sup>90</sup>

Charles Howe and other plaintiffs in *Varity* were employees of Massey-Ferguson, Inc., a wholly owned subsidiary of the defendant, Varity Corporation.<sup>91</sup> Varity transferred several of its money-losing divisions to a newly created separately incorporated subsidiary, Massey Combines.<sup>92</sup> Varity induced several employees to transfer to this division, releasing Massey-Ferguson from its obligation to provide them benefits and accepting the self-funded benefit plans of Massey Combines.<sup>93</sup> In persuading these employees, Varity held a special meeting where representations were made that the employees' benefits would remain secure with the transfer to Massey Combines.<sup>94</sup> Within two years, Massey Combines went into receivership and these employees lost their non-pension benefits.<sup>95</sup> The promises and assurances about secure benefits were made despite the fact that Massey Combines was essentially insolvent from inception, with a negative net worth and liabilities exceeding assets by \$46 million.<sup>96</sup>

While the Supreme Court primarily reviewed *Varity* to resolve disputes among the courts of appeals about appropriate remedies under ERISA,<sup>97</sup> the Court went beyond this question to address (1) whether the conduct of Varity violated its fiduciary duties and (2) the distinction between its discretionary actions as an employer and its fiduciary duties as a plan administrator.<sup>98</sup> After stating that the common law of trusts is the "starting point" for interpretation of the fiduciary provisions of ERISA,<sup>99</sup> the Court recognized that all such interpretations must be made in light of the specific purposes for which ERISA was

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89 Arguments about the remedies provided by ERISA to individual plan participants who are wronged by the fiduciaries of a plan are beyond the scope of this Comment. For a discussion of these issues, see generally Karl J. Stoecker, *ERISA Remedies After Varity Corp v. Howe*, 9 DEPAUL BUS. L.J. 237 (1997). See also Ward, *supra* note 17, at 1220-42 (discussing remedies for wronged individual plan participants).

90 See *Varity Corp. v. Howe*, 516 U.S. 489, 496-507 (1996).

91 *Id.* at 492.

92 *Id.* at 493.

93 *Id.* at 493-94.

94 *Id.* at 493-94, 499-501.

95 *Id.* at 494.

96 See Clobes, *supra* note 34, at 233.

97 See *Varity*, 516 U.S. at 495.

98 See *id.*

99 *Id.* at 497. The dissent vigorously disagreed with this position, suggesting the only possible starting point must be the statutory language itself. *Id.* at 528 (Thomas, J., dissenting).

enacted.<sup>100</sup> The Court then addressed three separate issues, which provide guidelines for the extent of fiduciary disclosure duties and highlight issues that have yet to be resolved.

#### A. *Extent of Fiduciary Disclosure Duties Under Varsity*

Justice Steven Breyer, writing for the majority, flatly rejected Varsity's argument that its fiduciary disclosure responsibilities were fulfilled by compliance with ERISA statutory requirements and the terms of the plan instruments.<sup>101</sup> As the Court noted, "If the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose."<sup>102</sup> The most noteworthy aspect of this rejection is that the Court *assumed* that disclosure was part of the fiduciary duty of plan administrators.<sup>103</sup> Therefore, one can assume there are *some* fiduciary disclosure duties beyond the statutory disclosure duties and those mandated by the terms of the plan itself.

The second relevant issue was the Court's decision that Varsity's conduct itself violated fiduciary duties.<sup>104</sup> Justice Breyer characterized Varsity's behavior as "deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense."<sup>105</sup> Breyer felt such actions were clearly inconsistent with ERISA's mandate to act "solely in the interests of participants and beneficiaries,"<sup>106</sup> as well as with the common law duty of loyalty for a trustee, which is included in ERISA's fiduciary duties.<sup>107</sup> Thus, the Court left a clear guideline that

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100 *Id.* at 497. For a discussion of the various Congressional purposes of ERISA, see *supra* notes 79-80 and accompanying text.

101 *See Varsity*, 516 U.S. at 504. This rejection would seem to place in doubt lower court decisions that have found no violation of fiduciary duties when such statutory and plan requirements were met. *See supra* note 39.

102 *Varsity*, 516 U.S. at 504.

103 This assumption might have been explicit rather than implicit, because the Court indicated that information disclosure was part of the fiduciary duty, since trust law traditionally conveyed the powers necessary for carrying out the purposes of the trust. This discussion, however, was limited to the Court's analysis of whether Varsity was acting as an employer or a fiduciary in its informational sessions. *See id.* at 502 (citing 3 A. SCOTT & W. FRATCHER, *LAW OF TRUSTS* § 186 (4th ed. 1988)).

104 *See Varsity*, 516 U.S. at 506.

105 *Id.* The dissent characterized Varsity's conduct much more benignly, suggesting that it involved a combination of optimistic statements and a clear reservation of the right to terminate, amend, or modify the plan on relevant distributed documents at the meeting. *See id.* at 538 (Thomas, J., dissenting).

106 29 U.S.C. § 1104(a)(1)(A)(i) (1994).

107 *See Varsity*, 516 U.S. at 506 (citing *Cent. States, S.E. & S.W. Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570-71 (1985)).

affirmative misrepresentations in disclosures by employers violate fiduciary duties imposed by ERISA.

Finally, the Court noted that it "need not reach the question whether ERISA fiduciaries have any fiduciary duty to disclose truthful information on their own initiative, or in response to employee inquiries."<sup>108</sup> Both before and since the decision in *Varity*, these situations remain a source of constant litigation, with disagreements among the courts of appeals about the scope of fiduciary duties.<sup>109</sup>

In its discussion about the scope of fiduciary duties then, *Varity* provided two basic guidelines: (1) there *are* fiduciary disclosure duties beyond the minimum reporting and disclosure duties of ERISA statutory provisions and, (2) at a *minimum*, ERISA fiduciaries cannot affirmatively mislead beneficiaries about existing or proposed benefit plans.<sup>110</sup> However, the Supreme Court refused to address an issue which has generated a tremendous amount of litigation both before and since *Varity*—the fiduciary duty to disclose information either on the employer's own initiative, or in response to employee inquiry.<sup>111</sup> These situations are further complicated because, as mentioned earlier,<sup>112</sup> they often involve disclosure of proposed changes in benefit

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108 *Id.*

109 See generally *Bins v. Exxon Co.*, 189 F.3d 929 (9th Cir. 1999) (rejecting affirmative disclosure duties), *rev'd en banc*, No. 98-55662, 2000 U.S. App. LEXIS 19080 (9th Cir. Aug. 10, 2000); *Vartanian v. Monsanto Co.*, 131 F.3d 264 (1st Cir. 1997) (adopting the serious consideration test); *Becker v. Eastman Kodak Co.*, 120 F.3d 5 (2d Cir. 1997) (noting materiality as the test for misrepresentations); *Hockett v. Sun Co.*, 109 F.3d 1515 (10th Cir. 1997) (adopting the serious consideration test); *Fischer v. Phila. Elec. Co. (Fischer II)*, 96 F.3d 1533 (3d Cir. 1996) (giving three elements to the serious consideration test); *Chiles v. Ceridian Co.*, 95 F.3d 1505 (10th Cir. 1996) (no affirmative misrepresentations by employer-fiduciary); *Glaziers & Glassworkers Union Local #252 v. New Bridge Sec.*, 93 F.3d 1171 (3d Cir. 1996) (no affirmative misrepresentations); *Swinney v. Gen. Motors*, 46 F.3d 512 (6th Cir. 1995) (same); *Mullins v. Pfizer*, 23 F.3d 663 (2d Cir. 1994) (finding a duty to be truthful); *Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3d Cir. 1993) (individualized disclosure duty); *Anweiler v. Am. Elec. Power Serv. Corp.*, 3 F.3d 986 (7th Cir. 1993) (individualized disclosure duty); *Drennan v. Gen. Motors*, 977 F.2d 246 (6th Cir. 1992) (no affirmative misrepresentations); *Barnes v. Lacy*, 927 F.2d 539 (11th Cir. 1991) (same); *Stanton v. Gulf Oil Corp.*, 792 F.2d 432 (4th Cir. 1986) (no affirmative disclosure duties). For a discussion of many of these seminal cases regarding disclosure duties of employers for proposed benefit changes, see *infra* Parts IV–VI.

110 As the Court noted, "[W]e can find no adequate basis here . . . for any special interpretation that might insulate *Varity*, acting as a fiduciary, from the legal consequences of the kind of conduct (intentional misrepresentation) that often creates liability even among strangers." *Varity*, 516 U.S. at 506.

111 See *id.*

112 See *supra* notes 84–87 and accompanying text.

plans or enhanced retirement packages,<sup>113</sup> which create strong economic incentives for non-disclosure by employers.

*B. Distinguishing Discretionary Actions v. Fiduciary Duties Under Varsity*

Varsity Corp. argued that its communications to its employees regarding benefits<sup>114</sup> were not *fiduciary* acts of administering or managing the plan—rather, they were the *discretionary* acts of an employer.<sup>115</sup> Courts have consistently held that fiduciary obligations imposed upon employers are separate from the employer's discretionary power—for instance, to amend or terminate a plan.<sup>116</sup> The general principle is that “employers remain unilaterally free to adopt, amend or terminate welfare benefit plans.”<sup>117</sup> For instance, the Ninth Circuit held there was no breach of fiduciary duty when an employer threatened to terminate employees unless they accepted a reduction in unaccrued benefits as consistent with this discretionary power.<sup>118</sup> Similarly, another court found no fiduciary breach by a president paying the business expenses of the company at a time of potential collapse, since these were discretionary actions in the company's interest.<sup>119</sup> The courts have shown deference to the theory that employers often wear “two hats”—that of administrator of employee benefit plans with fiduciary duties, as well as that of employer, which carries large powers to take discretionary actions.<sup>120</sup> “[A] simplistic formulation of the distinction is that a person is not acting as a fiduciary

113 See generally *Wayne v. Pac. Bell Corp.*, 189 F.3d 982 (9th Cir. 2000) (early retirement package); *Bins*, 189 F.3d 929 (same); *Fischer*, 96 F.3d 1533 (same); *Pocchia v. Nynex Corp.*, 81 F.3d 275 (2d Cir. 1996) (same).

114 For a brief summary of the facts of *Varsity*, see *supra* text accompanying notes 91–96.

115 *Varsity*, 516 U.S. at 498.

116 See *Davi*, *supra* note 26, at 638–39.

Employers often engage in discretionary policy decisions such as creating, amending or terminating a pension plan as well as administrative decisions regarding an existing plan. Courts have been tolerant of employers' dual roles in designing and administering employee benefit plans, only imposing ERISA fiduciary obligations on employers acting in their fiduciary capacity as plan administrators.

*Id.* (citing William L. Scogland, *Fiduciary Duty: What Does It Mean?*, 1989 A.B.A. SEC. TORT & INS. PRAC. 806).

117 *Nimtz*, *supra* note 38, at 903 (citing *Curtis-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995)).

118 *West v. Greyhound Corp.*, 813 F.2d 951, 955–56 (9th Cir. 1986).

119 *United Mine Workers of Am. v. Powatan Fuel*, 828 F.2d 710, 713–14 (11th Cir. 1987).

120 See *Drennan v. Gen. Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992) (recognizing the “employer's prerogative to initiate discretionary policy decisions such as creat-

ary when he makes business decisions that affect employee plans, but is a fiduciary when he acts with respect to a plan in an attempt to effect business ends."<sup>121</sup>

While *Varity* does not provide clear guidelines for distinguishing between the roles of fiduciary and employer, the Court's decision suggests that it may be difficult for any employer to ignore its fiduciary disclosure roles when communicating with its employee-beneficiaries. *Varity Corp.* argued that its communications to its employees about benefits inducing them to transfer to Massey Combines were in the capacity of an employer and not of a plan administrator.<sup>122</sup> After examining the ERISA definition of fiduciary actions,<sup>123</sup> the Court looked to the common law of trusts and found that trust law implicitly confers "such powers as are necessary to or appropriate for carrying out the purposes" of the trust.<sup>124</sup> The Court reasoned that conveyance of information about the likely future of plan benefits was the exercise of such a power necessary or appropriate for providing beneficiaries detailed plan information as the administrator of a benefit plan.<sup>125</sup> Moving beyond this proposition, the Court also noted that the "reasonable employee" could have *interpreted* the employer making such communications to be acting in its capacity as a plan administrator.<sup>126</sup> This

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ing, amending, or terminating a particular plan . . . for the benefit and interests of its participant-employees").

121 *Amato v. W. Union Int'l Inc.*, 773 F.2d 1402, 1416-17 (2d Cir. 1985); *see also* *Berlin v. Mich. Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988) (noting that ERISA does not interfere with an employer acting solely as a businessman in the interest of the business).

122 *Varity Corp. v. Howe*, 516 U.S. 489, 498 (1996).

123 See 29 U.S.C. § 1002(21)(A) (1994), which states that a person is a fiduciary to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such a plan.

124 *Varity*, 516 U.S. at 502 (quoting 3 A. SCOTT & W. FRATCHER, *LAW OF TRUSTS* § 186 (4th ed. 1988)).

125 *Id.* at 502-03. The dissent saw such actions as representations about the current and expected financial condition of the corporation and, as such, made in the "employer's corporate non-fiduciary capacity as plan sponsor or settlor" . . . . [T]hey are necessary incidents of conducting a business." *Id.* at 530 (Thomas, J., dissenting) (quoting *Borst v. Chevron Corp.*, 36 F.3d 1308, 1323 n.28 (5th Cir. 1994)). The dissent also placed great weight on the fact that these types of representations were not included in the Act's disclosure requirements. *See id.* at 532.

126 *Id.* at 503.

ruling creates uncertainty about any clear distinctions between the fiduciary and discretionary roles—the determination might be made on the subjective reasonable employee's perspective on the role of the employer in certain acts.

The Court flatly rejected *Varity*'s argument that its actions were discretionary since they were neither required by ERISA's statutory disclosure regime or the terms of the plan.<sup>127</sup> Justice Breyer explicitly stated that *Varity* was not acting as a fiduciary because it made statements about the financial future of Massey Combines or its business decision turned out to have an adverse impact upon the plan, but that "*Varity* intentionally connected its statements about . . . financial health . . . to the future of benefits, so that its intended communication about benefits was materially misleading."<sup>128</sup>

*Varity* elucidates general principles about discerning between the fiduciary acts of a plan administrator and the discretionary acts of an employer. Employers must be cautious about any communications with their employees about plan benefits, because they will likely be governed by a fiduciary standard. Secondly, it is possible that an employer may be making a discretionary decision, but still be subject to fiduciary duties if perceived to be acting in the fiduciary role by their employees. As one commentator noted, "[E]mployers are likely to be considered fiduciaries whenever they say something that an employee could reasonably understand to involve the future security of their benefit plans."<sup>129</sup>

#### IV. CURRENT DISPUTES OVER THE FIDUCIARY DUTY TO DISCLOSE

While the Supreme Court decision in *Varity* gave general guidelines about analyzing the scope of the fiduciary duty,<sup>130</sup> the decision left open many questions about fiduciary duties, which have been the source of constant litigation, both before and after the *Varity* decision. One source of many fiduciary disclosure disputes deals with *individualized* disclosure about the various options or benefits available under pension plans. To what extent are employer-fiduciaries required to inform, disclose, and explain the various options that are material to

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127 See *id.* at 504.

128 *Id.* at 505.

129 Ward, *supra* note 17, at 1240. The volume of litigation involving breach of fiduciary disclosure duties since *Varity* has proved Ward right about the impact of this vague standard. See *id.* at 1241 ("Ultimately, employers will be subject to increased litigation and elevated litigation costs.").

130 See *supra* Part III.A.

the choices facing the employee-beneficiary?<sup>131</sup> Another source of disputes revolves around fiduciary disclosure duties about *proposed* benefit plans or changes. Here, the dispute centers over when and to what extent an employer-fiduciary must disclose proposed benefit or plan changes to employee-beneficiaries.<sup>132</sup>

#### A. *Individualized Disclosure About Available Benefits and Options*

While the law remains unsettled about the scope of a fiduciary's duty to disclose beyond the specific reporting and disclosure requirements of ERISA, *Varity* has provided basic guidelines about the analysis of the scope of this duty.<sup>133</sup> One absolute principle is that plan administrators and fiduciaries cannot make *misrepresentations* about the plan or proposed changes to the employee-beneficiary.<sup>134</sup> As one commentator has noted: "[A]ny communication by a fiduciary must be truthful and complete . . . . [P]lan fiduciaries are obligated to provide complete and accurate information in response to questions by participants concerning employee benefits and benefit plans."<sup>135</sup>

While there is general agreement that the fiduciary duty prohibits misrepresentations to beneficiaries, some courts have imposed a "broad fiduciary duty to provide individualized disclosure to participants and beneficiaries."<sup>136</sup> The seminal case for this proposition is *Eddy v. Colonial Life Insurance Co.*<sup>137</sup>

131 See, e.g., *Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1296 (3d Cir. 1993); *Anweiler v. Am. Elec. Power Serv. Corp.*, 3 F.3d 986, 989 (7th Cir. 1993); *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 751 (D.C. Cir. 1990).

132 See *Varity*, 516 U.S. at 506; see, e.g., *Vartanian v. Monsanto Co.*, 131 F.3d 264, 268 (1st Cir. 1997); *Becker v. Eastman Kodak Co.*, 120 F.3d 5, 12 (2d Cir. 1997); *Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 120 (2d Cir. 1997); *Muse v. IBM Corp.*, 103 F.3d 490, 495 (6th Cir. 1996); *Fischer v. Phila. Elec. Co. (Fischer II)*, 96 F.3d 1533, 1540 (3d Cir. 1996); *Pocchia v. Nynex Corp.*, 81 F.3d 275, 280-81 (2d Cir. 1996); *Mullins v. Pfizer*, 23 F.3d 663, 669 (2d Cir. 1994); *Berlin v. Mich. Bell Tel. Co.*, 858 F.2d 1154, 1160 (6th Cir. 1992).

133 See *supra* Part III.A.

134 See, e.g., *Vartanian*, 131 F.3d at 268; *Wilson v. S.W. Bell Tel. Co.*, 55 F.3d 399, 405 (8th Cir. 1995); *Maez v. Mountain States Tel. & Tel., Inc.*, 54 F.3d 1488, 1499-501 (10th Cir. 1995); *Taylor v. Peoples Natural Gas Co.*, 49 F.3d 982, 990 (3d Cir. 1995); *Swinney v. Gen. Motors Corp.*, 46 F.3d 512, 520-21 (6th Cir. 1995); *Berlin*, 858 F.2d at 1163-64.

135 Clobes, *supra* note 34, at 225-26.

136 Bintz, *supra* note 4, at 998.

137 919 F.2d 747, 752 (D.C. Cir. 1990). For two other cases supporting this broad duty of individualized disclosure, see *Anweiler v. American Electric Power Service Corp.*, 3 F.3d 986, 992 (7th Cir. 1993), and *Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1298 (3d Cir. 1993).

*Eddy* involved a plaintiff who was diagnosed as HIV-positive and developed symptoms of Acquired Immune Deficiency Syndrome (AIDS) for which exploratory surgery was scheduled on September 14, 1987.<sup>138</sup> Meanwhile, his employer terminated the employer-sponsored group health policy on September 10, 1987.<sup>139</sup> Prior to the expiration of the policy, Eddy telephoned Colonial Life and asked about his right to "continue" his coverage, but not about his "conversion rights."<sup>140</sup> However, the insurance company failed to explain to Eddy his option of "converting" his group policy into an individual policy.<sup>141</sup>

The Court of Appeals for the D.C. Circuit held that once Eddy explained his situation, Colonial Life had a fiduciary duty to do more than avoid providing misinformation.<sup>142</sup> Rather, Colonial Life had an affirmative obligation "to convey to Eddy complete and correct material information as to his status and his conversion options."<sup>143</sup> This duty could not be avoided by the technicality that the plaintiff inquired about "continuation" rather than "conversion" rights.<sup>144</sup>

The Court of Appeals provided a broad justification for this decision with an expansive concept of fiduciary duties in providing information about current plans or options. Since "the duty to disclose material information is the core of a fiduciary's responsibility," the court found that "a fiduciary has a duty not only to inform a beneficiary of new and relevant information as it arises but also to advise him of circumstances that threaten interests relevant to the relationship."<sup>145</sup> This general principle creates such a broad standard for individualized disclosure that one commentator characterized it as "an

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138 *Eddy*, 919 F.2d at 748.

139 *Id.*

140 *Id.* at 749. Eddy did not have a right to continuation of coverage under COBRA, Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82 (codified in scattered titles and sections of U.S.C.), because continuation coverage does not have to be offered if an employer terminates all of its group health plans. Because Eddy's employer terminated its only group health plan, Eddy was not entitled to continued coverage.

141 *Eddy*, 919 F.2d at 749. There was a factual dispute at the district court level about whether Eddy inquired about conversion rights or continuation rights under his policy. *Id.*

142 *Id.* at 752.

143 *Id.*

144 Interestingly, the appellant only alleged a breach of fiduciary duties by misinformation and never actually made the argument that the fiduciary standards of ERISA encompass a fiduciary duty to provide individual disclosure. *See Bintz, supra* note 4, at 1002 n.103.

145 *Eddy*, 919 F.2d at 750.



immense burden . . . placed upon fiduciaries of plans covering a large number of employees and the sponsors of such plans."<sup>146</sup>

Other cases have followed the general principles of *Eddy* in finding fiduciary duties to provide individualized disclosure.<sup>147</sup> For instance, the Third Circuit explicitly adopted the *Eddy* approach of individualized fiduciary disclosure in *Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund*.<sup>148</sup> The court in *Bixler* adopted the language from *Eddy* holding there is a fiduciary obligation to convey complete and accurate information, even when such information comprises elements that were not specifically inquired about.<sup>149</sup> The court repeated the mantra of an "affirmative duty to inform when silence might be harmful," noting that full disclosure requires providing all material information relevant to the circumstances.<sup>150</sup>

These decisions run contrary to previous case law suggesting limited informational duties beyond the specific disclosure requirements of ERISA.<sup>151</sup> For instance, in *Howard v. Gleason Corp.*, the widow of the defendant's former employee sued because the defendant failed to inform her husband of his right to convert his group life insurance coverage into an individual policy.<sup>152</sup> She contended that this duty arose when Gleason Corp. sold off the subsidiary for which her hus-

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146 Bintz, *supra* note 4, at 998. Bintz proposes a narrow interpretation of this ruling that the fiduciary is responsible to provide individualized disclosure to participants and beneficiaries only in responding to specific factual inquiries concerning the terms or operation of a plan. *Id.* at 1003. The alternative, a free-standing affirmative duty to provide individualized disclosure at the employer's own initiative, seems impractical given the hopeless number of details an employer would be required to keep track of for individual employees. *Id.* at 1003-04 n.108.

147 See *Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1298 (3d Cir. 1993); *Anweiler v. Am. Elec. Power Serv. Corp.*, 3 F.3d 986, 992 (7th Cir. 1993).

148 12 F.3d at 1300.

149 *Id.*

150 *Id.* The Seventh Circuit made a similar ruling in the same year that *Bixler* was decided, echoing the language from *Eddy* and holding there is a fiduciary duty to disclose material facts affecting interests of beneficiaries regardless of whether he or she asked for the information. See *Anweiler*, 3 F.3d at 991-92. This duty of providing material information might not necessarily involve informing beneficiaries of possible options, but simply a duty of clarity in informing the beneficiary on how the employer interprets the plan. See *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1511 (10th Cir. 1996).

151 See, e.g., *Howard v. Gleason Corp.*, 901 F.2d 1154, 1158 (2d Cir. 1990); *Stahl v. Tony's Bldg. Materials, Inc.*, 875 F.2d 1404, 1409 (9th Cir. 1989); *Schultz v. Metro. Life Ins. Co.*, 872 F.2d 676, 679 (5th Cir. 1989); *Cummings v. Briggs & Stratton Ret. Plan*, 797 F.2d 383, 387 (7th Cir. 1986); *Childers v. N.W. Airlines, Inc.*, 688 F. Supp. 1357, 1361 (D. Minn. 1988); *Hopkins v. FMC Corp.*, 535 F. Supp. 235, 239 (W.D.N.C. 1982); *Allen v. Atl. Richfield Ret. Plan*, 480 F. Supp. 848, 851 (E.D. Pa. 1979).

152 901 F.2d at 1156.

band worked.<sup>153</sup> The group life insurance terminated at the time of the sale because he was no longer an employee of Gleason Corp., and thus his wife's claim for life insurance benefits was denied upon his death.<sup>154</sup> The Second Circuit denied the claim because the defendant fulfilled all of ERISA's express requirements and also provided other employee communications which clearly described available conversion rights.<sup>155</sup>

Some commentators have seized upon the broad language in the *Eddy* opinion and other decisions finding this broad duty to provide individualized disclosure<sup>156</sup> as evidence of court decisions holding the employer-fiduciary has a general duty of disclosure even in the absence of inquiry.<sup>157</sup> However, while the language in *Eddy*, standing by itself, could support this reading,<sup>158</sup> the context was the provision of information and options to a current participant of a current plan. The court, then, was really making a pronouncement about the breadth of the fiduciary duty to explain current provisions and options to a beneficiary, including outlining which options would be preferred in the situation facing the particular beneficiary.<sup>159</sup> The relevant principle is *individualized disclosure*—relating all the possible facts and options which are material and relevant to *this* beneficiary.<sup>160</sup> To interpret these cases as providing a generalized fiduciary disclosure duty and cite them as support for such duties in the case of disclosing *proposed* benefit plans or changes is somewhat misleading.<sup>161</sup> These cases reflect individualized disclosure duties of current benefit plans to current participants. A fiduciary duty to disclose proposed benefit or plan changes has little to do with individualized dis-

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153 *Id.* at 1155–56.

154 *Id.*

155 *Id.* at 1161.

156 *See supra* note 147.

157 *See* Rotenberg, *supra* note 34, at 1929 n.54; *see also* Barry, *supra* note 6, at 756–60 (interpreting *Eddy* to provide a general disclosure duty).

158 The *Eddy* court pronouncement generally referred to is “a fiduciary has a duty not only to inform the beneficiary of new and relevant information as it arises but also to advise him of circumstances that threaten interests relevant to the relationship.” *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 750 (D.C. Cir. 1990).

159 The facts of *Bixler* also involve the failure to provide relevant information about a current plan when the fiduciary had information which would lead it to believe the particular option was material. *Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1296 (3d Cir. 1993).

160 *See* Bintz, *supra* note 4, at 998; *see also* *Bins v. Exxon Co.*, No. 98-55662, 2000 U.S. App. LEXIS 10980, at \*28 n.10 (9th Cir. Aug. 10, 2000) (en banc).

161 *See* Barry, *supra* note 6, at 756; *see also* Rotenberg, *supra* note 34, at 1929 (noting *Eddy* as a case mandating disclosure duties for proposed benefit changes).

closure. Rather, it requires an independent analysis of both ERISA statutory language and common law trust rules.

*B. Fiduciary Duty to Disclose Proposed Plan or Benefit Changes*

The *Varity* Court refused to address the issue of whether ERISA obligates the disclosure of proposed plan or benefit changes to participants.<sup>162</sup> There has been considerable disagreement among the lower courts dealing with disclosure of proposed benefit changes,<sup>163</sup> but there has been a trend towards a "serious consideration" test as triggering fiduciary disclosure duties in these cases.<sup>164</sup>

The Sixth Circuit first formulated the "serious consideration" test as a method of determining when a fiduciary's disclosure duties are triggered to disclose proposed benefit or plan changes in response to employee inquiry.<sup>165</sup> In *Berlin v. Michigan Bell Telephone Co.*, plaintiffs alleged that they retired subsequent to an early retirement package offering and were persuaded by management that no future retirement packages would be offered.<sup>166</sup> Subsequently, a second retirement package was announced, and plaintiffs claimed that the failure to disclose this proposed benefit change upon inquiry breached the defendant's fiduciary disclosure duty.<sup>167</sup>

The Sixth Circuit recognized that, while the decision to offer the second retirement package was a discretionary decision of the employer, communications to plan participants about such an offering might support a claim for breach of fiduciary duty.<sup>168</sup> The court held that "there can be no misrepresentations about a future offering until that point in time (a question of material fact) when *serious consideration has been given* by the plan administrator and/or fiduciary concerning the *implementation of the plan*."<sup>169</sup> The court also noted they were not imposing a "duty of clairvoyance" and requiring the employer to predict accurately whether future changes or offerings would be made.<sup>170</sup>

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<sup>162</sup> Nimtz, *supra* note 38, at 894.

<sup>163</sup> *Id.* at 895.

<sup>164</sup> See Clobes, *supra* note 34, at 226; see also Nimtz, *supra* note 38, at 894 (noting the formulation of the serious consideration test).

<sup>165</sup> See *Berlin v. Mich. Bell Tel. Co.*, 858 F.2d 1154, 1164 (6th Cir. 1988).

<sup>166</sup> *Id.* at 1156-60. Cases involving allegations of breach of fiduciary duties frequently involve "retirement sweetener packages" such as this factual situation. See *supra* notes 84-87 and accompanying text.

<sup>167</sup> *Id.* at 1159-60.

<sup>168</sup> See *id.* at 1163.

<sup>169</sup> *Id.* at 1164 (emphasis added).

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

While this decision may have introduced a fiduciary standard, it did not provide any guidance about how one can determine when "serious consideration" has occurred. The Third Circuit adopted and expounded this test in *Fischer v. Philadelphia Electric Co.*<sup>171</sup> The test given by the *Fischer* court has been adopted by several other circuits and best approaches a consensus on fiduciary disclosure duties for proposed benefit changes in response to employee inquiries.<sup>172</sup>

The *Fischer* court began with a basic principle: plan administrators cannot make affirmative misrepresentations to plan participants about changes to an employee pension benefit plan.<sup>173</sup> In determining whether the misrepresentation was "material," the key factor was whether such change was under serious consideration.<sup>174</sup> In the court's opinion, the concept of serious consideration assisted in moderating the tension between "an employee's right to information and an employer's need to operate on a day to day basis."<sup>175</sup>

According to the court in *Fischer*, serious consideration occurs when "(1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change."<sup>176</sup> The specific proposal prong separates the mere evaluation of options and focuses on a proposal that is "sufficiently concrete to support consideration by senior management."<sup>177</sup>

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171 *Fischer II*, 96 F.3d 1533, 1538 (3d Cir. 1996). This case was actually an analysis of the application of "serious consideration" from a case that had already been remanded to the district court after the Third Circuit determined there was an issue of material fact as to whether the defendant had made material misrepresentations to its employees-beneficiaries. See *Fischer v. Phila. Elect. Co.*, 994 F.2d 130 (3d Cir. 1994). The facts of this case, as retold in *Fischer II*, involve the president and CEO of the defendant, Philadelphia Electric Company, announcing in a letter dated April 19, 1990 plans to cut payroll through early retirement and suggesting employees consider delaying retirement until the early retirement package was finalized. The plan was approved on May 25, 1990. Various pre-plan retirees filed suit, alleging that the defendant had long known of its intent to offer an early retirement package, or at least that it was considering such a package, and had thus breached its fiduciary disclosure obligations under ERISA by providing material misinformation. See *Fischer v. Phila. Elec. Co. (Fischer II)*, 96 F.3d at 1533-38.

172 For other cases adopting a "flexible" version of the *Fischer* test, see *Vartanian v. Monsanto Co.*, 131 F.3d 264, 272 (1st Cir. 1997), *Hochett v. Sun Co.*, 109 F.3d 1515, 1523 (10th Cir. 1997), *Muse v. IBM Corp.*, 103 F.3d 490, 494 (6th Cir. 1996), *Maez v. Mountain States Telephone & Telegraph, Inc.*, 54 F.3d 1488, 1500 (10th Cir. 1995), and *Barnes v. Lacy*, 927 F.2d 539, 544 (11th Cir. 1991) (using a modified form of the test).

173 See *Fischer II*, 96 F.3d at 1538.

174 *Id.*

175 *Id.* at 1539.

176 *Id.*

177 *Id.* at 1540.

Discussion for implementation helps distinguish the process of simply gathering data and allows senior management to participate in the process without triggering the disclosure duty.<sup>178</sup> Finally, the prong of consideration by senior management focuses the test on those who actually have the authority to implement the proposal, although it can extend to those who have the power to make recommendations to the board.<sup>179</sup>

In adopting this test, the Third Circuit described it as an attempt to balance the considerations of all the involved parties, intended to be flexible and fact-specific.<sup>180</sup> Several of the circuits that have adopted the three-pronged formulation have also emphasized the fact-specific and flexible nature of the test.<sup>181</sup> While some courts completely reject fiduciary duties to disclose proposed benefit changes,<sup>182</sup> the Second Circuit has modified the serious consideration test precisely because it was not sufficiently flexible and fact-specific in examining the factual situations that determine whether such fiduciary duties arise.<sup>183</sup>

In *Ballone v. Eastman Kodak Co.*,<sup>184</sup> the Second Circuit became the first circuit to seriously modify the three-pronged serious consideration test promulgated by the *Fischer* court.<sup>185</sup> The court below had granted judgment to the defendants because it believed there was no serious consideration.<sup>186</sup> The Second Circuit rejected the idea that "serious consideration" is a prerequisite to finding such misrepresentations material.<sup>187</sup> Instead, the court found that serious considera-

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178 *Id.*

179 *Id.*

180 *Id.* at 1540-41.

181 *See, e.g.,* Hockett v. Sun Co., 109 F.3d 1515, 1523-24 (10th Cir. 1997).

182 *See, e.g.,* Porto v. Armco Inc., 825 F.2d 1274, 1276 (8th Cir. 1987).

183 *See* Ballone v. Eastman Kodak Co., 109 F.3d 117, 123 (2d Cir. 1997).

184 *Id.* This case involved plaintiffs who filed suit against Eastman Kodak, alleging that Kodak breached its fiduciary duty by making misrepresentations that led retirees to believe that no enhanced pension plan would be offered in the months following their retirement. In particular, the plaintiffs asserted that Kodak told them no retirement packages would be offered during the current year, yet such a plan was announced in mid-August of 1991, shortly after the plaintiffs left the company. *Id.* at 117-20.

185 *See* Barry, *supra* note 6, at 754; *cf.* Bins v. Exxon Co., No. 98-55662, 2000 U.S. App. LEXIS 10980, at \*29 (9th Cir. Aug. 10, 2000) (en banc) (describing a modification).

186 *See* Ballone, 109 F.3d at 121 (citing Mullins v. Pfizer, 23 F.3d 663, 669 (1994)). The court interpreted statements in *Mullins* to indicate that, as more serious consideration is given to ERISA plan changes, the misrepresentation becomes more material. *See id.*

187 *See id.* at 124.

tion was but one factor in the "materiality" inquiry about alleged misrepresentations.<sup>188</sup> Thus, the Second Circuit rejected serious consideration as a "talismanic indicator," in favor of a broader fact-based examination that seeks to discover whether the misrepresentation would mislead the reasonable employee.<sup>189</sup> The court noted that this decision was in line with the *Varity* decision that a fiduciary has a duty not to make affirmative misrepresentations.<sup>190</sup>

There are several important points about the *Ballone* decision. The *Ballone* ruling itself only deals with affirmative misrepresentations in the context of proposed ERISA plan changes. This ruling does not necessarily constitute an opinion about employer silence in response to employee inquiries about proposed plan changes. It simply restates the rule from *Varity* that an employer-fiduciary can never make affirmative misrepresentations to a beneficiary.<sup>191</sup> Second, the broad materiality inquiry created by *Ballone* could possibly be stretched (by those who are more employer-oriented) to reach more conservative results than the three-pronged analysis of *Fischer*. It would be a mistake to assume that the materiality inquiry is always an expansion of fiduciary duties.<sup>192</sup>

Finally, it is significant that none of these landmark cases addresses the fiduciary duty to disclose proposed benefit changes in the absence of employee inquiry.<sup>193</sup> In fact, previous to *Bins*, the Second and the Fourth Circuits both addressed the question of disclosure of proposed benefit changes in the absence of employee inquiry, and both decided there was no fiduciary disclosure duty in such instances.<sup>194</sup> While some commentators have attempted to construe a later Second Circuit case, *Becker v. Eastman Kodak Co.*,<sup>195</sup> as "eviscerating" *Pocchia v. Nynex Corp.*,<sup>196</sup> the prior Second Circuit case, and other limitations on disclosure duties,<sup>197</sup> this analysis misconstrues the *Becker*

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188 *Id.* at 123-24.

189 *Id.*

190 *Id.* at 124; see *supra* notes 106-09 and accompanying text.

191 See *supra* note 107 and accompanying text.

192 But see Barry, *supra* note 6, at 760-61 (indicating that *Ballone* represents an expansion of fiduciary duties).

193 This is the topic which *Bins*, 189 F.3d 929, 954 (9th Cir. 1999), addresses in its adoption of the serious consideration test.

194 See *Pocchia v. Nynex Corp.*, 81 F.3d 275, 279 (2d Cir. 1996); *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986).

195 120 F.3d 5 (2d Cir. 1997).

196 81 F.3d 275 (2d Cir. 1996).

197 Barry, *supra* note 6, at 759-60.

case.<sup>198</sup> *Becker* is more in line with the individualized disclosure cases of current benefit plans, because it involves an employee benefit counselor who failed to provide material information when she knew of the employee's circumstances.<sup>199</sup>

#### V. IMPOSING AFFIRMATIVE DISCLOSURE DUTIES OF PROPOSED BENEFIT CHANGES IN THE ABSENCE OF EMPLOYEE INQUIRY

The panel decisions in *Bins v. Exxon Co.*<sup>200</sup> and *Wayne v. Pacific Bell Corp.*<sup>201</sup> represent pronouncements of Ninth Circuit panels imposing affirmative fiduciary duties to disclose proposed benefit changes. The Ninth Circuit adopted the serious consideration test in *Bins*,<sup>202</sup> with the gloss adopted by the Second Circuit in *Ballone*.<sup>203</sup> However, the Ninth Circuit panel went beyond other circuits in addressing fiduciary disclosure duties for proposed changes to ERISA-covered plans. The court became the first to hold that employer-fiduciaries have an affirmative duty to disclose such proposed changes to

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198 *Becker* involved an employee who became eligible on January 1, 1990 for an early retirement incentive package, paying retirement benefits in the form of an annuity. Kodak announced in August, 1990 that employees would have the option of choosing between an annuity or a one-time lump-sum payment in taking their retirement benefits. After Becker became ill, she went to an employee benefits counselor in April, 1990, who advised her to take long-term disability rather than retirement without mentioning the possibility of retiring with the lump-sum benefit. Becker's health deteriorated, and she was informed about the lump-sum option too late (in October, 1990), for she died three days before the date on which she was to receive the lump-sum payment (November 1). This was because the plan would not allow a retroactive retirement. *Becker*, 120 F.3d at 5-10.

199 *See id.*

200 189 F.3d 929 (9th Cir. 1999).

201 189 F.3d 982 (9th Cir. 1999). The decision was decided the same day as the *Bins* decision.

202 For a description of the serious consideration test, see *Fischer v. Philadelphia Electric Co. (Fischer II)*, 96 F.3d 1533, 1538-40 (3d Cir. 1996). For circuits that have adopted the serious consideration test for disclosure of proposed benefit changes, see *Vartanian v. Monsanto Co.*, 131 F.3d 264, 272 (1st Cir. 1997), *Hockett v. Sun Co.*, 109 F.3d 1515, 1523 (10th Cir. 1997), *Muse v. IBM Corp.*, 103 F.3d 490, 494 (6th Cir. 1996), *Maz v. Mountain States Telephone & Telegraph, Inc.*, 54 F.3d 1488, 1500 (10th Cir. 1995), and *Barnes v. Lacy*, 927 F.2d 539, 544 (11th Cir. 1991).

203 109 F.3d 117, 120-24 (2d Cir. 1997). The *Ballone* court followed the Supreme Court's pronouncement in *Variety* that a fiduciary can never make affirmative misrepresentations about benefit plans to its beneficiaries/participants. *See supra* notes 106-09 and accompanying text. In examining when such fiduciaries are liable for such misrepresentations, *Ballone* decided that the basic test was the materiality of such misrepresentations judged by the totality of the circumstances. Serious consideration, in the *Ballone* court's judgment, was only one factor in this materiality inquiry. *See id.* at 120-24.

its employee-beneficiaries, even in the *absence* of employee inquiry.<sup>204</sup> While this decision has since been reversed by the Ninth Circuit en banc,<sup>205</sup> the original panel decision has laid the theoretical groundwork which may be followed by other circuits which have not addressed the issue.

#### A. *The Facts Giving Rise to Bins*

*Bins* involved the scenario of a "retirement sweetener package," intended to create financial incentives for employees to retire, which was not disclosed to certain employees before they retired.<sup>206</sup> The appellant, Ernest S. Bins, worked for Exxon U.S.A., a division of Exxon Corp., for fifteen years and had attempted to confirm rumors of a possible lump-sum retirement incentive before his planned retirement on January 1, 1996.<sup>207</sup> Bins heard rumors throughout the fall of 1995 that a lump-sum retirement incentive would be offered by Exxon through its Special Program of Severance Allowances (SPOSA).<sup>208</sup> He attempted to confirm this rumor by speaking to personnel in a position to know and provide information about this type of offering.<sup>209</sup> This included his direct supervisors, his assigned benefit counselor, and a human resources advisor, all of whom informed him they had no knowledge of such a planned SPOSA offering.<sup>210</sup>

Because of these SPOSA rumors and his desire to avoid a penalty for early withdrawal from his Thrift Account, Bins delayed his retirement to February 1, 1996.<sup>211</sup> In November, 1995, he attended a retirement seminar conducted by an Exxon attorney, who also denied any knowledge of a SPOSA offering.<sup>212</sup> Bins's last attempt to uncover information about a SPOSA offering came at his retirement party on

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204 *Bins v. Exxon Co.*, No. 98-55662, 2000 U.S. App. LEXIS 10980, at \*29 (9th Cir. Aug. 10, 2000) (en banc). Some commentators feel that the *Eddy* decision from the D.C. Circuit already made such a ruling. See Barry, *supra* note 6, at 756-57; see also Rotenberg, *supra* note 34, at 1929 n.54 (noting *Eddy* as a case expanding disclosure duties to proposed benefit changes).

205 *Bins*, No. 98-55662, 2000 U.S. App. LEXIS 10980, at \*29.

206 For a discussion of the prevalence of "retirement sweetener" plans in proposed benefit changes litigation, see *supra* notes 84-87 and accompanying text. The companion case, *Wayne v. Pacific Bell Corp.*, 189 F.3d 982 (9th Cir. 1999), also involved the non-disclosure of retirement "sweetener" packages to employees who had previously inquired before such a plan reached "serious consideration."

207 *Bins v. Exxon Co.*, 189 F.3d 929, 932 (9th Cir. 1999).

208 *Id.*

209 *Id.*

210 *Id.*

211 *Id.*

212 *Id.*



December 27, 1995, where his "supervisor's supervisor" denied knowledge of a SPOSA offering.<sup>213</sup> On February 13, 1996, two weeks after Bins's retirement, Exxon U.S.A. publicly announced the availability of SPOSA benefits.<sup>214</sup>

On the management side, an "Organization Effectiveness Study" (OES) team submitted proposals in December, 1995 and January, 1996 to Exxon U.S.A. senior management that suggested offering increased benefits under the SPOSA to induce early retirement of excess workers.<sup>215</sup> The vice-president and manager of the affected department, who was authorized to implement these proposals after obtaining approval from Exxon, reviewed the proposals on November 29, 1995.<sup>216</sup> An Exxon U.S.A. senior vice-president reviewed the proposals on December 1, 1995, as did the company's president on December 15, 1995.<sup>217</sup> These proposals were forwarded to Exxon Corp., where they were favorably reviewed by an Exxon senior vice-president on January 11, 1996. The Exxon U.S.A. president conducted a final review of the proposals on January 24, 1996, and the senior vice-president formally approved the proposal on January 26. On January 30, the Exxon U.S.A. human resources manager requested approval to implement the proposed SPOSA offering on February 2 and received this approval on February 5.<sup>218</sup>

While Exxon was reviewing the proposal on January 24, the human resources operation manager sent a memo to members of the department which gave legal guidance on how questions regarding SPOSA should be answered. Personnel were instructed to respond to such questions by referring to the SPOSA offering as "under review" and not to initiate any SPOSA-related conversation with employees.<sup>219</sup> Even with knowledge of final approval, personnel and supervisors were simply to respond with "an announcement is scheduled for (insert portion of the month)."<sup>220</sup>

*B. The Ninth Circuit's Analysis of "Serious Consideration"*

The court began its examination of the scope of fiduciary disclosure duties for proposed benefit plan changes by noting that *Varity*

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213 *Id.*

214 *Id.* at 933.

215 *Id.* at 932.

216 *Id.*

217 *Id.*

218 *Id.* at 933.

219 *Id.*

220 *Id.*

held that the law of trusts informs such fiduciary duties.<sup>221</sup> In particular, the court noted *Varity*'s conclusion that "[t]o offer beneficiaries detailed plan information in order to help them decide whether to remain with the plan" is part of the fiduciary role played by a plan administrator.<sup>222</sup> The court then looked to other circuits adopting the "serious consideration" standard to determine when the likelihood of offering a severance program must be communicated to participants and beneficiaries.<sup>223</sup> The court also realized, however, that even the *Fischer* court believed that the analysis of this question is "an inherently fact-specific review."<sup>224</sup> The flexibility of the "serious consideration" test, according to the court, was essential "particularly in cases that present evidence of an employer's 'deliberate attempt to circumvent ERISA' by carefully patterning its conduct so as to evade one of the three factors."<sup>225</sup>

The court then expressed agreement with the general principle that serious consideration occurs when information about a proposed change in plan benefits becomes material, but it disagreed with the *Fischer* characterization of the test as a compromise between an employer's fiduciary duties and its profit-seeking role as a business.<sup>226</sup> The *Bins* court instead saw the employer as having an objective, unambiguous duty. "The employer, when acting as a fiduciary, has an undivided duty of loyalty to the participants and beneficiaries of the plan."<sup>227</sup> Along with this commitment to fiduciary duties for the employer, the court agreed with the *Ballone* test of "serious considera-

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221 *See id.* at 934.

222 *Id.* at 934 (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 503 (1996)).

223 *Id.* Serious consideration, as defined by the circuits adopting the test, means the point at which there is a (1) specific proposal (2) being discussed for purposes of implementation (3) by senior management with the authority to implement the change. *See Fischer v. Phila. Elec. Co. (Fischer II)*, 96 F.3d 1533, 1539-40 (3d Cir. 1996). The *Fischer* case also provides a lengthy explanation of how these different factors should be analyzed. *Id.*

224 *Bins*, 189 F.3d at 935 (quoting *Fischer II*, 96 F.3d at 1539).

225 *Id.* at 936 (quoting *Vartanian v. Monsanto Co.*, 131 F.3d 264, 272 (1st Cir. 1997)).

226 *See id.* (citing *Fischer II*, 96 F.3d at 1539). The court also cited a recent Sixth Circuit case recognizing an ERISA fiduciary's affirmative duty to inform participants and beneficiaries of the existing provisions of an ERISA plan. Essentially, this amounts to a duty of individualized disclosure. *See Krohn v. Huron Mem. Hosp.*, 173 F.3d 542, 548 (6th Cir. 1999).

227 *Bins*, 189 F.3d at 936. The court cited *Varity* for support of this proposition. *Id.* "A fiduciary must discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." *Varity*, 516 U.S. at 506.

tion" being the "starting point for assessing materiality."<sup>228</sup> Rather than giving talismanic significance to a strict formula for determining when serious consideration has occurred, *Bins* emphasized a flexible, factual inquiry looking at whether "the employer has violated its duty of loyalty . . . by failing to disclose material information, making misleading statements, or otherwise putting its business goals ahead of its fiduciary obligations."<sup>229</sup>

### C. *The Affirmative Duty of Disclosure*

The court began its analysis of affirmative disclosure duties by making reference to a Ninth Circuit decision upholding a broad fiduciary duty to provide individualized disclosure.<sup>230</sup> The court regarded the possible affirmative fiduciary duties to provide information concerning a proposed amendment to an ERISA plan as related to the question of individualized disclosure.<sup>231</sup> The court noted the positions other circuits had taken on the duty to disclose a proposed change in benefits, including the circuits which had adopted the serious consideration test, but declined to address the "affirmative duty" question.<sup>232</sup> *Bins* recognized that other courts had addressed the issue of affirmative duty to disclose proposed changes in the absence of employee inquiry and found no basis upon which to impose fiduciary duties.<sup>233</sup>

After examining all of these decisions,<sup>234</sup> the *Bins* court announced, "once an ERISA fiduciary has material information relevant

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228 *Bins*, 189 F.3d at 937. The court also discussed the mild modification of the Sixth Circuit, which combines the Third Circuit three-pronged approach with the overall qualification that serious consideration is "when a company focuses on a particular plan for a particular purpose." *Id.* at 939 (quoting *Muse v. IBM Corp.*, 103 F.3d 490, 494 (6th Cir. 1996)).

229 *Id.* at 937.

230 *Id.* at 938; see *Barker v. Am. Mobil Power Corp.*, 64 F.3d 1397, 1403 (9th Cir. 1995) ("[A]n ERISA fiduciary has an obligation to convey complete and accurate information material to the beneficiary's circumstance, even when a beneficiary has not specifically asked for the information."). The court has recognized that this duty cannot extend so as to contradict or supplant provisions of ERISA. See *Acosta v. Pac. Enters.*, 950 F.2d 611, 618-19 (9th Cir. 1991).

231 See *Bins*, 189 F.3d at 938.

232 *Id.* at 939; see *Vartanian v. Monsanto Co.*, 131 F.3d 264, 268 (1st Cir. 1997); *Hockett v. Sun Co.*, 109 F.3d 1515, 1525 (10th Cir. 1997).

233 See *Pocchia v. Nynex Corp.*, 81 F.3d 275, 278 (2d Cir. 1996); see also *Bins v. Exxon Co.*, No. 98-55662, 2000 U.S. App. LEXIS 19080, at \*28 (9th Cir. Aug. 10, 2000) (en banc) (rejecting affirmative disclosure duties); *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986) (same).

234 It is informative that the court did not even cite *Eddy*, 919 F.2d 747 (D.C. Cir. 1990), as precedent for the decision, lending justification for the interpretation that

to a plan participant or beneficiary, it must provide that information whether or not it is asked a question.”<sup>235</sup> Because the principle of disclosing material information only applied in cases involving material misrepresentations and in cases involving participants who inquire about a proposed plan (under serious consideration), the court felt it should extend to cases where the beneficiary fails to inquire about the proposed plan.<sup>236</sup> By penalizing employees who fail to ask the appropriate question, the court worried about discriminating against employees who work further from headquarters, or who would be less likely to have access to informal sources of information.<sup>237</sup>

This result, according to the *Bins* court, was only the logical extension of the fiduciary duty to disclose material information to beneficiaries. “[A] blanket disclosure rule appropriately requires the employer to provide information about a potential change in ERISA benefits to all employees who might be affected by such information.”<sup>238</sup> While employers may wish to keep such information from employees for business reasons, this general principle of disclosure prevents concealment of such information as it becomes material.<sup>239</sup> Recognizing the intuitive logic of a principle of general disclosure from the common law of trusts, the *Bins* court saw no reason to require responses to questions from some employees, while allowing the employer to remain silent to others.<sup>240</sup> The court felt that such a duty would not burden employers to the extent that it would discourage the offering of employee benefit plans or enhanced benefits and adequately protects an ERISA fiduciary from liability where there is no reasonable knowledge the information was material.<sup>241</sup>

Overall, the extension of disclosure obligations to create an affirmative disclosure duty for proposed benefit changes, even in the absence of employee inquiry, rests on a theoretical basis. The *Bins* court grounded the argument on the logic that there is a principle of

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*Eddy* and its progeny really stand for duties to provide individualized disclosure. This is despite the fact that the appellant *Bins* relied on *Eddy* in his brief. *Bins*, 189 F.3d at 939.

235 *Bins*, 189 F.3d at 939. The court restated this later in the opinion—“[O]nce an employer-fiduciary seriously considers a proposal to implement a change in ERISA benefits, it has an affirmative duty to disclose information about the proposal to all plan participants and beneficiaries to whom the employer knows, or has reason to know, that the information is material.” *Id.*

236 *See id.*

237 *See id.*

238 *Id.*

239 *See id.*

240 *See id.*

241 *See id.*

disclosure of material facts from the common law of trusts, and it makes little sense to treat the inquiring employee differently from the silent employee if the information is material to both. Finally, the *Bins* court summarily dismissed practical and pragmatic objections to this extension without much discussion—but these arguments were much more persuasive to the Second Circuit and the en banc panel.<sup>242</sup>

VI. *POCCHIA V. NYNEX CORP. & BINS II: THE IMPRACTICALITY OF AN AFFIRMATIVE DUTY TO DISCLOSE PROPOSED BENEFIT CHANGES IN THE ABSENCE OF EMPLOYEE INQUIRY*

The Second Circuit addressed the issue of fiduciary disclosure duties for proposed benefit changes to participants of a particular ERISA-covered plan in *Pocchia*.<sup>243</sup> While the Second Circuit followed the general consensus that a fiduciary may not mislead participants about either an existing or proposed benefit plan,<sup>244</sup> *Pocchia* adopted the general rule that plan fiduciaries have no affirmative disclosure obligations regarding proposed changes to ERISA-covered benefit plans.<sup>245</sup> Similarly, the Ninth Circuit sitting en banc reversed the *Bins* panel decision, holding there were no affirmative disclosure duties in the absence of employee inquiry.<sup>246</sup> While the Ninth Circuit justified its decision primarily on theoretical grounds resting on principles from the common law of trusts,<sup>247</sup> the *Pocchia* decision relied on practical grounds and the legislative intent behind ERISA.<sup>248</sup>

A. *The Facts Giving Rise to Pocchia*

Anthony Pocchia worked for Nynex Corporation, or one of its subsidiaries or predecessors, from May, 1965 to his resignation on May 15, 1989.<sup>249</sup> Upon his resignation, Pocchia signed an agreement entitling him to a lump sum payment of \$28,500 and extinguishing certain claims Pocchia could raise against his former employer.<sup>250</sup> Seven

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242 See *Bins v. Exxon Co.*, No. 98-55662, 2000 U.S. App. LEXIS 19080, at \*29 (9th Cir. Aug. 10, 2000) (en banc); *Pocchia v. Nynex Corp.*, 81 F.3d 275, 279 (2d Cir. 1996).

243 81 F.3d at 278.

244 See, e.g., *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996); *Mullins v. Pfizer*, 23 F.3d 663, 669 (2d Cir. 1994).

245 *Pocchia*, 81 F.3d at 278–80.

246 See *Bins*, 2000 U.S. App. LEXIS 19080, at \*27.

247 See *id.* at \*27–28.

248 See *Pocchia*, 81 F.3d at 278–80.

249 *Id.* at 277.

250 *Id.*

months later, on December 21, 1989, Nynex announced an early retirement incentive program, which would have given Pocchia enhanced benefits if he had retired under this plan.<sup>251</sup> Pocchia requested to be included in this plan in a letter dated January 22, 1990, but Nynex denied the request.<sup>252</sup> After this denial, Pocchia filed suit against Nynex in April, 1990, alleging breach of the fiduciary disclosure duty by not informing him that Nynex was considering implementing an early retirement plan.<sup>253</sup>

### B. *The Scope of Fiduciary Duties Under Pocchia*

The Second Circuit began its analysis of the alleged breach of fiduciary duty of disclosure by examining the vague language of the fiduciary duties statutes codified in ERISA.<sup>254</sup> Because the statute does not enumerate or elaborate on the fiduciary duties owed to a plan beneficiary, the *Pocchia* court recognized that courts have used the common law of trusts to define fiduciary rights and obligations.<sup>255</sup>

While the court noted a general consensus about the duty of plan fiduciaries not to affirmatively mislead beneficiaries, it reflected that "the law is not well developed with respect to whether fiduciaries must disclose plan changes that have been proposed and/or considered but not yet adopted in the absence of a request for such information."<sup>256</sup> For instance, Judge Fernandez, the dissenter in *Bins*, read the relevant precedent simply to mean "that upon inquiry the fiduciary must volunteer all material information and cannot play 'scope of the question' games."<sup>257</sup> The court found no affirmative guidance in such cases where the beneficiary simply believed he should have been provided more information in order to make an informed decision about the financial consequences of his retirement.<sup>258</sup>

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251 *Id.*

252 *Id.*

253 *Id.*

254 29 U.S.C. §§ 1101-1114 (1994 & Supp. IV 1998).

255 *See Pocchia*, 81 F.3d at 278.

256 *Id.* It is noteworthy that *Pocchia* did not even bother to address the "individualized disclosure" cases as precedents for the decision. *See generally* *Barker v. Am. Mobil Power Corp.*, 64 F.3d 1397 (9th Cir. 1995) (requiring individualized disclosure); *Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3d Cir. 1993) (same); *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747 (D.C. Cir. 1990) (same). However, Judge Fernandez does address these cases in his dissent in *Bins* and finds them at the root involving misinformation about existing rights under an existing plan. *See Bins v. Exxon Co.*, 189 F.3d 929, 940 (Fernandez, J., dissenting).

257 *Bins*, 189 F.3d at 942 (Fernandez, J., dissenting).

258 *See id.* As Judge Fernandez noted in *Bins*, the cases "do not speak to a requirement of *sua sponte* disclosure of information about a yet-adopted plan." *Id.*

The court then reflected on dicta in *Mullins v. Pfizer*,<sup>259</sup> which stated that ERISA fiduciaries are not expected to be perfect in predicting what future changes in employee benefits will be offered, nor should such fiduciaries be forced to disclose internal deliberations.<sup>260</sup> Based on this line of reasoning, the court held that "a fiduciary is not . . . required to disclose changes in a benefit plan before they are adopted."<sup>261</sup>

What practical concerns are there for adopting this policy? The *Pocchia* court felt that insisting on voluntary disclosure during plan formulation would increase the confusion of beneficiaries, especially if such an amendment or change is not adopted.<sup>262</sup> At the same time, management would be burdened with the confusion and uncertainty of what to disclose and when to disclose it.<sup>263</sup> The court also looked past the uncertainties of the amendment process to the fact that such pre-adoption disclosure could impair legitimate business goals.<sup>264</sup> For instance, a business seeking to reduce its workforce through an improvement of an early retirement or severance package would not follow such a strategy if it were forced to disclose the strategy to employees. Both the employer and beneficiaries recognize the fact that in this instance, employees would not leave "if they were informed that improved benefits were planned if workforce reductions were insufficient."<sup>265</sup>

The Second Circuit also felt the imposition of affirmative disclosure duties for proposed benefit plan changes could not be justified by the legislative intent of ERISA. The *Pocchia* court cited the Fourth Circuit's decision in *Stanton v. Gulf Oil Corp.*<sup>266</sup> in support of the proposition that ERISA was not intended to safeguard the expectations of employees in receiving early retirement benefits.<sup>267</sup> Rather, the pri-

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259 23 F.3d 663, 669 (2d Cir. 1994).

260 See *id.*; see also *Bins v. Exxon Co.*, No. 98-55662, 2000 U.S. App. LEXIS 19080, at \*27-28 (9th Cir. Aug. 10, 2000) (en banc) (making a similar ruling).

261 *Pocchia*, 81 F.3d at 278. The court also relied on a similar ruling from the Fourth Circuit as precedent. See *id.* (citing *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986) ("It is not a violation of ERISA to fail to furnish information regarding amendments before these amendments are put into effect. This is so because the legislative intent of ERISA was not to assure the sanctity of early retirement expectations, but to safeguard accrued retirement benefits.")).

262 See *id.*

263 See *id.*

264 See *id.* But see *Bins v. Exxon Co.*, 189 F.3d 929, 939 (9th Cir. 1999) (reaching the opposite conclusion).

265 *Pocchia*, 81 F.3d at 279 (citing *Bintz*, *supra* note 4, at 997).

266 792 F.2d 432 (4th Cir. 1986).

267 *Pocchia*, 81 F.3d at 278.

mary intention of Congress was that "employees [would have] sufficient information and data to enable them to know whether the plan was financially sound and being administered as intended."<sup>268</sup> To impose affirmative fiduciary disclosure duties for plans not yet adopted would move further away from the "policy of 'encouraging the formation of employee benefit plans.'"<sup>269</sup> Permitting fiduciaries to remain silent during pre-adoption deliberations and discussions does not frustrate this goal, but, as the court noted, it protects the interests of beneficiaries at the earliest point when their rights can be affected.<sup>270</sup> Fiduciaries, meanwhile, are only required to provide information when it becomes complete and accurate.<sup>271</sup>

The *Pocchia* decision rejecting affirmative disclosure duties of proposed benefit plan changes rested on widely differing grounds from the *Bins* en banc decision discussed below. The *Pocchia* court found that such a policy was not within (and possibly contrary to) the legislative intent of ERISA and had the practical effect of impeding the legitimate business goals of employers. Furthermore, there were no clear precedents for the imposition of this affirmative disclosure duty in the absence of employee inquiry. In contrast, the *Bins* en banc decision rejected affirmative disclosure duties on the distinct basis of being theoretically inconsistent to require the administrator of the plan to act as both employer and fiduciary.<sup>272</sup>

### C. *The Bins En Banc Gloss on Affirmative Disclosure*

The decision by the Ninth Circuit sitting en banc followed *Pocchia* in rejecting affirmative disclosure duties for proposed benefit changes. However, the case also gave more elaborate guidelines for employers, which may serve as precedents for other circuits dealing with complicated factual situations in the area of disclosure of proposed benefit changes. The court addressed the particular factual situation where employees inquire about benefit changes and are given a negative response because no consideration has occurred. The court considered whether an employer has an affirmative obligation to inform employees of benefit changes after serious consideration has occurred.

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268 H.R. REP. No. 93-533, at 1-5 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4649.

269 *Bins*, 189 F.3d at 943 (Fernandez, J., dissenting) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987)).

270 See *Pocchia*, 81 F.3d at 279.

271 See *id.*; see also *Bins v. Exxon Co.*, No. 98-55662, 2000 U.S. App. LEXIS 19080, at \*25-26 (9th Cir. Aug. 10, 2000) (en banc) (agreeing with the *Pocchia* mantra).

272 See *Bins*, 2000 U.S. App. LEXIS 19080, at \*27-28.



The en banc decision distinguished two separate situations, which require different responses. If the employee inquiring had requested to be kept informed of any changes in the status of a potential change, and the employer provides assurances, then the employer has a fiduciary duty to follow up with that employee.<sup>273</sup> This is because continued silence by the employer “conveys an implicit message that no serious consideration has occurred and that the employee will rely on that silence to his or her detriment.”<sup>274</sup> In the second situation, the court refused to impose such a reporting duty on employers who did not provide such assurances. This refusal rested on the theoretical basis as the court believed imposing a duty would “extend an ERISA plan administrator’s fiduciary duty beyond conveying truthful information and any discretionary duties it had assumed, and thus would be inconsistent with *Varity*.”<sup>275</sup>

## VII. ANALYSIS AND CONCLUSION

The decision of the Ninth Circuit panel in *Bins*—that there are affirmative disclosure duties forcing employers to reveal proposed but not yet adopted changes in benefit plans, regardless of employee inquiry—was a radical departure from precedent in expanding the scope of fiduciary duties under ERISA. In fact, the decision to broaden the scope of fiduciary disclosure duties under ERISA to this extent contradicted two other circuits which had previously ruled on the issue.<sup>276</sup> While this decision was overturned by the Ninth Circuit sitting en banc, the initial ruling may still persuade courts that have not yet addressed the issue to impose affirmative disclosure duties.<sup>277</sup>

Imposing such disclosure duties, while seeking to protect the interests and expectations of employee-beneficiaries, unduly burdens employers and creates the impractical result of forcing employers to reveal internal deliberations and discussions. One can see that offering improved retirement severance packages, for instance, will no longer be a practical option for companies that follow the affirmative disclosure formulation. If a company wishes to reduce its workforce by offering “sweeter” retirement incentives, they will need to conduct an actuarial and statistical review of this proposal. Because the Ninth Circuit refused to limit the standards by which such proposals are

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<sup>273</sup> See *id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at \*30–31.

<sup>276</sup> See *Pocchia*, 81 F.3d at 279; *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 436 (4th Cir. 1986).

<sup>277</sup> See *Bins*, 2000 U.S. App. LEXIS 19080, at \*27–28.

under "serious consideration," the fiduciary duty to disclose such proposals is a "fact-specific" determination.<sup>278</sup> The intelligent employer will wish to avoid possible lawsuit liability and thus disclose any consideration of such a proposal to all employees as soon as there is any sort of concrete, substantive plan. Upon learning of the retirement "sweetener" proposal, *all* employees considering retirement will then delay their decision in hopes of taking advantage of the financially advantageous proposal. Thus, the proposal to offer early retirement incentives might perhaps have an *adverse* short-term effect upon employers attempting to reduce their workforce, and it could possibly give rise to *more* litigation about misrepresentation if the employer decides to offer the "sweetener."

The broad fiduciary affirmative disclosure standards, along with nebulous, fact-specific criteria for determining when possible changes are "material," create serious burdens on the ability of an employer to make flexible judgments and business decisions. Because of these burdens, employers in the Ninth Circuit may have been less likely to offer improved benefits or options under benefit plans, if the panel ruling had not been overturned. The complex and ambiguous standards about disclosure would not have created an atmosphere conducive for employers to decide to offer new benefit plans that are covered by ERISA. Thus, the affirmative disclosure policy, as the dissent in *Bins* noted,<sup>279</sup> is contrary to the basic ERISA purpose of "encouraging the formation of employee benefit plans."<sup>280</sup>

Imposing such a broad and ambiguous fiduciary standard upon employer-fiduciaries would be understandable if there were ample precedent from case law and the standard was justified by the legislative intent of ERISA. However, in this case, neither is true. While some commentators have referred to the *Eddy* decision as the basic precedent for affirmative disclosure duties of proposed benefit plans in the absence of employee inquiry,<sup>281</sup> the *Eddy* case and its progeny<sup>282</sup> clearly stand for a duty of *individualized* disclosure of material

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278 *Id.*

279 *Bins v. Exxon Co.*, 189 F.3d 929, 939, 941 (9th Cir. 1999) (Fernandez, J., dissenting).

280 *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987).

281 See Barry, *supra* note 6, at 762 n.172-73. In addition, Barry's analysis makes no distinction between disclosure duties in the face of inquiry and in the absence of employee inquiry. *Id.* at 762-65; see also Rotenberg, *supra* note 34, at 1929 n.54 (noting *Eddy* as generally giving affirmative disclosure duties in the absence of employee inquiry).

282 See, e.g., *Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1296 (3d Cir. 1993); *Anweiler v. Am. Elec. Power Serv. Corp.*, 3 F.3d 986, 991 (7th Cir. 1993); *Drennan v. Gen. Motors Corp.*, 977 F.2d 246, 252 (6th Cir. 1992).

facts relating to a *current* benefit plan.<sup>283</sup> This distinction might have been the reason why the *Bins* panel did not even cite *Eddy* in its opinion, despite the fact that it was cited as precedent in appellant *Bins*'s brief.<sup>284</sup> The decision imposed this duty with no substantial precedents, even though two other circuits had given contrary rulings on such a duty.<sup>285</sup> The en banc reversal by the Ninth Circuit noted the weight of opinion to limit disclosure duties in its opinion.<sup>286</sup>

While not having much support in case law, the broad fiduciary standards advocated by the *Bins* panel have no foundation in the legislative intent of ERISA as well. The main purpose of an ERISA disclosure requirement was to enable plan participants and beneficiaries to know whether the plan was on solid footing and being administered properly.<sup>287</sup> The *Pocchia* decision reiterated this point by citing numerous decisions which pointed out this very basic purpose of the disclosure requirement.<sup>288</sup> The imposition of affirmative disclosure duties is no longer simply trying to protect beneficiaries, but rather attempting to protect expectation interests of employees in the possibility of enhanced benefit changes.

Consider employee X, who discovers through the Ninth Circuit ruling that his employer-fiduciary is considering offering a "retirement sweetener" to decrease excess middle management. X delays his already planned retirement in order to take advantage of the enhanced plan benefit. While X has done nothing wrong, are the fiduciary protections of ERISA intended to codify his right to have knowledge of such possible benefit increases? As *Stanton* notes, "the legislative intent of ERISA was not to assure the sanctity of early retirement expectations."<sup>289</sup>

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283 For a discussion of this distinction, see *supra* notes 143-56 and accompanying text.

284 See *Bins*, 189 F.3d at 929-40.

285 See *Pocchia v. Nynex Corp.*, 81 F.3d 275, 278 (2d Cir. 1996); *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986). Barry has depicted *Pocchia* as being "eviscerated" by *Ballone*, 109 F.3d 117 (2d Cir. 1997). See Barry, *supra* note 6, at 759. However, *Ballone* is really a case involving individualized disclosure and the duty to provide material information about current plans, as well as the duty not to provide misinformation. See *Ballone*, 109 F.3d at 122-26. Barry seems to acknowledge this reading of *Ballone* later in his discussion. See Barry, *supra* note 6, at 765-67.

286 See *Bins v. Exxon Co., No. 98-55662*, 2000 U.S. App. LEXIS 19080, at \*28 (9th Cir. Aug. 10, 2000) (en banc).

287 See H.R. REP. NO. 93-533, at 1-5 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4649.

288 See *Pocchia*, 81 F.3d at 279. For a further discussion of the purpose of ERISA and the motivating forces behind the statute, see *supra* note 2 and accompanying text.

289 *Stanton*, 792 F.2d at 435.

Finally, while affirmative disclosure may provide a neat theoretical structure by creating a uniform analogy to the undivided loyalty that a trustee owes the beneficiary at common law,<sup>290</sup> it does not coexist with the legislative intent that common law fiduciary duties must be imposed "bearing in mind the special nature and purpose of employee benefit plans."<sup>291</sup> In particular, there is a presumption against imposing such a duty when it does not "clearly advance ERISA's goal of protecting the interests of participants . . . and . . . encourag[ing] the development of the private pension and welfare system."<sup>292</sup>

Along with the fiduciary duties employers often have as administrators of such plans, they also wear the "second hat" of making discretionary decisions as the operators of businesses.<sup>293</sup> Some of these decisions may have direct or indirect negative consequences to the possible benefits available under ERISA-covered plans, but are within the employer's prerogative as business decisions. Imposing affirmative disclosure obligations for proposed benefit changes in the absence of employee inquiry interferes with the basic right of the employer to terminate, amend, or create various changes to a benefit plan. In other words, such a broad disclosure requirement creates such a large fiduciary "head" that the discretionary "hat" of the employer no longer fits.

The standard of fiduciary duties proposed by the original *Bins* decision imposed an ambiguous disclosure duty that creates the possibility of more litigation and fewer improvements to employee benefit plans. In seeking to protect the interest of ERISA plan participants and beneficiaries, the en banc decision recognizes that such duties will foster employer uncertainty and inertia with respect to employee benefit plans. While courts which have not yet addressed the issue of affirmative disclosure duties in the absence of employee inquiry may find imposing such duties to have appeal in theory, there are serious practical consequences. Courts that impose such a duty unduly burden employers and extend fiduciary duties beyond the legislative intent of ERISA.

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290 Barry's analysis seems to stem from the uniform loyalty owed by a trustee at common law. See Barry, *supra* note 6, at 763-65.

291 H.R. REP. NO. 93-1280, at 302 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5083.

292 Rotenberg, *supra* note 34, at 1926 n.39.

293 *Id.* For a discussion of the "two hats" theory of the dual roles of the employer, see *supra* notes 115-29 and accompanying text.



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