UNINFORMED, MISINFORMED, OR DISINFORMED WHEN "MOVIN' OUT"?: CIRCUIT COURT SPLITS ON EMPLOYER FIDUCIARY DUTIES OF DISCLOSURE

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The Employment Retirement Income Security Act of 1974 (ERISA) is a regulatory scheme frequently subject to litigation. In recent years, the fiduciary duties owed by employers under ERISA in their role as benefit plan administrators have become a point of controversy. Two such issues, (1) the triggering moment for attachment of an employer's fiduciary duty to disclose new plan information when asked by employees, and (2) the proper standard for actionable intent in breach of the duty of care claims, have been decided differently by the circuit courts. Two conflicting lines of thought have developed regarding the triggering point for an employer's fiduciary duty: the Serious Consideration Test, or the likelihood that the company will adopt the in-consideration plan, and the Expansive Materiality Test, or what impact information regarding consideration of a new plan would have on an employee's

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The author would like to dedicate this work to his family, and particularly his recently departed grandmother, without whose support and encouragement none of the extraordinary opportunities he has been afforded in life would have been possible.

retirement decision. In addition, the circuits have split on whether misinformation provided to the employee about potential future plans must be intentional to be actionable. The author explores the background of ERISA and the purposes Congress intended it to promote before examining the relevant case law dealing with fiduciary duties under ERISA. The author then concludes that the Expansive Materiality Test and the immateriality of the intention behind incorrectly provided information are the proper standards that best comport with the purposes of ERISA.

I. Introduction

> Anthony works in the grocery store / Savin' his pennies for some day.
> Mama Leone left a note on the door / She said, "Sonny, move out to the country."
> Working too hard can give you a heart attack / You oughta know by now
> Who needs a house out in Hackensack? / Is that all you get for your money?
> And it seems such a waste of time / If that's what it's all about
> Mama, if that's movin' up, then I'm movin' out . . .
> You can pay Uncle Sam with the overtime—Is that all you get for your money?
> And if that's what you have in mind / Yeah, if that's what you're all about
> Good luck movin' up cause I'm movin' out.[1]

While Billy Joel intended the above dichotomy of "movin' up" versus "movin' out" to contrast and denigrate materialism in favor of quality of life, Americans often view the opportunity to retire as a way of "movin' up" precisely by "movin' out" of their existing employment. In "movin' out" of the working world and collecting their expected retirement benefits, older Americans can potentially "move up" enjoyment of their golden years and reap the rewards of a lifetime of hard work. By this logic, severance[2] and early retirement packages (SERPs) allow an accelerated arrival of a better lifestyle. Moreover, they are often accompanied by additional incentives that enhance the plans' attractiveness to workers whose collective departure may achieve a company-wide reduction-in-force (RIF) or other managerial goals.[3]

1. BILLY JOEL, *Movin' Out (Anthony's Song)*, *on* THE STRANGER (Columbia 1977).

2. Severance incentives are often referred to as separation incentives. *See, e.g.*, Berlin v. Mich. Bell Tel., 858 F.2d 1154, 1156–57 (6th Cir. 1988) (using severance and separation interchangeably when discussing early retirement packages offered to employees).

3. The theoretical mutual benefit of an early retirement package is that an employer is able to ratchet down its workforce and better manage its company, while the employee receives pot sweeteners or bonuses to retire. *See* Howard Shapiro & Robert Rachal, *The Duty to Disclose and Fiduciary Breaches: The "New Frontier" in ERISA Litigation*, EFP GLASS-CLE 45, 54 (2003) ("These cases arise out

Thus, both parties—employee and employer—benefit from a SERP, the former by moving onto retirement and the latter by cost containment.

Unfortunately, SERP scenarios in corporate America have not been as rosy as that arrangement might suggest. Instead, the combination of corporate restructuring, mergers and acquisitions, and skyrocketing welfare benefit costs[4] has brought retiree benefit issues to the forefront of legal disputes.[5] While corporate retirees seek to realize the perceived promise of wealth and benefits at an advanced age, employers struggle to balance such benefit commitments with the financial challenges of the modern economy.[6] As a result, much litigation has arisen regarding what retirees believe they are, or should have been, entitled to under their retirement benefit plans and what companies feel they are obligated to disburse.[7]

Within the growing realm of federal litigation under the Employee Retirement Income Security Act of 1974 (ERISA)[8] focusing on SERPs, the fiduciary duties owed by corporations acting as benefit

of attempts by companies to downsize or restructure by offering enhanced retirement or severance benefits for a limited period of time—the 'window' period."); *see also* Lorraine A. Schmall, *Telling the Truth About Golden Handshakes: Exit Incentives and Fiduciary Duties*, 5 EMPLOYEE RTS. & EMP. POL'Y J. 169, 170 (2001) [hereinafter Schmall, *Telling the Truth*] ("Motivated by a desire to reduce their workforces efficiently, expeditiously and humanely, many firms offer sweeteners or enhancements to vested and nonvested benefits in order to accelerate employees' departure from the company . . . .").

4. *See generally* Patricia Barry, *Medicare HMOs: Charging More . . . But Often Cutting Back on Benefits to Participants*, AARP BULL., Dec. 2002, at 8 (showing that healthcare costs are significantly increasing while employer participation and coverage of benefits is declining); Kelly Greene, *The Economy: Health Benefits for Retirees Continue to Shrink, Study Says—Outlook Is Even Bleaker for Workers Leaving Jobs over the Next 20 Years*, WALL ST. J., Sept. 16, 2002, at A.2.

5. Eugene P. Schulstad, *ERISA Disclosure Decisions: A Pyrrhic Victory for Disclosure Advocates*, 34 IND. L. REV. 501, 517–19 (2001) (highlighting tension between employer's business needs and fulfillment of its financial responsibilities, including employee benefit coverage).

6. *Id.; see also* Ellen E. Schultz & Theo Francis, *Fringe Benefits: How Lucent's Retiree Programs Cost It Zero, Even Yielded Profit*, WALL ST. J., Mar. 29, 2004, at A.1 ("Last September, as Lucent faced the need to spend cash on retiree health benefits for the first time, the company chose to cut them . . . . The effect was to rescind some of the health coverage Lucent had offered people in 2001 to get them to retire early."); Alex Taylor III, *GM Hits the Skids*, FORTUNE, Apr. 4, 2005, at 71 (illustrating deleterious profitability impact of GM's 2.5:1 retiree to active worker ratio and "astronomic escalation of health care costs" experienced by "all of corporate America").

7. *See infra* note 16 and accompanying text (highlighting ERISA benefit plan litigation among the various federal circuits).

8. *See* 29 U.S.C.A. §§ 1001–1053 (West 1998 & Supp. 2005).

plan administrators to their employees has emerged as a burgeoning area of contention.[9] Two fact patterns often arise in early retirement cases where a retiree is provided inaccurate information by the employer's plan administrator. One scenario involves ERISA claims by new retirees that have missed out on future benefits of a SERP because they retired before the package was officially announced, yet after the package was actually under consideration by corporate management.[10] The second scenario involves the company stripping SERP retirees of selected benefits post-retirement, despite having been assured of the stability and perpetuity of those benefits at the time of early separation from their employers.[11] Two recent Seventh Circuit decisions released in 2004, *Beach v. Commonwealth Edison Co.* and *Vallone v. CNA Financial Corp.*, serve as apt illustrations of these two fact patterns.[12]

Beach and *Vallone* address two important and unsettled issues in ERISA fiduciary duty law regarding changes in retiree benefit plans: (1) what triggers an employer's fiduciary duty to disclose new plan information when queried by employees, and (2) what is the actionable intent standard for breach of the fiduciary duty of care under ERISA? Interestingly, the Seventh Circuit's pro-employer holdings on these controversial questions signify departures from one or more of its sister courts of appeals. Furthermore, *Beach* and *Vallone* do not

9. *See infra* note 16 and accompanying text (highlighting ERISA benefit plan litigation among the various federal circuits).

10. *See, e.g.*, Beach v. Commonwealth Edison Co., 382 F.3d 656, 657–58 (7th Cir. 2004). Fact scenario involves variations on the following model: Prior to retiring "early" of his own volition and prompting, Employee *X* asks a company official whether or not any SERPs are being formulated by management to induce early retirees in the company. When the company official answers in the negative, Employee *X* retires without gaining additional bonuses—only to then be shut out of the enhanced benefits offered in a SERP tendered to employees shortly after Employee *X*'s departure. An "empty-handed" Employee *X* then sues the company for, *inter alia*, breach of its fiduciary duty to properly disclose material information about the prospective SERP that was in its formative stage.

11. *See, e.g.*, Vallone v. CNA Fin. Corp., 375 F.3d 623 (7th Cir. 2004), *cert. denied*, 125 S. Ct. 670 (2004). Fact scenario involves variations on the following model: Employee X retires and takes advantage of a SERP offered by his employer that includes a specified package of additional benefits. Following X's retirement, the employer cuts one or more benefits that were included as part of the SERP. Employee X sues the employer for, *inter alia*, factual misrepresentation in violation of its fiduciary duty as plan administrator.

12. *See id.* (early retirees stripped of benefits years after departure when company exercises contractual right to amend plan); *Beach*, 382 F.3d at 657 (early retiree departs company a moment too soon to receive sweet payday). At the time of this writing, the *Beach* and *Vallone* decisions are less than one year old.

necessarily align with the existing precedent of the United States Supreme Court,[13] nor do they comport with the general legislative policy of ERISA.

Using *Beach* and *Vallone* as a contextual backdrop, this note identifies, deconstructs, and analyzes discrete aspects of the fiduciary duties owed by corporate employers to their early retirees under ERISA-covered benefit plans. In addition, this paper seeks to illustrate the ideological divergence between federal circuit courts on the legal standards governing an employer's fiduciary role under ERISA. Within this broad sphere, this note will only address the issues of an employer's duty of disclosure when considering changes to benefit plans and the intent standard for evaluating misrepresentation claims in breach of fiduciary duty cases.[14]

Part II provides a broad overview of ERISA legislation and policy objectives, characterizes the fiduciary duties incumbent upon employers as mandated by ERISA, and summarizes the Supreme Court's 1996 *Varity* decision and the 2004 Seventh Circuit cases of *Beach* and *Vallone*. Part II concludes by framing the circuit court splits emerging from these decisions, focusing on the fiduciary duty to disclose in *Beach* and the evidentiary intent standard for breach in *Vallone.*

Having identified circuit disagreement on fiduciary duty issues, Part III further explores the *Beach* and *Vallone* decisions by tracing their holdings to other relevant case law and distinguishes the Seventh Circuit's positions from opposite precedent in some of its sister courts of appeals. More specifically, this section (1) contrasts the Serious Consideration Doctrine against the Expansive Materiality Test

13. Varity v. Howe, 516 U.S. 489 (1996).

14. The complexities of fiduciary duties under ERISA present an overwhelming amount of recent case law and secondary source commentary. While this note is limited in scope to fiduciary disclosure of new plans and existing plan amendments to potential early retirees, other commonly litigated ERISA issues include: (1) contract law principles applied to benefit plan ambiguities, *see, e.g.*, U.A.W. v. Yard-Man, Inc., 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 1002 (1984) (union and employer dispute perpetuity of benefits where collective bargaining agreement had no clear showing of employer's intent; U.A.W. v. Skinner Engine, 188 F.3d 130 (3d Cir. 1999) (retirees contend employer's cancellation of benefits violates ERISA), (2) promissory estoppel claims levied against employers for knowing misrepresentation of written plan documents inducing detrimental employee reliance, *see, e.g.*, Coker v. Trans World Airlines, Inc., 165 F.3d 579 (7th Cir. 1999) (airline employee's estoppel claim for loss of ERISA-covered plan benefits not actionable absent reasonable reliance), and (3) employers' ability to retroactively amend plan agreements under ERISA, *see, e.g.*, *Yard-Man*, *Inc.*, 716 F.2d 1476; *Skinner Engine*, 188 F.3d 130.

within the context of a fiduciary's duty to disclose, and (2) differentiates the negligent from the intentional misrepresentation standard that courts may use to evaluate breach of the fiduciary duty of disclosure.

Part IV then determines which standards best comport with ERISA's general policy goals and related case law in an effort to forecast the future resolution of these issues by the Supreme Court.[15] Ultimately, this note highlights two circuit court disagreements on important issues in ERISA benefit litigation and recommends that the Court resolve the issues in favor of retirees—the beneficiaries in whose interests fiduciary duties are created and whom ERISA was intended to protect.

II. Background

In 2004, the federal docket was fraught with suits filed by employees and retirees against their employers for breach of fiduciary responsibilities as plan administrators.[16] Involved in all such litigation is the labyrinthine regulatory web of the Employee Retirement Income Security Act of 1974 (ERISA),[17] which was enacted for the simple pur-

15. The *Vallone* decision in favor of defendant-employer and against plaintiff-retiree was appealed to the Supreme Court, which denied certiorari. *See Vallone*, 375 F.3d 623.

16. *See, e.g.*, Kergosian v. Ocean Energy, Inc., 390 F.3d 346 (5th Cir. 2004) (company amends ERISA plan to exclude former workers to facilitate merger); Baker v. Kingsley, 387 F.3d 649 (7th Cir. 2004) (employee class-action against employer's parent company for termination of ERISA covered benefits plan); *Vallone*, 375 F.3d 623 (retiree protests stripping of ERISA benefits); Mathews v. Chevron Corp., 362 F.3d 1172 (9th Cir. 2004) (involuntarily terminated employees seek ERISA covered benefits); Colin v. Marconi Commerce Sys. Employees' Retirement Plan, 335 F. Supp. 2d 590 (M.D.N.C. 2004) (retirees allege employer-administrator failed to provide benefit Summary Plan Descriptions within ERISA mandated timeframe); *In re* AEP ERISA Litig., 327 F. Supp. 2d 812 (S.D. Ohio 2004) (employer breaches fiduciary duty by providing materially misleading information to beneficiaries); Frommert v. Conkright, 328 F. Supp. 2d 420 (W.D.N.Y. 2004) (plan administrator's offsetting benefit plan calculations not violative of ERISA amendment regulations nor prejudiced against employees).

17. Lorraine A. Schmall, *Keeping Employer Promises When Relational Incentives No Longer Pertain: "Right Sizing" and Employee Benefits*, 68 GEO. WASH. L. REV. 276, 303–26 (2000) [hereinafter Schmall, *Keeping Employer Promises*] ("Labrynthine litigation under ERISA" includes sub-issues such as (A) federal preemption of state law, (B) voluntary quits and potential loss of standing, (C) prohibitions against discharges that interfere with employee benefits and early-out options, and (D) employer's duty to disclose.); *see also* Roger C. Siske et al., *What's New in Employee Benefits: A Summary of Current Cases and Other Developments*, SK023 A.L.I.-A.B.A. COURSE OF STUDY 1, *9 (2004) (Westlaw Citation) ("As ERISA celebrates its thirtieth birthday, courts continue to struggle to apply its provisions. A judge sitting in

pose of "protect[ing] . . . the interests of participants in employee benefit plans and their beneficiaries."[18] In doing so, ERISA establishes "standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and . . . provid[es] for appropriate remedies, sanctions, and ready access to the Federal courts."[19]

A. The Origin and Purpose of ERISA

ERISA's inception was necessary because, by 1974, "many employees were reaching retirement age only to find that promised retirement funds were nonexistent, either because of improper funding by the employer or because the company was in financial trouble."[20] ERISA legislation was driven by a dual-pronged platform. It was meant to (1) protect employees, while simultaneously (2) encouraging employer development of benefit plans whose standards were appealing and reasonable enough to generate employer participation, but limited enough to regulate employer abuse.[21]

Still, Congress' main purpose in enacting ERISA was "to ensure that workers receive promised pension benefits upon retirement."[22] 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.[23] The key takeaway here is that ERISA was an employee-focused response measure meant to balance out the uneven employee-employer power dynamic that had been increasingly injurious to employees in the 1950s, 1960s, and into the 1970s.[24]

the Southern District of New York last year described ERISA as having 'come to earn the distinction as our modern contender for high rank in the law's order of obscurity.'").

18. *See* 29 U.S.C. § 1001(b) (2000).

19. *Id.*

20. Schulstad, *supra* note 5, at 505.

21. *See* 29 U.S.C. § 1001b(c) (2000) (congressional adoption of ERISA was meant to balance competing goals of employee benefit protection and reasonable standards for employers); *see also* Melissa Elaine Stover, *Maintaining ERISA's Balance: The Fundamental Business Decision v. The Affirmative Fiduciary Duty to Disclose Proposed Changes*, 58 WASH. & LEE L. REV. 689, 690 & nn.1–2 (2001).

22. Dade v. N. Am. Philips Corp., 68 F.3d 1558, 1562 (3d Cir. 1995).

23. Schulstad, *supra* note 5, at 505 & n.30 (citing *Dade*, 68 F.3d at 1562).

24. *See* Stover, *supra* note 21, at 694–96 & nn.23–27 (highlighting congressional investigation into "dubious" employer benefit plan practices as the impetus for legislation encouraging employer fulfillment of pension promises); *see also* Sandra L. Sprott, *Will the Correct Legal Standard Please Step Forward: When Should an Employer's Affirmative Duty Under ERISA to Disclose Potential Plan Changes Kick-In?*, 11

B. Fiduciary Duties Established Under ERISA

Prior to ERISA's passage in 1974, unsecured employee benefit plans were generally subject to state common law trust principles.[25] Not surprisingly, the codification of ERISA borrowed significantly from these trust law ideals. Common-law trust theory used the concept of fiduciary duties, or prudential obligations, to act as a loyal trustee in the best interests of a plan's beneficiaries.[26] As such, fiduciary duties became an important part of the ERISA statutory scheme.[27]

TEX. WESLEYAN L. REV. 189, 194 (2004) (explaining two-fold motivation for ERISA—employee protection and cost containable encouragement of employer plan offerings—that "first and foremost" addressed employee benefit security).

25. *See* Frank Cummings, *ERISA Litigation: An Overview of Major Claims and Defenses*, SH082 A.L.I.-A.B.A. COURSE OF STUDY 1, 7 & nn.23–24 (2003) (Westlaw Citation) (showing confusion of pre-ERISA interstate law conflicts where based on common law standards that varied by state); *see also* Schulstad, *supra* note 5, at 505.

26. *See* Sprott, *supra* note 24, at 198–200 (explaining that the scope of ERISA as drafted by Congress was based on common law of trusts that was spearheaded by duty of loyalty).

27. *Id.* at 199–200 & nn.78–85 (claiming that duties of loyalty, beneficiary care, and prudent-man standards "charged to an ERISA fiduciary are the highest known to the law"). Moreover, as Dana Muir points out:

> Trust law imposes a wide variety of obligations on a trustee. A trustee has a duty of loyalty and must act "solely in the interest of the [trust] beneficiary." Whenever a trustee is dealing with the beneficiary on the trustee's own account, the trustee must act fairly and communicate all known material information as well as that information that the trustee should know. The duty of loyalty is further complicated by the requirement that a trustee must be impartial in the treatment of multiple current beneficiaries as well as multiple successive beneficiaries. In investing trust assets, a trustee must comport with the standard of a prudent investor, and to the extent the trust provides specific instructions regarding the propriety of investments, the trustee generally must obey those instructions. While administering the trust, a trustee must act in accordance with a standard of ordinary prudence. If, however, the trustee represents herself as having skills that meet a higher standard the trustee will be held to that higher standard. A trustee also must maintain accounts for the trust as well as furnish "complete and accurate information as to the nature and amount of the trust property" to the beneficiaries of the trust. The drafters of ERISA explicitly mobilized a number of these trust law standards and adopted them into the federal regime of benefit plan regulation. Specifically, the statute sets the general standard of care as that of a prudent person familiar with the benefit plan matters at issue. The counterpart to the trust law duty of loyalty is found in those provisions requiring fiduciaries to act "solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries." The other substantive standards require benefit plan fiduciaries to minimize the risk of large losses by diversifying plan investments and to act in accordance with plan documents.

Specifically, Section 404(a)(1) of ERISA is the relevant provision imposing fiduciary duties on an ERISA plan administrator:

> § 1104. Fiduciary duties
>
> (a) Prudent man standard of care
>
> (1) Subject to [other] sections . . . of this title, 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 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.[28]

The ERISA fiduciary duties are to be executed solely in the interests of plan participants and beneficiaries, and are spearheaded by the duty of loyalty, which is a strict common-law standard considered by courts to be the most fundamental ERISA fiduciary obligation.[29] Section 1104(a)(1)(B) sets forth the fiduciary duty of care,[30] which is characterized by such charges as an impartiality standard of administration[31] to alleviate potential bias, a "prudent man" standard of decision making that ensures sensibility, a duty of diversification in investment pursuits to minimize risk, and fidelity to the written instruments and documentation governing the plan[32] that preserves contractual consistency.

Dana Muir, *Fiduciary Status as an Employer's Shield: The Perversity of ERISA Fiduciary Law*, 2 U. PA. J. LAB. & EMP. L. 391, 396–97 (2000).

28. 29 U.S.C. § 1104(a)(1) (2000).

29. *See id; see also In re* Enron Corp. Sec., 284 F. Supp. 2d 511, 546 (S.D. Tex. 2003) (considering duty of complete loyalty to be a paramount ERISA plan fiduciary responsibility).

30. 29 U.S.C. § 1104(a)(1)(B).

31. Kyle Murray, *Assumption-of-the-Risk Retirement?: A Survey of Recent "Serious Consideration" Case Law*, 37 J. MARSHALL L. REV. 159, 160 (2003) (discussing the ERISA fiduciary duties in relation to the origins of the serious consideration cases).

32. Siske, *supra* note 17, at 122 (defining the duty of loyalty within ERISA regulations).

C. Fiduciary Duty Attachment Under ERISA

Under ERISA, a person is a fiduciary with respect to a benefits plan if he or she performs the following functions: exercises control over plan management, renders investment advice, or maintains discretionary authority over the plan's execution.[33] It therefore follows that corporate benefits administrators undertake fiduciary obligations to plan participants by disseminating and managing benefit plans within the company.

Yet, these fiduciary duties only attach to an employer in situations where he or she is functioning as a fiduciary. Specifically, "§ 1002(21)(A) defines a fiduciary as a person who exercises authority or discretion over the administration of a plan, but only when performing those functions.[34] Thus an employer *is not* a fiduciary when considering whether to establish a plan in the first place."[35] This distinction is particularly noteworthy, as it exemplifies the dual, and potentially conflicting, roles of an employer as a self-interested business entity and a loyal fiduciary to its employee-beneficiaries.

Because "ERISA allows employers to act as a plan's administrator, the employer is in a precarious position of potentially conflicting loyalties and must balance its duty of loyalty to the plan participants against the loyalty it owes to the company."[36] In recognition of this unique position that ERISA forces upon an employer,[37] the Supreme

33. See 29 U.S.C. § 1002(21)(A) (1997) ("Except as otherwise provided in subparagraph (B), 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, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan."); *see also* Stover, *supra* note 21, at 698 (attaching fiduciary duties when the employer acts in one of the three designated functions).

34. Varity Corp. v. Howe, 516 U.S. 489, 528 (1996) (emphasis added) (Thomas, J., dissenting) (employees lost nonpension benefits after being affirmatively mislead by corporate managers into switching benefit plan affiliations to a failed corporate subsidiary).

35. *See generally id*.

36. Sprott, *supra* note 24, at 201.

37. This situation is unusual in that traditional trust law disallows fiduciaries from taking actions creating a conflict of interest with trust beneficiaries. *See Varity*, 516 U.S. at 498 (differentiating company's dual roles as employer and benefit plan administrator with common law trust principle disallowing conflicts of interest in a normal fiduciary's endeavors).

Court formulated the "two hats"[38] doctrine to establish a threshold for when an employer's fiduciary duties attach.[39] At its heart, the two hats doctrine endorses the idea that an employer is only subject to fiduciary liability under ERISA when performing one of the statutorily defined functions: exercising control over plan management, rendering investment advice, or maintaining discretionary authority over plan administration.[40] Ultimately, it is the employer's action, not simply its position, that determines its fiduciary status.

D. The Supreme Court's *Varity* Decision Made Breach of Fiduciary Duties Actionable

The first case to recognize an actionable claim for breach of fiduciary duty under ERISA was *Varity Corp. v. Howe*.[41] In *Varity*, corporate management affirmatively advised and induced employees to switch their benefit plans from the parent company to a newly formed subsidiary.[42] The managers went to such lengths as distributing letters and videotapes encouraging the switch while providing repeated verbal assurances about the integrity of the new subsidiary's benefits plan.[43] When the subsidiary went bankrupt and the employees lost all of their non-pension-protected benefits, the employees discovered that management had knowingly encouraged them to transfer to a lame duck benefits plan as part of a cost-cutting executive scheme.[44] The Court held that these managers, acting in fiduciary capacities, violated the duty of loyalty by not acting "solely in the interests" of their employees.[45] More importantly, while the Court found that Varity's managers had a duty to not affirmatively mislead their employees, it did not "reach the question whether ERISA fiduciaries have a duty to disclose truthful information on their own initiative, or in response to

38. *See* Stover, *supra* note 21, at 715–17. The concept is entitled "two hats" because the company's actor can wear either a "fiduciary" hat when acting as benefits plan administrator or a "business entity" hat when acting in the interests of the business.
39. *See* Sprott, *supra* note 24, at 201 & nn.95–96.
40. *See* Stover, *supra* note 21, at 698, 717–19 (subjecting employer to ERISA fiduciary duties only when wearing its fiduciary hat as defined by performance of statutory functions).
41. *Varity*, 516 U.S. at 489.
42. *Id.* at 493–94.
43. *Id.* at 499.
44. *Id.* at 493–94.
45. *Id.* at 506–07.

employee inquiries."[46] The Court essentially decided the case on fraud or misrepresentation principles based on the company trustees' insidious behavior,[47] but it did not address the question of when a fiduciary's duty to accurately disclose intended changes to an employee benefit plan is triggered. Furthermore, because *Varity* involved intentional misconduct by the employer, it left open the question of whether the fiduciary duty can be breached by unintentional dissemination of misinformation, or incorrect information conveyed without the intent to deceive.[48]

E. 2004 Seventh Circuit Decisions Resonate with Unresolved *Varity* Issues

The Seventh Circuit's recent rulings in *Beach v. Commonwealth Edison Co.* and *Vallone v. CNA Financial Corp.* implicate the two issues that went unaddressed by the Supreme Court in *Varity*.[49] The first issue, the point at which the fiduciary duty to affirmatively disclose plan changes attaches to the employer, came to the forefront in *Beach*.[50] Only one month prior in *Vallone*, the Seventh Circuit faced *Varity*'s unresolved question of whether unintentional misrepresentation of plan benefits by a fiduciary was actionable for a breach of fiduciary duty claim.[51]

46. *Id.* at 506 (failing to consider disclosure questions because fraud factors sufficed for employer's guilt); *see also* Schmall, *Telling the Truth*, *supra* note 3, at 194 (highlighting loose ends left unresolved by the *Varity* Court).

47. *Varity*, 516 U.S. at 505 (admonishing company's active deception in plan administration) ("We accept the undisputed facts found . . . that Varity *intentionally* connected its statements about [the subsidiary's] financial health to statements it made about future benefits, so that its intended communication about the security of benefits was rendered materially misleading . . . . And we hold that making intentional representations about the future of plan benefits in that context is an act of plan administration." (citations omitted)).

48. *See id.* at 506 (failing to reach issue of fiduciary duty to disclose truthful information).

49. *See* Beach v. Commonwealth Edison Co., 382 F.3d 656, 664–65 (7th Cir. 2004) ("employer advances a temporal argument to cabin its fiduciary status"); Vallone v. CNA Fin. Corp., 375 F.3d 623, 642 (7th Cir. 2004), *cert. denied*, 125 S. Ct. 670 (2004) (demonstrating narrower interpretation of intent requirement).

50. *Beach*, 382 F.3d at 664 (supporting serious consideration threshold for fiduciary duty of affirmative disclosure as evidenced by majority dicta).

51. *Vallone*, 375 F.3d at 640–42 (discussing intent requirement in fiduciary duty breach).

1. *BEACH V. COMMONWEALTH EDISON*

Randall Beach retired from Commonwealth Edison (ComEd) following thirty-one years as an employee of the company, yet he was not entitled to future healthcare under the company's retirement plan because he departed three years shy of age fifty-five.[52] Prior to retiring, Beach believed that an incentive laden voluntary separation package (VSP) might be under consideration, which led him to ask his supervisor, as well as human resources administrators, whether such an early retirement package would be offered to his department in the immediate future.[53] Although ComEd told Beach that he was "not going to get the package . . . [because] the company is not going to offer your department a package," ComEd offered a VSP to Beach's department six weeks after his departure.[54] Because he would have been eligible for such a package had he not relied upon plan administrators' assurances that his department would not be offered a VSP, Beach brought suit against ComEd for breach of the fiduciary duty of accurate disclosure under ERISA.[55]

In reversing the district court judgment that found in favor of Beach, the Seventh Circuit determined that ERISA "defines a 'fiduciary' as a person who exercises authority or discretion over the administration of a plan, but only when performing those functions.[56] Thus, an employer is not a fiduciary when considering whether to establish a plan in the first place, or what specific benefits to offer when creating or amending a plan."[57] Accordingly, ComEd defeated Beach's claims for entitlement to lost VSP benefits and breach of a fiduciary duty to disclose.[58] The VSP was not itself an existing plan in the Seventh Circuit's view, nor was it an amendment to an established ERISA plan to which a duty of disclosure could have attached at the time of Beach's retirement.[59] Beach argued that the formative stages of the VSP were underway and its disclosure to employees would have

52. *Beach*, 382 F.3d at 657.
53. *Id.*
54. *Id.* Factually speaking, the company officials spoke to the best of their knowledge when they brushed off Beach's preretirement inquiries, and the VSP offered to Beach's department was not decided upon by corporate management until after he left. Nevertheless, the issue of when the duty to disclose was triggered arises in this case.
55. *Id.*
56. 29 U.S.C. § 1002(21)(A) (2001).
57. *Beach*, 382 F.3d at 657.
58. *Id.* at 657–61.
59. *Id.*

been material to his early retirement decision.[60] The Seventh Circuit did not find this argument persuasive.

The theoretical standard used by the Seventh Circuit in *Beach* is known as the Serious Consideration Doctrine.[61] Under this standard, "a duty of accurate disclosure begins 'when (1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change.' At that point, details of the amendment become material; until then there is only speculation."[62]

2. *VALLONE V. CNA FINANCIAL CORPORATION*

Michael Vallone and two fellow employees at Continental Insurance Company accepted an early retirement package in 1992 that included a provision of "lifetime" welfare benefits known as the Health Care Allowance (HCA).[63] This provision of lifetime HCA benefits was conveyed both orally and in writing to the early retirees.[64] Six years later, CNA Financial Corporation, the plan's employer-administrator that had acquired Continental Insurance in 1995, notified Vallone and other early-retirees that their HCAs were being terminated as of January 1, 1999.[65] CNA's justification for termination was a contractual clause reserving the employer's right to change or amend the plan.[66] In a class action, Vallone brought suit against CNA for, among other things, breach of its fiduciary duty, arguing that CNA provided informational misrepresentations as plan administrator in violation of

60. *Id.*
61. *Id.* at 659–60.
62. *Id.* (quoting Fischer v. Phila. Elec. Co., 96 F.3d 1533, 1539 (3d Cir. 1996)). The Serious Consideration Doctrine, at a high level, means that the employer's development, or "consideration," of a new benefits plan was not yet serious enough to warrant the attachment of a fiduciary duty and obligation to disclose the strategy to employees. *Id.* In other words, the idea is not close enough to completion and therefore need not be shared with employees.
63. Vallone v. CNA Fin. Corp., 375 F.3d 623, 626 (7th Cir. 2004), *petition for cert. filed*, No. 04-502, 2004 WL 2326794 (U.S. Oct. 13, 2004), *cert. denied*, 125 S. Ct. 670 (2004).
64. *Id.*
65. *Id.*
66. *Id.* at 634 (discussing how reservation of rights allows stripping of "lifetime" benefits because contractual silence as to vesting presumes nonvested benefit status) ("[I]n the perhaps beady eyes of the law, the 'lifetime' nature of a welfare benefit does not operate to vest that benefit if the employer reserved the right to amend or terminate the benefit, given . . . the presumption that welfare benefits do not vest.").

§ 404 of ERISA.[67] The Seventh Circuit affirmed the district court's grant of summary judgment for CNA on all claims.[68]

On the fiduciary duty claim, the appellate court held that, under *Varity* and other Seventh Circuit precedent, "an employer must have set out to disadvantage or deceive its employees . . . in order for a breach of fiduciary duty" claim to succeed.[69] Vallone's appeal argued that the Seventh Circuit mistakenly characterized *Varity* as only allowing breach of fiduciary duty claims to succeed "where there is proof that a fiduciary has acted with a subjective intent to deceive employees under a plan."[70] In other words, unless the employer engaged in intentional or deceitful misconduct, the employee loses out under the current law.[71]

F. Seventh Circuit Standards in Contrast to Other Circuits

1. TRIGGERING THE DUTY TO DISCLOSE: SERIOUS CONSIDERATION DOCTRINE VS. EXPANSIVE MATERIALITY (TOTALITY OF MATERIALITY) TEST

The Seventh Circuit's Serious Consideration Doctrine follows reasoning developed in the Sixth Circuit's *Berlin v. Michigan Bell Telephone Co.* decision[72] and the Third Circuit's *Fischer II* decision.[73] These concepts will be discussed in greater detail in Part III.

67. *Id.* at 626–27; 29 U.S.C. § 1104(a)(1) (2002).

68. *Vallone*, 375 F.3d at 626.

69. *Id.* at 642 (endorsing intentional deception standard necessary for breach of fiduciary duty); s*ee id.* at 640 ("[A] breach of fiduciary duty exists if fiduciaries 'mislead plan participants or misrepresent the terms or administration of a plan.'") (quoting Anweiler v. Am. Elec. Power Serv. Corp., 3 F.3d 986, 991 (7th Cir. 1993)).

70. Petition for Writ of Certiorari at I, Vallone v. CNA Fin. Corp., 125 S. Ct. 670 (2004) (No. 04-502) (highlighting Seventh Circuit disagreement with Third and Sixth Circuits on intent requirement in fiduciary duty breach).

71. *Id.*

72. Berlin v. Mich. Bell Tel. Co., 858 F.2d 1154 (6th Cir. 1988); s*ee also* Murray, *supra* note 31, at 163 ("Sixth Circuit maintained that communications or representations by an employer prior to a business decision would not be exempt from the ERISA fiduciary standards simply because the business decision *itself* was a nonfiduciary activity. The court held that 'when serious consideration was given by [Michigan Bell] to implementing MIPP by making a second offering . . . , then [Michigan Bell] as the plan administrator and/or its [vice president], the plan fiduciary, had a fiduciary duty not to make misrepresentations, either negligently or intentionally, to potential plan participants concerning the second offering.' As a result, misrepresentations made to potential plan participants after Michigan Bell afforded serious consideration to the second MIPP offering could constitute a breach of a fiduciary duty.").

73. Murray, *supra* note 31, at 167–68 ("The court noted that the test balanced an employee's interest in material information of plan changes for use in making employment decisions, against that of an employer's need to conduct ongoing re-

In contrast, the Second Circuit[74] and Fifth Circuit[75] have rejected the Serious Consideration Doctrine and developed an "Expansive Materiality" standard, which is similar to a totality of the circumstances test. This standard focuses on the materiality of the information—that is, the material impact that such information may have on an employee's retirement decision—and takes into account the employer's "serious consideration" as one of many factors affecting the duty to disclose.

2. INTENT REQUIREMENT IN BREACH OF THE FIDUCIARY DUTY: DISINFORMATION VERSUS MISINFORMATION

The Seventh Circuit's *Vallone* decision incorporates the idea that an intentional affirmative misrepresentation by the employer must exist in order to successfully make out a breach of fiduciary duty claim. According to the *Vallone* court, in interpreting ERISA's fiduciary misrepresentation provisions, "the Supreme Court has held that an employer breaches its fiduciary obligation by lying to employees in order to induce them to surrender their benefits."[76] This is essentially a disinformation standard, such that an employer can only breach the fiduciary duty by affirmatively (i.e., intentionally) undertaking wrongdoing.[77]

The *Vallone* plaintiffs pointed out in their petition for writ of certiorari that "the Second, Third and Sixth Circuits have interpreted *Varity* as permitting claims against a fiduciary even in the absence of negligent or intentional misconduct so long as materially misleading information was provided by the fiduciary."[78] This is essentially a misinformation evidentiary standard that gets applied to situations of

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view of its benefits packages without having to disclose every aspect of such activities. Given these competing considerations, the court held that serious 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.' The court of appeals added that the serious consideration assessment would not hinge upon any one of the three factors, but that the three would 'interact and coalesce to form a composite picture.'").

74. *See generally* Ballone v. Eastman Kodak Co., 109 F.3d 117 (2d Cir. 1997) (rejecting the Serious Consideration Doctrine).

75. *See generally* Martinez v. Schlumberger, Ltd., 338 F.3d 407 (5th Cir. 2003) (rejecting the Serious Consideration Doctrine).

76. Vallone v. CNA Fin. Corp., 375 F.3d 623, 640 (7th Cir. 2004) (citing Varity Corp. v. Howe, 516 U.S. 489, 506 (1996)).

77. *See generally* Frahm v. Equitable Life Assurance Soc'y of the United States, 137 F.3d 955, 959 (7th Cir. 1998). The disinformation label has been assigned to the test by the author, but similar vocabulary can found in the case.

78. Petition for Writ of Certiorari, *supra* note 70, at I.

fiduciary communications with their employees.[79] If incorrect information was provided, it is possible to make out a claim for breach of fiduciary duty so long as the disseminated information was materially misleading.[80] The key idea is that an employee's subjective evaluation of the information matters just as much as the actual truth of the information provided. If misinformation is conveyed to an employee who, in light of other factors, internalizes the information and acts on it, then perhaps a claim for breach of fiduciary duty can be levied.[81]

III. Analysis

A. The Circuit Split on Duty to Disclose Under ERISA

1. BACKGROUND ON SERIOUS CONSIDERATION

a. Berlin v. Michigan Bell Telephone Co. In *Berlin v. Michigan Bell Telephone Co.*,[82] a class of former employees claimed that they were denied additional retirement benefits in violation of ERISA after they accepted early retirement packages under the guise that no additional incentives would be offered in the near future.[83] Relying on published communications from management reiterating that no improved packages would be forthcoming, the *Berlin* plaintiffs retired.[84]

In reviewing the relevant fiduciary duties applicable to the employer, the Sixth Circuit "noted that the pure business decisions of an employer are not subject to the statute's fiduciary requirements."[85] Nevertheless, representations or publications made available to employees regarding those business decisions, regardless of whether the "pure business decision" is a fiduciary activity in itself, are still within the scope of ERISA claims:

> The court held that when serious consideration was given by [Michigan Bell] to implementing [a second wave of early retire-

79. *See generally Frahm*, 137 F.3d 955. The misinformation label has been assigned by the author rather than a court or secondary research.
80. Petition for Writ of Certiorari, *supra* note 70, at I.
81. *Id.*
82. 858 F.2d 1154 (6th Cir. 1988).
83. *Id. See generally* Pamela Perdue, *The Evolving Area of ERISA Disclosure*, SG073 A.L.I.-A.B.A. COURSE OF STUDY 927, 932 (2002) (Westlaw Citation) (noting that Berlin involved the implementation of a prospective or contingent plan, as opposed to the amendment of an existing plan). In *Drennan v. General Motors Corp.*, 977 F.2d 246, 252 (6th Cir. 1992), the Sixth Circuit extended its *Berlin* holding to anticipated changes of an existing plan. *Id.*
84. *Berlin*, 858 F.2d at 1159 (6th Cir. 1988).
85. *See* Murray, *supra* note 31, at 163.

> ment packages] . . . then [the company] as the plan administrator and/or its vice president, the plan fiduciary, had a fiduciary duty not to make misrepresentations, either negligently or intentionally, to potential plan participants concerning the second offering.[86]

The impact of *Berlin* was that once serious consideration was given to a particular business objective or issue, and even if that issue was outside the realm of fiduciary responsibilities, there would still exist the fiduciary duty under ERISA to not misinform employees in any communications about the nature of the decision.[87]

b. Fischer I *Linked Serious Consideration to Likelihood of Materiality* In *Fischer v. Philadelphia Electric Co.* (*Fischer I*), benefits administrators working for the employer fiduciary had no knowledge of upper management's discussion of an early retirement package.[88] As such, the administrators denied inquiries from employees about the existence of a possible package to be offered.[89] When the management announced the package less than a month later, employees brought suit.[90] The court ruled that simply because benefits counselors were not as informed as senior management did not excuse the employer from liability in the matter.[91] The Third Circuit said the company "could not escape its ERISA fiduciary duties by 'building a Chinese wall' around those employees on whom plan participants reasonably rely for important information and guidance about retirement."[92] And thus the slogan for the Serious Consideration Doctrine was born: "when a plan administrator speaks, it must speak truthfully."[93]

86. *See id.* (highlighting concept that although pure business decisions of a company are not subject to ERISA's fiduciary regulations, representations or publications of these business decisions to the employee beneficiaries are subject to ERISA).
87. *See id.*
88. Fischer v. Phila. Elec. Co. (*Fischer I*), 994 F.2d 130, 132 (3d Cir. 1993) ("As far as the benefits counselors knew, they were telling the truth since the Company had not kept them abreast of any discussions taking place among senior management.").
89. *Id.*
90. *Id.* at 132–33.
91. *Id.* at 135 (holding overall company owed fiduciary obligations as plan administrator).
92. *See* Murray, *supra* note 31, at 166.
93. *Fischer I*, 994 F.2d at 135; *see also* Wilber H. Boies & Nancy G. Ross, *Communicating with Employees About Benefits: A Central Issue in ERISA Administration and Litigation*, 664 PLI/Lit 487, 522 (2001) (describing and analyzing standards used by appellate courts).

Ultimately, the rule of *Fischer I* was that the materiality of a representation, or misrepresentation, regarding plan information turned on the likelihood that a reasonable employee would be misled into making an ill-informed decision regarding when to retire.[94] The court drew a direct relationship between the degree of seriousness regarding plan implementation and the likelihood of a misrepresentation passing the materiality test.[95]

2. THE SERIOUS CONSIDERATION DOCTRINE TODAY

a. The Fischer II *Three-Element Standard for Serious Consideration* The Third Circuit was forced to address *Fischer* (*Fisher II*)[96] a second time, but this time it was required to provide a more detailed explanation of the Serious Consideration standard.[97] In its opinion, the *Fischer II* court recognized that its test needed to "moderate[ ] the tension between an employee's right to information and an employer's need to operate on a day-to-day basis" in various aspects of corporate decision making.[98] Faced with this balancing, the Third Circuit devised a three-element test for the Serious Consideration Doctrine to determine if a discussed change in benefit plans required disclosure to employees because it involved information material to their early retirement decision.[99] Under that test, the three elements are: (1) specificity of proposal, or a specific and concrete plan; (2) probability of implementation, or realistic discussion and likelihood of execution by management; and (3) sufficient managerial authority, or ability and discretion to implement the proposal.[100] These elements were to be evaluated as a composite whole, not as individual elements whose

94. *Fischer I*, 994 F.2d at 135 (showing correlation of materiality and probability of employee choosing to retire early).

95. *Id.* (holding seriousness of employer's consideration to be determinative proxy for materiality).

96. Fischer v. Phila. Elec. Co. (*Fisher II*), 96 F.3d 1533 (3d Cir. 1996).

97. *Id.* at 1536, 1539 ("In this appeal, we must review the application of a decision we reached when this case first came before us. . . . We will now provide further guidance on the meaning of serious consideration.").

98. *Id.* at 1539; *see also* Murray, *supra* note 31, at 167 ("[*Fischer II* balanced] employee's interest in material information of plan changes for use in making [informed] employment decisions, against that of an employer's need to conduct ongoing review of its benefits packages without having to disclose every aspect of such activities.").

99. *Fischer II*, 96 F.3d at 1539.

100. *Id.* ("Serious 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.").

success or failure would dictate the outcome.[101] Simply stated, the Serious Consideration Doctrine governed when the fiduciary duty to disclose would be triggered in the Third Circuit.

b. The Seventh Circuit Endorsed Serious Consideration in Beach The Seventh Circuit applied the Serious Consideration Doctrine in *Beach* when the court said that "the majority rule, reflected in *Fischer* [*II*], has the better of this debate."[102] Based on the *Fischer II* elements, the court determined that there was neither sufficient detail, probability of implementation, nor authoritative clout behind ComEd's managerial speculation regarding a possible early retirement package offering to attach the fiduciary duty of disclosure.[103]

In justifying its decision, the *Beach* panel advanced numerous rationales to support the application of the Serious Consideration Doctrine.[104] It first drew a comparison between the trustee-beneficiary relationship to that of financial entities and their investors in corporate transactions, concluding that certainty of deal structure triggers disclosure to its stakeholders.[105] Next, the court warned that an opposite view of the Serious Consideration Doctrine might cause all benefits administrators to be ostracized by other employer executives, because there would be little safety in any confidential information made

101. *Id*. (serious consideration factors not isolated, but rather interactive).

102. Beach v. Commonwealth Edison Co., 382 F.3d 656, 660 (7th Cir. 2004) (indicating support of Fischer serious consideration doctrine in evaluating the fiduciary duty, if any, owed by ComEd to its employees relating to preliminary strategizing of early retirement plan).

103. *Id.* at 660–61 (evaluating ComEd's behavior on *Fischer II* serious consideration criteria) ("ComEd did not amend any of its plans. We need not decide whether *Fischer*'s approach would apply to the establishment of a new plan, because none was under consideration when Beach resigned. There was no proposal at all, let alone a specific proposal under review by senior managers. It is undisputed that ComEd did not begin internal discussion of the details about the Transmission and Distribution Organization's reorganization until mid-June 1997, a month after Beach had given notice.").

104. *Id.* at 660.

105. *Id.* ("We know . . . that firms cannot commit fraud about such transactions at any stage, but the time at which the information becomes so important that it must be disclosed accurately (if the issuer says anything), even if there is no intent to deceive, has been hard to determine. We have taken the view that accurate disclosure is not required until the price and structure of the deal have been resolved. . . . No court has held . . . that there is a duty in corporate or securities laws to predict accurately the events that lie ahead. There is no reason why ERISA should require more." (citations omitted)).

privy to the administrator-fiduciaries.[106] Furthermore, such a lack of information flowing to the human resource administrators would render them useless in the system, as they could not perform their fundamental role of benefits counseling and would likely breed rumor circulation among employees as well as mistrust.[107] Accordingly, the Seventh Circuit followed a Serious Consideration standard in dealing with the question of fiduciary duty to disclose.[108]

c. Other Circuits and the Serious Consideration Doctrine The Seventh Circuit's endorsement of the Third Circuit's Serious Consideration Doctrine finds significant accord among other courts of appeals.[109] Indeed, the First, Fourth, Sixth, Eighth, Ninth, Tenth, and Eleventh circuits have agreed that a plan amendment becomes material at the juncture of serious consideration, but until then it is only speculation and need not be disclosed to an inquiring employee.[110]

Two circuits, however, have notably departed from the rigidity of the Serious Consideration Doctrine. Based on the notion that materiality of information is not solely a function of the employer's own

106. *Id.* ("Giving firms a duty to forecast accurately, if the benefits staff says anything at all, could not help plan participants. It would just induce employers to tell the human resources staff to say nothing at all—to make no predictions and to refer employees to the printed plan descriptions. Yet chancy predictions may be better than silence; think of the 95% of the employees in ComEd's Transmission and Distribution Organization who would have received exactly the right advice, which could have facilitated their retirement planning.").

107. *Id.* ("The alternative to enforced silence would be a declaration in the employee handbook that no one should rely on any oral information about the plans. That might or might not curtail legal risks—some workers would be bound to ask why the firm even had a benefits advisory staff . . . . If the benefits staff must clam up, then rumor and office scuttle-butt come to the fore, and it's likely to be less accurate than the staff's educated guesses.").

108. *Id.* at 660.

109. *Id.* All but two circuits, the Second and Fifth, that have considered the issue have upheld a version of the Third Circuit's *Fischer II* serious consideration standard; *see, e.g.*, Mathews v. Chevron Corp., 362 F.3d 1172, 1180–82 (9th Cir. 2004); Bins v. Exxon Co., 220 F.3d 1042, 1048 (9th Cir. 2000) (en banc); McAuley v. IBM Corp., 165 F.3d 1038, 1043 (6th Cir. 1999); Vartanian v. Monsanto Co., 131 F.3d 264, 272 (1st Cir. 1997); Hockett v. Sun Co., 109 F.3d 1515, 1522–23 (10th Cir. 1997); Wilson v. Southwestern Bell Telephone Co., 55 F.3d 399, 405 (8th Cir. 1995); Elmore v. Cone Mills Corp., 23 F.3d 855 (4th Cir. 1994); Barnes v. Lacy, 927 F.2d 539, 544 (11th Cir. 1991).

110. *Beach*, 382 F.3d at 659 ("The majority view is that a duty of accurate disclosure begins 'when (1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change.' At that point [the] details of the amendment become material; until then there is only speculation." (citation omitted)) (accord of view across numerous circuit courts).

deliberations, the Second and Fifth Circuits have come to a different conclusion.[111] While the crux of the Serious Consideration Doctrine rests solely within the employer's internal network, these two circuits draw on the Supreme Court's *Varity* principle to inject an equitable regulatory element of truth in fiduciary communication into the debate surrounding when the fiduciary duty of disclosure attaches.[112]

3. THE MATERIALITY STANDARD

The dissenting jurisprudence from the Serious Consideration Doctrine highlights a fatal flaw in its operation; specifically, the doctrine permits a "free zone for lying" to employees prior to the fulfillment of all three Serious Consideration elements (proposal specificity, probability of implementation, managerial authority), but after such information would become materially relevant to the inquiring employee's retirement decision.[113] Said differently, a benefits administrator could knowingly deny or mislead employees in answering questions about future changes simply because the changes had not achieved sufficient internal ratification.[114] This concern, voiced by the Second Circuit in *Ballone v. Eastman Kodak Co.*[115] and later recognized by the Fifth Circuit,[116] inspired a more expansive Materiality Test that included recognition of the Serious Consideration elements along with contemplation of other competing factors.

a. Ballone *and the Materiality Test* In *Ballone*, early retirees were told by their employer that an enhanced pension plan would not be

111. *See generally* Ballone v. Eastman Kodak Co., 109 F.3d 117 (2d Cir. 1997); Martinez v. Schlumberger, Ltd., 338 F.3d 407 (5th Cir. 2003). *Ballone* and *Martinez* both expand the materiality analysis beyond the three Serious Consideration Doctrine factors.

112. *Ballone*, 109 F.3d at 124 ("It is clear that Kodak may not actively misinform its plan beneficiaries about the availability of future retirement benefits to induce them to retire earlier than they otherwise would, regardless of whether or not it is seriously considering future plan changes. Kodak has a duty to deal fairly and honestly with its beneficiaries.").

113. *See Martinez*, 338 F.3d at 428 ("[L]ack of serious consideration does not equate to a free zone for lying."); Beach v. Commonwealth Edison Co., 388 F.3d 1133, 1135 (7th Cir. 2004) (Ripple, J., dissenting) (Justices Ripple and Evans dissent from Seventh Circuit's denial of en banc re-hearing).

114. *Beach*, 388 F.3d at 1135.

115. *See generally Ballone*, 109 F.3d 117 (2d Cir. 1997).

116. *See Martinez*, 338 F.3d at 428.

available in the months following their retirement.[117] Plaintiffs subsequently sued Kodak for breach of its ERISA fiduciary duty because, after retiring based on these false assurances, plaintiffs failed to obtain a more attractive deal offered by the company soon thereafter.[118]

Reversing an employer-friendly district court decision that was based on the Serious Consideration Doctrine, the Second Circuit determined that the materiality of Kodak's misrepresentations to its employees was not solely predicated upon the doctrine's three-pronged elements. Rather, the materiality inquiry should focus on whether the employer's affirmative misrepresentation was substantially likely to mislead a reasonable employee in making an adequately informed retirement decision.[119] To assess such materiality, the court offered numerous decision-making factors, which included many of the Serious Consideration Doctrine's factors.[120] These factors are: (1) the egregiousness of the employer's misrepresentation; (2) the level of trust in the instant fiduciary relationship; (3) the availability of extrinsic evidence contrary to the misrepresentation; (4) the degree of the employee's reliance on the misrepresentation; and (5) the specificity and depth of the misrepresentation provided.[121] In further explaining the new standard, the court noted that simple "mispredictions" would not be actionable, but false statements "couched as guarantees" regarding future benefits could be deemed material in light of other factors.[122] Thus, the Materiality Test was characterized by an expansive totality of the circumstances assessment in contrast to the formulaic Serious Consideration Doctrine.

117. *Ballone*, 109 F.3d at 121–22 (describing factual background of employees' early retirement under assurances that turn out to be false).

118. *Id.*

119. *Id.* at 122–23.

120. *Id.* at 125.

121. *Id.* (stating that materiality of false assurances could be assessed by the five factors of "[1] how significantly the statement misrepresents the present status of internal deliberations regarding future plan changes; [2] the special relationship of trust and confidence between the plan fiduciary and beneficiary; [3] whether the employee was aware of other information or statements from the company tending to minimize the importance of the misrepresentation or should have been so aware, taking into consideration the broad trust responsibilities owed by the plan administrator to the employee; [4] the employee's reliance on the plan administrator for truthful information; and [5] the specificity of the assurance." (citations omitted)); *see also* Hudson v. Gen. Dynamics Corp., 118 F. Supp. 2d 226, 257 (D. Conn. 2000) (citing *Ballone* materiality factors).

122. *Ballone*, 109 F.3d at 125 ("[F]alse statements about future benefits may be material if couched as a guarantee.") (referencing Malone v. Microdyne Corp., 26 F.3d 471, 479 (4th Cir. 1994)).

b. The Fifth Circuit's Martinez *Decision* The Fifth Circuit's 2003 ruling in *Martinez v. Schlumberger, Ltd.*[123] further developed the Second Circuit's Materiality Test.[124] In May and June of 1998, the *Martinez* plaintiffs inquired whether a new Voluntary Early Retirement Plan (VERP) would be offered in the near future.[125] Plaintiffs retired at the end of June in reliance on corporate personnel's statements that they had no knowledge of such a VERP, and the retirees subsequently sued the company when a new VERP was announced at the end of July.[126] The Fifth Circuit affirmed the district court's decision in favor of the employer because serious consideration of the VERP did not occur until after the plaintiffs retired, but it departed from the majority view on the specific issue of when an employer misrepresentation can be held actionable in its own right.[127]

Although the doctrine used by all circuits other than the Second held that a misrepresentation cannot be actionable in advance of the employer's serious consideration, the Fifth Circuit adopted the *Ballone* materiality test in evaluating employer misrepresentations.[128] For the Fifth Circuit, the central issue was "whether there is a substantial likelihood that a reasonable person in the plaintiffs' position would have considered the information an employer-administrator allegedly misrepresented important in making a decision to retire."[129] The *Martinez* court cited *Ballone* factors such as egregiousness of the misrepresentation, contrary extrinsic evidence, and specificity of the assurance in determining that a fact-specific totality approach was preferable.[130] Although the employer-administrator in *Martinez* was found not to have made a material misrepresentation based on a totality of the circumstances, the Fifth Circuit nevertheless deemed the Materiality Test preferable to the Serious Consideration Doctrine such that a lack of

123. 338 F.3d 407 (5th Cir. 2003).
124. *Id.* at 430 (adopting *Ballone* materiality approach).
125. *Id.* at 431.
126. *Id.* at 432 (explaining that facts showed human resources staff member stated to one of the plaintiffs that "Schlumberger was doing too good right now" to offer any packages "because they'd lose too many good people.").
127. *Id.* at 430 (adopting middle-road approach that duty to disclose is not exclusively determined by serious consideration, but that employee communications must be truthful when engaged in). *Id.* at 432.
128. *Id.* at 428 (adopting fact-specific approach similar to the Second Circuit).
129. *Id.*
130. *Id.* (holding that factors beyond those of serious consideration are relevant, as identified by the Second Circuit).

serious consideration "does not equate to a free zone for lying" by the employer.[131]

4. THE SERIOUS CONSIDERATION DOCTRINE VERSUS THE MATERIALITY TEST

Given the split among the circuits regarding the Serious Consideration Doctrine and the growing Materiality Test, the differences between these approaches can be highlighted on a variety of levels.

a. Procedural Operation: Temporality At its heart, the Serious Consideration Doctrine's central premise is that the timing of an employer's decision on changes to a benefit plan determines whether the duty of accurate disclosure attaches in the face of employee inquiries.[132] *Fischer II* drew a clear bright line rule that where a three-pronged composite test is satisfied, the fiduciary duty attaches regarding truthful communication.[133] Thus, the doctrine provides that a misrepresentation is material in the context of ERISA at the point at which serious consideration by the employer occurs. It necessarily follows, as stated by the Seventh Circuit and other courts, that any misrepresentation prior to serious consideration is not material because it is simply "mere speculation."[134]

The doctrine's clear division between *before* and *after* serious consideration effectively creates a tiered temporal prioritization. Said differently, the nature of the communication (i.e., the conversation) between the fiduciary-administrator and beneficiary-employee is never evaluated unless the information to be communicated (i.e., the planned benefit change) is already deemed ripe for transmission, regardless of the administrator's level of actual knowledge.[135] A misrep-

131. *Id.* at 428.

132. *See, e.g.*, Fischer v. Phila. Elec. Co. (*Fischer II*), 96 F.3d 1533, 1538 (3d Cir. 1996) (establishing serious consideration by employer as determining factor of materiality of employer misrepresentations) ("In the current case, as in any case where the misrepresentation in question is the statement that no change in benefits is under consideration, the only factor at issue is the degree of seriousness with which the change was in fact being considered. This factor controls the materiality test . . . .").

133. *Id.* at 1539.

134. Beach v. Commonwealth Edison Co., 382 F.3d 656, 659–60 (7th Cir. 2004) (holding that materiality cannot exist until serious consideration is reached).

135. *See, e.g.*, Ballone v. Eastman Kodak Co., 109 F.3d 117, 124 (2d Cir. 1997) (rejecting Serious Consideration Doctrine and asserting that consideration by employer is relevant to materiality, but not a prerequisite).

resentation by a plan administrator is not actionable prior to serious consideration, no matter its substantive impact on the employee's retirement decision.[136] And therein exists the "free zone for lying" under the doctrine that frightens advocates of the Materiality Test—a plan administrator who knowingly misleads an employee because serious consideration has yet to attach.[137]

In contrast, the Materiality Test takes the elements of serious consideration into account as part of a totality of the circumstances determination.[138] Accordingly, it discounts the serious consideration components from being exclusively probative of when an employer's misrepresentation is a material breach of its duty to disclose.[139] Absent a bright line rule determining when a misrepresentation becomes material, it considers the serious consideration elements characterizing an employer's internal deliberations in conjunction with factors surrounding the fiduciary communication to the employee.[140] The timing of the employer's internal consideration is not separate from evaluation of the administrator's ERISA-regulated benefits advisory capacity as it is under the doctrine.[141] As such, the Materiality Test balances the competing interests of the employer's business objectives and the employee's informed decision making as impacted by the administrator's communication.

b. Deferential Posture: Employee Consideration As implied above, a key difference between the two standards in the disclosure and affirmative misrepresentation context is whether an employee's perspective is considered at all. Overall, the Serious Consideration Doctrine is more deferential to employers in that a corporation determines its own fate regarding the duty to disclose and avoid misrepresentation in response to employee inquiries. Once an employer moves ahead with sufficient serious consideration, then the ERISA fiduciary

136. *See id.*
137. *See Beach*, 388 F.3d at 1135 (Ripple, J., dissenting).
138. *See* Martinez v. Schlumberger, Ltd., 338 F.3d 407, 428 (5th Cir. 2003) (showing that a variety of factors beyond serious consideration elements are considered in the materiality test).
139. *See Ballone*, 109 F.3d at 123 (discussing nonexclusivity of serious consideration in the materiality analysis).
140. *Id.* at 125 (discussing how a fact-specific determination of materiality turns on numerous factors).
141. *Id.*

duties will apply.[142] Conversely, the Materiality Test appears more deferential to employees, as even prior to fulfillment of a serious consideration element, a court could determine that other factors such as the strength or specificity of an assurance caused the misrepresentation to be material, and therefore actionable.[143]

However, it is also possible that the Materiality Test's approach could be beneficial to an employer. Consider a scenario where all serious consideration elements are met, yet the misrepresentation made by an employer-administrator is so contrary to rumors within the company that a reasonable employee could not believe its truth. In such a case, the Materiality Test might benefit the employer over the employee.

c. Decision Criteria: Formulaic Inputs or Case-Specific Analysis? A final, readily apparent difference between the Serious Consideration Doctrine and the Materiality Test is in their relative flexibility toward the facts of a particular case.[144] The Serious Consideration Doctrine is formulaic, considering the same three elements in absolutes rather than degrees across the gamut of cases; a proposal is either specific or vague, ready for implementation or still in the planning stages, and is backed by authority or unconfirmed speculation.[145] In contrast, the Materiality Test takes into account relevant factors on a case specific basis, and as such allows the decision to be based on the most probative variables instead of predetermined conditions.[146]

B. The Circuit Split on Employer's Intent to Deceive Under ERISA

The *Varity* Court ruled that the company *intentionally* connected its statements about its shell company's financial health to statements it made about the future of benefits, so that its intended communication about the security of benefits was rendered materially mislead-

142. Beach v. Commonwealth Edison Co., 382 F.3d 656, 659 (7th Cir. 2004) (explaining serious consideration factors).
143. *Ballone*, 109 F.3d at 123.
144. *See Beach*, 382 F.3d at 659–60 (highlighting concreteness of Serious Consideration versus amorphous nature of fact-specific materiality).
145. *Id.*
146. *Id.*

ing.[147] *Varity* thereby suggested two issues playing into the employer-misrepresentation-as-fiduciary-breach equation—materiality and intent.[148] Yet the Court neglected to rule comprehensively on either because of the employer's obvious fraudulent breach of the duty of loyalty.[149] While the materiality controversy has been exhaustively debated on the merits of the Serious Consideration Doctrine,[150] the intent piece of the *Varity* puzzle has also generated disagreement among some circuits.

Discord over the intent requirement is evident in both *Beach* and *Vallone*. Indeed, although neither decision ultimately turned on the issue,[151] Judge Ripple of the Seventh Circuit cited jurisprudential tension over the employer intent requirement in assessing fiduciary breach.[152] To better understand the issue, it is necessary to frame it in the context of *Varity* and related trust law.

1. ERISA PRINCIPLES, *VARITY*, AND THE UNINFORMED MISINFORMER

ERISA imposes upon a trustee or fiduciary a duty of loyalty to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries."[153] It further adopts a duty to perform these duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters" would undertake.[154] Assessing these duties, the *Varity* Court held simply that lying to employees in

147. Varity Corp. v. Howe, 516 U.S. 489, 505 (1996) (showing intent and materiality principles in decision while criticizing company's invidious behavior).

148. *Id.*

149. *Id.* at 506 (failing to reach questions of disclosure because fraud existed). In ruling that the intentional deception of employer was material to employees' decision, the Court neither determined when materiality itself is achieved (*see supra* Part III.A) nor whether *unintentional* misleading could be considered material.

150. *See supra* Part III.A (discussing the circuit split on duty to disclose).

151. *See generally* Beach v. Commonwealth Edison Co., 382 F.3d 656 (7th Cir. 2004) (holding defined by major premise that new plan offering is not subject to ERISA regulation of existing plan amendments and minor premise that serious consideration wins in the disclosure debate); Vallone v. CNA Fin. Corp., 375 F.3d 623 (7th Cir. 2004), *cert. denied*, 125 S. Ct. 670 (2004) (using contract law to hold that reservation of rights clause in benefits plan trumps any possible misrepresentations by benefits administrator).

152. *See* Beach, 382 F.3d at 668–89 (Ripple, J., dissenting) (issue of intent to deceive requirement unmentioned by majority but raised by dissent); *Vallone*, 375 F.3d at 640 (breach of ERISA fiduciary duty as Count III addressed by court cites disparity among circuits).

153. 29 U.S.C. § 1104(a) (2002).

154. *Id.* § 1104(a)(1)(B).

the context of benefits administration violated the fiduciary obligation.[155] As such, the easy case of intentional deceit, or "disinformation,"[156] by employers is unanimously adopted by the federal bench as a violation of ERISA; "when a plan administrator speaks, it must speak truthfully."[157] But what happens when the fiduciary is not lying in benefits communication, but he unintentionally conveys a material misrepresentation whose falsity is unknown to him? What of the reckless, clueless, or uninformed misinformer? Are his mistaken actions the company's liability or the unwitting employee's tough luck? Must there be deceptive intent, or scienter,[158] in the employer's actions to allow an employee claim for breach of the fiduciary duty?

Federal appellate courts are divided on this question,[159] although it has not received nearly the depth of treatment that the Serious Consideration debate has spawned relating to the duty to disclose. Still, the *Beach* and *Vallone* opinions reveal turmoil between the Seventh Circuit, which applies a narrow "disinformation" standard to misrepresentations made by an employer-fiduciary, and the Second, Third, Sixth, and sometimes Ninth Circuits, whose broader view of ERISA imposes a harsher "misinformation" fiduciary standard on the employer.[160]

2. MISINFORMATION STANDARD IN THE SECOND, THIRD, AND SIXTH CIRCUITS

According to the Second, Third, and Sixth Circuits, as well as Judge Ripple's dissents in *Beach* and its en banc denial, "importing the intent to deceive requirement—synonymous in tort law with fraud or

155. Varity Corp. v. Howe, 516 U.S. 489, 506 (1996).

156. *See* Frahm v. Equitable Life Assurance Soc'y of the United States, 137 F.3d 955, 959 (7th Cir. 1998).

157. Boies & Ross, *supra* note 93, at 522 (quoting Fischer v. Phila. Elec. Co. (*Fischer I*), 994 F.2d 135 (3d Cir. 1993)).

158. BLACK'S LAW DICTIONARY 624 (8th ed. 2004) ("scienter . . . 1. A degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission; the fact of an act's having been done knowingly, esp. as a ground for civil damages or criminal punishment. . . . 2. A mental state consisting in an intent to deceive, manipulate, or defraud.").

159. *See* Beach v. Commonwealth Edison Co., 382 F.3d 656, 668–89 (7th Cir. 2004) (Ripple, J., dissenting) (discussing disagreement that exists on scienter requirement in ERISA fiduciary breach).

160. *See id. But cf.* Mathews v. Chevron, 362 F.3d 1172, 1183 (9th Cir. 2004) (rejecting the employer intent requirement, but nevertheless showing more hesitance than Second, Third, and Sixth Circuits in adopting a negligent misstatement standard).

deceit—into this type of ERISA fiduciary case lacks any grounding."[161] Rather, to these courts, unintentional misrepresentations may suffice as an actionable ground for breach of the fiduciary duty.[162] They conclude this based on their interpretative extensions of *Varity* and ERISA statutory language, an alignment of ERISA with its trust law ancestry, and finally an analogy with agency law.[163]

a. ERISA Duties When an employer acts as a fiduciary, ERISA's § 1104(a) prudent man standard of care, and particularly the duty of care found in § 1104(a)(1)(B), control.[164] The *Varity* Court established that, even more so than its common-law trust pedigree, ERISA was meant to protect the "special nature and purpose of employee benefit plans."[165] Thus, *Varity* expanded the scope of ERISA.[166] In conflict with this expansion, upholding a scienter requirement "would effectively mean that employer-administrators have a mere duty to avoid committing fraud."[167] Because fraud creates liability even among strangers, ERISA cannot be constrained with a watered-down, lowest-common denominator standard.[168] The Second, Third, Sixth, and Ninth Circuits concur in this viewpoint.[169]

Some of the provisions of ERISA trace back to trust law theory, while surpassing the latter's acuity and force based on a congressional directive.[170] Accordingly, ERISA fiduciary duties are inclusive of trust law principles.[171] Common-law trust doctrine makes no mention of an

161. *Beach*, 382 F.3d at 668–89 (Ripple, J., dissenting) (denouncing Seventh Circuit panel's endorsement in dicta of employer scienter requirement).

162. *Id.*

163. *Id.* at 668–70.

164. *See id.* at 669.

165. Varity Corp. v. Howe, 516 U.S. 489, 497 (1996) (citing legislative intent in congressional documents showing that ERISA was meant to enhance the common law of trusts that had offered inadequate protection to beneficiaries).

166. *See id.*

167. *Beach*, 382 F.3d at 669 (Ripple, J., dissenting) (citing *Varity* and later cases to show that subjective intent to deceive is too low a standard).

168. *See id.*

169. *See id.*; *accord* Mathews v. Chevron, 362 F.3d 1172, 1183 (9th Cir. 2004); James v. Pirelli Armstrong Tire Corp., 305 F.3d 439, 449 (6th Cir. 2002); Abbruscato v. Empire Blue Cross, 274 F.3d 90, 102–03 (2d Cir. 2001); *In re* Unisys Corp. Retiree Med. Benefit "ERISA" Litig., 58 F.3d 1255, 1266–67 (3d Cir. 1995); Fischer v. Phila. Elec. Co. (*Fischer I*), 994 F.2d 130, 135 (3d Cir. 1993).

170. *See Varity*, 516 U.S. at 496–97.

171. *See id.* ("'Congress invoked the common law of trusts to define the general scope of their authority' . . . [but it] does not tell the entire story . . . . [T]he law of trusts often will inform, but will not necessarily determine the outcome of, an ef-

intent requirement in trustee breach of the fiduciary duty;[172] rather, scienter is technically an element of tortious deceit rather than an element of the law of fiduciaries and trusts.[173]

On the other hand, common-law trust principles do promulgate a duty to inform along with a duty not to misinform.[174] The Restatement of Trusts notes that a trustee must convey to its beneficiary all material facts related to a transaction that the "trustee knows or should know."[175] Misinformation standard proponents argue that "a person actively misinforms by saying that something is true when it is not true. But the person *also misinforms by saying that something is true when the person does not know whether it is true or not*."[176] Using such logic, an employer-administrator breaches his fiduciary duty by providing plan participants with materially misleading information, "regardless of whether the fiduciary's statements or omissions were made negligently or intentionally."[177] Thus, the Second, Third, Sixth, and Ninth Circuits have "rejected the invitation to graft onto ERISA's fiduciary duty provision fraud's scienter requirement."[178] In these circuits, reckless misinformation is actionable because the benefits administrator should have known better.

fort to interpret ERISA's fiduciary duties. In some instances, trust law will offer only a starting point.") (quoting Cent. States v. Cert. Transp. Inc., 472 U.S. 559, 570 (1985)).

172. *See* RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. d (1959) ("Duty in the absence of a request by the beneficiary. . . . In dealing with the beneficiary on the trustee's own account, however, he is under a duty to communicate to the beneficiary all material facts in connection with the transaction which the trustee knows or should know. . . . Even if the trustee is not dealing with the beneficiary on the trustee's own account, he is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person with respect to his interest.").

173. *Mathews*, 362 F.3d at 1183 (failing to see logic of transplanting scienter from tort of deceit into ERISA since trust law does not include it).

174. *See id.; see also* Bixler v. Cent. Pa. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1300 (3d Cir. 1993) (showing that § 173 cmt. d implies duty to inform and corresponding duty against misinformation).

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

176. *See Mathews*, 362 F.3d at 1183 (citing Wayne v. Pac. Bell, 238 F.3d 1048, 1055 (9th Cir. 2001)) (negative duty not to misinform is read into ERISA via trust law principles and cases following *Varity*).

177. Berlin v. Mich. Bell Tel., 858 F.2d 1154, 1163–64 (6th Cir. 1988) (employer intent not necessary to make out breach of fiduciary claim).

178. Beach v. Commonwealth Edison Co., 382 F.3d 656, 669 (7th Cir. 2004) (Ripple, J., dissenting).

b. Agency Law Misrepresentation advocates also draw a parallel with agency principles to criticize the intent requirement promulgated by the Seventh Circuit. Under agency law's apparent authority doctrine, a plan fiduciary may be liable for misrepresentations made by its nonfiduciary agents if and when a beneficiary reasonably relies on the nonfiduciary's apparent authority.[179] The apparent authority doctrine focuses only on the reasonable reliance of the employee; it does not consider the agent's subjective intent.[180] The doctrine is important because it imposes liability on a corporation that otherwise might circumvent its ERISA obligations by erecting a "Chinese wall" between its plan administrator—a fiduciary—and its human resources counselors who may have nonfiduciary status.[181] Moreover, incorporation of the apparent authority doctrine into ERISA fiduciary law provides an incentive for plan administrators to maximize information channels between themselves, their agents, and their beneficiaries.[182]

3. THE SEVENTH CIRCUIT DISINFORMATION STANDARD

In contrast to its sister courts in the Second, Third, Sixth, and Ninth Circuits, the Seventh Circuit endorses a strict employer-intent "disinformation" standard for breach of the ERISA fiduciary duty.[183] The Seventh Circuit applied this scienter requirement in *Vallone*, eviscerating plaintiff-retirees' ERISA fiduciary breach claim by showing that there was no evidence of purposeful deception akin to *Varity*'s "campaign of disinformation."[184] The *Vallone* court justified its disinformation approach on the grounds of allegiance to *Varity*'s intent to deceive requirement and by stating that it was avoiding a variety of

179. RESTATEMENT (THIRD) OF AGENCY § 2.03 (Tentative Draft No. 2, 2001) (apparent authority doctrine).

180. *See id.*; *see also Beach*, 382 F.3d at 669 (Ripple, J., dissenting).

181. *See Beach*, 382 F.3d at 669–70 (Ripple, J., dissenting) (referencing *Fischer I* decision). Also recall that fiduciary status is defined by administration, discretion, or investment advice with regard to a benefits plan. If a human resource counselor does not perform these functions, but serves informational purposes only, then he/she does not operate as fiduciary. Fiduciary designation is functionally determined, not title or identity driven. *See supra* Part II.C (discussing when ERISA fiduciary duties attach).

182. *Beach*, 382 F.3d at 670 (using the apparent authority doctrine to place burden on employer-administrator to sufficiently inform frontline staff).

183. Vallone v. CNA Fin. Corp., 375 F.3d 623, 640–41 (7th Cir. 2004) (discussing disagreement on intentional misrepresentation among courts), *cert. denied*, 125 S. Ct. 670 (2004).

184. *Id.* at 641.

excessive burdens on employers in their duty of care.[185] Interestingly, in explaining these reasons, the *Vallone* court relied solely on its own precedent without referencing other circuit support for its strict scienter requirement.[186]

The Seventh Circuit and Varity The *Varity* Court held that lying to employees to induce surrender of benefits constituted a fiduciary breach of the duty of loyalty.[187] The Seventh Circuit first took this to mean that a plan fiduciary misleading plan participants or misrepresenting the plan's terms would equate to breach.[188] Material facts impacting a beneficiary's interests had to be communicated, regardless of active inquiry by the employee.[189] However, in the context of advice on "lifetime" benefits, the court later excepted employers from fiduciary liability where a contractual reservation of rights clause allowed future plan changes at the administrator's discretion.[190] In allowing this exception, the panel narrowed its reading of *Varity* to only recognize fiduciary breach in situations where an employer actively undertook deception.[191]

Whereas Varity Corporation betrayed its employees by knowingly acting against their interests,[192] a fiduciary that believes his actions serve the best interests of his beneficiaries cannot, by definition, be in breach of the § 1004(a)(1) duty of loyalty.[193] Because the duty of loyalty does not equate to a "duty of prevision" or "guarantor" of future events, and because circumstances may change in the future to

185. *Id.* at 640–43 (explaining rejection of negligence standard and adoption of intent requirement).
186. *See id.* (failing to indicate other circuits echoing court's hard-line approach).
187. Varity v. Howe, 516 U.S. 489, 506 (1996).
188. Anweiler v. Am. Elec. Power Serv. Corp., 3 F.3d 986, 991 (7th Cir. 1993).
189. Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574, 590 (7th Cir. 2000).
190. Frahm v. Equitable Life Assurance Soc'y, 137 F.3d 955, 959–60 (7th Cir. 1998) (discussing common ERISA and contract law presumption that written document trumps subsequent oral communications or silence on a particular issue).
191. *Id.* at 960.
192. *See supra* Part II.D.
193. *See Frahm*, 137 F.3d at 959 (fiduciaries not engaged in *Varity* form of disinformation, but rather acted loyally in what it believed to be beneficiaries' best interests).

render a prior statement misleading, a claim for fiduciary breach absent deceitful intent must fail.[194]

b. Duty of Care and the Duty of Loyalty Also important to the Seventh Circuit's strict interpretation of *Varity*'s intent requirement is its relatively narrow view of the § 1104(a)'s "prudent man standard."[195] The Seventh Circuit takes a unique tack in distinguishing the duty of loyalty from the duty of care in its analysis of the scienter issue.[196]

The Seventh Circuit asserts that the duties of loyalty and care should not be conflated when assessing the requisite threshold for fiduciary breach.[197] By focusing on the duty of care specifically, the court shows that negligent breach of this duty is not actionable in a corporate fiduciary context, and thus should not be so in a benefits administration context either:[198]

> A duty of *loyalty* must be distinguished . . . from a duty of *care*. A corporate manager is the investors' fiduciary and must act loyally in their interests. But slipups in managing any complex enterprise are inevitable, and negligence—a violation of the duty of care—is not actionable. Quite the contrary, in corporate law managers rarely face liability even for gross negligence . . . . Running a benefits plan is just one aspect of running a corporation, and the managers (and other employees) of a firm are no less apt to err in one endeavor than in another. Efforts to administer any complex plan fall short of the ideal. Some employees . . . will receive bad or misleading advice.[199]

By showing that negligence is too low a threshold for breach of the fiduciary duty of care, the Seventh Circuit held that § 1104(a)(1) should not be subject to a negligence standard.[200]

194. *See* Vallone v. CNA Fin. Corp., 375 F.3d 623, 641–42 (7th Cir. 2004) (characterizing duty of loyalty as acting in best interests absent invidious intent), *cert. denied*, 125 S. Ct. 670 (2004); *Frahm*, 137 F.3d at 960 (noting that duty of loyalty does not equate to clairvoyance).

195. *Frahm*, 137 F.3d at 960 (showing separate treatment of duty of loyalty and duty of care).

196. 29 U.S.C. § 1104(a)(2)(A)–(B) (2000); *Frahm*, 137 F.3d at 960 (discussing negligence as breach of duty of care rather than duty of loyalty). This characterization is unique because neither the Second, Third, nor Sixth Circuits mention it in their analyses of the intent requirement. *See, e.g.*, James v. Pirelli Armstrong Tire Corp., 305 F.3d 439 (6th Cir. 2002); Abbruscato v. Empire Blue Cross & Blue Shield, 274 F.3d 90 (2d Cir. 2001); *In re* Unisys Corp. Retiree Med. Benefit "ERISA" Litig., 57 F.3d 1255 (3d Cir. 1995).

197. *Frahm*, 137 F.3d at 959.

198. *Id.*

199. *Id.*

200. *See id.*

c. Application to Overall Plan Management Finally, the Seventh Circuit has taken a holistic view of ERISA's duty of care provision to say that a fiduciary's overall diligence in benefits plan management overrides any discrete instances of oral advice.[201] Stated differently, the duty of care is plan-specific rather than beneficiary-targeted, and it does not scrutinize the quality of oral advice or misrepresentations given to beneficiaries.[202] Thus, the Seventh Circuit decreases the importance of a benefits administrator's oral communications to his investment and plan management activities.[203] In doing so, the court downplays the significance of misrepresentations made by a fiduciary, effectively marginalizing negligent breach as actionable under ERISA.[204] Negligence will be too low a standard, thereby returning the court to the stricter, narrower, and higher threshold scienter/intent standard that it prefers.[205]

IV. Resolution

A. The Materiality Test Should Define an Employer's Fiduciary Duty to Disclose

An employer's duty to disclose is best judged by the Materiality Test. The Materiality Test both includes and gives weight to the employer-focused elements of Serious Consideration, while simultaneously allowing for contemplation of employee-focused factors like depth of the assurance, state of mind, and reasonable reliance.[206] The Materiality Test is more protective of the employee-beneficiary's interests, is consistent with ERISA's fundamental purpose, and its fact-specific approach allows greater flexibility in dealing with variables in the materiality analysis.[207]

201. *Id.* at 960 (explaining that overall management of the plan, and specifically asset management, is targeted by the duty of care).

202. *Id.* *But cf.* Beach v. Commonwealth Edison Co., 382 F.3d 656, 669 (7th Cir. 2004) (Ripple, J., dissenting) (criticizing the majority for not considering when employee's state of mind is relevant to oral misrepresentations).

203. *See Frahm*, 137 F.3d at 959–61.

204. *See id.*

205. *See id.* (finding that the only remaining alternative is *Varity*'s intent-based standard if negligence is too low of an actionable standard for ERISA fiduciary breach).

206. *See supra* Part III.A (discussing the Serious Consideration Doctrine vs. Materiality Test debate on the duty of affirmative disclosure).

207. *Id.*

It is also important to realize where the circuit courts went astray in adopting the Serious Consideration Doctrine. *Fischer I* provided the starting point for both the Materiality Test and the Serious Consideration Doctrine in dicta.[208] The opinion stated that the materiality of an affirmative misrepresentation to an employee was a mixed question of law and fact. Because there was no clear answer to the question, such materiality should be judged by fact-specific inquiry. But it then drew a proportional relationship between the serious consideration timeline of an employer and a finding of materiality, such that the more serious the consideration means the greater the likelihood of materiality.[209] As such, *Fischer I* indicated that serious consideration by the employer implies materiality to the employee, but is only suggestive and not a guarantee.

Fischer II incorrectly crystallized *Fischer I*'s proportional relationship between materiality and employer consideration into its absolute three-pronged Serious Consideration test of employer-focused elements. Thus, instead of heeding *Fischer I*'s observation that employer consideration and materiality trend together, *Fischer II* erroneously blessed employer consideration as a proxy for materiality. It conflated the two wholly separate questions and made any situation that met the Serious Consideration Doctrine material. But *Fischer I* never suggested that materiality occurs at the moment of an employer's serious consideration, nor did it preclude materiality from occurring before serious consideration is achieved.

Although other circuits adopted *Fischer II*'s Serious Consideration Doctrine, the Second and Fifth Circuits in *Ballone* and *Martinez*, respectively, correctly return to a totality of the circumstances, "mixed question of law and fact" assessment as implied by *Fischer I*. They even echo *Fischer I*'s language, such that "a misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision about if and when to retire."[210] How seriously a plan is being considered for implementation by management involves important factors, but it is not entirely probative of whether a misrepresentation is material.[211]

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

209. *Id.*

210. Ballone v. Eastman Kodak Co., 109 F.3d 117, 123 (2d Cir. 1997); Martinez v. Schlumberger, Ltd., 338 F.3d 407, 419 (5th Cir. 2003).

211. *See, e.g.*, *Fischer I*, 994 F.2d at 135.

Finally, even though endorsing the Materiality Test would contradict the Seventh Circuit in *Beach*, the outcome would remain the same in either case. Where the Serious Consideration Doctrine elements are not close to being met, it is more difficult to prove that materiality of a misrepresentation is actionable for breach of the fiduciary duty.[212] Regardless, the mixed question of law and fact in *Beach* would not survive the Seventh Circuit's onerous intent requirement, a viewpoint which is also misguided.[213]

B. A Misinformation Standard Should Prevail That Does Not Require Employer Scienter

The intent to deceive issue is far simpler than that of the duty to disclose. While multiple circuit courts—namely the Second, Third, Fifth, and Ninth—have all ruled against the scienter requirement in making out a fiduciary breach claim, the Seventh Circuit upholds this standard in interpreting the *Varity* decision.[214] The circuits in opposition to the Seventh recognize that trust law theory, agency theory, and the legislative intent behind ERISA are more aligned with a negligence standard regarding fiduciary breach. They are correct for all these reasons.[215]

The Seventh Circuit seems pro-employer in the tension between employer's business interests and an employee's benefits interests, as it sides both with the employer-favorable Serious Consideration Doctrine and with the intent to deceive disinformation standard for breach.[216] By deeming negligent or reckless treatment of the duties of loyalty and care as nonactionable, the Seventh Circuit significantly narrows the volume of ERISA fiduciary claims that may be brought in its circuit. The danger exists, however, that employer-fiduciaries may become so lax in discharging their fiduciary duties that they begin to skirt the line of scienter.

Finally, it is worth noting that an application of a negligent misinformation standard will not guarantee the success of a fiduciary breach claim. The materiality hurdle still must be overcome by a beneficiary seeking redress, and thus, there seems to be little to no

212. *See supra* Part III.A.4.
213. *See infra* Part IV.B.
214. *See supra* Part III.B.
215. *Id.*
216. *Id.*

harm in lowering the evidentiary threshold for fiduciary breach.[217] The Seventh Circuit appears alone on this matter. The *Vallone* plaintiffs should be able to levy a claim for fiduciary breach on a negligence standard, but they would still fail on the materiality issue given the employer's contractual reservation of rights in its summary plan documentation.

V. Conclusion

Varity stands for the undeniable proposition that employer deceit violates ERISA. An employer-fiduciary may not actively lie to employees if and when it chooses to communicate with them, whether through a nonfiduciary agent or by its own accord. Beyond this insidious intent that ERISA condemns outright (and that the Seventh Circuit apparently requires to make a breach of fiduciary claim), the *Varity* court strongly implied that the materiality of information is the touchstone for determining when an employer's duty to disclose is triggered. How this materiality should be judged forms the basis of the Serious Consideration Doctrine/Materiality Test circuit split in contemporary jurisprudence. The correct standard going forward should be the Materiality Test, as it best comports with past precedent on the matter, as well as ERISA's pro-employee bent.

The requisite scienter issue is less controversial, but it would be incorporated into the Materiality Test's totality evaluation in circuits that uphold a misinformation standard for breach. In such a case, the degree of negligence or recklessness involved in a misrepresentation can impact the materiality equation along with many other fact-specific variables. Conversely, a disinformation intent standard court would use scienter, or lack thereof, as a bottleneck gateway to either allow or dismiss potential fiduciary duty claims. The disinformation standard is incorrect because it very narrowly applies *Varity*, when the Supreme Court did not actually reach the question of an intent requirement in fiduciary breach claims. Moreover, the Seventh Circuit's lonely adoption of the disinformation standard appears decidedly pro-employer and anti-employee, which in itself seems at odds with the intent of ERISA.

Ultimately, potential early retirees in America struggle with the decision on "movin' up" to a more leisurely lifestyle by "movin' out"

217. *See supra* Part III.A–B.

of their current jobs. Employers are equally wary of giving away too much—both financially and in the context of information flow. Thus, the problems will continue until the Supreme Court rules on multiple issues of the duty to disclose and employer's intent to deceive.