

ERISA DISCLOSURE DECISIONS: A PYRRHIC VICTORY FOR DISCLOSURE ADVOCATES

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INTRODUCTION

A primary goal of Congress when it passed the Employee Retirement Income Security Act of 1974 ("ERISA" or "Act") was to protect the interests of pension plan participants and their beneficiaries.¹ Congress recognized, however, that the voluntary nature of private retirement plans made it necessary to balance requirements placed on employers against the burdens of plan administration.² Congress hoped that by achieving such a balance there would be an overall increase both in the number of retirement plans and in the number of employees entitled to receive employee retirement benefits.³ Contrary to Congress' intent, however, the combined burdens placed on employers by the passage of ERISA and subsequent court decisions have caused considerable tension between the needs of businesses and the desires of plan participants.⁴

One area that typifies this tension is disclosure. For example, a common source of disputes between employers and plan participants arises when modifications to pension and other benefit plans are under consideration.⁵ Questions inevitably arise regarding what information must be communicated to plan participants as plan changes are contemplated.⁶ Circumstances under which disclosure issues surface include communication of the health care benefits available under a plan, the procedures that must be followed to take advantage of benefits, and what information should be disclosed when a company converts from one type of retirement plan to another. A typical disclosure case in litigation concerns a retirement decision in which an employee opted for early retirement and later learned that his employer was considering a retirement incentive program that would have resulted in increased pension benefits for the employee had retirement been delayed.⁷

The statutory requirements of ERISA that address disclosure are largely

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1. See 29 U.S.C. § 1001(b) (1999) ("[T]he policy of this chapter [is] to protect . . . the interests of participants in employee benefit plans and their beneficiaries . . .").

2. See H.R. REP. NO. 93-533, pt. 1, at 1 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 1973 WL 12549.

3. See *id.*

4. See Mary O. Jensen, Note, *Separating Business Decisions and Fiduciary Duty in ERISA Litigation?*, 10 BYU J. PUB. L. 139, 140 (1996).

5. See Ryan P. Barry, Comment, *ERISA's Purpose: The Conveyance of Information from Trustee to Beneficiary*, 31 CONN. L. REV. 735, 736 (1999).

6. See *id.* at 736-37.

7. See *Bins v. Exxon Co. U.S.A.*, 189 F.3d 929, 931 (9th Cir. 1999), *rev'd en banc*, 220 F.3d 1042 (9th Cir. 2000).

confined to the plan administrator's reporting duties to plan participants and government regulators and therefore do not directly address the issue of precisely what communications are required and when they must be made.⁸ These reporting obligations include providing participants with summary plan descriptions written in a manner that the average plan participant can understand, filing annual reports with the Internal Revenue Service, and distributing summary annual reports to participants.⁹ Under ERISA, a plan administrator is a fiduciary, and as such owes a fiduciary duty to participants to disclose the information required by the Act.¹⁰ A "fiduciary" is defined under ERISA as a person who exercises control over management of a plan or disposition of plan assets, who gives investment advice for compensation with respect to the plan, or who has discretionary authority or responsibility for administration of the plan.¹¹ Early court decisions interpreted ERISA narrowly, holding that the fiduciary duties of a plan administrator were only those specific reporting and disclosure obligations outlined in ERISA.¹² Subsequent decisions, however, have expanded the fiduciary duties of plan administrators relating to disclosure far beyond the specific reporting mandates of ERISA. The Sixth Circuit Court of Appeals, for instance, found that plan administrators have an affirmative duty not to mislead or misrepresent plan participants when material changes to a plan are under consideration.¹³ Expanding on that decision, the Third Circuit held that a misrepresentation was "material" if contemplated changes to a plan were under "serious consideration."¹⁴ Other courts have reached similar conclusions and held that if an employee asks his employer whether plan changes are being considered, and in fact such changes are under serious consideration, the employer has a fiduciary obligation to disclose that fact.¹⁵ These decisions have added to the regulatory burdens of ERISA and therefore have contributed to the steady decline in the number of traditional pension plans being offered to employees.¹⁶

8. See 29 U.S.C. § 1021 (1999).

9. See *id.* §§ 1024-1025.

10. See *id.* § 1104.

11. *Id.* § 1002(21)(A).

12. See *Acosta v. Pac. Enters.*, 950 F.2d 611, 619 (9th Cir. 1992) (indicating requested disclosures were not "sufficiently related to the provision of benefits or the defrayment of expenses," which were the purposes of ERISA); see also *Porto v. Armco, Inc.*, 825 F.2d 1274, 1275 (8th Cir. 1987), *cert. denied*, 485 U.S. 937 (1988). A plan administrator who meets ERISA's statutory deadlines for disclosure does not breach his fiduciary duty by not making earlier disclosures. See 29 U.S.C. § 1021 for specific disclosure requirements.

13. See *Berlin v. Mich. Bell Tel. Co.*, 858 F.2d 1154, 1163-64 (6th Cir. 1988).

14. *Fischer v. Phila. Elec. Co.*, 994 F.2d 130, 135 (3d Cir. 1993).

15. See *McAuley v. IBM*, 165 F.3d 1038, 1043 (6th Cir. 1999); *Vartanian v. Monsanto Co.*, 131 F.3d 264, 268 (1st Cir. 1997). *But see Pocchia v. NYNEX Corp.*, 81 F.3d 275, 278 (2d Cir. 1996), *cert. denied*, 519 U.S. 931 (1996) (holding plan administrators have no duty to disclose contemplated changes until a plan is actually amended).

16. See Colleen T. Congel & Elizabeth A. White, *Advisory Council: Consensus on CB*

Although the ruling has since been reversed, a three-judge panel of the Ninth Circuit recently attempted to significantly extend ERISA's disclosure requirements.¹⁷ In *Bins v. Exxon*, an employee of Exxon asserted that he would have delayed his retirement had he known that the company was considering a change to its pension plan that would have resulted in increased retirement compensation for him.¹⁸ Arguably, the court could have chosen to find in favor of the employee on the basis that the plan was under serious consideration when he made his inquiry.¹⁹ The Ninth Circuit panel instead opted to expand ERISA disclosure requirements even further than prior decisions in holding that a company has a fiduciary duty to affirmatively disclose the fact that it is seriously considering a change to its pension plan to all potentially affected plan participants whether or not participants have inquired about the prospects of such a change.²⁰ The panel's ruling conflicts with disclosure decisions of other circuits, none of which had previously required such a broad affirmative duty of disclosure under ERISA.²¹ Although the Ninth Circuit reversed this decision en banc, the panel's holding indeed reflects the views of recent commentators who suggest that ERISA's fiduciary duty requires affirmative disclosure even without participant inquiry.²²

This Note contends that courts' disclosure decisions have decreased the availability of traditional pension plans to employees, thus defeating the

Conversions Unlikely; IBM Official Defends Company's Actions, BNA PENSION & BENEFITS DAILY NEWS, Sept. 10, 1999, at D3 (the Pension Benefit Guaranty Corporation (PBGC) reported that the number of defined benefit retirement plans it insures has dropped from 114,000 to 45,000 since 1985); see also Thomas Lee, *A Dying Plan*, INDIANAPOLIS STAR, June 12, 2000, at D1 (according to the PBGC the number of traditional pension plans has now fallen to 40,000 and the number of actual workers covered by plans decreased from 27.3 million to 22.6 million from 1988 to 1996); *ERISA's Requiem*, PENSIONS & INVESTMENTS, Sept. 6, 1999, at 10 (editorial) ("Spooked by ERISA's requirements, companies terminated 5,000 defined benefit plans in the first nine months after the law was passed.").

17. See *Bins v. Exxon Co. U.S.A.*, 189 F.3d 929, 931 (9th Cir. 1999), *rev'd en banc* 220 F.3d 1042 (9th Cir. 2000).

18. See *id.* at 932.

19. See *id.* at 940.

20. See *id.* at 939.

21. See *McAuley v. IBM*, 165 F.3d 1038, 1043 (6th Cir. 1999) (holding that employers cannot make either intentional or negligent misrepresentations if a plan change is under serious consideration); *Pocchia v. NYNEX Corp.*, 81 F.3d 275, 278 (2d Cir. 1996), *cert. denied*, 519 U.S. 931 (1996) (finding no duty to disclose changes before they are adopted); *Fischer v. Phila. Elec. Co.*, 994 F.2d 130, 135 (3d Cir. 1993) (holding that employer cannot mislead if a plan change is under serious consideration). In a companion case decided the same day as *Bins*, the Ninth Circuit panel applied the "affirmative duty to disclose rule" announced in *Bins*, holding that Pacific Bell breached its fiduciary duty to certain employees who took early retirement by not disclosing that it was seriously considering a more favorable program. See *Wayne v. Pac. Bell*, 189 F.3d 982, 989 (9th Cir. 1999).

22. See generally Barry, *supra* note 5, at 2; Jensen, *supra* note 4, at 2.

balancing intent of Congress in establishing ERISA.²³ Court decisions such as the Ninth Circuit panel's holding in *Bins*, that attempt to expand disclosure requirements beyond those set forth in ERISA, only contribute to the rate of decline in the number of traditional benefit plans being offered. Although ERISA covers employee benefit plans other than pension plans, this Note focuses on courts' disclosure decisions as they relate to employee retirement decisions.²⁴ Disclosure cases discussing other employee benefit plans will be reviewed only to the extent that they have been relied upon by courts in making disclosure decisions involving retirement benefits.²⁵

Part I of the Note reviews the purpose and background of ERISA. The discussion sets forth the fiduciary duties, disclosure requirements, and enforcement schemes established by ERISA. Part II outlines the history of circuit courts of appeals' disclosure decisions under ERISA and how the courts have incrementally increased the disclosure burdens on businesses over time. Part III examines how changes dictated by the competitive needs of business clash with the fiduciary requirements under ERISA as developed and expanded by the courts. Part III then concludes by demonstrating how court rulings have apparently influenced company decisions with respect to pension plan offerings. Part IV analyzes the initial *Bins* decision and compares it with the holdings of other circuits, contains a critique of *Bins*, and discusses disclosure alternatives that would more appropriately balance the needs of employers and plan participants. Part V addresses the need for a resolution of the current split in circuit court views concerning disclosure under ERISA so that the balance between business needs and the protection of plan participants originally envisioned by Congress can be restored.

I. ERISA

A. Origin

The growth in private pension plans was spawned by dissatisfaction with government retirement plans (i.e., the Social Security Act and the Railroad Retirement Act) that existed in the 1940s and by employers' recognition of a responsibility for their employees' welfare beyond retirement.²⁶ Experience demonstrated that existing regulations were unable to adequately protect the rights of workers with respect to their employers' pension plans.²⁷ Many employees were reaching retirement age only to find that promised retirement

23. See 29 U.S.C. § 1001 (1999); see also Barry, *supra* note 5, at 2.

24. See 29 U.S.C. § 1002(1) (2000). Plans other than pension plans are generally referred to as welfare benefit plans, and include health and disability benefit plans.

25. See *Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3d Cir. 1993); *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747 (D.C. Cir. 1990).

26. See H.R. REP. NO. 93-533, pt. 2, at 2 (1974) (providing background), *reprinted in* 1974 U.S.C.C.A.N. 4639, 1973 WL 12549.

27. See *id.* at 4.

funds were nonexistent either because of improper funding by the employer or because the company was in financial trouble.²⁸ ERISA was enacted in 1974 to provide for disclosures and safeguards “with respect to the establishment, operation, and administration” of retirement plans.²⁹

B. Purpose of ERISA

Congress’ main purpose in enacting ERISA was “to ensure that workers receive promised pension benefits upon retirement.”³⁰ To achieve this goal, Congress established statutory procedures in ERISA to regulate plan funding and required that participants’ benefits become nonforfeitable upon normal retirement age.³¹ ERISA also established minimum standards of fiduciary conduct³² for those administering retirement plans and for “public disclosure of the plan’s administrative and financial affairs.”³³ To enable plan participants to enforce their rights under ERISA, including its disclosure and reporting requirements, Congress provided them access to the federal courts.³⁴ However, Congress also recognized that because employers are not required to offer retirement plans, it is important that employers be able to administer plans with reasonable expense so that they are not discouraged from establishing or continuing such plans.³⁵

C. Fiduciary Duties

ERISA’s fiduciary duties are based on the common law of trusts, which governed most benefit plans before ERISA’s enactment.³⁶ However, the U.S. Supreme Court in *Varity Corp. v. Howe* instructed that trust law is only a “starting point” and that courts must determine when the purposes of ERISA depart from trust law requirements under the common law.³⁷ ERISA specifies that a fiduciary will use a “[p]rudent man standard of care” and will “discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries.”³⁸ A fiduciary must also act “for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying

28. *See id.* at 5.

29. 29 U.S.C. § 1001(a) (1999).

30. *Dade v. N. Am. Philips Corp.*, 68 F.3d 1558, 1562 (3d Cir. 1995) (quoting *Hoover v. Cumberland, Md. Area Teamsters Pension Fund*, 756 F.2d 977, 985 (3d Cir. 1985)); *see also* 29 U.S.C. § 1001 (1999).

31. *See* 29 U.S.C. § 1001.

32. *See id.* § 1104.

33. H.R. REP. NO. 93-533, pt. 7, at 17 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 1973 WL 12549.

34. *See* 29 U.S.C. § 1001(b).

35. *See id.* § 1104(a)(1)(A)(ii).

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

37. *Id.* at 497.

38. 29 U.S.C. § 1104(a)(1) (1999).

reasonable expenses of administering the plan."³⁹ The Act also generally requires a fiduciary to exercise prudence by diversifying plan investments to minimize risk, unless it is prudent not to do so, and to manage the plan in accordance with the instruments governing the plan.⁴⁰

D. Disclosure Requirements Under ERISA

The disclosure and reporting requirements specified under ERISA are generally administrative and regulatory in nature.⁴¹ The requirements include a duty to provide participants and beneficiaries with summary descriptions of plans, financial reports, and other plan information, some automatically and others on request by a participant.⁴² Certain filings with the government, such as annual reports or premium payment records to the Pension Benefit Guaranty Corporation ("PBGC"), are also required.⁴³ Such reporting was seen as a means to provide employees and the government with enough information to know whether the plan was being properly administered with financial integrity.⁴⁴ In short, reporting requirements were intended to provide employees with enough information to reveal what benefits will be received, what procedures must be followed, who is responsible for the plan, and whether the plan is adequately funded.⁴⁵

E. Enforcement

ERISA contains specific enforcement procedures allowing plan participants to bring private actions for violations of the Act in order to recover benefits, enforce rights under the plan, or clarify future rights.⁴⁶ Beyond those specific requirements, Congress noted that "a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans."⁴⁷ Prior to *Varity*, courts had held that remedies were to be attributed only to the benefit plan at issue, but the Court held in *Varity* that ERISA's remedial provisions authorize lawsuits for individual relief.⁴⁸

39. *Id.*

40. *See id.* *But see* 29 U.S.C. § 1104(c)(1) (stating that if a participant is allowed to exercise control over investments in his account and chooses to do so, the fiduciary will not be liable for any loss in the account).

41. *See* 29 U.S.C. § 1021.

42. *See id.*

43. *See id.*

44. *See* H.R. REP. NO. 93-533, pt. 6, at 11 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 1973 WL 12549.

45. *See* *Porto v. Armco, Inc.*, 825 F.2d 1274, 1276 (8th Cir. 1987), *cert. denied*, 485 U.S. 937 (1988).

46. *See* 29 U.S.C. § 1132(a).

47. 129 CONG. REC. 29,942 (1974) (remarks of Sen. Jacob Javits).

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

F. Competing Interests—Individual Rights and Business Needs

Congress was constrained in its desire to statutorily protect individual benefit rights through regulation because pension plans are voluntary.⁴⁹ The desire to protect participants' rights was countered by a desire that employers adopt new plans and expand the coverage of their existing plans so that a greater number of employees would receive retirement benefits.⁵⁰ The Supreme Court recognized these concerns in *Varity*, noting that courts may have to take into account competing congressional interests, such as Congress' desire to protect employee benefits versus its concern about creating a system so complex and costly that employers are discouraged from establishing employee benefit plans.⁵¹ Despite Congress' stated intent, however, it was evident early on that the complexities of ERISA administrative regulations were "unduly burdensome" to businesses.⁵²

II. THE PROGRESSION OF DISCLOSURE DECISIONS UNDER ERISA

A. The Statutory Duties of ERISA

The first court decisions to address disclosure held that there was no fiduciary duty to disclose beyond the specific statutory requirements outlined in ERISA.⁵³ For example, in *Porto v. Armco, Inc.*, a retired employee sued the plan administrator and his employer claiming that he should have been informed of an amendment to a benefit plan at the same time active employees were informed of the change in the plan. He had been informed of the change, however, within the statutory limits of ERISA.⁵⁴ The Eighth Circuit held that a plan administrator who complies with ERISA's disclosure standard cannot be said to have breached the fiduciary duty.⁵⁵ Furthermore, in *Acosta*, the plan participant was employed by a subsidiary of the appellee and participated in the subsidiary's retirement plan.⁵⁶ The employee claimed that the company breached its fiduciary duty

49. See H.R. REP. NO. 93-533, pt. 1, at 1 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 1973 WL 12549.

50. See *id.*

51. See *Varity Corp.*, 516 U.S. at 497; see also Vineeta Anand, *A History of Good Intentions Gone Awry*, PENSION & INVESTMENTS, Sept. 6, 1999, at 19 (quoting remarks of Rep. Al Ullman). "This legislation provides urgently needed reform in the pension area. But at the same time, it continues the basic governmental policy of encouraging the growth and development of voluntary private pension plans." *Id.*

52. Reorg. Plan No. 4 of 1978, 43 Fed. Reg. 47,713 (Aug. 10, 1978), reprinted in 29 U.S.C. § 1001 (1999) (Letter from President Carter describing a plan intended to reduce the administrative burdens and complexity of ERISA).

53. See *Acosta v. Pac. Enters.*, 950 F.2d 611, 619 (9th Cir. 1992); *Porto v. Armco, Inc.*, 825 F.2d 1274, 1276 (8th Cir. 1987).

54. See *Porto*, 825 F.2d at 1274-75.

55. See *id.* at 1276.

56. See *Acosta*, 950 F.2d at 615.

under ERISA because it refused to provide the employee with names and addresses of all plan participants, which the employee wanted in order to solicit votes for an individual he favored for a director's position on the company's board.⁵⁷ The Ninth Circuit in *Acosta* agreed with the Eighth Circuit, holding that the employee's requested disclosure was not "sufficiently related to the provision of benefits or the defrayment of expenses" to be mandated under ERISA and therefore no disclosure was required.⁵⁸

B. *Fiduciary Duty Not to Mislead or Misrepresent*

A number of courts deciding disclosure issues moved quickly beyond a mere statutory interpretation of the disclosure requirements of ERISA and began interpreting the scope of a plan administrator's duty to disclose under the auspices of the common law of trusts.⁵⁹ Court decisions informed by the law of trusts that have focused on the plan administrator's general fiduciary duties under ERISA have increasingly interpreted those duties in favor of plan participants. Early decisions recognized a fiduciary duty to "speak truthfully" to plan participants.

In *Berlin v. Michigan Bell Telephone*,⁶⁰ employees contended that Michigan Bell intentionally misled them by indicating that the company was not considering an enhanced early retirement package and that employees should therefore not delay their retirement decisions.⁶¹ The Sixth Circuit held that the company's actions constituted a breach of fiduciary duty in affirmatively misrepresenting the plan terms to plan participants.⁶² In 1996, the Second Circuit in *Pocchia v. NYNEX Corp.* agreed with the Sixth Circuit and noted that it is "well-settled that plan fiduciaries may not affirmatively mislead plan participants about changes, effective or under consideration, to employee pension benefit plans."⁶³

In *Varity Corp. v. Howe*, the Supreme Court weighed in on the subject of misrepresentation, holding that "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'" and is therefore a breach of the employer's fiduciary duty under ERISA.⁶⁴ The egregious employer behavior in *Varity* involved employees being told that if they agreed to voluntarily transfer

57. *See id.*

58. *Id.* at 619.

59. For further discussion of fiduciary duties under the common law of trusts, see Barry, *supra* note 5, at 741-43. *See also* Jensen, *supra* note 4, at 145-49.

60. 858 F.2d 1154 (6th Cir. 1988).

61. *See id.* at 1158.

62. *See id.* at 1163.

63. 81 F.3d 275, 278 (2d Cir. 1996). *See also* Mullins v. Pfizer, Inc., 23 F.3d 663, 669 (2d Cir. 1994); Fischer v. Phila. Elec. Co., 994 F.2d 130, 135 (3d Cir. 1993); Drennan v. Gen. Motors Corp., 977 F.2d 246, 251 (6th Cir. 1992), *cert. denied*, 508 U.S. 940 (1993).

64. 516 U.S. 489, 506 (1996) (quoting 29 U.S.C. § 1021).

to a new company formed by Varity, their benefits would remain secure when, in fact, Varity knew that the newly formed company was insolvent when it was created.⁶⁵ When the new company went into receivership during its second year of operation, the employees who had transferred to it lost all of their non-pension benefits.⁶⁶ The Supreme Court agreed with the district court that Varity's communications to its employees concerning the security of their benefits were materially misleading and therefore a violation of Varity's fiduciary duty.⁶⁷

In *Anweiler v. American Electric Power Service Corp.*,⁶⁸ the Seventh Circuit found that silence could also be misleading and constitute a breach of fiduciary duty under ERISA. In *Anweiler*, an employee was asked by his insurer to sign a reimbursement agreement that made the insurer a beneficiary under the employee's group life insurance policy. The request was made because Anweiler had been receiving disability benefits in excess of what he was owed.⁶⁹ The Seventh Circuit found that because the employee was informed neither that it was unnecessary for him to sign the agreement in order to receive his long-term disability benefits nor that the agreement was revocable at will, the company breached its fiduciary duty to the employee.⁷⁰

C. Materiality

Not all misrepresentations are necessarily material, and only material misrepresentations constitute a breach of fiduciary duty. The issue of materiality was addressed by the Third Circuit in *Fischer v. Philadelphia Electric Co.*⁷¹ In *Fischer*, the court linked materiality to the degree of seriousness with which a change to a plan is being considered.⁷² Employees in *Fischer* complained that they took early retirement because they received assurances from company representatives that no enhanced early retirement plans were under consideration.⁷³ The company argued that the plan counselors were telling employees the truth because the company had never told the counselors it was considering a new plan. The *Fischer* court did not accept this argument and instead held that the company's fiduciary obligations "cannot be circumvented by building a 'Chinese wall' around those employees on whom plan participants reasonably rely for important information and guidance about retirement."⁷⁴ The court went on to instruct that the "more seriously a plan change is being

65. *See id.* at 494.

66. *See id.*

67. *See id.* at 505.

68. 3 F.3d 986, 991 (7th Cir. 1993).

69. *See id.* at 989.

70. *See id.* Despite the court's holding, the plaintiff received no remedy as the employer had already paid out more than the beneficiary was due under the plan. *See id.* at 994.

71. 994 F.2d 130 (3d Cir. 1993).

72. *See id.* at 135.

73. *See id.*

74. *Id.*

considered, the more likely a misrepresentation, e.g., that no change is under consideration, will pass the threshold of materiality."⁷⁵

The case was reviewed a second time by the Third Circuit after the district court found on remand that the company was in fact seriously considering an early retirement program at the same time employees were requesting information about such programs.⁷⁶ In *Fischer II*, the court offered a formulation that "[s]erious consideration of a change in plan benefits exists when (1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change."⁷⁷ Applying this three-pronged test, the Third Circuit held that none of the plaintiffs were materially misinformed after the earliest date at which the retirement plan was being seriously considered.⁷⁸ Given a similar set of facts, the First Circuit held that there was no fiduciary duty of disclosure when an employee inquired about plan changes because the changes were not under serious consideration at the time of inquiry.⁷⁹

The Second Circuit took the *Fischer II* "serious consideration test" even further in *Ballone v. Eastman Kodak Co.*, holding that employers cannot mislead employees by making statements about a plan that they know are false *whether or not* they are seriously considering altering the plan.⁸⁰ In another case dealing with early retirement issues, *McAuley v. IBM*, the Sixth Circuit applied the *Fischer II* test to determine that communications to employees were made at a time plan when changes were under "serious consideration" by management. The court remanded the case to determine if the representations were materially misleading.⁸¹ The Supreme Court, on the other hand, specifically declined to consider the validity of the "serious consideration test" in *Varity*.⁸²

75. *Id.* The case was remanded to the district court to determine if the changes were being seriously considered when the employee requests were made. *See id.* at 136.

76. *See Fischer v. Phila. Elec. Co.*, 96 F.3d 1533 (3d Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997). This case is referred to in subsequent cases as *Fischer II*. *See Vartanian v. Monsanto Co.*, 131 F.3d 264, 268 (1st Cir. 1997).

77. 96 F.3d at 1539.

78. *See id.* at 1544.

79. *See Vartanian*, 131 F.3d at 272.

80. 109 F.3d 117, 126 (2d Cir. 1997).

81. *McAuley v. IBM*, 165 F.3d 1038, 1043-47 (6th Cir. 1999). The Sixth Circuit disagreed with the district court as to the date that serious consideration of the early retirement plan had begun and remanded the case. IBM subsequently reached a settlement with its former employees. *See Jon G. Auerbach & Ellen E. Schultz, IBM Settles Pension Suit at \$15.5 Million*, WALL ST. J., Sept. 14, 1999, at B14.

82. *See Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996) ("[W]e need not reach the question whether ERISA fiduciaries have a fiduciary duty to disclose truthful information on their own initiative, or in response to employee inquiries.").

D. Voluntary Duty to Disclose

Although most of the circuit courts have embraced the “serious consideration test” as it applies to disclosure in response to inquiries by plan participants, the courts’ differences are more pronounced on the issue of whether a fiduciary duty to voluntarily disclose information exists. The D.C. Circuit in *Eddy v. Colonial Life Insurance Co.*⁸³ applied the Restatement (Second) of Trusts section 173 to find that “[r]egardless of the precision of his questions, once a beneficiary makes known his predicament, the fiduciary ‘is under a duty to communicate . . . all material facts in connection with the transaction which the trustee knows or should know.’”⁸⁴ The Seventh Circuit in *Anweiler* also found a breach of fiduciary duty where the company did not provide its employee complete information at the appropriate time.⁸⁵ The *Anweiler* court held there was an affirmative duty to communicate facts concerning employee rights whether or not a beneficiary asks the fiduciaries for information.⁸⁶

The Second Circuit established a bright line rule in *Pocchia v. NYNEX Corp.*, holding that a fiduciary does not have a duty under ERISA to “voluntarily disclose changes in a benefit plan before they are adopted.”⁸⁷ In *Pocchia*, although changes to the company’s retirement plan were announced several months after the employee’s retirement, he contended that the company had already decided to implement a new plan when he was negotiating his retirement, and that he should have been informed at that time.⁸⁸ The *Pocchia* court recognized that the uncertainty faced by employers if such a disclosure rule were adopted would be an undue burden on management because it would be difficult to determine when and what needed to be disclosed.⁸⁹

Finally, the Ninth Circuit panel in *Bins v. Exxon Co.* extended the duty to disclose beyond that required by all other circuits, holding that “once an employer-fiduciary seriously considers a proposal to implement a change in ERISA benefits, it has an affirmative duty to disclose information about the

83. 919 F.2d 747 (D.C. Cir. 1990).

84. *Id.* at 751 (quoting RESTATEMENT (SECOND) OF TRUSTS § 173 (1959)). In contrast with the “retirement cases” with which this note is primarily concerned, *Eddy* dealt with an insurer’s duty as a fiduciary under ERISA § 1104 to convey to a “lay beneficiary” correct and material information about his status and options when a group health policy is canceled. *Id.* at 750; see also *Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993) (citing *Eddy*, the court held that an “ERISA fiduciary who is aware of the beneficiary’s status and situation . . . has an obligation to convey complete and accurate information material to the beneficiary’s circumstance . . . even if that information comprises elements about which the beneficiary has not specifically inquired”). Like the facts in *Eddy*, *Bixler* dealt with a beneficiary’s claim for insurance benefits after her spouse had died. See *id.*

85. See *Anweiler v. Am. Elec. Power Serv. Corp.*, 3 F.3d 986, 991-92 (7th Cir. 1993).

86. See *id.* at 991.

87. 81 F.3d 275, 278 (2d Cir. 1996).

88. See *id.* at 277.

89. See *id.* at 278.

proposal to all plan participants and beneficiaries to whom the employer knows, or has reason to know, that the information is material."⁹⁰ The facts in *Bins* are similar to those in *Fischer*. *Bins*, an employee of Exxon, was contemplating retirement but had heard rumors that a retirement incentive program was being considered. *Bins* asked his supervisor and others about such a program, but received no confirmation that it was under consideration. A few weeks after *Bins* retired, Exxon announced a reorganization plan and an enhanced retirement plan for early retirees.⁹¹ *Bins* brought suit against Exxon, contending that under *Fischer*, once the company "began 'seriously considering' a proposal to offer enhanced benefits under the ERISA severance plan, it had not only a duty to respond accurately . . . to *Bins*' questions, but also an affirmative duty to provide information even in the absence of specific questions."⁹² The district court applied the holding in *Fischer II* and held that although Exxon was seriously considering the incentive benefits before *Bins* retired, there was no breach of fiduciary duty because *Bins* did not ask about the benefits during the time that they were under consideration.⁹³

The Ninth Circuit panel agreed that the *Fischer II* test was the appropriate test to determine when information becomes material, but disagreed with *Fischer II* to the extent it "characterizes the 'serious consideration' test as a compromise between an employer's role as a fiduciary . . . and its role as a business in seeking to maximize returns for its owners."⁹⁴ The court held that there was no room for compromise between these roles and that the "employer's need to operate efficiently 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."⁹⁵ The *Bins* panel indicated that "this view of the fiduciary's duty is compelled by the Supreme Court's decision in *Varity*, where the Court focused on ERISA's requirement that a fiduciary 'discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries.'"⁹⁶ The Ninth Circuit panel then reviewed the application of the "serious consideration test" by other circuits.⁹⁷ The court concluded, "The core inquiry must always be whether

90. 189 F.3d 929, 939 (9th Cir. 1999), *rev'd en banc* 220 F.3d 1042 (9th Cir. 2000).

91. *See id.* at 932.

92. *Id.* at 933.

93. *See id.*

94. *Id.* at 936. The Ninth Circuit en banc agreed that *Fischer II* is the appropriate test to determine materiality, but disagreed with the panel's rigid interpretation. *See Bins*, 220 F.3d at 1049-50.

95. *Bins*, 189 F.3d at 936.

96. *Id.* (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996)).

97. *See id.* at 936-37; *see also Vartanian v. Monsanto Co.*, 131 F.3d 264, 272 (1st Cir. 1997) (holding that the plan change under consideration must affect a person in the plaintiff's position); *Hockett v. Sun Co., Inc.*, 109 F.3d 1515, 1522-24 (10th Cir. 1997) (adopting the *Fischer II* test without modification); *Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 123 (2d Cir. 1997) (finding that serious consideration is only one "factor in the materiality inquiry"); *Muse v. IBM*, 103 F.3d 490, 494 (6th Cir. 1996) (holding that serious consideration occurs when a company "focuses on

the employer has violated its duty of loyalty to plan participants by failing to disclose material information, making misleading statements, or otherwise putting its business goals ahead of its fiduciary obligations.”⁹⁸

The *Bins* panel addressed the issue of an affirmative duty to disclose plan information by first recognizing a split in other circuits as to “whether an ERISA fiduciary has an affirmative duty to disclose a proposed change in benefits.”⁹⁹ In its discussion, the court dismissed its earlier decision in *Acosta* that conflicting provisions of ERISA limit the affirmative duty to disclose, simply noting that the court was “aware of no conflicting provisions of ERISA that would undermine the affirmative duty of disclosure in this case.”¹⁰⁰ The court concluded that there is an affirmative duty to disclose information regarding plan changes to plan participants and beneficiaries to whom the employer knows, or has reason to know, that the information is material.¹⁰¹

III. THE TENSION BETWEEN BUSINESS NEEDS AND FIDUCIARY REQUIREMENTS

A. Congressional Intent

Congress’ original intent was to balance the needs of plan beneficiaries with the business requirements of employers.¹⁰² This intent was clearly indicated by Senator Long’s statement in the Congressional Record that stated, “[W]e know that new pension plans will not be adopted and that existing plans will not be expanded and liberalized if the costs are made overly burdensome, particularly for employers who generally foot most of the bill.”¹⁰³ Since the enactment of ERISA in 1974, courts have repeatedly acknowledged this congressional sentiment. As early as 1985, in *Massachusetts Mutual Life Insurance Co. v. Russell*,¹⁰⁴ the Supreme Court noted that while Congress emphasized that ERISA’s objective was to guarantee that employees receive their pension benefits, Congress was concerned that if the cost of complying with federal standards became too high, employers would be discouraged from providing

a particular plan for a particular purpose”).

98. *Bins*, 189 F.3d at 937.

99. *Id.* at 938. See *Vartanian*, 131 F.3d at 268 (declining to address affirmative duty issue); *Hockett*, 109 F.3d at 1525 n.4 (reserving the question of whether an affirmative “duty to disclose exists”); *Pocchia v. NYNEX Corp.*, 81 F.3d 275, 278 (2d Cir. 1996) (citing *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986) (finding no duty to disclose plan changes until they are adopted)).

100. *Bins*, 189 F.3d at 938 n.5.

101. See *id.* at 939.

102. See H.R. REP. NO. 93-533, pt. 1, at 1 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, WL 12549.

103. CONG. REC. 29,945 (1974) (statement of Sen. Russell Long).

104. 473 U.S. 134 (1985).

pension plans.¹⁰⁵ Again, in 1987, in *Pilot Life Insurance Co. v. Dedeaux*,¹⁰⁶ the Supreme Court recognized the need for balance, stating ERISA's "civil enforcement scheme . . . represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans."¹⁰⁷ The Supreme Court reaffirmed this view most recently in *Varity*.¹⁰⁸

B. Business Needs Versus Fiduciary Responsibility

Prior to the enactment of ERISA, benefit plans were generally governed by the common law of trusts.¹⁰⁹ Congress intended that the fiduciary duties codified under ERISA continue to be informed by the common law of trusts.¹¹⁰ Accordingly, the courts have looked to trust law to develop the plan administrator's fiduciary duties under ERISA.¹¹¹ However, as noted earlier, the *Varity* court instructed that the "courts must go on to ask whether, or to what extent, the language of the statute, its structure, or its purposes require departing from common-law trust requirements" in order to properly interpret ERISA's fiduciary duties.¹¹² Arguably, therefore, some departure from a literal application of trust law to ERISA is necessary in order to avoid the danger of upsetting the desired balance between businesses' and participants' needs.

The natural conflict that exists between a company's business needs and its fiduciary responsibility to plan participants is recognized by the *Fischer II* court, which noted that the "concept of 'serious consideration' recognizes and moderates the tension between an employee's right to information and an employer's need to operate on a day-to-day basis."¹¹³ The dramatic difference in how the circuits view the need to strike a compromise between business

105. *See id.* at 148.

106. 481 U.S. 41 (1987).

107. *Id.* at 54.

108. *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (noting that courts must take into account Congress' desire to balance the need for protection of benefits with its desire not to create a plan that is so costly in terms of administrative and litigation expenses that it discourages employers from offering benefit plans).

109. *See id.* at 496; *see also* Barry, *supra* note 5, at 735, 737-45 (reviewing the origins of the common law of trusts and its evolution in American courts). This article develops the view that the state of the law under ERISA is such that there is a mandatory duty for voluntary disclosure on the part of fiduciaries whenever information is "material to an employee's retirement decision." *Id.* at 761. This view, of course, is consistent with that of the Ninth Circuit in *Bins v. Exxon Co. U.S.A.*, 189 F.3d 929 (9th Cir. 1999), *rev'd en banc* 220 F.3d 1042 (9th Cir. 2000).

110. *See* H.R. REP. NO. 93-533, pt. 6, at 12 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, WL 12549.

111. *See Varity Corp.*, 516 U.S. at 496.

112. *Id.* at 497.

113. *Fischer v. Phila. Elec. Co.*, 96 F.3d 1533, 1539 (3d Cir. 1996), *cert. denied*, 520 U.S. 116 (1997).

realities and fiduciary duties under ERISA is demonstrated by comparing the view of the Third Circuit in *Fischer* with that of the Ninth Circuit panel in *Bins*:

[W]e disagree with one aspect of *Fischer* 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 beneficiaries of the plan. The employer's need to operate efficiently 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.¹¹⁴

The *Bins* panel justified its approach by saying it is compelled by *Varity*, "where the Court focused on ERISA's requirement that a fiduciary 'discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries.'"¹¹⁵ However, *Bins*' reliance on *Varity* is not supported contextually by *Varity*. First, the statement the panel in *Bins* finds so compelling is merely a recitation by the *Varity* court of the common law principle of fiduciary duty as stated in the statute.¹¹⁶ Moreover, *Varity* is distinguishable because the employer's acts in that case were more egregious.¹¹⁷ The *Varity* employees lost all of their benefits because of the employer's misrepresentation.¹¹⁸ The employee in *Bins*, however, received his promised benefits. The only question was whether he should have received more.¹¹⁹

Other courts have adopted a more measured interpretation of *Varity*. In *Vartanian v. Monsanto*,¹²⁰ for example, the First Circuit interpreted *Varity* in a less aggressive fashion, noting specifically the Supreme Court's mention in *Varity* of the need to temper application of trust principles with a "scrupulous regard for the delicate balance Congress struck in enacting ERISA."¹²¹ The facts in *Vartanian* were similar to those in *Bins*. The employee in *Vartanian* heard rumors of a possible early retirement buyout, asked his superiors about it, and was told by them that they were unaware of any such plan. Shortly after he retired, a buyout plan was announced.¹²² Applying the *Fischer II* test, the *Vartanian* court held that the plan was not under serious consideration when the employee asked about it.¹²³ In arriving at its decision, the *Vartanian* court specifically declined to follow the more flexible standard of affirmative

114. *Bins v. Exxon Co. U.S.A.*, 189 F.3d 929, 936, *rev'd en banc* 220 F.3d 1042 (9th Cir. 2000) (citing *Varity Corp.*, 516 U.S. at 506).

115. *Id.* (quoting *Varity Corp.*, 516 U.S. at 506).

116. *See* 29 U.S.C. § 1104(a) (1999).

117. *See Varity Corp.*, 516 U.S. at 493-94 (employer made blatantly false misrepresentations to plan participants).

118. *See id.* at 494.

119. *See Bins*, 189 F.3d at 933-34.

120. 131 F.3d 264 (1st Cir. 1997).

121. *Id.* at 269.

122. *See id.* at 266-67.

123. *See id.* at 272.

disclosure urged by the employee.¹²⁴

In general, courts have considered the needs of business in a considerably more sympathetic fashion than that of the *Bins* panel. In *Pocchia*, for example, the court noted that if disclosure was required prior to adoption of a plan, a business would not be able to develop a strategy for reducing its workforce because if "fiduciaries were required to disclose such a business strategy, it would necessarily fail. Employees simply would not leave if they were informed that improved benefits were planned if workforce reductions were insufficient."¹²⁵ In *Pocchia*, an employee claimed that the company breached its fiduciary duty under ERISA because it did not inform him at the time of his resignation that a decision had already been made to implement an early retirement incentive plan. The employee had received a lump sum payment upon his resignation, and the new plan was not announced until seven months later.¹²⁶ The *Pocchia* court believed that mandatory disclosure prior to adoption of a plan would cause confusion for participants and "unduly burden management, which would be faced with continuous uncertainty as to what to disclose and when to disclose it."¹²⁷ In reaching its decision, the *Pocchia* court joined the courts in *Porto*, *Acosta*, and *Vartanian* in noting, "Congress' main purpose in imposing a disclosure requirement on ERISA fiduciaries was to ensure that 'employees [would have] sufficient information and data to enable them to know whether the plan was financially sound and being administered as intended.'"¹²⁸

Bettis v. Thompson,¹²⁹ a decision diametrically opposed to *Bins*, ironically involved the same employer:

The idea of imposing a fiduciary duty affirmatively not to mislead a beneficiary once a company has begun to take a plan into serious consideration is unworkable. . . .

. . . .

The only duty a corporation has to employees is accurately to explain the current state of affairs about the pension[s] plan then in effect.

. . . ERISA does not create a duty that requires the disclosure of plan amendments before they are put into effect. A different rule would cause employers to be reluctant to improve benefits because everyone who retired just before a change could sue.¹³⁰

Finally, the *Varity* court itself recognized the necessity of balancing the needs of business with those of employees.¹³¹ The *Varity* court also appears to

124. See *id.* at 268.

125. *Pocchia v. NYNEX Corp.*, 81 F.3d 275, 289 (2d Cir. 1996).

126. See *id.*

127. *Id.*

128. *Id.* at 279 (citing H.R. REP. NO. 93-533, pt. 6 (1974)).

129. *Bettis v. Thompson*, 932 F. Supp. 173, 175-76 (S.D. Tex. 1996) (citations omitted).

130. *Id.* at 175-76.

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

acknowledge that its holding concerning fiduciary responsibility was intended to be quite narrow and based on the specific facts of that case.¹³²

C. *The Changing Workplace*

Tension between the needs of business and plan participants has grown in recent years, in part because of changing conditions in the workplace. Businesses must reduce costs and attract and retain key workers to remain competitive.¹³³ Another factor driving change in pension plan offerings is the mobility of today's work force. Unlike workers of the 1960s and 1970s, today's workers rarely spend an entire career at the same company. Employees who frequently switch jobs receive little from defined benefit plans where the size of the benefit is determined by length of service and final average pay.¹³⁴ The mobility of employees also creates the need for companies to find new ways to attract and retain workers.¹³⁵ Finally, changes involving corporate structure such as mergers, business sales, and the creation of joint ventures have dramatically affected the pension industry.¹³⁶

Businesses responded to the changing workplace in part by introducing benefit plans more attuned to the needs of younger, more mobile workers. In 1999, in defense of a controversial decision to switch from a traditional final average pay pension plan to a cash balance plan, IBM executives noted that "[seventy-five] percent of its high-tech competitors, such as Microsoft Corp. . . don't even offer pensions and have more money for other expenses."¹³⁷ IBM,

132. *See id.* at 503 ("We conclude, therefore, that the factual context in which the statements were made, combined with the plan-related nature of the activity, engaged in by those who had plan-related authority to do so, together provide sufficient support for the District Court's legal conclusion that Varsity was acting as a fiduciary."); *see also id.* at 538 ("I do not read the Court's opinion to extend fiduciary liability to all instances in which the Court's rationale would logically apply.") (Thomas, J., dissenting).

133. *See* Curt Anderson, *Congress, Feds Examine Pension Plan*, YAHOO NEWS, Sept. 22, 1999, available at http://dailynews.yahoo.com/h/cp/19990922/bs/pensions_older_workers_3.html.

134. *See* PATRICK J. PURCELL, CONG. RESEARCH SERV., PENSION ISSUES: CASH BALANCE PLANS (1999).

135. *See* Stephen Franklin, *A Corporate Pension Headache: How May IBM Employees Spell Relief?* U-N-I-O-N, CHI. TRIB., Aug. 29, 1999, at C1.

136. *See Pension Bills: Hearings Before the Sen. Fin. Comm. on Pension Reform Legislation*, 106th Cong. (1999) [hereinafter *Pension Bills*] (statement of Scott J. Macey, senior counsel, American Society of Actuaries) (explaining that such changes accounted for forty percent of the new plans set up in 1995 by one large pension manager).

137. Anderson, *supra* note 133 (explaining that defined benefit pension plan provides the employee a fixed monthly income based on years of service and income level the last several years of employment). *See also* 29 U.S.C. § 1002(34) (1999); *Pension Bills*, *supra* note 136 (statement of Patrick J. Purcell, Specialist in Social Legislation, Congressional Research Service). A defined contribution plan is a pension plan that "provides for an individual account for each participant" and where benefits are "based solely on the amount contributed to the participant's account." *Id.*

therefore, changed its overall compensation package to compete and to attract the people necessary for its success.¹³⁸ IBM's change to a cash balance plan generated a major uproar primarily among its older employees, who in turn succeeded in attracting the attention of Congress.¹³⁹

According to one industry source, the main reasons why employers convert a defined benefit plan to a cash balance plan are to reduce costs, remain competitive, and attract younger workers.¹⁴⁰ Younger workers generally support cash balance plans because benefits are accumulated faster than under traditional defined benefits plans.¹⁴¹ Following a conversion, however, senior workers may find that the change from defined benefit plans to cash value plans lowers their future benefit accruals because long-time workers may not accrue additional benefits until they "wear away" the old benefit.¹⁴² The conversion may force older workers to work additional years before the cash-balance account exceeds the level of benefits that had accrued under the old plan.¹⁴³

Most cash balance conversions, however, do not save the company money because most companies that convert to such plans provide enhancements to benefits at the same time the conversion takes place.¹⁴⁴ Critics of cash balance plans, however, claim that cash balance sponsors fail to disclose changes to benefit computation methods and do not provide enough information about the plan amendments.¹⁴⁵ "The issue of disclosure—how far companies should go to make sure their employees are informed about plan amendments that replace a traditional defined benefit plan arrangement with a cash balance plan arrangement—is one of the more contentious topics surrounding the debate over cash balance conversions."¹⁴⁶ Although both employees and industry representatives agree on the need for disclosure, the issues of when and how

A popular example of a defined contribution plan is a 401(k) plan. A cash-balance plan, sometimes referred to as a "hybrid," is a defined benefit plan that has characteristics of a defined contribution plan. An employer contributes a percentage of pay into an employee 'account' and credits interest to the account. *Id.* at 1.

138. See *Pension Bills*, *supra* note 136.

139. See Congel & White, *supra* note 16, at D3.

140. See Colleen T. Congel, *Advisory Council: Cash Balance Plan Conversions Focus of ERISA Council Working Group*, BNA PENSION & BENEFITS DAILY NEWS, Apr. 9, 1999, at D3.

141. See Colleen T. Congel, *Plans Draw Both Praise, Criticism*, BNA PENSION & BENEFITS DAILY NEWS, Mar. 5, 1999, at D9; see also Vivian Marino, *Old Pensions Put Out to Pasture*, TOPEKA CAP.-J., July 18, 1999, at C1.

142. See Congel, *supra* note 141, at D9.

143. See *id.*

144. See *Minimal Cost Savings Found in Cash Balance Conversions*, WATSON WYATT WORLDWIDE, Feb. 21, 2000, available at http://www.watsonwyatt.com/homepage/us/new/pres_rel/feb00/cashbal.htm (study done by Watson Wyatt found average employer savings of only 1.4% during plan conversions).

145. See Congel, *supra* note 140, at D3.

146. Congel & White, *supra* note 16, at D3.

much plan participants need to be told are the focus of much debate.¹⁴⁷

A review of the debate surrounding proposed legislation relating to cash balance plan disclosure requirements suggests that Congress remains concerned about the tension between plan participants and business needs. Legislation has been proposed that would substantially expand ERISA's notice requirements, but it has faced strong opposition because it would result in significantly increased administrative costs to employers.¹⁴⁸ One such disclosure bill, introduced by former New York Senator Moynihan, would require that companies disclose to employees how a conversion to a cash balance plan would affect them and mandate that each employee be given a "personal statement comparing benefits under the old and new plans."¹⁴⁹ Employers oppose Moynihan's bill because of the cost of providing individual disclosure statements to each plan participant and note that "[a]ll pension plans are voluntary . . . and companies have the right to make appropriate changes to their business plans."¹⁵⁰ Employers argue that it is sufficient to provide employees with hypothetical examples to illustrate the effect of the change.¹⁵¹ While Congress tries to decide what to do in terms of disclosure, "corporate America is sending a clear message: Without varied benefit options, more companies will opt not to offer pensions."¹⁵²

D. Net Effect on Pension Plans

Beginning in the 1980s market pressures, combined with the burdensome requirements of ERISA, caused many companies to terminate traditional pension plans.¹⁵³ Commentators have surmised that the traditional defined benefit pension plans may not be compatible with the "flexible labour market of the American economy's so-called 'New Era.'"¹⁵⁴ For example, "400 to 600 mid and large sized companies, including [twenty-two] of the Fortune 100 companies, have adopted cash balance plans covering approximately [seven] million people."¹⁵⁵ The overall reduction in defined benefit plans, along with the conversion to alternate plans such as cash balance plans, is a signal that the requirements of ERISA and additional court-imposed regulations are too burdensome for businesses in today's marketplace.

Although ERISA has protected promised worker benefits for plans that are in effect, the reduction in the number of pension plans is a clear indication of the failure to achieve Congress' intended balance between business needs and

147. See Congel, *supra* note 141, at D9; see also Anderson, *supra* note 133.

148. See Congel, *supra* note 140, at D3.

149. Marino, *supra* note 141, at C1.

150. *Id.*

151. See *Pension Bills*, *supra* note 136.

152. Anderson, *supra* note 133.

153. See Congel & White, *supra* note 16, at D3.

154. Richard A. Hawkins, *The Promise of Private Pensions: The First Hundred Years*, BUS. HIST., July 1998, at 157.

155. Congel, *supra* note 141, at D9.

protection of benefits for plan participants.¹⁵⁶ Representative Rob Portman recently stressed the need to provide relief from regulatory burden as an incentive for business owners to offer retirement plans to their employees.¹⁵⁷ In response to opponents of his pension reform legislation, Portman commented, "I sort of view pensions, particularly defined benefit plans, as kind of like the Titanic sinking and someone saying, 'gee, I'm worried there might be an officer in the lifeboat, so we don't want to put the lifeboats out.'"¹⁵⁸

IV. ANALYSIS

A premise of this Note is that the amount of disclosure required by ERISA should not be the same for all circumstances, but rather should be determined by the factual context of each case. Two common fact patterns emerge in most disclosure cases that reach the circuit courts. The first fact pattern occurs where an employee is not provided complete or correct information concerning a medical or insurance plan covered by ERISA.¹⁵⁹ If the need for a fiduciary duty to disclose information is viewed on a continuum, it is strongest in these cases. The need is strongest because the statutory requirements of ERISA clearly justify an interpretation by the courts that an employer has an affirmative duty to disclose complete information to plan participants to protect their existing rights and benefits.¹⁶⁰ The second typical fact pattern occurs when an employee opts to retire or resign his position and learns thereafter that delaying the termination would have resulted in an enhanced retirement package.¹⁶¹ In these cases, ERISA's fiduciary requirements do not dictate an affirmative duty to disclose and no intention of Congress to promote such a requirement can be inferred from the legislative history.¹⁶² This view, of course, is contrary to the Ninth Circuit panel's holding in *Bins*, as well as to arguments presented by other commentators regarding the ERISA disclosure issue.¹⁶³

156. See *ERISA's Requiem*, *supra* note 16, at 10 (noting benefits promised by defined benefit plans are today more secure than before ERISA, but that the number of such plans has dropped dramatically, and is still dropping).

157. See Elizabeth A. White, *Retirement Policy: Portman, Cardin Bill Gets Positive Airing at Hearing on Legislation's ERISA Provisions*, BNA PENSIONS & BENEFITS DAILY, July 1, 1999, at 16.

158. *Id.*

159. See, e.g., *Eddy v. Colonial Life Ins. Co. of Am.*, 919 F.2d 747, 750 (D.C. Cir. 1990).

160. See 29 U.S.C. § 1104 (1999).

161. See, e.g., *Bins v. Exxon Co. U.S.A.*, 189 F.3d 929, 931 (9th Cir. 1999), *rev'd en banc* 220 F.3d 1042 (9th Cir. 2000).

162. See 29 U.S.C. § 1104 (1999); see also H.R. REP. NO. 93-533, pt. 1, at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 1973 WL 12549.

163. See *Bins*, 189 F.3d at 939; see also Barry, *supra* note 5, at 761 (the "state of the law has arrived to a point where voluntary disclosure is mandatory"); Jensen, *supra* note 4, at 159 ("Courts should continue along the path of several recent circuit and district court decisions toward requiring increased accountability and disclosure from ERISA employers . . .").

The panel's approach in *Bins* would impose an affirmative duty on employers to voluntarily disclose information to participants with no apparent reservation. There is nothing in ERISA however that demands that an employer's fiduciary duty rise to the level requested by the panel in *Bins*, nor was it ever the intent of Congress that ERISA create such a duty. Rather, the sponsors of ERISA knew that to place too heavy a burden on employers might result in companies ceasing to provide plans, thus thwarting the objective of having more workers covered by pension plans.¹⁶⁴

The panel's holding in *Bins* represents a culmination of disclosure decisions made by the courts in the years since the enactment of ERISA. In arriving at its sweeping holding, the Ninth Circuit panel reviewed the rulings of the most significant circuit court decisions dealing with the disclosure issue.¹⁶⁵ For that reason, as well as the fact that the arguments of the panel in *Bins* will likely be reflected in future disclosure cases, it serves as a logical and convenient vehicle for analysis of ERISA's fiduciary and disclosure requirements.

A. Fiduciary Duty

The Ninth Circuit panel in *Bins* agreed with the *Fischer II* "serious consideration test" as to when "information about a proposed change in benefits becomes material."¹⁶⁶ The panel disagreed, however, with the *Fischer II* characterization that the test is a compromise between an "employer's role as a fiduciary . . . and its role as a business."¹⁶⁷ In the panel's view, there is no room for compromise between these roles, and business considerations cannot be considered with regard to communications to employees about proposed changes in benefits.¹⁶⁸

As noted earlier, the *Bins* panel believed its view was compelled by *Varity*. *Bins* adopted the *Varity* holding that "making intentional misrepresentations about the future of plan benefits is an act of plan administration" and therefore a fiduciary act, because to deceive a plan's beneficiaries in order to save the employer money is not acting "solely in the interests of the participants and beneficiaries."¹⁶⁹ However, in coming to its conclusion that *Varity's* interpretation of ERISA's fiduciary duty compels an affirmative duty to disclose future plan benefits, the *Bins* panel suggested a very broad and expansive

164. See H.R. REP. NO. 93-533, pt. 1, at 1 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 1973 WL 12549. But see Lorraine A. Schmall, *Keeping Employer Promises when Relational Incentives No Longer Pertain: "Right Sizing" and Employee Benefits*, 68 GEO. WASH. L. REV. 276, 279 (2000) (claiming the complexity of ERISA has not overly deterred employees from creating pension plans). That claim does not square, however, with the significant drop in defined benefit plans that has occurred in the years since ERISA was enacted.

165. See *Bins*, 189 F.3d at 936-39.

166. *Id.* at 936.

167. *Id.*

168. See *id.*

169. *Id.*

interpretation of the fiduciary duty outlined in *Varity*.¹⁷⁰

Several objections can be raised to the *Bins* panel's view of an employer's fiduciary duty under ERISA. First, ERISA itself does not mandate the standard of fiduciary duty prescribed in *Bins*.¹⁷¹ Rather, a reading of the fiduciary duty requirements set forth in ERISA demonstrates that the duty is tied very closely to the protection of existing plan benefits.¹⁷² Second, the *Bins* view disregards the intent of ERISA's sponsors to balance the needs of businesses and employees as outlined in the legislative history.¹⁷³ Finally, the Supreme Court's decision in *Varity* does not dictate the result reached by the *Bins* court.

In *Varity*, information was communicated to employees to fraudulently induce them to accept a transfer to another company that the fiduciary knew was insolvent, rather than to help them determine whether or not to stay in a plan.¹⁷⁴ The employer's actions were an affirmative misrepresentation and a per se violation of ERISA's "duty to act solely in the interests of participants."¹⁷⁵ The decision therefore falls squarely within the purview of ERISA.¹⁷⁶

However, nothing in *Varity* justifies the unprecedented broad application of this duty in a fact pattern such as that in *Bins*. The employee in *Bins* had already made the decision to retire, and there was no question about the benefits due him or about whether he would be paid those benefits.¹⁷⁷ *Bins* was simply trying to determine whether a "better deal" might be forthcoming if he delayed his retirement. His position bears little resemblance to that of the plaintiffs in *Varity*, or to that in other cases where an employee seeks information to assist in making benefit decisions related to benefits already in existence.¹⁷⁸ Simply stated, in one case a participant is attempting to protect his existing rights to benefits, which falls within the purposes of ERISA, and in the other case the participant is trying to use the Act to gain a greater future benefit than he has neither earned nor was promised.

The *Bins* court's view of business needs versus disclosure requirements is in direct conflict with the Supreme Court and most other circuits' recognition of Congress' intent to balance the tensions between business and the protection of

170. *See id.*

171. *See Acosta v. Pac. Enters.*, 950 F.2d 611 (9th Cir. 1991); *Porto v. Armco, Inc.*, 825 F.2d 1274, 1276 (8th Cir. 1987).

172. *See* 29 U.S.C. § 1104 (1999).

173. *See* H.R. REP. NO. 93-533, pt. 1, at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 1973 WL 12549.

174. *See Varity Corp. v. Howe*, 516 U.S. 489, 494 (1996).

175. *Id.* at 494. *See also* 29 U.S.C. § 1104 (1999).

176. *See* 29 U.S.C. § 1001 (1999); *Dade v. N. Am. Philips Corp.*, 68 F.3d 1558, 1562 (3d Cir. 1995) ("Congress' chief purpose in enacting [ERISA] was to ensure workers receive promised pension benefits. . .").

177. *See Bins v. Exxon Co. U.S.A.*, 189 F.3d 929, 931-33 (9th Cir. 1999), *rev'd en banc* 220 F.3d 1042 (9th Cir. 2000).

178. *See generally Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993); *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 750 (D.C. Cir. 1990).

plan participants.¹⁷⁹ In fact, the *Varity* court, which the *Bins* court claims compels its view, recognized that:

[C]ourts may have to take account of competing congressional purposes, such as Congress' desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, 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.¹⁸⁰

Accordingly, it does not seem that either *Varity* or ERISA itself compels the expansive application of fiduciary duty of disclosure suggested by the *Bins* panel.

B. Affirmative Duty to Disclose

After reviewing the disclosure decisions of other circuits that have addressed the *Fischer II* "serious consideration test," the *Bins* panel summarized its view of the test: "The core inquiry must always be whether the employer has violated its duty of loyalty to plan participants by failing to disclose material information, making misleading statements, or *otherwise putting its business goals ahead of its fiduciary obligations*."¹⁸¹ The panel then turned to the issue of whether there is an affirmative duty to disclose information, even when a beneficiary has made no request for information.¹⁸²

The *Bins* panel began by summarizing prior decisions in which courts have indicated that an affirmative duty to volunteer information exists.¹⁸³ As noted by the court, however, all of the cases cited dealt with considerably different circumstances than did *Bins*.¹⁸⁴ The panel's inquiry then focused on other circuit

179. See *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (discussing competing Congressional purposes); *Vartanian v. Monsanto Co.*, 131 F.3d 264, 268 (1st Cir. 1997) (tension often rises and is in "many respects, an inherent feature of ERISA"); *Hockett v. Sun Co.*, 109 F.3d 1515, 1522 (10th Cir. 1997) (agreeing with the *Fischer II* comment on the tension between employer and employee rights); *Muse v. IBM*, 103 F.3d 490, 494 (6th Cir. 1996) (discussing disclosure versus burden on management with respect to what and when to disclose); *Fischer v. Phila. Elec. Co.*, 96 F.3d 1533, 1539 (3d Cir. 1996) (stating their serious consideration test "moderates the tension between an employee's right to information and an employer's need to operate on a day to day basis"), *cert. denied*, 520 U.S. 1116 (1997).

180. *Varity*, 516 U.S. at 497.

181. *Bins*, 189 F.3d at 937 (emphasis added).

182. See *id.* at 938.

183. See *id.*

184. See *id.* In one case the fiduciary did not conduct an investigation or alert plan participants concerning his suspicions that plan funds were being mismanaged. See *Barker v. Am. Mobil Power Corp.*, 64 F.3d 1397, 1403 (9th Cir. 1995). In a second case, the fiduciary withheld information about potential negative tax consequences of early retirement. See *Farr v. U.S. W. Communications, Inc.*, 151 F.3d 908, 914 (9th Cir. 1998), *as amended*, 179 F.3d 1252 (9th Cir. 1999). A third case suggested an affirmative duty to inform when silence might be harmful. See

decisions about whether ERISA compels an affirmative duty for fiduciaries to disclose proposed changes in benefits. Although a split was noted in the circuits, the *Bins* court concluded that, once a "fiduciary has material information relevant to a plan participant or beneficiary, it must provide that information whether or not it is asked a question."¹⁸⁵

The Ninth Circuit panel could see no reason why there should be a duty to supply information when a participant asks, as the "serious consideration test" requires, but not supply information if the participant does not think to ask.¹⁸⁶ In the court's view, there was no justification for rewarding those lucky enough to ask, but allowing employers to remain silent with respect to those who did not take such initiative.¹⁸⁷

The *Bins* panel realized the problems its holding of an affirmative duty to disclose may cause employers but stated that it did not believe the affirmative duty it placed on plan fiduciaries would be such a heavy burden that it would discourage companies from offering benefit plans or from enhancing them to induce early retirements.¹⁸⁸ This view, of course, is diametrically opposed to that of the Second Circuit in *Pocchia*.¹⁸⁹ The *Pocchia* court recognized that insisting on voluntary disclosure prior to adoption of a new plan would likely confuse beneficiaries, unduly burden management, and "impair the achievement of legitimate business goals."¹⁹⁰ Significantly, the *Pocchia* court went on to note that a business strategy to induce early retirements with plan incentives would fail if participants were "informed that improved benefits were planned if workforce reductions were insufficient."¹⁹¹

C. Discussion

The view espoused by this Note is that the Second Circuit in *Pocchia* has formulated the most appropriate rule with respect to a fiduciary-employer disclosure requirement, at least in early retirement incentive cases.¹⁹² As the *Pocchia* court notes:

[S]uch a bright line rule protects the interests of beneficiaries, who will receive information at the earliest point at which their rights can possibly be affected, as well as the interests of fiduciaries, who will be required

Bixler v. Cent. Pa. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1300 (3d Cir. 1993).

185. *Bins*, 189 F.3d at 939. *But see* Vartanian v. Monsanto Co., 131 F.3d 264, 268 (1st Cir. 1997) (declining to address the issue of an affirmative duty to disclose); Hockett v. Sun Co. Inc., 109 F.3d 1515, 1525 (10th Cir. 1997) (reserving the question on an affirmative duty); *Pocchia v. NYNEX Corp.*, 81 F.3d 275 (2d Cir. 1996) (holding no duty to disclose until a plan is amended).

186. *See Bins*, 189 F.3d at 939.

187. *See id.*

188. *See id.*

189. *See Pocchia v. NYNEX Corp.*, 81 F.3d 275, 279 (2d Cir. 1996).

190. *Id.* at 278.

191. *Id.* at 279.

192. *See id.* at 278 (holding no duty to disclose until plan changes have been adopted).

to provide information only at the point at which it becomes complete and accurate.¹⁹³

This decision demonstrates an understanding of the tension between employer and beneficiary interests which was recognized by Congress at the inception of ERISA. It is also directly in line with the stated intent of ERISA to protect participant benefits.¹⁹⁴ Employees will receive all the benefits promised. Employers, meanwhile, can operate their businesses and plan business strategy in an efficient manner without wondering whether they have crossed the point at which they must notify employees of a potential change in plan benefits.

The *Bins* panel, on the other hand, ignores any need for a balance between employers and plan participants and creates a climate that will almost assuredly result in a net decrease in pension plans or benefits thereunder. In effect, the panel shifts an approach that was intended to be balanced to one that significantly favors employees. While ERISA was intended to protect employees' retirement benefits and to provide for administration of plans at a reasonable cost,¹⁹⁵ the panel's ruling in *Bins* essentially turns ERISA into a tool for employees to leverage maximum financial benefits from employers regardless of the circumstances and no matter what the costs. It allows employees "to have their cake and eat it too."¹⁹⁶

An affirmative duty to disclose information concerning the possibility of increased benefits in this context is unrealistic, and it ignores the fiduciary responsibilities corporate officers and directors have to their shareholders, many of whom are also employees. For example, a business may be considering an early retirement incentive as part of a merger discussion or as part of a corporate reorganization or cost reduction. A requirement on employers to disclose information with respect to potential plan changes prior to announcement of the event prompting the changes would undermine the company's strategy and could easily result in a negative impact on company stakeholders, employees and shareholders alike. Disclosure of such information might cause a company's stock price to change, thus affecting the cost of a merger, or it could inspire competitive actions that would derail the merger altogether.

A very likely result of an affirmative duty to disclose such as the *Bins* panel proposed would be an accelerated reduction in the number of benefit plans offered by employers, at least in part, because of the uncertainty such a requirement will create among businesses. There is no requirement that companies offer pension plans.¹⁹⁷ In fact, that is one reason why Congress and

193. *Id.* at 279.

194. *See* 29 U.S.C. § 1104 (1999).

195. *See id.* § 1001.

196. For example, an employee plans to retire and is fully informed of his or her retirement benefits when the decision is made, but believes that he or she perhaps could squeeze a bit more out of the company or the plan.

197. *See* H.R. REP. NO. 93-533, pt. 1, at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 1973 WL 12549.

the courts have attempted to use caution in the implementation and interpretation of ERISA. The concern remains that placing too extensive a burden on employers will result in a reduction in the number of plans offered. Further, since an employer has no legal obligation to provide a retirement plan, the employer has no obligation to increase the payments under a plan that already exists.¹⁹⁸ Why then, should an employer be obligated to divulge business strategies by telling employees they might receive more if they stay longer?

As *Pocchia* suggests,¹⁹⁹ employees would have no incentive to retire under those circumstances. Also, in some cases, the additional cost to the employer may well exacerbate a company's already deteriorating financial position, thus jeopardizing the employment position of all its workers. Imposing the requirement suggested by *Bins* may also work to employees' disfavor in another way. One reason for offering early retirement incentives is to reduce employment in a less egregious manner than simply terminating employees. Decisions like that of the *Bins* panel that increase the burden on employers in this situation could well lead to companies exercising the undesirable option of simply terminating employees in order to achieve their goals. In that event, neither those who would like to leave early nor those who would like to stay would be satisfied.

Bins suggests there is no reason why some employees (those who ask) should be lucky enough to receive additional incentive benefits versus those who do not ask. That argument is eliminated if *Pocchia* is adopted, because under that court's bright line test there is no need to disclose such information to any employee.²⁰⁰ Whether employees ask or not, the only duty is not to mislead or misinform them.²⁰¹ Even if that were not the case, however, luck is not the issue. For example, if an early retirement incentive program is introduced, it generally requires participants to be fifty-five or older. Many of those who are near the cut-off age would also consider themselves "unlucky" because they were not quite old enough to take advantage of the incentives. Of course, it would be ridiculous to require the company to lower the age level so the "unlucky" ones who are only fifty-four are covered. There simply must be a definite cut-off level for age and for disclosure requirements.

Businesses generally operate as rational economic entities. They will attempt to operate in an efficient manner in order to remain profitable and competitive. In their attempt to control costs, they will try to reduce uncertainty to the extent possible in the operation of their businesses. A disclosure requirement such as that suggested by *Bins* would increase both uncertainty and the cost burden on companies. An employer's reaction may very well be to eliminate plans affected by the court's ruling, or in the case of new enterprises, to refrain from adopting such plans in the first place. The net effect, therefore, may well be the

198. *See id.*

199. *See Pocchia v. NYNEX Corp.*, 81 F.3d 275 (2d Cir. 1996); *see also supra* text accompanying note 125.

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

201. *See id.* at 278.

elimination of the need for such disclosure as the benefit plans that fall under its aegis are terminated.

The circuit court decisions with respect to disclosure requirements under ERISA diverged in opinion prior to the Ninth Circuit panel's ruling in *Bins*, but an affirmative duty to disclose as suggested by the panel would significantly widen the gap.²⁰² It is important that there be continuity in disclosure requirements since a substantial number of employers who are affected by such rulings engage in business activities and have employees in multiple states. As a result, these businesses would be essentially required to conform with any circuit holding that is similar to that in *Bins*, as unhappy plan participants would almost certainly file complaints in that jurisdiction whenever possible. The Supreme Court specifically declined to address the issue of the serious consideration test in *Varity* and denied certiorari in *Pocchia* and *Fischer*, thus allowing the circuit courts to develop the law in this area.²⁰³ The divergence in circuit court opinions has now reached the point, however, that the Supreme Court should review a case with a similar fact pattern to *Bin* that applies an "affirmative duty to disclose" requirement. It is important that this be resolved in order to establish continuity in the circuits so that both employers and participants know their rights on this issue.

CONCLUSION

An affirmative duty to disclose as suggested by the *Bins* panel obliterates the intent of Congress, which was recognized by the *Varity* court to balance business requirements with the protection of beneficiaries. This tilting of the scales would likely quicken the exodus of employers from those still offering defined benefit plans. The net effect will be a reduction in the number of employees covered by such plans.

If the Supreme Court addresses the "affirmative duty to disclose" issue, it should conclude that the type of disclosure requirements suggested by the *Bins* panel, at least in the context of early retirement cases, are invalid. The panel's ruling clearly goes beyond what Congress ever intended in adopting ERISA. The employee considering an early retirement decision is making a voluntary choice as to his or her retirement date. The employee is not required to retire but simply desires to do so. There is no legitimate reason an employer should be required to disturb its business strategies to inform the prospective retiree that an improved plan might be forthcoming if he or she delays retirement. The requirement to do so exceeds the protection intended by Congress and, in effect, forces the company to increase an employee's benefits in the case of a voluntary retirement.

202. See *Bins v. Exxon Co. U.S.A.*, 189 F.3d 929, 939 (9th Cir. 1999), *rev'd en banc* 220 F.3d 1042 (9th Cir. 2000). *But cf. Pocchia*, 81 F.3d at 279; *Fischer v. Phila. Elec. Co.*, 96 F.3d 1530 (3d Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997).

203. See *Pocchia v. NYNEX Corp.*, 517 U.S. 931 (1996); *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996); *Fischer*, 96 F.3d at 1530.

Finally, businesses seek as much certainty as possible in conducting their affairs. In the context of early retirement cases such as *Bins*, the superior option is the Second Circuit's bright line rule established in *Pocchia* that there is no duty to inform until plan changes have been adopted.²⁰⁴ This option enables all parties to have a degree of certainty with respect to ERISA administration, yet beneficiaries are still protected from misleading statements or misrepresentations on the part of fiduciaries. Concurrently, it fulfills the purpose of ERISA that existing plan benefits be protected. The certainty and reasonableness created by the *Pocchia* rule would therefore encourage companies to provide pension benefits and help fulfill Congress' intent that more workers be covered by retirement plans.

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

