

LITIGATING RETIREMENT AND OTHER POST-EMPLOYMENT BENEFIT CLAIMS UNDER ERISA

Robert M. (Hoppy) Elliot
Elliot Pishko Morgan, P.A.
Winston-Salem, NC

No area requires more knowledge and creativity to help supposed beneficiaries of the law than ERISA (the Employment Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*). In general, the axiom that "for every wrong, there is a remedy," is inapplicable to ERISA. Under ERISA there are many wrongs that cannot be righted, and even where a claim is actionable, remedies may be severely limited or inadequate to do justice. Thus, the identification of claims, the selection of forum, the determination of appropriate relief all require an awareness and knowledge which few other fields entail.

As an employee nears the end of her employment, a number of issues arise which may implicate ERISA. The most obvious relate to the retirement or pension plan which will, presumably, provide income and security for the employee and her spouse for their final years after retirement. The employee's medical needs as she grows older will depend, to a great extent, on the maintenance of health benefits provided for retirees. If the termination is due to layoff or downsizing, severance provisions may come into play. Thus, life under ERISA does not end with the termination of employment.

This paper will explore some of those issues which may arise at termination of employment or in retirement.

I. PENSION AND SEVERANCE PLANS

A. Pension Plans—Fundamental Principles

ERISA was passed in 1974 to protect employees' pension funds. 29 U.S.C. § 1001. Following multiple reports in preceding decades of employers' or administrators' embezzlement, wasting and misinvestment of pensions, with tragic consequences, Congress was pushed to action. Thus, while ERISA's grand scheme for other types of benefits arguably resulted in a net loss for employees, its requirements for ERISA pension funds were more stringent, and have provided some minimal standards which have protected employees.

These more stringent requirements distinguish "employee

pension benefit plans” from “employee welfare benefit plans.” ERISA defines an “employee pension benefit plan” or “pension plan” as

[A]ny plan, fund, or program. . . established or maintained by an employer. . . to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

- (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,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

29 U.S.C. § 1002(2)(A). Thus, under this definition, virtually any plan of deferred compensation, including retirement, 401(k) plans, profit sharing plans, and other deferred compensation programs are included within the definition. The definition exempts severance plans and certain supplemental retirement payments, as prescribed by the Secretary of the Department of Labor, *29 U.S.C. § 1002(2)(B)*.

There are, basically, two types of pension plans under ERISA. In addition, there are hybrid plans which include features of both of the two basic plans.

Defined contribution plan: A “defined contribution plan” or “individual account plan” includes any “pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant’s account” plus any gains or losses on the account from income or expenses. *29 U.S.C. § 1002(34)*. Under a defined contribution plan, the ultimate benefit of the plan to the employee upon retirement is not fixed, although his contribution to the plan is fixed. When the employee retires, the accumulated contributions and income are generally paid out in the form of annuity or lump sum, depending on the terms of the plan. This type of plan is more like an individual retirement account, where the employee’s account is at risk for any investments which are made.

There are several traditional examples of defined contribution plans. With respect to some, contributions are made by the employer; with respect to others, contributions are made by the employee; and in still others, contributions are jointly made. Examples include profit sharing plans where contributions by employers are voluntary, depending on profits; money purchase pension plans, where employers’ contributions are mandatory, generally based on a set percentage of each employee’s compensation; salary deferral or 401(k) plans, permitting employees to deduct amounts from their income to defer to retirement; some stock bonus plans; and some employee stock ownership plans (ESOPs). *See 26 U.S.C. § 401(k), 404.*

Defined Benefit Plan: A “defined benefit plan” is described as “a pension plan other than an individual account plan” with some exceptions. *29 U.S.C. § 1002(35)*. Both the definition and its exceptions point out the distinguishing characteristic of a defined benefit plan as one where the employer promises to provide for payment of benefits to its employee after retirement. The formula for ascertaining the amount of benefits is generally set forth in the plan. The employer makes contributions to the plan or to a trust fund or insurance contract covering the plan based on actuarial advice on amounts necessary to pay the promised benefits. Under this plan, the risk of loss and the prospect for gain is all on the employer—i.e., in the end, regardless of the investments from year to year, the employer must pay what is promised to the employees.

1. Statutory requirements of pension plans.

Minimum participation/eligibility standards: A “participant” or member of a plan is an employee who has met the eligibility requirements for participation in the plan. Generally, eligibility requirements include a period of service with the company and a minimum age. Under ERISA, as amended over the years, the general rule is that any employee who is at least 21 years of age, and has completed one year of service is eligible to participate in a pension plan. As an exception, however, plans which permit 100% vesting after two years of service can require two years of service for eligibility. *29 U.S.C. § 1052(a)(1)*.

Older employees, as well, must be allowed to participate in the plan, even if they are within a few years from retirement. However, the retirement date for an employee whose participation begins within 5 years before the “normal retirement date,” may be delayed until the fifth anniversary of his date of participation in the plan. The “normal retirement date” should be provided in the terms of the plan.

An employer is not required to include all employees in a pension plan. Generally, an employer may establish a plan for one category of employees, without establishing a plan for another category of employees. The minimum participation/eligibility standards apply, of course, only to those who are within the included category. The exception to this rule lies within the Internal Revenue Code. Under the Code, there are rules which prohibit discrimination between upper level, highly compensated employees and those below. *26 U.S.C. § 410, 415*.

An employee who has met the minimal eligibility requirements must be allowed to participate in the plan on the first day of the next plan year or six months after the employee’s satisfaction of the requirements, whichever is earlier. *29 U.S.C. § 1052(a)4*.

While the above standards are minimal, the plan may provide more favorable eligibility requirements. In that case, the plan, of course, governs.

Minimum vesting standards: Generally, ERISA requires that an employee’s right to accrued benefits becomes “vested” or nonforfeitable under certain minimum vesting schedules. These schedules provide alternatives to the covered employer. Under one schedule, the 100%

vesting must occur upon 5 years of service. Under the alternative schedule, an employee's accrued benefits vest 20% upon completion of 3 years service, and 20% for each year thereafter, resulting in total vesting in 7 years. *29 U.S.C. § 1053.*

Of course, an employee's rights to his own contributions are nonforfeitable. In other words, regardless of how long an employee stays with a company, she has a right to her own contributions, generally upon termination. *29 U.S.C. § 1053(a)(1).* In addition, ERISA requires that an employee be fully vested in her accrued benefits upon reaching normal retirement age, which is defined as age 65 or the fifth anniversary after the employee commenced participation, whichever is later. *Id.*

Federal law also requires that in the event of termination, or partial termination of a pension plan, all employees must be considered fully vested. *26 U.S.C. § 411(d)(3).*

Generally, "vested" and "nonforfeitable" mean what they say. Such benefits cannot be lost through any misconduct of the employee which leads to a discharge for cause. There are several limited circumstances in which forfeiture can apply:

- upon death of the employee, except where the benefits are payable as a survivor annuity;
- upon the voluntary withdrawal of an employee's own contribution, in which case the employer can impose some forfeiture, *29 U.S.C. § 1053(a)(3)(A);*
- upon re-employment of the employee with the employer, although if the employee is older than normal retirement age under the plan, payment may only be suspended during months in which the employer completes 40 hours of service.

29 U.S.C. § 1053(a)(3)(B).

Minimum benefit accrual standards: With respect to a defined contribution plan, an accrued benefit is the balance in the employee's individual account. Thus, an employee who terminates employment after 4 years under a 5-year vesting schedule would be entitled only to his own contributions; an employee who terminates after 4 years on a 3-7 year vesting schedule would be entitled to his own contributions plus 40% of the accrued balance of his employer's contributions; and an employee who terminates after he is 100% vested would be entitled to the entire accrued benefit at the time of termination. These amounts would include any income attributable to the contributions. *29 U.S.C. § 1054(c).*

ERISA requires that in defined benefit plans, the employee's retirement benefit be accrued relatively proportionately during the employee's years of service with the company. *29 U.S.C. § 1054.* The purpose of this rule is to prevent "backloading," in which accrual of a substantial portion of an employee's benefit is delayed until the final years before retirement. For example, a defined benefit plan which accrues benefits at the rate of 1% of compensation of the employee until age 55, and 2% per year thereafter, is characterized by "backloading." The employee who then terminated at

an earlier age would receive only a small portion of his benefit. There are several alternative methods for computing accrued benefits in a defined benefit plan which avoid “backloading” under the statute. *See 29 U.S.C. § 1054(b)*.

Years of service: Eligibility, vesting and accrual all depend on an employee's completed years of service. Under ERISA, a year of service means 12 months of work during which an employee completes at least 1000 hours of service. *29 U.S.C. § 1052(a)(3)*. The 12-month computation period must begin on the commencement of employment for eligibility requirements; however, for vesting or benefit accrual, the initial computation period may begin with the next plan year. *29 C.F.R. § 2530.202-2*.

ERISA also defines a “break in service.” This period is defined as a year in which an employee works no more than 500 hours. An employee who has incurred a “break in service,” but who then returns to work and completes a year of service, will not be credited with the years of service prior to the break in service unless she was vested in benefits at the time of the break in service; the total number of years of service before the break is greater than the consecutive years of break in service; or there were less than 5 consecutive years of break in service. *26 U.S.C. § 410(a)(5)*, *29 C.F.R. § 2530.200(b)-4*. If an employee completes 500-1000 hours of service in a computation period, the employee receives no credit for the year of service, but is not deemed to incur a break in service.

An employee is given credit for service for some absences. This credit generally applies to absences for maternity or paternity leaves or caring for a child following birth or adoption. *Id.*

There are alternative methods of counting work service or breaks in service. Generally, an employer is given several alternatives for determining an employee's absence for credit purposes, and the methods must be scrutinized on a case-by-case basis. *See Bolton v. Construction Laborers' Pension Trust*, 943 F.2d 1117 (9th Cir. 1991).

As with respect to other provisions under ERISA, these are minimum standards. If the plan provides greater standards or protections for employees, then the plan documents govern.

2. Payment of pension benefits.

Commencement of payment of benefits: A participant is entitled to payment of pension benefits on or before:

the 60th day after the latest of the close of the plan year in which—

- 1) Occurs the date on which the participant attains the earlier of age 65 or the normal retirement age specified under the plan,
- 2) Occurs the 10th anniversary of the year in

which the participant commenced participation in the plan, or

- 3) The participant terminates his service with the employer.

29 U.S.C. § 1056(a).

Early retirement: ERISA does not require a pension plan to provide for early retirement. However, most pension plans do. In that event, plans are generally free to establish their own eligibility standards for the payment of early retirement benefits.

If a plan permits active employees to elect early retirement age after a stated age and number of years of service, it must also permit terminated employees who had completed the required period of service but who had not reached the required age at the time of termination to receive vested benefits when they do reach the required age. *29 U.S.C. § 1056(a)*. This provision requires the plan to calculate the monthly benefits expected to be payable at the normal retirement age and then reduce that monthly amount to take into account the retiree's age.

Disability pensions: A pension plan is not required to provide for disability benefits. A plan which does so is generally free to establish its own rules as to the those who are eligible for disability pension. Thus, the plan may require 20 years of service for disability retirement and may establish its own definition of total disability, without guidance or restrictions from ERISA.

Other payment provisions under ERISA: When reviewing a plan for proper payments to an employee, one must review the pertinent statute under ERISA carefully. *See 29 U.S.C. § 1056*. There are a number of provisions which may bear on specific issues. For instance, there are requirements with respect to the integration of retirement benefits and social security. There is a prohibition against assignment or alienation of plan benefits. Within this prohibition, ERISA recognizes an exception for division of pension benefits under equitable distribution. *29 U.S.C. 1056(d)*.

In addition, ERISA permits a company to "cash-out" vested benefits of a participant who leaves employment of the company if the present value of the vested benefits is less than or equal to \$3,500. If the value is above that level, the employer and employee may consent to a cash payment of the benefit. *Id.*

If a participant who is partially or fully vested with accrued benefits dies, the participant's spouse generally would be entitled to survivor benefits. The only exception to this rule applies if the participant and the spouse have rejected survivor coverage in writing. A joint/survivor annuity means an annuity for the life of the participant with a survivor annuity for the life of the spouse which is not less than 50% and not greater than 100% of the annuity paid to the participant. The amount paid in a joint/survivor annuity is typically less than the amount which would have been payable if the participant had received a single life annuity, but it must be the actuarial equivalent of

a single life annuity. 29 U.S.C. §1056(d).

3. Protection from mergers and terminations.

Both ERISA's plan termination insurance provisions and the Internal Revenue Code provide some protection to participants in the event of a plan's termination or insolvency. ERISA created a government agency, the Pension Benefit Guaranty Corporation (PBGC), to administer a federally chartered insurance program. PBGC insures vested pension benefits of employees and retirees in defined benefit pension plans up to a statutory limit. When a covered plan terminates or becomes insolvent, without enough money to pay vested benefits, PBGC will guarantee payment. 29 U.S.C. § 1301 *et. seq.* In the event of a merger or consolidation of plans or transfer of assets or liabilities from one plan to another, participants of the plan must be entitled to receive a benefit after the merger which is at least equal to the value of the benefit she would have been entitled to receive before the merger. ERISA provides:

A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan. . . unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation or transfer (if the plan had been terminated).

29 U.S.C. § 1058.

Under the Internal Revenue Code, a full and immediate vesting of all accrued benefits is required upon the complete or partial termination of a tax-qualified plan. However, benefits vested solely because of the termination or partial termination of a plan, rather than because of completion of the required number of years of service, are not guaranteed by the PBGC. Accordingly, payment of these benefits will likely depend on whether the plan is sufficiently funded to pay those benefits.

4. Specific types of pension plans.

Pension plans come in a variety of forms. Some of the most common plans are described below.

Employee Stock Ownership Plan (ESOP): An ESOP is a common "employee benefit plan" which provides for the purchase or awards of company stock to employees. The ESOP is a creation of the Internal Revenue Service. ESOPs are generally treated as pension plans, which are subject to the above provisions under ERISA. *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995).

401(k) Plans: 401(k) Plans, another creature of the IRS, are "employee benefit plans" which provide for investment by participant/employees and contributions by the employer. The fiduciaries of the Plan invest the collective contributions, generally in mutual funds or stock. Each

participant/member has an account which comprises his/her proportionate share of the plan assets, based on cumulative contributions. *Smith v. Sydnor*, 184 F.3d 356 (4th Cir. 1999) ; *Tatum v. RJ Reynolds*, 294 F. Supp. 2d 776 (MDNC 2003) (on appeal); *Franklin v. First Union Corp.*, 84 F. Supp. 2d 720 (ED Va. 2000) (401k plan subject to pension restrictions under ERISA).

There are generally two types of 401(k) plans:

- *Self-directed plans*: Under ERISA, self-directed plans are those in which the participants/employees have some choice as to the investment of the contributions in their accounts. In self-directed plans, the fiduciary is, logically, protected from bad choices by the participant. 29 U.S.C. § 1104(c)(1).
- *Plan-directed*: Other plans give the participants/employees no choice as to the investments. Instead, an investment advisor generally advises the plan fiduciaries on the investments. The fiduciary has full responsibility in complying with the requirements and obligations under 29 U.S.C. § 1104.

The following plans are generally not ERISA Plans:

- *Individual IRAs*: Since individual IRAs are generally set up by the individual and the company does not monitor or manage the assets, they are not ERISA plans. This rule would apply to IRAs which are, essentially, rollovers from an ERISA plan.
- *Stock Option Plans*: Generally, stock option plans are not ERISA plans since they are simply promises on the part of the company to permit the purchase of stock at a potentially discounted rate at a later time. Thus, since stock options generally do not meet the definition of an "employee benefit plan" (either welfare or pension), they are not governed by ERISA. *Musachia v. Medtronics USA, Inc.*, 2001 U.S. Dist. LEXIS 15984 (ND IL 2001) (stock option plans not covered by ERISA); *Kaelin v. Tenneco, Inc.*, 28 F. Supp. 2d 478 (ND IL. 1998) (stock option plans not covered by ERISA).

B. Severance Plans

Severance agreements frequently accompany reductions in force, mass layoffs and plant closings, and individual terminations. Some severance provisions are arbitrary, established on an individual basis at the whim of the employer, and others, particularly in larger companies, are administered pursuant to an existing policy or plan. Some require releases and some do not. Some provide basic benefits; others provide enhanced benefits for which the consideration is a general release of the company.

As indicated, a number of questions arise in reviewing any severance agreement. An initial inquiry, is whether the severance policies or plans of the company are covered by ERISA. The answer to this question is much less clear in the severance context than it is with regard to pension or health care plans.

Is the severance plan subject to ERISA? The core issue as to whether ERISA applies to a severance plan hinges on whether the plan constitutes an “employee welfare benefit plan.” 29 U.S.C. § 1002(1). The critical consideration is whether severance is an ongoing scheme which requires continual administration by the company administrator, or whether it is a one-shot deal.

If the answers to the following questions are generally *yes*, then chances are the plan is governed by ERISA:

- Are the severance benefits ascertainable or calculable in the policy?
- Are there identified intended beneficiaries of the severance policy?
- Is there a source of financing or funding for the severance policy?
- Does the policy establish a procedure through which the severance policy is to be administered?
- Are there discretionary decisions to be made in the administration of the severance?

Blair v. Young Phillips Corp., 158 F. Supp. 2d 654 (MDNC 2001); *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982); *Williams v. Wright*, 927 F.2d 1540 (11th Cir. 1991).

In *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), the Supreme Court determined that ERISA did not preempt a state statute requiring employers to provide a single-shot severance benefit in the event of plant closure. Since there was no ongoing commitment to pay benefits, and since payments were not made pursuant to any administrative scheme or plan, the court found that ERISA did not apply. The court emphasized the necessity of an ongoing administrative program in order for a severance plan to qualify as an “employee welfare benefit plan” under ERISA.

Other cases have followed the Supreme Court's logic, and have determined coverage under ERISA, depending on whether the severance payments are essentially ministerial, or whether there are discretionary decisions to be made which require the protection of ERISA. *See Delaye v. Agripac, Inc.*, 39 F.3d 235 (9th Cir. 1994) (ERISA did not apply because the plan was essentially a one-time obligation on the part of the company); *Cvelbar v. CBI ILL. Inc.*, 106 F.3d 1368 (7th Cir. 1997) (ERISA did apply because the company had established a plan in which there were ongoing obligations to provide and administer severance to terminated employees; in other words, the company did more than simply "write a check"); *Schonholz v. Long Island Jewish Medical Center*, 87 F.3d 72 (2nd Cir. 1996) (severance plan covered by ERISA because of discretionary requirements concerning potential re-employment of severed employees); *James v. Fleet/Norstar*, 992 F.2d 463 (2nd Cir. 1993) (ERISA did not cover plan because plan took little or no administration).

According to the Fourth Circuit, even one-on-one employment contracts which provide for severance may be considered ERISA plans if there is a need for ERISA protection, even if there was no intent on the part of the parties to design an ERISA plan. *Biggers v. Wyttek Indus., Inc.* 4 F.3d 291 (4th Cir. 1993) (individual severance agreement constituted ERISA plan). *See also, Blair v. Young Phillips Corp.*, 158 F. Supp. 2d 654 (MDNC 2001) (since severance was conditional on adherence to non-compete provision, there was a potential need for an administrative scheme; thus, ERISA applicable in spite of parties' intent to contrary).

Does the ERISA severance plan comply with the law? Assuming ERISA covers the plan, the same sorts of determinations made with respect to other plans must be applied to the severance plans. Unlike pension plans, and like health care benefit plans, severance plans fall under the category of "employee welfare benefit plans" which are not covered by ERISA vesting requirements. 29 U.S.C. § 1053.

However, like all ERISA plans, the plan must be in writing. 29 U.S.C. § 1021. The company must distribute an SPD (summary plan description) which explains in clear and understandable language the provisions of the plan. 29 U.S.C. § 1022. The company must comply with ERISA reporting requirements, including statements which are distributed to employees. 29 U.S.C. § 1021. And, most importantly, the administrators of the plan are considered fiduciaries. 29 U.S.C. § 1109.

Since there is no statutory vesting, ERISA severance plans may be terminated or amended at any time, as long as the plan reserves the right to do so. However, in that event, the company must follow the administrative procedure in making its changes. *See Curtiss-Wright v. Schoonejongen*, 514 U.S. 73 (1995) (if company did not properly adopt amendment in accordance with plan's requirements, modification of plan may be subject to challenge.); *Brewer v. Protexall*, 50 F.3d 453 (7th Cir. 1995) (oral modifications of ERISA severance plan invalid).

The reservation of rights clause must be explicit, and depending on the circuit, should be a part of the plan, as well as the SPD. *Panares v. Liquid Carbonic Inds. Corp.*, 74 F.3d 786 (7th Cir. 1996). The administrator has no right to change the severance policy if there is no reservation of rights clause in the plan, or if its rights have been waived through a collective bargaining agreement or some other type of contract. See, e.g., *American Federation of Greenmillers v. International Multifoods Corp.*, 116 F.3d 976 (2nd Cir. 1997).

In this age of buy-outs, acquisitions and mergers, a relatively common factual scenario is presented when an employee is involuntarily laid off or terminated by the acquired company, but she remains employed with the successor company, without missing time. In other words, when an employee's employment is terminated with the first company, but she is immediately employed by the successor company with the same title, pay and benefits, has she truly been severed for purposes of the severance policy? This determination depends on the specific wording of the plan.

For example, in *Harris v. Pullman Standard, Inc.*, 809 F.2d 1495 (11th Cir. 1987), the plan provided severance for employees who were "involuntarily terminated." Another company bought the first employer and hired all the employees of the first employer to continue its business. The employees did not experience any loss of work. However, the court found that since the employees were "involuntarily terminated" from the first company, they were entitled to severance under the plan. Compare *Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272 (10th Cir. 1994) (severance policy should not provide a windfall to employees who do not actually miss work); *Parker v. BankAmerica Corp.*, 50 F.3d 757 (9th Cir. 1995) (same).

Changes or terminations of the plan just prior to termination, without compliance with the administrative procedure, or misrepresentations concerning the provision of severance of employees subject to termination may give rise to a breach of fiduciary duties claim. *Varity Corporation v. Howe*, 516 U.S. 489 (1996).

Releases: Generally, ERISA releases are valid and enforceable. *Lockheed Corp. v. Spink*, 516 U.S. 882 (1996). Specifically, there is nothing in ERISA which precludes conditioning severance or other enhanced benefits upon signing a release. *Nichol v. Pullman Standard, Inc.*, 889 F.2d 115 (7th Cir. 1989).

One area in which releases are prohibited under ERISA is in

the realm of fiduciary relations. ERISA, 29 U.S.C. § 1110, expressly bars agreements which attempt to excuse a fiduciary from its responsibilities under law. Such agreements are characterized as void as against public policy. *Id.*

A release of ERISA rights is little different from any other release. To be enforceable, the release must be required by the language of the plan; or there must be consideration to support the release such as enhanced severance or benefits in addition to that to which the employee is already entitled. The release must be executed knowingly, intelligently, and without fraud or duress. *Lynn v. CSX Transp., Inc.*, 84 F.3d 970 (7th Cir. 1996).

II. COMMON ISSUES IN LITIGATION OF POST-EMPLOYMENT BENEFIT PLANS

A. Administration of Plan—Misrepresentations by Fiduciaries: *Varity v. Howe*

For the two decades following the passage of ERISA, courts had wrestled with the issues surrounding the misrepresentation of benefits information to beneficiaries. Generally, courts which recognized the claims, considered them under federal common law principles of estoppel, requiring proof that the administrator had made a misrepresentation of an existing fact upon which plaintiff reasonably relied to his detriment. *See, e.g., Tregoning v. American Community Mut. Ins. Co.*, 12 F.3d 79 (6th Cir. 1993); *Kane v. Aetna Life. Ins.*, 893 F.3d 1283 (11th Cir. 1990). Some courts required an actual misrepresentation; while others recognized concealment as misrepresentation. *See, e.g., Kurz v. Philadelphia Elec. Co.*, 96 F.3d 1544 (3rd Cir. 1996).

The Fourth Circuit had been extremely limited in its recognition of these claims. In *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54 (4th Cir. 1992), the Fourth Circuit rejected claims of estoppel, except in the interpretation of ambiguous plan provisions, in a case where plaintiff alleged that the company orally approved her continued coverage under a health care policy although she had failed to make payments. The court emphatically stated the following:

Equitable estoppel principles, whether denominated as state or federal common law, have not been permitted to vary the written terms of a plan. Indeed, this circuit has said that "resort to federal common law is generally inappropriate when its application would . . . threaten to override the explicit terms of an established ERISA benefit plan."

969 F. 3d at 59. Compare, *Singer v. Black & Decker Corp*, 964 F.2d 1449 (4th Cir. 1992) (estoppel claims not permitted); *Elmore v. Cone Mills Corp*, 23 F.3d 855 (4th Cir. 1994) (estoppel claims viable); *Healthsouth Rehab. Hosp. v. National Red Cross*, 101 F.3d 1005 (4th Cir. 1996) (indicating that *Elmore* was not viable precedent, and that estoppel claim not permissible). See also, *Bonovich v. Knights of Columbus*, 146 F.3d 57 (2nd Cir. 1998) (unnecessary to show ambiguity in plan terms to prevail); *Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, 58 F.3d 896 (3rd Cir. 1995) (showing of "extraordinary circumstances" required in order to apply estoppel theory).

But the ERISA doors opened slightly in 1996. In *Varity Corporation v. Howe*, 516 U.S. 489 (1996), the United States Supreme Court recognized a claim under ERISA upon an intentional misrepresentation by a benefits administrator. The plaintiffs were former employees of Varity who had been transferred to a new subsidiary created to take over the least productive parts of Varity's business. At the time employees were asked to transfer, they were assured that the new subsidiary was projected to be a profitable operation, and that their benefits would be secure. However, company documentation and other evidence revealed that in fact the company had set up the subsidiary to take over the losing parts of the business and to eliminate benefit obligations to employees. Within two years after the transfer of approximately 1,500 employees, the subsidiary went into receivership, and all of the employees lost their non-pension benefits. The employees sued, and the lower courts upheld their claims for breach of fiduciary duty under ERISA.

Upon review, in a 6-3 decision, the United States Supreme Court affirmed the decision. Recognizing that a company administrator can act in a dual capacity—as an employer and administrator—the court determined that when it misrepresented the facts concerning the employees' benefits, the company was acting in its role as a "fiduciary." Specifically, since the representations concerned the *continued administration of the plan*, the company representatives were acting in their capacity as plan administrators.¹

¹The dissent (Justices Thomas, O'Connor and Scalia), disagreed. They reasoned that in making representations concerning the future vitality of the benefits, the employer was not exercising its fiduciary responsibilities of plan administrator, and thus its lies to the employees did not breach any responsibilities under ERISA: "The untruthfulness of a statement cannot magically transform it from a nonfiduciary representation into a fiduciary one; the determinative factor is not truthfulness but the capacity in which the statement is made." 516 U.S. at 533.

The second question presented—whether *Varity* had breached its fiduciary responsibilities—met with a “brief, affirmative answer” by the Court:

ERISA requires a “fiduciary” to “discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries.” ERISA § 404(a). To participate knowingly and significantly in deceiving a plan’s beneficiaries in order to save the employer money at the beneficiaries’ expense is not to act “solely in the interest of the participants and beneficiaries.” As other courts have held, “[l]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in Section 404(a)(1) of ERISA.” [Citations omitted].

516 U.S. at 506.

The final issue addressed in *Varity* was whether ERISA authorized an individual action for breach of fiduciary duties. *Varity* had argued that 29 U.S.C. § 1109 only authorized actions for breach of fiduciary duty when a fiduciary acted detrimentally to the plan itself—embezzlement, misuse of plan benefits, reckless investment. Based on the prior Supreme Court decision in *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), *Varity* argued that ERISA does not authorize an action for harm to an individual participant through breach of fiduciary duty. The Supreme Court reviewed § 1132(a)(3), which authorized civil action

by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief [i] to address such violations or [ii] to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a)(3). Through this section, the court recognized an individual action for breach of fiduciary duty.

Based on *Varity* and cases that have followed, the analysis of

a misrepresentation case must focus on (1) the source of the misrepresentation—who spoke for the plan and in what capacity; and (2) the nature of the misrepresentation.

1. Who is the fiduciary and what is his duty?

Under ERISA, a fiduciary has the duty to act in the interest of the benefits plan and its participants and beneficiaries at all times. 29 U.S.C. § 1104(a). ERISA defines a fiduciary as follows:

[A] person is a fiduciary with respect to a plan 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 . . . with respect to any monies or property of such plan . . . , or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1102(21)(A). A fiduciary's responsibilities are derived from the law of trusts which provides the theoretical foundation for ERISA. See, e.g., *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Rosen v. Hotel & Restaurant Employees & Bartenders Union*, 637 F.2d 592 (3rd Cir. 1981). A fiduciary must act in the interest of the participants and beneficiaries, and his failure to do so constitutes a breach of his duties. 29 U.S.C. § 1104(a)(1)(A).

In determining whether a person is a fiduciary, the courts have generally adopted a *functional* approach—looking at the duties which the person is carrying out, and how the person will assume the duties. *Birmingham v. Sogen-Swiss Intn'l Corp. Retirement Plan*, 718 F.2d 15 (2nd Cir. 1983). Even if a person holds no position which has been formally assigned responsibilities for interpreting a plan, the person may become a fiduciary if he exercises control of a fiduciary function. *Concha v. London*, 62 F.3d 1493 (9th Cir. 1995); *Brock v. Hendershott*, 840 F.2d 339 (6th Cir. 1988) (union official becomes plan fiduciary by exercising control over plan administration); *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449 (9th Cir. 1995) (corporate officers may be liable as fiduciaries based on their conduct and authority with respect to ERISA plan). As stated by the Supreme Court, paraphrasing the statutory definition:

In relevant part, the statute says that a "person is a fiduciary with respect to a plan," and therefore, subject to ERISA fiduciary duties, "to the extent" that he or she "exercises any discretionary authority or discretionary control respecting management" of the plan, or "has any discretionary authority or discretionary responsibility in the administration" of the plan. ERISA § 3(21)(A).

Varity, 516 U.S. at 498.

In the first instance, a fiduciary under ERISA is the plan administrator and any others to whom is delegated the discretionary authority to administer and interpret the plan. 29 U.S.C. 1002(16)(A). Fiduciaries include any "named fiduciary" who has overall responsibilities for the plan. 29 C.F.R. § 2509.75-5. A plan document may also appoint fiduciaries for particular purposes. 29 C.F.R. § 2509.75-8.

It is not always a simple matter to determine when an employer is acting as a fiduciary with respect to the plan. As discussed in *Varity*, ERISA permits an employer to wear two hats—one as the employer, and one as the fiduciary. When a conflict of interest arises, which happens, of course, all too frequently, one must determine which hat the employer is wearing before determining whether there has been a breach. For it is only in the exercise of his discretionary responsibilities in administering the plan or managing its assets, that an employer wears the fiduciary hat. This critical determination in misrepresentation cases has gone both ways. *Varity*, 516 U.S. at 529. See, e.g., *Curtis-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995) (an employer, even though it may act as a fiduciary in administering an ERISA plan is not engaged in plan administration when it decides to establish, modify or terminate a plan); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996) (same principle with respect to pension plans). As emphasized by the Supreme Court, "[a] person is a fiduciary 'to the extent that' he performs one of the described duties; people may be fiduciaries when they do certain things but be entitled to act in their own interests when they do others." *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86 (1993). See also, *Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660 (6th Cir. 1998).

The plan administrator can delegate its fiduciary responsibilities. Thus, the fiduciary under a common benefits plan, such as a long term disability or health benefits plan, may be the employer, an insurance company or a third party administrator if it exercises discretionary functions. See, e.g.,

IT Corp v. General Am. Life Ins. Co., 107 F.3d 1415 (9th Cir. 1997); *Harrold Ives v. Spradley and Coker, Inc.*, 178 F.3d 523 (8th Cir. 1999).

Employees of the benefits department of the employer may act as fiduciaries if they are delegated the duties to advise employees as to the administration of the plan. See, e.g., *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449 (9th Cir. 1995); *Confer v. Custom Engineering Co.*, 952 F.2d 34 (3rd Cir. 1991).

However, management employees of the plan administrator who have no responsibilities in administering the plan are probably not fiduciaries, and their statements concerning benefits would probably not be binding on the company in the absence of evidence that the company gave them such authority. See, e.g., *Atwood v. Burlington Indus.*, 18 EBC 2009 (M.D.N.C. 1994) (“[t]he fact that he is an officer and a director of [defendant], by itself, is insufficient to create fiduciary status; he must otherwise meet the definition of fiduciary spelled out [in ERISA]”); *Arevalo v. Herman*, 2002 U.S. Dist. LEXIS 7076 (ED Va. 2002) (officer of company not a fiduciary simply by virtue of his position). Union officials who explain the provisions of benefits provided in collective bargaining agreements to their members may act as fiduciaries to the extent they have been delegated the responsibility and authority to speak on behalf of the pension fund or other plan administrator. See, e.g., *Warren v. Oil, Chem. & Atomic Workers, Union-Indus. Pension Fund*, 729 F.Supp. 563 (E.D. Mich. 1989).

An “investment manager” may be a fiduciary. *Lowen v. Tower Asset Management*, 829 F.2d 1209 (2nd Cir. 1987). A bank which has been appointed as fiduciary by a court is considered a fiduciary under ERISA. *Kenney v. Quigg*, 820 F.2d 665 (4th Cir. 1987). A third party administrator of a health plan may be a fiduciary, despite limited duties, if the administrator is given the authority to resolve questions concerning the plan. *IT Corp v. General Am. Life. Ins. Co.*, 107 F.3d 1415 (9th Cir. 1997).

A fiduciary does not include an insurance company when it is engaged in the performance of its normal contractual claims-handling responsibilities. *Pohl v. National Ben. Consultants*, 956 F.2d 126 (7th Cir. 1992); *Crocco v. Xerox Corp.*, 956 F.Supp. 129 (D.Conn. 1997) (firm that served as case management claims review administrator for employer's medical benefit plan was not ERISA fiduciary, and therefore, was not liable as fiduciary for failure to pay benefits since benefit determinations were advisory only and all final determinations were left to the independent responsibility of the employer), *aff'd on other grounds*, 137 F.3d

105 (2nd Cir 1998). See also, *Protocare of Metropolitan NY, Inc. v. Mutual Assoc. Administrators, Inc.*, 866 F.Supp. 757 (S.D. NY 1994) (claims administrator was not a fiduciary because it merely applied rules determining eligibility for benefits).

As revealed in the discussion in *Varity*, the determination of when an employer acts as a fiduciary is critical and often complex. Thus, when the management of the company discussed benefits in its successful efforts to persuade employees to transfer their employees to the newly-created subsidiary, there was a sharp difference of opinion between the majority and the dissent as to whether the company was exercising its fiduciary duties. As discussed above, the majority reasoned that because the management officials were discussing the benefits and making assurances to the employees concerning their continued vitality, they were exercising their duties to administer the plan. The dissent felt otherwise, holding to a narrow definition of administration which imposes fiduciary duties on an employer only when the employer is actually carrying out his explicit duties under the plan. See *n.1 above and Varity*, 516 U.S. at 489.

The Fourth Circuit is responsible for one of the better-reasoned decisions following *Varity*. In *Griggs v. DuPont De Nemours & Co.*, 237 F.3d 371 (4th Cir. 2001), the court considered the case of an employee who claimed a breach of fiduciary duty by a company official who misled the plaintiff as to the taxability of a lump-sum distribution of his retirement benefits. The court first considered whether the employee who had advised the plaintiff was a fiduciary. Finding that the employee had been delegated and had performed discretionary functions in the administration of the plan, the court concluded that he was a fiduciary, and that his misrepresentation to the plaintiff was a breach under *Varity*. The court pointed out that ERISA imposes an obligation on a fiduciary "not to misinform employees through material misrepresentations and incomplete, inconsistent or contradictory disclosures." See also, *Davis v. Bowman Apple Products Co., Inc.*, 2002 U.S. Dist. LEXIS 6204 (WD Va. 2002) (under *Varity* and *Griggs* fiduciary may not make misleading communications to participant; fact that fiduciary failed to disclose key information regarding the administration of plan was BFD).

2. The nature of the misrepresentation.

Varity left open "the question of whether ERISA fiduciaries have a duty to disclose truthful information on their own initiative, or in response to employee inquiries." 516 U.S. at 489.

A number of issues may arise from the evidence concerning the

nature of the misrepresentations, including the following:

- Whether the misrepresentation was intentional?
- Whether the misrepresentation provided the only information received by the employees or whether it was isolated and accompanied by accurate information on which the employees reasonably should have relied?
- Whether the misrepresentation was inconsistent with unambiguous written plan language, or whether there were ambiguities in the plan which required interpretation?
- Whether the misrepresentations were affirmative or amounted to the concealment of material information?
- Whether the misrepresentation or concealment occurred in response to a direct inquiry by a plan participant?
- Whether there was a duty to disclose information in the absence of a specific inquiry?
- Whether the misrepresentation concerned future plans which had not been finally determined?

The duty not to lie—affirmative misrepresentations: The narrow holding of *Varity* that misrepresenting the facts to employees concerning the administration of benefits is a breach of fiduciary duty, established a minimal standard. Other decisions have followed this logic. See *In Re: Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, 57 F.3d 1255 (3d Cir. 1996) (intentional misrepresentations that retiree medical benefits were guaranteed for life found actionable); *Curcio v. John Hancock Mutual Life Ins. Co.*, 33 F.3d 226 (3d Cir. 1994) (employer's intentional misrepresentations concerning benefits to be provided under life insurance policy held actionable).

Illustrative of this principle is the decision in *Krohn v. Huron Mem. Hosp.*, 173 F.3d 542 (6th Cir. 1999). In *Krohn*, the employer's benefits employees had given erroneous advice to an injured employee about the comparative advantages of disability benefits as opposed to benefits under an automobile insurance policy. As a result of this inaccurate information, the employee

failed to file for LTD benefits on a timely basis. The court found that the misrepresentation was a breach of fiduciary duty, and upheld the action by the employees.

Some courts have pointed out a caveat to the *Varity* holding. In a variety of contexts, these courts have found that "isolated misrepresentations" would not amount to a breach of fiduciary obligation under ERISA. For example, in *Frahm v. Equitable Life Assurance Society of the United States*, 137 F.3d 955 (7th Cir. 1998), the court emphasized that oral representations made by management officials without official support cannot vary the written provisions of the plan. The court indicated that it was not reasonable for the plaintiffs to rely on these remarks, given their inconsistency with the written plan. See also, *Ames v. American National Can Co.*, 170 F.3d 751 (7th Cir. 1999) (remark of company official that the transferee company's plan was "very comparable" was not actionable even though it was not true since other information given to plaintiffs revealed the differences in the two plans); *Coleman v. Nationwide Life. Ins. Co.*, 969 F.2d 54 (4th Cir. 1992) (see above).

In *Griggs*, 237 F.3d 371 (4th Cir. 2001), the Fourth Circuit made it clear that misrepresentations concerning the administration of the plan, on which the employee reasonably relied, were actionable as a breach of fiduciary duty. See also, *Davis v. Bowman Apple Products Co., Inc.*, 2002 U.S. Dist. LEXIS 6204 (WD Va. 2002) (under *Varity* and *Griggs* fiduciary may not make misleading communications to participant; fact that fiduciary failed to disclose key information regarding the administration of plan was BFD).

The duty to disclose—nondisclosure of material information: Nondisclosure of material information concerning the present administration of the plan occurs in several factual contexts, raising distinct questions. First, when there has been a specific inquiry by a plan participant, is the fiduciary required to provide complete and accurate information in response to the inquiry; and is she required to provide information beyond the scope of the inquiry? Second, is a fiduciary required to provide information to plan participants in the absence of a specific inquiry, and if so, under what circumstances?

Fortunately, there is some judicial consensus that when an issue is directly raised, the fiduciary has a responsibility to disclose complete and accurate information concerning the issue. See, e.g., *Krohn v. Huron Mem. Hosp.*, 173 F.3d 542 (6th Cir. 1999); *Switzer v. Wal-Mart Stores, Inc.*, 52 F.3d 1294 (5th Cir. 1995).

For example, in *Jordan v. Federal Express Corp.*, 116 F.3d 1005

(3rd Cir. 1997), the Third Circuit found that the fiduciary who had sent a letter informing participants of their election rights under a benefit plan could be held liable for withholding material information when it did not include a warning that the election would be irrevocable. The court pointed out that in a breach of fiduciary duty claim, a plaintiff could prevail by showing a nondisclosure on the part of the plan fiduciary since "an omission may rise to a material level" placing it on an equal level with positive misrepresentations. 116 F.3d at 1015-1016.

In *Bixler v. Central Penn. Teamsters Health & Welfare Plan*, 12 F.3d 1292 (3rd Cir. 1993), a widow sued the fiduciary for failing to inform her of the availability of COBRA coverage under her deceased husband's plan. While the widow had asked about death benefits, she had not asked about her rights to the continuation of health care under COBRA. The Third Circuit, recognizing that under the law of trusts, "the duty to disclose material information is the core of a fiduciary's responsibility," elaborated as follows:

This duty to inform is a constant thread in the relationship between beneficiary and trustees; it entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence may be harmful. In addition, the duty recognizes the disparity of training and knowledge that potentially exists between a lay beneficiary and a trained fiduciary. Thus, while the beneficiary may, at times, bear a burden of informing the fiduciary of her material circumstances, the fiduciary's obligations will not be excused merely because she failed to comprehend or ask about a technical aspect of the plan.

12 F.3d at 1300.

See also, Eddy v. Colonial Life Insurance Co. of America, 919 F.2d 747 (D.C. Cir. 1990), where the plaintiff, an HIV positive employee, sued his employer concerning the cancellation of its health care coverage; the court upheld his claim, stating 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." 919 F.2d at 751-52; *Berlin v. Michigan Bell Tele. Co.*, 858 F.2d 1154 (6th Cir. 1988); *Estate of Becker v. Eastman Kodak Co.*, 120 F.3d 5 (2nd Cir. 1997).

In the absence of any inquiry by a plan participant, the

courts have looked to several factors to determine whether there is any duty to disclose. Most courts have emphasized that there is no duty to give an individual participant advice about the impact of the plan on her particular circumstances. Thus, where a participant who had failed to review her summary plan description (SPD) complained that she was not advised that she needed to file an election form by a certain deadline, the court had no sympathy: "The great majority of courts. . . . have not imposed. . . .the duty individually to notify participants and/or beneficiaries of the specific impact of the general terms of the plan upon them." *Maxa v. John Alden Life Ins. Co.*, 972 F.2d 980, 985 (8th Cir. 1992).

This principle can be called the *caveat emptor* of ERISA law—that, particularly where the terms of a summary plan description provide the relevant information, a participant who does not ask questions does not deserve answers. See also, *Switzer v. Wal-Mart Stores, Inc.*, 52 F.3d 1294 (5th Cir. 1995); *Electro-Mechanical Corp. v. Ogan*, 9 F.3d 445 (6th Cir. 1993).

Under certain circumstances, courts have required disclosure. For instance, where it is clear that adverse consequences will result, an administrator must warn participants of the facts. In *Farr v. U.S. West Communications, Inc.*, 151 F.2d 908 (9th Cir. 1998), the Ninth Circuit held that a fiduciary was required to provide information concerning the tax consequences of accepting a special early retirement program. Since there were clearly adverse circumstances which would arise from the decision, the information was material. The company's justification for nondisclosure was the cost of providing the information to numerous employees, and the court rejected this reason for failing to disclose important information. Unfortunately, however, while the plaintiffs had won the battle, they lost the war. The court determined, in view of the limited remedies under ERISA, that there was no remedy—that the plaintiffs could not recover their tax losses since they were only entitled to equitable relief. See *Mertens v. Hewitt Assoc.*, 508 U.S. 248 (1993). See also, *Bins v. Exxon Co., USA*, 198 F.3d 1191, (9th Cir. 2000).

In *Herdrich v. Pegram*, 530 U.S. 211 (2000), the Supreme Court, presented with an opportunity to extend *Varsity*, dodged the issue. The Seventh Circuit, dealing with the unique "fiduciary" fictions in modern-day health care, had recognized a breach of fiduciary claim when the HMO had failed to disclose its incentive system, which provided bonuses to physicians who avoided referring members to specialists. The court of appeals, in a divided decision, found that this nondisclosure of material information was critical and material since it indicated an ulterior motive for the doctor's decision. 154 F.3d 362 (7th Cir. 1998). Upon review, the Supreme Court determined that in carrying out its duties in the performance

of medical care, the physician was not acting in a fiduciary capacity (*see above*); and that, therefore, there was no duty or breach. § 530 U.S. at 231. *Cf. Shea v. Esensten*, 107 F.3d 625 (8th Cir. 1997) (where the Eighth Circuit, confronting facts similar to *Herdrich*, ruled that the “financial incentive scheme put in place to influence a treating doctor’s referral practices when the patient needs specialized care is certainly a piece of material information;” and given the importance of health care decisions, the fiduciary has a “duty to speak out if ‘he knows that silence might be harmful.’”).

Duty to disclose plans to change benefits in the future: A peculiar species of nondisclosure cases are those involving a company’s plans to change benefits in the future. These cases are distinguished from the *Varity* facts in that the plans to modify or terminate benefits are still under consideration. In other words, there is no present intent, as existed in *Varity*, to make the changes. As in the above cases, material misrepresentations are treated at a different level from nondisclosures. In addition, the degree to which the company has considered the future plans—i.e., the closer the company has come to making a decision—weighs heavily in the determination of whether disclosures are necessary.

Several lines of cases illustrate these principles. In *Fischer v. Philadelphia Electric Co.*, 96 F.3d 1533 (3rd Cir. 1996), the court considered claims of participants of a health plan which was ultimately changed. The plaintiffs contended that there was a breach of fiduciary duty in the administrator’s failure to disclose its future plans to modify its benefits. The court found a breach of fiduciary duty, holding that when a prospective benefit change is under “serious consideration,” a fiduciary has a duty to disclose it to affected employees. The court reasoned that “serious consideration” of a future program or change in benefits is present “when (1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with authority to implement the change.”

In *Bins v. Exxon Co., USA*, 198 F.3d 1191 (9th Cir. 2000), the Ninth Circuit addressed the issue. There the employer, acting as fiduciary, failed to announce changes which were being considered by the company in its early retirement and incentive plan. The plaintiff, who had retired before the plan was implemented, had repeatedly inquired about the plan. According to the evidence, the company had instructed its staff to deny knowledge of any prospective change in the plan. The Ninth Circuit found that the potential change in benefits was material and under serious consideration, and the fiduciary owed a duty to plan participants

who were considering retirement to disclose the information, whether or not they asked about it. Refreshingly, the court stated the following:

To the extent that *Fischer II* characterizes the “serious consideration” test as a compromise between an employer’s role as a fiduciary in administering an ERISA plan and its role as a business in seeking to maximize returns for its owners, we disagree. In our view, there is no such thing as an appropriate compromise between these two roles. The employer, when acting as a fiduciary, has an undivided duty of loyalty to the participants and the beneficiaries of the plan. The employer’s need to operate effectively as a business should play no role in determining when the employer has an obligation to communicate with employees about a proposed change in benefits.

See also, *Ballone v. Eastman Kodak Co.*, 109 F.3d 117 (2nd Cir. 1997) (“serious consideration” not necessarily required).

In a case which pre-dated *Varity*, the Fourth Circuit weighed in on the opposite side of this issue. In *Staton v. Gulf Oil Corp.*, 792 F.3d 432 (4th Cir. 1986), the Fourth Circuit considered an action by a plan participant for breach of fiduciary duty based on the company’s failure to announce its new early retirement program. The evidence established that the company had approved the program three weeks before plaintiff’s retirement, but in response to repeated inquiries by the employee, company officials denied any knowledge of any change. The court approved the company’s deceptive action, stating: “It is not a violation of ERISA to fail to furnish information regarding amendments before these amendments are put in effect.” Taking a very narrow view of fiduciary responsibilities, the court found that the duties were specific to the plan, and “do not begin until the terms at issue are incorporated into a plan.” Thus, in spite of the company’s misrepresentations to plaintiff, since the company was not acting as a fiduciary at the time, it was not liable for breach.

B. Mismanagement of Assets—Investment Decisions

A fiduciary, responsible for administering and managing the assets of an ERISA retirement plan must do so in the interest of the participants. Under the “prudent man standard of care,” fiduciaries are restricted by the following rules:

- (1) Subject to [exceptions], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
 - (A) for the exclusive purpose of:
 - (i) providing benefits to the participants and their beneficiaries; and
 - (ii) defraying reasonable expenses of administering the plan;
 - (B) 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 of a like character and with like aims;
 - (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
 - (D) in accordance with the documents and instruments governing the plan insofar as such documents are consistent with the provisions of this subchapter and subchapter III of this chapter.

29 U.S.C. § 1104.

The cases alleging breach of fiduciary duty in the mismanagement of plan assets generally involve investment decisions. The duties of the fiduciary in carrying out his responsibilities fall into the following categories.

1. The duty to investigate.

The fiduciary has an obligation to investigate alternative investment strategies prior to exercising his discretion. The statute, § 1104, “imposes an unwavering duty on an ERISA trustee to make decisions with single-minded devotion to a plan’s participants and beneficiaries and, in so doing, to act as a prudent person would act in a similar situation.” *Morse v. Stanley*, 732 F.2d 1139 (2d Cir. 1984). *See also, Smith v. Sydnor*, 184 F.3d 356 (4th Cir. 1999); *Felber v. Estate of Regan*, 117 F.3d 1084 (8th Cir. 1997) (BFD in self-dealing and imprudent transactions); *Reich v. Compton*, 57 F.3d 270 (3rd Cir. 1995) (BFD in duties of loyalty and prudence).

The courts measure prudence according to the “prudent person” standard developed in the common law of trusts. *Katsaros v. Cody*, 744 F.2d 270 (2d Cir. 1984). This is an objective standard which

judges actions on the basis of how a person who is experienced or familiar with the matter at hand (rather than a layperson) would act. *Id.* Prudence is a flexible standard to the extent that it is evaluated in view of the “character” and “aims” of the particular plan. *Donovan v. Cunningham*, 716 F.2d 1455 (5th Cir. 1983).

Prudence focuses on the *process* that the fiduciary undertakes in reaching a decision. That is, prudence is a test of conduct and procedure, not results. *In re Unisys Sav. Plan Litig.*, 74 F.3d 420 (3d Cir. 1996). The focus of a court's inquiry is on how the fiduciary acted. It is judged from the perspective of the “time of . . . decision” rather than from “the vantage point of hindsight.” *Katsaros v. Cody*, 744 F.2d 270 (2d Cir. 1984).

A fiduciary's duty to investigate is a key facet of prudence and is often at the heart of fiduciary litigation. See *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286 (5th Cir. 2000) where the court held that summary judgment was inappropriate in an action challenging RJR Nabisco's purchase of single-premium annuities to cover its pension obligations to employees of its subsidiary; the court discussed the fiduciary's duty “at a minimum’ [to] undertake an ‘intensive and scrupulous independent investigation of [the fiduciary's] options.’” 223 F.3d at 299.

2. The duty to diversify.

As explicitly required by statute, the fiduciary must diversify the plan's investments to provide some security to the participants. At common law, diversification is an aspect of the trustee's duty of prudence. Under ERISA, a fiduciary with investment responsibility is required to diversify the investments of the plan so as to “minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so. 29 U.S.C. § 1104(a)(1)(C). If a plaintiff proves a failure to diversify, the burden shifts to the defendant to demonstrate that nondiversification was nonetheless prudent. *Concha v. London*, 62 F.3d 1493 (9th Cir. 1995)(BFD in failure to diversify); *In re Unisys Sav. Plan Litig.*, 74 F.3d 420 (3d Cir. 1996).

A violation of the diversification requirement may arise from

- concentration of investments in a single issuer (often the employer-sponsor)
- failure to diversify by type of investment
- concentration of investments in a single geographic area
- failure to take plan liquidity needs into account

- concentration of plan assets in a single investment.

Congress did not provide any objective measure by which to evaluate whether the risk of loss to the plan has been spread adequately. Accordingly, the fiduciary must consider "the facts and circumstances" of each case. Factors relevant to this analysis include the purpose of the plan, the amount of the plan assets, financial and industrial conditions, the type of investment, the distribution as to geographical location, the distribution as to industries, and the dates of maturities. *Donovan v. Guaranty Nat'l Bank*, 4 Emp. Benefits Cas. (BNA) 1686 (S.D. W. Va 1983) (80 percent of plan's assets invested in 625 mortgage loans secured by property primarily single county; court ordered the trustees to reduce real estate to no more than 33 percent of plan assets).

To establish a breach of the diversification requirement, a plaintiff must first prove the fiduciary failed to diversify. The burden thereafter shifts to the fiduciary to justify his failure to diversify. The fiduciary's burden is to prove that the challenged investments were clearly prudent and that the plan was not running any significant risk of losses based on the failure to diversify. *Jones v. OHiggins*, 11 Emp. Benefits Cas. (BNA) 1660 (N.D.N.Y. 1989) (finding that defendant had proven prudence of investing 90 percent of a plan's assets in three stocks).

3. The duty to act in accordance with the plan.

As is emphasized throughout ERISA law, the fiduciary must act in accordance with the plan, unless to do so would violate his standard of care under the above provisions. 29 U.S.C. § 1104(a)(2). The limitation on this duty is that the plan documents and instruments provide standards of conduct only "insofar as such documents and instruments are consistent with" ERISA. Because the provisions of plan documents and instruments differ from plan to plan, the effect of this rule is to impose fiduciary-like duties that vary according to the terms and governing documents of the plan.

The duty to act in accordance with plan documents means that a fiduciary is required to take prudent and reasonable steps to correct past administrative actions that were not taken in accordance with the plan documents. *Reynolds v. Bethlehem Steel Corp.*, 619 F.Supp. 919, 924-25 (D. Md. 1984) (failure to correct administrative error, in which lump-sum benefit was mistakenly granted, would have been breach of duty to administer plan in accordance with its terms. A fiduciary is not required to comply

with plan documents and instruments to the extent that they are inconsistent with the provisions of ERISA Title I (e.g., reporting, vesting, funding, fiduciary responsibility) and ERISA Title IV (governing plan termination)). *Central States, SE & SW Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559 (1985).

4. The duty to avoid self-dealing.

It seems fundamental that a fiduciary is not permitted to act in his own interest, particularly at the expense of the participants of the plan. ERISA is specific on prohibited transactions between the plan and a “party in interest,” (as defined in 29 U.S.C. § 1002(14))²:

A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

- (A) sale or exchange, or leasing, or any property between the plan and a party in interest;
- (B) lending of money or other extension of credit between the plan and the party in interest;
- (C) furnishing of goods, services, or facilities between the plan and a party in interest;
- (D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan; or
- (E) acquisition on behalf of the plan, of any employer security or employer real property in violation of § 1107(a) of this Title.

29 U.S.C. § 1106. The statute specifically restricts transactions between the plan and the fiduciary:

A fiduciary with respect to a plan shall not—

- (1) deal with the assets of the plan in his own interest or for his own accounts,

²In sum, a “party in interest,” includes a fiduciary, employee of the plan, counsel, a service provider, the covered employer or union, a dominant owner (shareholder) of the employer, and others listed. *See* 29 U.S.C. § 1001(14).

- (2) in his individual or any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or
- (3) receive any consideration for his own personal account from any party dealing with such plan in connection with the transaction involving the assets of the plan.

29 U.S.C. § 1106(b). See *Smith v. Sydnor*, 184 F.3d 356 (4th Cir. 1999) (BFD in self-dealing and § 1132(a)(3) action; *Felber v. Estate of Regan*, 117 F.3d 1084 (8th Cir. 1997) (BFD in self-dealing and imprudent transactions).

C. Modification and Termination of Retiree Healthcare Benefits

Many employees who have retired from long-term employment depend significantly on the continuation of their benefits. Indeed, since most working class retirees are on relatively fixed incomes, their lifetime healthcare benefits become a critical part of their future planning.

It is a rude awakening, to say the least, to advise a retiree that their benefits can be modified or terminated at any time, perhaps without legal recourse. This general rule roots in the fundamental difference in treatment between healthcare benefits and pension benefits under ERISA. ERISA has minimum vesting and coverage requirements for pension plans which theoretically prevent an employer from affecting retirees' pension benefits after the fact. Healthcare plans, however, are defined as "employee welfare benefit plans" which are exempt from vesting requirements. 29 U.S.C. § 1001(1).

Thus, as a general rule, employers are free to modify or terminate all types of employee welfare benefit plans at any time, for any reason, with respect to employees or retirees. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995). Since there is no statutory vesting of benefits, retirees generally have no greater rights than employees, regardless of their dependence on the benefits, and their inability to replace them. *American Fed'n of Grain Millers v. International MultiFoods Corp.*, 116 F.3d 976 (2d Cir. 1997).

Of course, that does not mean that employees and retirees have

not tried to challenge the termination of benefits. They have generally done so through one or more of the following theories³:

- that the retirees have a continuing right to such benefits based on the plan language;
- that the employer is estopped, for one reason or another, from terminating their benefits; and
- that the modification or termination of benefits constitutes a breach of fiduciary duty.

These theories have met with varying success, and are discussed below.

1. The plan language—contractual vesting.

The definitions under ERISA make it clear that there is no statutory vesting with respect to retiree health benefits and other welfare plans. Nevertheless, a retiree may have the equivalent of vested rights which are mandated not by statute, but by the plan itself. In other words, while employers are not required to limit or release their right to modify or terminate benefits by law, they may contract to do so in the ERISA plan.

Most plans do *not*. The vast majority of employee welfare benefit plans contain the reservation of rights on the part of the administrator to modify, alter, or terminate the benefits provided. However, when there is no provision, when the provision is ambiguous, or when there are contradictory provisions, a contractual challenge may be successful.

One of the most prominent decisions in this realm is an older case, *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983). The plan in *Yard-Man* promised that the company “will provide insurance.” 716 F.2d at 1480. There were no contrary provisions reserving a right to the administrator to change the plan. When the administrator did so anyway, the retirees sued.

³In addition, former union employees may have a § 301 claim for breach of the Collective Bargaining Agreement (CBA).

The Sixth Circuit in *Yard-Man* analyzed the case under traditional rules of contract construction, including the following:

- that a court should consider provisions of the contract in relation to the whole “so that all of the provisions, if possible, will be given effect,” 716 F.2d at 1479-80;
- the “agreement’s terms must be construed so to render nugatory and void illusory promises,” 716 F.2d at 1480; and
- a general clause cannot “take precedence” over a specific law, 716 F.2d at 1483.

The court found that there was no ambiguity in the plan since the company had promised insurance during retirement, and did not reserve the right to change it. Significantly, the *Yard-Man* court also recognized an inference in favor of the retirees in the absence of a reservation of rights clause: “It is unlikely that such benefits, which are typically understood as a form of delayed compensation or reward for past service, would be left to the contingencies of future negotiations.” 716 F.2d at 1482.

Interestingly, the Fourth Circuit is one of the few circuits which has recognized the *Yard-Man* inference in favor of retirees. In *Keffer v. H.K. Porter Co.*, 872 F.2d 60, 64 (4th Cir. 1989), the Fourth Circuit observed the “far-reaching understanding of the context in which retiree benefits arise: [they] are typically understood as a form of delayed compensation or reward for past services [which would not] be left to the contingencies of future negotiations.”

However, in a later decision, the Fourth Circuit indicated that any inference was of little utility. In *Gable v. Sweetheart Cup Co.*, 35 F.3d 851 (4th Cir. 1994), the Fourth Circuit reviewed the retirees’ claim that the company had wrongfully cut off their benefits. Apparently ignoring the *Yard-Man* inference, the court emphasized that “plaintiffs bear the burden of proving that their employer’s ERISA plan contains a promise to provide vested benefits.” 35 F.3d at 855. The court then found that the plaintiffs had failed to carry their burden, even though they had received assurances from the company that their benefits were for life.

In another Fourth Circuit decision, *Pierce v. Security Trust Life Ins. Co.*, 979 F.2d 23 (4th Cir. 1992), the retirees claimed

that changes in the medical plan which required the retirees' contributions to premiums violated ERISA. The medical plan documents clearly provided a reservation of rights clause giving the company the right to change the plan at any time. The SPD initially did not, but was amended in 1984, to include the clause prior to the retirement of the plaintiffs. The Fourth Circuit dismissed plaintiffs' claims, stating the following:

The only theory on which the plaintiffs could base a claim is the omission from the SPD of a statement clearly articulating the right of [the employer] to terminate or change the plan unilaterally. But [the employer] did not make any change in its hospital and medical benefits until January, 1989, and as of that time [the employer] had long since given the plan participants the required notice in the 1984 SPD.

979 F.2d at 29-30.

This decision implies that even if the absence of reservation of rights language in the SPD indicates contractual vesting, the vesting does not actually occur until and unless the employees retire. Thus, because the employer changed the SPD before retirement of the plaintiffs, no vesting would occur in any event. There is another ground on which the Fourth Circuit would rule today. In later cases, the Fourth Circuit has held that any conflict between SPD and the plan documents are resolved in the favor of the plan documents. See, e.g., *Gable v. Sweetheart Cup*, 35 F.3d 851 (4th Cir. 1994) (violations of ERISA's SPD requirements—to include all material terms of the plan—do not give rise to remedies under ERISA). This is so, even though most employees probably never see the plan documents.

In recent years, a number of cases involving the termination of retiree benefits have been decided. See *Sprague v. GMC*, 133 F.3d 388 (6th Cir. *en banc*) (GM's reservation of rights clause, which was a part of the plan documents, was unambiguous, and gave to the company the right to reduce retiree healthcare benefits at any time; *In Re: Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, 57 F.3d 1255 (3rd Cir. 1995) (despite the employer's contractual right to terminate the healthcare plans, their oral and written representations that the benefits would continue for life constituted a breach of fiduciary duty which was actionable by the retirees); *American Fed'n of Grain Millers v. International Multifoods Corp.*, 116 F.3d 976 (2nd Cir. 1997) (the plan documents contained a reservation of rights clause, but since the SPD did

not, the court agreed that, under Second Circuit precedent, the company had no right to terminate coverage); *Helwig v. Kelsey-Hayes Co.*, 93 F.3d 243 (6th Cir. 1996) (under Sixth Circuit precedent, the court found that since the SPD included no reservation of rights clause, the reservation in the plan would not be considered; and since the SPD promised "lifetime coverage," there was contractual vesting triggered when the employees retired).

2. Estoppel.

The success of estoppel theories to circumvent reservation of rights clauses has been limited. In circuits which recognize estoppel as a valid theory under the federal common law of ERISA, this claim can succeed. See, e.g., *Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991). In circuits, such as the Fourth Circuit, which apparently do not recognize estoppel, it is to no avail. See, e.g., *Reynolds v. Bethlehem Steele Corp.*, 619 F.Supp. 919 (D.Md. 1984); *Sedlack v. Braswell Servs. Group, Inc.*, 134 F.3d 219 (4th Cir. 1998). But see *Sentara Virginia Beach Gen. Hosp. v. LeBean*, 182 F. Supp. 2d 518 (ED Va. 2002) (equitable estoppel principles incorporated in ERISA case as a matter of federal common law).

The standards for an estoppel claim, where recognized, are generally higher than under state common law principles. For instance, the Third Circuit requires "a material representation, reasonable and detrimental reliance upon the representation, and extraordinary circumstances." *In Re: Unisys*, 58 F.3d 896, 907 (3rd Cir. 1995). In *Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72 (2nd Cir. 1996), the Second Circuit held that a plaintiff must establish the following elements to make out a claim of estoppel under ERISA: (1) a promise; (2) reliance on the promise; (3) injury caused by the reliance; and (4) an injustice if the promise is not enforced.

Under some decisions, estoppel is not applicable unless there is ambiguity in the plan provisions concerning the company's reservation of rights. Under this rationale, an employee who is governed by a plan document or SPD which includes an unambiguous reservation of rights clause cannot reasonably rely on oral or written representations to the contrary by company officials. *In Re: Unisys*, 58 F.3d 896 (3rd Cir. 1995); *Alday v. Container Corp. of America*, 906 F.2d 660 (11th Cir. 1990).

3. Breach of Fiduciary Duty.

As set forth above, the courts have generally allowed employers/administrators to wear two hats, one as a fiduciary and

one as an employer. Under this strained rationale, when an employer administers or interprets the plan or manages its assets, it is a fiduciary. When it makes decisions concerning its business, it is an employer. Unfortunately, generally, when an employer decides to terminate or amend its plans under a reservation of rights clause, it is acting as an employer, not a fiduciary. This would, of course, exclude a breach of fiduciary duty claim based solely on the change in the plan. *United Paperworkers Union v. Jefferson Smurfit Corp.*, 961 F.2d 1384 (8th Cir. 1992).

Two U. S. Supreme Court decisions give significant support to this position. In *Hughes Aircraft v. Jacobson*, 119 S.Ct 755 (1999), the Supreme Court dismissed fiduciary claims of retirees who alleged that their former employer's change of the retirement benefit plan violated the employer's duties under ERISA. Drawing on a trust analogy, the court reasoned that when an employer acts as a "settlor" of the plan, it has the traditional settlor's power to modify or terminate the plan in accordance with the plan's provisions. See also *Sengpiel v. B. F. Goodrich Co.*, 156 F.3d 660 (6th Cir. 1998).

In *Lockheed Corp. v. Spink*, 516 U.S. 882 (1996), the Supreme Court considered a retiree's challenge to the change of their plan. The court emphasized that "employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans," reasoning that they are not acting as fiduciaries when they do so.

While, under these cases, assuming no misrepresentations, an employer is not a fiduciary when it modifies or terminates benefit plans, the manner in which the decision is carried out may implicate fiduciary duties. For example, if a plan requires a certain procedure to amend or terminate the plan, then the employer who has failed to follow the procedure has breached its fiduciary duty in administering the plan provisions. See *Curtiss-Wright v. Schoonejongen*, 514 U.S. 73 (1995); *Algie v. RCA Global Communications*, 60 F.3d 956 (2nd Cir. 1995).

On the other hand, a retiree's claim which focuses on misrepresentations of the employer in the administration of the plan clearly implicates fiduciary duties. As in *Varity*, when an employer undertakes to explain its plan, it is acting as a fiduciary, and has the duty not to lie, at minimum. Under decisions both before and after *Varity*, this duty is broader—it includes the duty to disclose information under various circumstances.

Thus, the *Unisys* court, which dismissed the retiree's claims

for contractual vesting or estoppel, upheld the retiree's claims for breach of fiduciary duty in the face of evidence that the employer had assured the retirees prior to retirement that they would have benefits "for life." *In Re: Unisys*, 57 F.3d 1255, (3rd Cir. 1995) (a fiduciary's duty to inform "entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful"). *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3rd Cir. 1993).

III. THE LITIGATION OF POST-EMPLOYMENT CLAIMS

Generally, litigation of issues concerning pension plans and other post-employment benefits is no different than the litigation of other benefits issues. A participant's rights are found in 29 U.S.C. § 1132(a):

- (a) A civil action may be brought—
 - (1) by a participant or beneficiary—
 - • •
 - (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
 - (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
 - (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

A. Denial of Benefits Claims—§1132(a)(1)(B)

Individual participants who have claims for denial of pension, severance or healthcare benefits may sue under this provision. Exhaustion of plan appeal procedures is required. *See Makar v. Healthcare Corp. of Mid-Atlantic*, 872 F.2d 80 (4th Cir. 1989). An administrative record is critical, particularly with respect to factual issues. *Quesinberry v. Life Ins. Co. of North America*, 987 F.2d 1017 (4th Cir. 1993).

Upon exhaustion, a participant may bring legal action for denial of benefits. 29 U.S.C. § 1132(a)(1). If the violation hinges on the interpretation of terms in the plan, then, as in disability

cases, the discretionary authority of the administrator to interpret or define the terms may be crucial.

Potential remedies include monetary relief in the form of all back benefits due and interest; injunctive relief to require continuing payment of benefits or adherence to the decision in the future; and declaratory relief to clarify the participant's rights to future benefits.

B. Breach of Fiduciary Duty Claims—§ 1132(a)(3)

Participants suing, not for individual benefits under the plan, but to challenge a fiduciary's actions under ERISA may sue for breach of fiduciary duties under § 1132(a)(3). *Varity v. Howe*, 516 U.S. 489 (1996); *Smith v. Sydnor*, 184 F.3d 356 (4th Cir. 1999) (not a "recasting" of denial of benefits claim where action involves the interpretation of ERISA). An action under this section is subject to dismissal if it is duplicative of a denial of benefits action. *Coyne & Delany Co. v. Blue Cross/Blue Shield*, 102 F.3d 712 (4th Cir. 1996) (BFD claim which is, in actuality, a denial of benefits claim is redundant and subject to dismissal). In other words, if a plaintiff is challenging the fiduciary's action under the plan, then he should do so under § 1132(a)(1)(B); if he is attacking a fiduciary's action under ERISA (i.e., misrepresentations, etc.), then the appropriate action is one for breach of fiduciary duties under § 1132(a)(3). *Smith v. Sydnor*, 184 F.3d 356 (4th Cir. 1999).

Exhaustion is not required in an action for breach of fiduciary duties under this section. *Smith v. Sydnor*, 184 F.3d 356 (4th Cir. 1999) (no exhaustion required on BFD claim).

Under § 1132(a)(3), as seen in *Varity*, remedies are strictly limited to equitable relief—i.e., no "damages" are recoverable under this section. *Great-Western Life & Annuity Ins. Co. v. Knudsen*, 534 U.S. 204 (2002); *Griggs*, 237 F.3d 371 (4th Cir. 2001). The statute permits actions for "appropriate equitable relief." Such relief would include injunctive relief such as reinstatement of benefits, but would not authorize compensatory or punitive damages. *Mertens v. Hewitt Assoc.*, 508 U.S. 248 (1993) (compensatory and punitive damages not authorized under ERISA); *Griggs*, 237 F.3d 371 (4th Cir. 2001) (in pre-*Knudsen* decision, the Fourth Circuit recognized that, upon its finding of a breach in fiduciary's misrepresentations concerning the taxability of benefits, the district court could fashion some equitable relief for plaintiff). *Cf. Farr v. U.S. West Communications, Inc.*, 151 F.3d 908 (9th Cir. 1998) (breach of fiduciary duty by company in not disclosing information concerning tax liability did not give rise to damages suffered by participants in having to pay unnecessary taxes). *See also, Rego v. WestAvco Corp.*, 319 F.3d 140 (4th Cir. 2003) (where court rejected plaintiff's claim that fiduciary violated plan and ERISA in preventing plaintiff from withdrawing his benefits during time that the stock value was

high; no claim for equitable relief under § 1132(a)(3) since plaintiff was unable to show any fund from which to recover); *LeBlanc v. Cahill*, 153 F.3d 134 (4th Cir. 1998) (§ 1132(a)(3) relief available to restore pension fund to previous level and disgorge defendants of profits from their breaches); *Graham v. PACTIV Corp. Benefits Comm.*, 301 F. Supp. 2d 483 (ED Va. 2004) (no monetary relief permitted under § 1132(a)(3)).

C. Plan Claims—§ 1132(a)(2)

In the event that the plan as a whole is affected, an action may be brought under 29 U.S.C. § 1104. As stated above, this section involves a breach which harms the plan, and permits plan participants to sue for damages to the plan itself. Generally, actions under § 1132(a)(2) are brought as class actions. *Tatum v. RJ Reynolds*, 294 F. Supp. 2d 776 (MDNC 2003) (on appeal). No exhaustion is required.

Smith v. Sydnor, 184 F.3d 356 (4th Cir. 1999). And in the event that plaintiff prevails, remedies under § 1109 for all damages to the plan are allowed. *Mass Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985).

CONCLUSION

For better or for worse, then, life under ERISA does not end with the end of employment. Prospective retirees and retirees alike must be aware of their rights when making decisions which will affect their security in their twilight years. With the ever-changing landscape of ERISA litigation, lawyers handling these cases face a formidable task. Still, in order to help the many employees who face these issues, plaintiffs' employment lawyers must become knowledgeable and creative in attempting to protect and vindicate the rights of their clients.