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I. Introduction

Since the enactment of the Employee Retirement Income Security Act (ERISA) in 1974, employers have been able to wear the twin hats of ERISA pension plan "sponsor" and "administrator."[1] As a plan administrator, an employer may owe plan participants a fiduciary duty, but no such duty is triggered when the employer acts only in its sponsoring capacity. Courts have held that when acting as a fiduciary of an employee retirement plan, the employer must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries."[2] (Employers are viewed as fiduciaries of a plan when they are named as such in the written plan or when they have some discretionary authority over the administration of the plan.)[3] Nevertheless, the courts have also recognized the rights of companies to make "business decisions" free from their ERISA fiduciary responsibilities and, consequently, from the obligation of acting exclusively for the benefit of plan participants. As stated in *Sutton v. Weirton Steel*:[4]

> [W]hen acting on behalf of the pension fund, there is no doubt that [an employer] must act solely to benefit participants and beneficiaries. However . . . the mere fact that a company has named itself as pension plan administrator or trustee does not restrict it from pursuing

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1. 29 U.S.C. § 1104(a)(1) (1988).

2. *See, e.g.*, Local 144 Nursing Home Pension Fund v. Demisay, 113 S. Ct. 2252, 2259 (1993); 29 U.S.C. § 1104(a)(1).

3. Specifically, ERISA provides that:

> [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.

29 U.S.C. § 1002(21)(A).

4. Sutton v. Weirton Steel Div. of Nat'l Steel Corp., 567 F. Supp. 1184 (N.D.W.Va.), *aff'd*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984).

> reasonable business behavior in negotiations concerning pension benefits not otherwise affected by the requirements of ERISA.[5]

While this delineation of responsibilities seems fairly clear-cut (i.e., the employer must merely identify which hat he is wearing at any given time), in practice the distinctions are far from apparent. Communications between the company and pension plan participants or beneficiaries are of particular concern when modifications of the plan are in various stages of discussion. In fact, the tension between the concepts of fiduciary responsibility and business decisions threatens to become more pronounced with several recent circuit and district court decisions. These decisions seem to extend the fiduciary duty to disclose communications with employees though the subject of those communications may still fall within the realm of a non-fiduciary business decision. A careful reading of these cases reveals that in almost every instance the courts have held only that a company must refrain from making material misrepresentations to employees.[6] The problem of determining whether non-communication can constitute a material misrepresentation has only been marginally addressed and, inevitably, must be considered more fully.

Many businesses express concern that imposing an affirmative duty to disclose prospective plan changes to employees could constitute an additional burden on them. However, the language and legislative intent of ERISA, as well as the common law of trusts, supports the recent court decisions which expand the fiduciary duty of employers. Part I of this comment analyzes the duties of a fiduciary as outlined under the statutory language of ERISA. Further, it considers ERISA reporting requirements by examining case law which attempts to define the relationship between fiduciary duty and reporting.

Part II analyzes fiduciary duty and disclosure in light of legislative intent, federal common law, and the common law of trusts. This analysis concludes that under some conditions triggering of fiduciary duty also invokes an affirmative duty to disclose.

Part III considers the extent that communication between an employer, functioning as plan sponsor and administrator, and plan participants should trigger fiduciary duty and, therefore, the duty to disclose. It concludes that federal common law and legislative intent, combined with the common law of trusts, provide a rational basis for presuming

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5. *Id.* at 1201.

6. *See, e.g.*, Vartanian v. Monsanto Co., 14 F.3d 697 (1st Cir. 1994); Kurz v. Philadelphia Elec. Co., 994 F.2d 136 (3rd Cir. 1993); Fischer v. Philadelphia Elec. Co., 994 F.2d 130 (3rd Cir. 1993), *cert. denied*, 114 S. Ct. 622 (1993); Drennan v. General Motors Corp., 977 F.2d 246 (6th Cir. 1992); Berlin v. Michigan Bell Tel. Co., 858 F.2d 1154 (6th Cir. 1988).

that most communications should invoke fiduciary duties. Furthermore, Part III discusses when silence should be viewed as communication and the impact expansion of fiduciary duties would have employers.

II. ERISA—THE STATUTE

A. *Duties of a Fiduciary Under ERISA*

There are three main components of the statutory fiduciary duty imposed by ERISA.[7] First, the express language of ERISA requires that a fiduciary of an employment plan be loyal to employees and "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries."[8] Second, ERISA regulations rely on the "prudent man rule" which requires a fiduciary to act "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."[9] This combined standard of the "prudent man" and loyalty "imposes an unwavering duty on an ERISA trustee to make decisions with single-minded devotion to a plan's participants and beneficiaries and, in so doing, to act as a prudent person would act in a similar situation."[10] Finally, ERISA requires a fiduciary to act "for the exclusive purpose" of providing benefits to plan participants.[11]

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7. *Berlin*, 858 F.2d at 1162 (citing Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir.), *cert. denied*, 459 U.S. 1069 (1982)).

8. 29 U.S.C. § 1104(a)(1) (1988).

9. *Id.* § 1104(a)(1)(B). The specific fiduciary duties outlined in ERISA are those in section 1104(a)(1) which states:

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

Id. § 1104(a)(1).

10. Morse v. Stanley, 732 F.2d 1139, 1145 (2d Cir. 1984).

11. *Berlin*, 858 F.2d at 1162.

Although ERISA regulations allow an employer to act both as a sponsor and as a pension plan administrator, once within the realm of fiduciary, the employer is not permitted to mix loyalties; he must act solely for the benefit of the plan participants.

B. *ERISA Disclosure and Reporting Duties*

While the express language of ERISA establishes the obligation of fiduciaries to act on behalf of plan participants and beneficiaries, the statutory language does not mention the fiduciary duty to disclose. Rather, the discussion of disclosure in ERISA is confined to sections associated with reporting duties.

ERISA regulations require that plan participants be provided with a summary plan description within ninety days of their entry into the program, or, within 120 days of the plan becoming subject to ERISA reporting rules.[12] The plan summary must be written in a way "calculated to be understood by the average plan participant" and must be "sufficiently comprehensive to apprise plan participants and beneficiaries of their rights and obligations."[13] In addition, ERISA regulations require that participants be provided a summary of any material modifications to the plan within 210 days after the end of the plan year in which the modification was adopted.[14]

Nothing in either the sections of ERISA dealing with fiduciary duty or in those concerned with disclosure rules specifically consider the relationship between the two sets of regulations. It may be argued that because ERISA does not speak on the issue, there is no duty to disclose or report beyond that outlined. Thus, there is no fiduciary duty to disclose. Indeed, in *Acosta v. Pacific Enterprises,*[15] the court found that the disclosure provisions of ERISA's Section 1104(a) establish the only reporting and disclosure requirements of the act.[16] The issue in *Acosta* was whether providing a list of plan participants was included within the sphere of "fiduciary duty." The court reasoned that under Section 1104(a), fiduciary duties "relate to the obligation to provide benefits to plan participants, to defray reasonable expenses in administering the plan, and to act with the requisite care and skill in conducting the affairs of employee benefit and pension plans."[17] Thus, the court held that "[i]t

12. 29 U.S.C. §§ 1024(a)(1)(B), 1024(b)(1); 29 C.F.R. §§ 2520.104a-2(a), 2520.104b-2(a)(1)-(2) (1994).

13. 29 C.F.R. § 2520.102-2(a) (1994).

14. 29 U.S.C. §§ 1022(a)(1), 1024(b)(1)(B); 29 C.F.R. § 2520.104b-3(a) (1994).

15. Acosta v. Pacific Enters., No. CV89 1172 RB (C.D. Cal. 1989).

16. *Id.*

17. *Id.*

would be a great stretch to interpret Section 1104(a) to imply an obligation on the part of a plan's fiduciaries to disclose, as part of their Section 1104(a) obligations, lists of all plan participants to any one participant upon request . . . . Such a duty would be unrelated to the purposes of Section 1104(a), viz, paying benefits, defraying expenses, and making prudent investments."[18]

Likewise, in *Porto v. Armco,*[19] the Eighth Circuit declined to extend the fiduciary duty to disclose beyond ERISA's statutory reporting and disclosure requirements. The plaintiff, Porto, aware that his choice was irrevocable under the terms of the plan had elected a particular retirement settlement. Armco later amended the plan to permit revocation of the previously irrevocable elections. While Armco informed active employees of the modification approximately one month later, Porto did not learn of the change until he spoke with a plan administrator ten months later. Moreover, Porto was not formally told of the amendment until a revised plan summary was sent to him over one year after the announcement to active employees.[20] Porto claimed that Armco had breached its fiduciary duties by not informing him of the changes at the same time that it notified active employees. In its opinion, the court maintained that "the district court did not err in holding that an administrator who complies with the statutory standard for disclosure cannot be said to have breached [his] fiduciary duty by not providing earlier disclosure."[21]

Similarly, in *Payonk v. HMW Industries,*[22] the plaintiffs brought an action alleging a breach of fiduciary duty because HMW did not inform them of a pending plan termination. The Court of Appeals for the Third Circuit concluded that:

> HMW, as plan administrator, would not normally be aware of the decision making process until after a decision on termination (or on any other plan change brought about by reason of a business decision) had been made by HMW as employer. This may explain why the regulations do not require HMW as administrator to disclose or provide notice of, an intention to terminate until HMW as administrator is in a position to file with the PBGC. Since the statute expressly sanctions an employer wearing 'two hats,' we can perceive no reason why HMW's decision to terminate its plan should put Payonk in a better position than Payonk

18. *Id.*
19. Porto v. Armco, Inc., 825 F.2d 1274 (8th Cir. 1987), *cert. denied*, 485 U.S. 937 (1988).
20. *Id.* at 1275.
21. *Id.* at 1276.
22. Payonk v. HMW Indus., 883 F.2d 221 (3rd Cir. 1989).

would otherwise have been in had someone other than HMW been the plan administrator.[23]

Finally, in *Kytle v. Stewart Title,*[24] the plaintiff claimed that the trustees of a health insurance plan breached their fiduciary duty by not disclosing an amendment to the plan prior to the date that ERISA regulations would have required notification. Borrowing reasoning from *Porto,* the court concluded that Stewart had not violated its fiduciary duties because ERISA rules required only that Kytle be informed within 210 days after the close of the plan year in which the amendment was made.[25]

III. ERISA REPORTING RULES IN LIGHT OF LEGISLATIVE INTENT, FEDERAL COMMON LAW, AND THE COMMON LAW OF TRUSTS

Although the above case law supports a rather rigid reading of ERISA reporting requirements, these analyses seem flawed. The legislative intent of the ERISA statutes, the federal common law which has arisen around ERISA, and the common law of trusts all indicate that this rigid reading is not supportable.

A. *Legislative Intent*

As mentioned previously, there is no language in ERISA which connects fiduciary duty with the disclosure and reporting rules. Admittedly, some connection may have been intended, but no language indicates that the disclosure requirements can not be augmented by judicial decision. Indeed, the 1986 amendment, which extended the time for notice to plan participants from ten to sixty days,[26] indicates the intention that earlier notice be given sooner and that statutory requirements be seen as minimum standards.

Further, it is not tenable to argue that ERISA's legislative purpose is to provide the controlling parameters of plan participants' notification rights. ERISA was enacted to insure protection of employees' rights to pensions and benefits.[27] From its inception the act was seen as remediation for a general lack of employee information and employer disclosure

23. *Id.* at 229.

24. Kytle v. Stewart Title Co., 788 F. Supp. 321 (S.D. Tex. 1992).

25. *Id.* at 324.

26. 29 U.S.C. § 1341(a)(2).

27. *See* S. REP. NO. 127, 93rd Cong., 1st Sess. 1 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838. "[This legislation addresses] the issue of whether American working men and women shall receive private pension plan benefits which they have been led to believe would be theirs upon retirement from working lives. It responds by mandating protective measures, and prescribing minimum standards for promised benefits." *Id.*

concerning pension plans, etc.[28] Specifically, Congressional records note that "[t]he intent of the [Senate Labor and Public Welfare] Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants."[29] Prior to ERISA, fewer than five percent of workers leaving employers who provided pension benefits received those benefits.[30] Employers denied workers their expected benefits in a variety of ways. Many employees lost their benefits because of stringent vesting requirements, or because employers terminated plans.[31] Others lost benefits through fiduciary incompetence and fraud.[32] ERISA regulations must be viewed as minimal standards when establishing breach of duty but which are intended to be explained and supplemented by judicial interpretation.

B. Federal Common Law

Judicial interpretation has created a body of federal common law surrounding ERISA. The First Circuit indicated in *Palino v. Casey*[33] that a duty to disclose plan modifications may, under some circumstances, supplement the express rules of ERISA. In particular, the court noted

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28. *See* 29 U.S.C. § 1001; H.R. REP. NO. 533, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639-43; H.R. REP. NO. 807, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4676-77; S. REP. NO. 127, 93d Cong., 2d Sess. (1974) *reprinted in* 1974 U.S.C.C.A.N. 4838, 4851; S. REP. NO. 383, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4890, 4898-99.

29. S. REP. NO. 127, 93d Cong., 1st Sess. (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4871.

30. Remarks of Senator Ribicoff, discussing findings of THE PRIVATE WELFARE PENSION PLAN STUDY, 1971, *discussed in* INTERIM REPORT OF ACTIVITIES OF THE PRIVATE WELFARE AND PENSION PLAN STUDY, 1971, S. REP. NO. 634, 92d Cong., 2d Sess. 65 (1971).

31. Plan termination frequently resulted in the loss of or severe reduction of pension benefits. In one of the most noteworthy cases, Studebaker ceased operations in 1963 and subsequently terminated its employees' pension plans. Over 4000 workers received barely fifteen percent of their promised benefits. *See* Michael S. Gordon, "Overview: Why Was ERISA Enacted?" *in* SENATE COMM. ON AGING, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: THE FIRST DECADE, S. REP. NO. 221, 98th Cong., 2nd Sess. 8 (1984). ERISA now provides for mandatory plan termination insurance through the Pension Benefit Guaranty Corporation. 29 U.S.C. §§ 1301-1461 (1988 & Supp. I 1989).

32. Fraud was, apparently, especially acute in union-dominated plans. For instance, in the mid-1960s, a Senate investigation of two New Jersey local unions revealed that the pension plan trustee of both unions had established a benefits consulting firm to manage the plans. Not only did the trustee charge exorbitant fees for the firm's services, he also diverted over $4 million in union assets to offshore "charities," of which the trustee was the principal shareholder. *See id.*

33. Palino v. Casey, 664 F.2d 854 (1st Cir. 1981).

that "[a]ny 'time of notice' rule is to some extent arbitrary,"[34] and that the appropriate measure of adequate notice is "fundamental fairness" under the circumstances.[35] The limits of "fundamental fairness" are exceeded when no notice is given to those "who, with a minimal effort, might easily have avoided the loss of . . . pension rights."[36]

The Supreme Court similarly held in *Pilot Life Insurance v. Dedeaux* that the specifics concerning ERISA's fiduciary duties are to be developed through a "federal common law of rights and obligations under ERISA-regulated plans."[37] Thus it is apparent that the intent of the legislature and the Supreme Court is that judicial decisions supplement specific ERISA disclosure requirements.

Some argue that "because ERISA expressly provides detailed reporting and disclosure rules, a presumption against imposing a fiduciary duty to disclose should apply to the extent that imposing such a duty would contradict or supplant an express reporting and disclosure requirement."[38] However, because the specific reporting requirements of ERISA are not linked in any way to the sections on fiduciary responsibility, court decisions should be limited only to the extent that they reduce or curtail reporting. There is nothing in the language of ERISA or in the legislative intent which would prevent the courts from imposing additional disclosure requirements.

C. The Common Law of Trusts

To regulate fiduciary conduct, ERISA imposes upon fiduciaries[39] two basic duties borrowed from the common law of trusts—the duty of loyalty and the duty of care.[40] Each of these general duties is shaped by

34. *Id.* at 859.

35. *Id.* (quoting Kosty v. Lewis, 319 F.2d 744, 748 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 964 (1964).

36. *Id.; see, e.g.*, Valle v. Joint Plumbing Industry Bd., 623 F.2d 196 (2d Cir. 1980); Argo v. Joint Plumbing Industry Bd., 623 F.2d 207 (2d Cir. 1980); Burroughs v. Board of Trustees of the Pension Trust Fund for Operating Engineers, 542 F.2d 1128 (9th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977).

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

38. Edward E. Bintz, *Fiduciary Responsibility Under ERISA: Is There Ever a Fiduciary Duty to Disclose?*, 54 U. PITT. L. REV. 979, 990 (1993).

39. Unlike the common law of trusts, ERISA defines a fiduciary as one who "exercises any discretionary authority or discretionary control" in the management of the plan, or who "exercises any authority or control" over the management or disposition of the plan's assets, or who "has any discretionary authority or discretionary responsibility in the administration" of the plan. 29 U.S.C. § 1002(21)(A).

40. RESTATEMENT (SECOND) OF TRUSTS §§ 170 (duty of loyalty), 174 (duty of care) (1959).

In adopting ERISA, Congress intended to "provide rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries." Although the rules and other, more specific ERISA provisions that affect their scope. For example, the prohibited transaction rules[41] strengthen the duties of loyalty and care by eliminating potential conflicts of interest. The duty of loyalty is further bolstered by the noninurement rule, which declares that, with certain exceptions, "the assets of the plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants."[42]

By contrast, the duties of loyalty and care might seem constricted by the exception to the prohibited transaction rules which permits officers, employees, agents, or other representatives of employers to serve as fiduciaries.[43] Without this exception, such a fiduciary would obviously violate his duty of loyalty to plan participants because of the simultaneous loyalty to the employer. The tension between these two loyalties is at the heart of the disclosure arguments.

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remedies are similar to those in trust law, they are not always identical. A House report explains why:

> [E]ven where the funding mechanism is in the form of a trust, reliance on conventional trust law often is insufficient to adequately protect the interests of plan participants and beneficiaries. This is because trust law had developed in the context of testamentary and inter vivos trusts (usually designed to pass designated property to an individual or small group of persons) with the attendant emphasis on carrying out the instructions of the settlor. Thus, if the settlor includes in the trust document an exculpatory clause under which the trustee is relieved from liability for certain actions which would otherwise constitute a breach of duty, or if the settlor specifies that the trustee shall be allowed to make investments which might otherwise be considered imprudent, the trust law in many states will be interpreted to allow the deviation. In the absence of a fiduciary responsibility section in the present Act, courts applying trust law to employee benefit plans have allowed the same kinds of deviations, even though the typical employee benefit plan, covering hundreds or even thousands of participants, is quite different from the testamentary trust both in purpose and in nature.

H.R. REP. NO. 533, 93d Cong., 1st Sess. 12 (1973). Congress expected "that the courts will interpret this prudent man rule (and the other fiduciary standards) bearing in mind the special nature and purpose of employee benefit plans." H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 302 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 5038.

41. 29 U.S.C. § 1106. The prohibited transaction rules forbid fiduciaries from engaging in transactions with so-called parties in interest. *See* 29 U.S.C. § 1106(a)(1). ERISA provides an extensive list of persons who are parties in interest, including fiduciaries, persons providing services to the plan, the employer-sponsor of the plan, the union representing employees who are covered by the plan, and relatives of individual parties in interest. 29 U.S.C. § 1002 (14).

The legislative history indicates that the prohibited transaction rules were considered vital to upholding strict fiduciary standards by closing a loophole in the federal effort to protect the integrity of employee pension and welfare funds against "raiding" by insiders. H. R. REP. NO. 533, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4765-66 (statement of Senator Javits).

42. 29 U.S.C. § 1108(c)(3).

43. § 1108 (c)(3).

This provision allowing an exception to the prohibited transactions rules is generally regarded as a necessary accommodation of most employers' desire to protect their interests by placing their own fiduciaries on boards of trustees. Since the majority of plans are employer-funded, the risks of plan investment and benefit payment fall on the employer.[44]

Despite these risks, the Supreme Court has rejected the argument that ERISA's fiduciary standards could or should be affected by potential administrative costs to employers.[45] Indeed, under the management-investment line of cases, courts have strictly construed the fiduciary's duties of loyalty and prudence. In the leading case of *Donovan v Bierwirth,*[46] the Second Circuit held that ERISA's duties of loyalty and prudence required those plan trustees, who were also officers of the sponsoring company, to act "with an eye single to the interests of the participants and beneficiaries."[47] The court reached this conclusion despite the trustees' objections that section 408(c)(3) moderates ERISA's fiduciary duties by expressly authorizing corporate officers to serve as plan trustees.[48]

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44. For an economic analysis that justifies section 29 U.S.C. 1108(c)(3) on the grounds that the employer is a fiduciary, *see* Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1126-28 (1988).

Professors Fischel and Langbein argue that, because of the voluntary nature of the plans, a rule disallowing employer fiduciaries could reduce the rate of plan formation. *Id.* at 1127. Legislative history may support this proposition:

> Generally, it would appear that the wider or more comprehensive the coverage, vesting, and funding, the more desirable it is from the standpoint of national policy. However, since these plans are voluntary on the part of the employer and both the institution of new pension plans and increases in benefits depend upon employer willingness to participate or expand a plan, it is necessary to take into account additional costs from the standpoint of the employer. If employers respond to more comprehensive coverage, vesting and funding rules by decreasing benefits under existing plans or slowing the rate of formation of new plans, little if anything would be gained from the standpoint of securing broader use of employee pensions and related plans. At the same time, there are advantages in setting minimum standards in these areas both to serve as a guideline for employers in establishing or improving plans and also to prevent the promise of more in the form of pensions or related benefits than eventually is available.

S.REP. NO. 383, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4890.

45. *See* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 114-15 (1989).

46. 680 F.2d 263 (2d Cir.), *cert. denied,* 459 U.S. 1069 (1982).

47. *Id.* at 271.

48. The trustees argue that despite the use of the words "solely" and "exclusive" in ERISA's loyalty provision, the statute permitted corporate officers to serve as trustees and did not forbid trustee actions that had the incidental effect of benefitting the corporation. The court agreed with this proposition in general but held that section 404 imposed "a duty on the trustees to avoid placing themselves in a position where their acts as officers or directors of the corporation will prevent their functioning with the complete loyalty to participants demanded

Because, in general, the scope of ERISA's fiduciary duties are drawn from the principles of the common law of trusts[49] and because the statutory language of ERISA is clearly not intended to be a complete outline of disclosure requirements, the duty to disclose under ERISA may be closely related to, but not limited to, that imposed under the law of trusts. In fact, prior to ERISA, trust law was used to determine the duty of pension plan administrators.[50] Since ERISA was enacted to provide additional protection to pension plan participants and beneficiaries, it would be illogical to assert that the duty to disclose is actually reduced under the statutory scheme.

The law of trusts suggests that if one is acting in a fiduciary capacity, he has an affirmative duty to disclose pertinent, material information to those whose interests he protects. The *Restatement (Second) of Trusts* indicates that a trustee has "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 . . . ."[51] This affirmative duty to disclose was not generally cited in earlier ERISA-based judicial decisions. However, this year in *Peachin v. Aetna Life Insurance*[52] the District Court for the Northern District of Illinois specifically included the duty to disclose as outlined in the law of trusts among the duties of fiduciaries.[53] Similarly, in *Anweiler v. American Electric Power Service,* the Seventh Circuit concluded that fiduciaries breach their duties when they fail to communicate material facts which affect beneficiaries' interests.[54]

It is reasonable to conclude, then, that if it is established that one is acting in a fiduciary capacity, the law of trusts would require an affirmative duty to disclose material information. Further, both legislative intent and recent federal common law suggest that such a requirement are not contrary to the statutory intent of ERISA.

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of them as trustees of a pension plan." *Id.* Thus section 29 U.S.C. 1108(c)(3) simply accommodates an employer's desire to protect his interests, but never at the expense of the participants.

49. The fiduciary responsibility provisions of ERISA "codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts." Firestone Tire and Rubber Co. v. Brunch, 489 U.S. 101, 110 (1989) (quoting H.R. REP. NO. 93-533, at 11 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649).

50. *See, e.g.*, Branch v. White, 239 A.2d 665 (N.J. Super. Ct. App. Div), *cert. denied*, 242 A.2d 13 (N.J. 1968); Lix v. Edwards, 147 Cal. Rptr. 294 (Ct. App. 1978); Erion v. Timken Co., 368 N.E.2d 312 (Ohio Ct. App. 1976).

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

52. Peachin v. Aetna Life Ins. Co., No. 92 C 2739, 1994 WL 61793 (N.D. Ill. Feb. 24, 1994).

53. *Id.* at *6.

54. Anweiler v. American Elec. Power Serv. Corp., 3 F.3d 986, 991 (7th Cir. 1993).

IV. Triggering the Duty to Disclose

Considering the statutory language and legislative intent of ERISA in combination with the common law of trusts' duty to disclose, it is apparent that at least under some conditions ERISA imposes a fiduciary duty to disclose information. The more significant question is when that duty arises for a plan sponsor which is also acting as a plan administrator in a fiduciary capacity.

The law of trusts and the statutory duties of a fiduciary as outlined in ERISA indicate the duty to disclose arises whenever the employer acts in his fiduciary capacity, whenever he wears that particular hat. Although some instances are clearly within the domain of fiduciary duty, others are less certain.

One troublesome area involves communication between an employer and his employees regarding pension plan modifications—particularly if the changes are being considered but have not yet been implemented. This is the heart of the "two hat" issue. Businesses frequently argue that so long as a plan modification is not implemented, it is still within the realm of business decisions and that there is no obligation to disclose information concerning it.

There are significant justifications for imposing fiduciary duties on communications between companies acting as plan sponsor/administrator and plan participants. These justifications exist despite the fact that more disclosure would be required than in situations where the responsibilities are held separately. The statutory requirements of a fiduciary under ERISA, the law of trusts, and the legislative intent of Congress all suggest that allowing communication to trigger fiduciary duty is appropriate.

This paper maintains that the most satisfactory resolution of the conflict would be to impose a rebuttable presumption that any communication between an employer (which is also a plan administrator and a plan participant) concerning a plan that launches fiduciary duty and with it the duty to disclose information according to the common law of trusts. While this is admittedly an expansion of ERISA fiduciary duty as it is currently articulated, the position has solid bases of support from the statutory language as well as from the recent direction of federal common law.

A. *The Statutory Argument*

The notion that communication triggers fiduciary duty receives support from the statutory language of ERISA which maintains that a person is a fiduciary. The duty is launched, whenever the fiduciary "exercises any discretionary authority or control respecting management of [an ERISA] plan or exercises any authority or control respecting management or disposition of its assets . . . or he has any discretionary authority or discretionary responsibility in the administration of such a plan."[55] The language does not indicate that a certain level of authority or control must be achieved before fiduciary duty commences; rather, if the person exercises *any* discretionary authority or control, he is a fiduciary to the extent of that authority. Certainly, when a plan administrator is communicating with a plan participant about the plan, he is exercising control with regard to both the management of the plan and the disposition of its assets. In particular, if the information the administrator gives or fails to disclose affects a plan member's or potential member's participation in a plan, choice of options, amount or distribution of benefits, etc., then the administrator has exercised some level of control over the plan and its assets. Whether the communication has effected a plan member is a fact question of materiality and will be case specific, but the presumption that the communication-triggered fiduciary duty is sound since it necessarily involves the exercise of authority and control.

Under ERISA, once fiduciary duty is triggered, the fiduciary must act solely for the benefit of plan participants and beneficiaries.[56] Thus, once communication has been initiated, the fiduciary must inform the beneficiary "of material facts affecting the interest of the beneficiary which he knows and which he knows the beneficiary does not know and which the beneficiary needs to know for his protection."[57] Again, the language of ERISA is quite clear; the fiduciary's loyalty, once fiduciary duty has been triggered, is solely toward the beneficiaries. It is illogical, then, to suggest that an employer knows something as a sponsor but does not know those same facts as an administrator. If the information possessed by the employer is material, if it would be necessary for the participants to make an informed choice, then the administrator has a responsibility to share that knowledge with the plan participants. Nothing in ERISA's fiduciary guidelines suggests that a fiduciary can segregate the knowledge he possesses into convenient categories of "plan sponsor" and "plan administrator." Rather, ERISA permits separation of duties only; a plan sponsor may decide to initiate, amend, or terminate a pension plan without triggering his fiduciary duties. However, once fiduciary obligations are instituted, the employer is required to act solely

55. 29 U.S.C. § 1002(21)(A)(i) & (iii).
56. 29 U.S.C. § 1104(a)(1).
57. RESTATEMENT (SECOND) OF TRUSTS § 173 (1959).

for the benefit of the participants and to disclose material information necessary for participants to make informed choices.

Communication between the employer and participants must be viewed as the triggering mechanism for fiduciary obligations since the employee would consult the employer about benefits in no other capacity. It is sensible, therefore, to conclude that an employer is responsible for disclosing material information when contacted by employees about the plan, and ERISA statutory language supports such an interpretation.

B. The Federal Common Law Argument

Recent federal common law also suggests that communication may trigger fiduciary duty. While not stating directly that an employer is acting in a fiduciary capacity whenever there is communication concerning the pension or benefit plan with an employee, recent courts have rightly imposed a duty to refrain from material misrepresentation in such instances.

For example, in *Berlin v. Michigan Bell Telephone,*[58] Michigan Bell offered a special severance pay plan to employees who voluntarily retired during a particular window period.[59] Later, a second window period was designated.[60] Between the two windows, Michigan Bell indicated to employees that no new window period would be offered. However, at that time, a second period was being seriously considered.[61] A class of affected employees asserted that Michigan Bell had breached its fiduciary responsibilities by making a material misrepresentation about the second window period.[62] While the Court of Appeals for the Sixth Circuit specifically refused to hold that a fiduciary had any duty "to say anything at all or to communicate with potential plan participants about the future availability [of a subsequent window period],"[63] it did conclude that "if the plan administrator and/or plan fiduciary does communicate with potential plan participants *after serious consideration* has been given concerning a future implementation or offering under the plan, then any material misrepresentations may constitute a breach of their fiduciary duties."[64]

If communication between the employer and employees concerning the pension plan is seen as triggering fiduciary duty, the question arises

58. Berlin v. Michigan Bell Tel. Co., 858 F.2d 1154 (6th Cir. 1988).
59. *Id.* at 1157-58.
60. *Id.*
61. *Id.* at 1159-60.
62. *Id.* at 1156, 1162-64.
63. *Id.* at 1164.
64. *Id.*

as to what constitutes communication. In *Drennan v. General Motors,*[65] while focusing on the issue of material misrepresentation, the court held that employers may have a duty to communicate pertinent information to employees. In *Drennan,* laid-off employees who had waived certain rights in exchange for a lump sum payment sued General Motors alleging breach of fiduciary duty because the company failed to inform them that it was seriously considering making a more generous offer. Employees had asked management, before accepting a lump sum, about the possibility of being covered under the richer plan. Employees were told that the more generous settlement would not be available to them.[66] However, at the time of the employee inquiry, the more favorable settlement plan was seriously being considered by General Motors. Thus, the Court of Appeals for the Sixth Circuit maintained that the corporation "was impressed with a fiduciary duty to keep the [employees] abreast of its consideration to permit their participation in [the more generous plan] so as to enable [the employees] to arrive at a meaningful decision . . . ."[67] The court further stated that "the duty to avoid material misrepresentations does not require the employer to predict an ultimate decision to offer a plan so long as it fairly discloses the progress of its serious considerations to make a plan available to affected employees,"[68] although the court also noted that this duty "does not require the fiduciary to disclose its internal deliberations . . . ."[69]

The court in *Drennan* based its decision in part on the reasoning of the District of Columbia Circuit in *Eddy v. Colonial Life.*[70] In *Eddy*, the plaintiff asked the insurer about his right to continue his former group coverage and was told he had no such rights. In fact, though Eddy did not have any rights to continue his policy, he was able to "convert" his coverage—a fact Colonial Life did not disclose. The District Court ruled for the insurance company, reasoning that Eddy's claims hinged on whether he asked about his conversion rights and not about his right to continue his coverage under the group policy. Since the District Court found that the plaintiff had not proven that he either used the word "convert" or otherwise appropriately communicated to the insurance company his wish to convert his group coverage, it maintained that the

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65. Drennan v. General Motors Corp., 977 F.2d 246 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 2416 (1993).

66. *Id.* at 249.

67. *Id.* at 252.

68. *Id.* at 251.

69. *Id.* at 251 (quoting Eddy v. Colonial Life Ins. Co. of Am., 919 F.2d 747, 750).

70. Eddy v. Colonial Life Ins. Co. of Am., 919 F.2d 747 (D.C. Cir. 1990)(reversing Eddy v. Unitag World Travel Serv., Inc., No. 88-1038, Memorandum Order (D.D.C. June 28, 1989)).

insurance company had not breached a fiduciary duty to Eddy.[71] In reversing the district court's decision, the Court of Appeals for the D.C. Circuit characterized the case as concerning the scope of an insurance company's duty to its insureds. The appellate court said that the standard of care articulated by the district court was too narrow and held that when Eddy explained his situation, Colonial Life had a duty not to misinform Eddy, as well as an affirmative responsibility "to convey to Eddy complete and correct material information as to his status and his conversion options."[72] Regardless of the precision of the beneficiary's question, the fiduciary is under a duty to communicate all material facts in connection with a transaction which the fiduciary knows or should know.[73] In fact, the court maintained that "[t]he duty to disclose material information is the core of a fiduciary's responsibility . . . ."[74] The appellate court held that, as ERISA suggests, the duties of an ERISA fiduciary are not limited by the statute's express provisions but rather include duties derived from common law trust principles.[75] Indeed, the D.C. Circuit suggested that in some circumstances, a fiduciary must act upon its own initiative to convey material information to a beneficiary.[76] The court said that fiduciary duty is not discharged simply by the issuance and dissemination of required reports and notices of material modifications, etc., but, rather, that fiduciary duty carries through in all of the fiduciary's dealing with participants and beneficiaries.[77]

Additionally, in *Fischer v. Philadelphia Electric*,[78] the Third Circuit held that even communications which are offered in good faith by company personnel may constitute a breach of fiduciary duty if management deliberately kept their personnel in the dark about seriously-

71. Eddy v. Unitag World Travel Serv., Inc., No. 88-1038, Memorandum Order (D.D.C. June 28, 1989), *rev'd*, Eddy v. Colonial Life Ins. Co., 919 F. 2d 747 (D.C. Cir. 1990).

72. *Id.* at 752.

73. *Cf.* Castello v. Gamache, 593 F.2d 358 (8th Cir. 1979) in which the Eighth Circuit affirmed a ruling that pension fund trustees did not violate their fiduciary duty by failing to notify a terminated employee of her conversion rights. The D.C. Circuit distinguished *Castello*, noting that there was nothing in the record to suggest that the trustees knew or had had any reason to know the facts of the termination, while in *Eddy* the employee called the insurance company to inform them of his situation.

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

75. *Id.* at 750.

76. *Id.* at 750.

77. *Id.* at 750. *See also* Mullins v. Pfizer, Inc., 23 F.3d 663 (2d Cir. 1994); Anweiler v. American Elec. Power Serv. Corp., 3 F.3d 986 (7th Cir. 1993); Iwans v. Aetna Life Ins. Corp., 855 F. Supp. 579 (D. Conn. 1994).

78. Fischer v. Philadelphia Elec. Co., 994 F.2d 130 (3rd Cir. 1993), *cert. denied*, 114 S. Ct. 622 (1993).

considered plan modifications. The court noted that "the fiduciary obligations owed to the plan participants were owed by [Philadelphia Electric] as plan administrator. These obligations cannot be circumvented by building a 'Chinese wall' around those employees on whom plan participants reasonably rely for important information and guidance . . . ."[79]

Finally, within the last year the District Court for the Northern District of Illinois indicated more directly that communication may indeed trigger fiduciary responsibility. In *Peachin v. Aetna Life Insurance*[80] the plaintiff, Peachin, sought to recover medical expenses from Aetna which had processed the claims of Peachin's employer, Laventhol and Horwath (L&H). Although Aetna was no longer the underwriter of the health plan, Aetna knew that (L&H) had not informed plan participants of the change. Aetna further knew that because the procedures for filing claims, etc. had not altered, participants would not know of the modification.[81] In denying Aetna's motion to dismiss, the court held that "if L&H gave Aetna discretion to communicate with employees concerning the plan, then Aetna had a duty to do so with loyalty and care. This duty derives from the fiduciary duties imposed by ERISA."[82] Although Aetna was not named as a plan administrator in the plan documents, the court held that it was nevertheless a fiduciary because it had the discretion to communicate with employees and because "ERISA is not that formalistic."[83] Rather, the trigger for fiduciary duties, according to the district court, is "actually perform[ing] the function"[84] of a fiduciary, and the court viewed communication as such a function.

Admittedly, *Peachin v. Aetna* is a somewhat isolated holding. While the recent direction of the courts seems clearly toward the imposition of fiduciary duties upon communications which misrepresent material facts, there is a definite reluctance to expand the duty to disclose to silences and non-communications. Courts generally have indicated that the "business decision" prerogative was fully intended by ERISA legislation.

There is some evidence that while the main purpose of ERISA was to protect the pensions and benefits of employees, there was also a concern that the regulations not unduly burden the private pension system. As Senator Long indicated, "We know that new pension plans

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79. *Id.* at 135.

80. Peachin v. Aetna Life Ins. Co, No. 92 C 2739, 1994 WL 61793 (N.D. Ill. Feb. 24, 1994).

81. *Id.* at *1.

82. *Id.* at *5.

83. *Id.* at *6.

84. *Id.*

will not be adopted and that existing plans will not be expanded and liberalized if the costs are made overly burdensome, particularly for employers who generally foot most of the bill."[85] Businesses argue that to generate a continuing stream of information about all possible amendments to a plan would be costly and burdensome. Further, some courts have held that since Congress specifically allowed businesses to wear "two hats," that it could not have "intended to penalize those corporations [choosing to wear both] by requiring greater disclosure of business decisions from them than from corporations acting solely as plan sponsors."[86]

The fear of penalizing dual-acting businesses is unnecessary. There are clear financial advantages for a company which chooses to function as both a plan sponsor and plan administrator. By sharing the duties, an employer can use information about the plan in making business decisions. For example, there are tax breaks available when money is shifted at appropriate times. However, justice dictates that the benefits should be reciprocal. If by opting to fill both roles concurrently, the employer as sponsor obtains valuable information which assists him in his fiduciary duties to company owners and shareholders, he must accept the fact that the information he receives as sponsor is subject to his duty as a plan administrator.

This does not suggest that the concept of a business decision is entirely eliminated. It is well known that a company is not required to inform shareholders of every deliberation, but only of those decisions or plans which have been sufficiently adopted so that knowledge of them would be considered material in making an informed decision. Similarly, an employer as administrator would be required to disclose only those proposals, plans, etc. which would affect the participants' ability to protect their rights under the plan. It is this distinction which seems at the core of court analyses separating amendments merely being discussed from those being "seriously considered." In practice this issue would continue to be a question of fact for the particular situation. Nevertheless, the presumption would be that communication triggers fiduciary duty, and that when plan administrators discuss the plan with participants, information about even potential modifications, etc. must be shared if doing so would be in the interest of the participant.

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85. *120 CONG. REC. 29,945 (1974).*

86. *Payonk v. HMW Indus., 883 F.2d 221, 232 (3rd Cir. 1989) (Stapleton, J., concurring).*

C. Dealing with Silence

There is ample case law requiring that an employer, when questioned, refrain from misleading or misinforming plan participants. Because these cases hold that communication triggers fiduciary duty, the question of whether silence can insulate an employer is partially resolved. An employer generally is presumed to have an affirmative duty to disclose material information to plan participants when questioned, thus eliminating the "Chinese wall" shield.

The bigger problem may lie in determining whether there is an affirmative duty to disclose information when the employer has not been questioned by plan participants. Specifically, if the employee does not initiate communication, is the fiduciary duty ever triggered? Again, the reasoning suggested by recent court decisions may provide an answer.

Where silence on a particular proposed amendment, etc. may in itself communicate that no such change is being anticipated and may, thus, adversely influence a participant's ability to make an informed decision, a fiduciary duty arises. For example, in *Anweiler v. American Electric,* the Seventh Circuit concluded that fiduciaries breach their duties of loyalty and care when they fail to communicate material facts affecting the beneficiaries' interests—even when the information was not requested by the beneficiaries.[87] Similarly, in *Peachin v. Aetna* the court expressly rejected Aetna's contention that L&H employees had a duty "to certify that the plan operated as they believed."[88] On the contrary, the court maintained that "[t]his argument is especially unconvincing . . . where employees had virtually no reason to suspect that their health care plan had changed."[89] This is consistent since non-communication in this instance is, in fact, communication and therefore launches fiduciary obligations. Where saying nothing is essentially saying something, courts should be free to find a breach of fiduciary duty.

Further, the trust principles underlying ERISA impose an affirmative duty to disclose information known by the fiduciary but unknown to the beneficiary if that information is necessary for the protection of the beneficiary's interests. Trust law treats silence as a potential breach and judicial interpretation of ERISA should demand no less since ERISA was enacted as a remedial measure to provide additional, undiminished, employee protection.

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87. *See* Anweiler v. American Elec. Power Serv. Corp., 3 F.3d 986, 991 (7th Cir. 1993).

88. Peachin v. Aetna Life Ins. Co., No. 92 C 2739, 1994 WL 61793, at *10 (N.D. Ill. Feb. 24, 1994).

89. *Id.* at 10.

This does not suppose that every silence would, or should, be construed as a breach of fiduciary duty. Decisions in this area would continue to be highly fact specific, requiring analysis not unlike that of the "seriously considered" determinations in *Drennan*, etc. The court would have to find that the undisclosed information was sufficiently certain to be considered "known" by the fiduciary and, further, that the information was "material" in terms of protection of the beneficiaries' interests.

The presumption that non-disclosure of a material fact could constitute a breach of fiduciary duty, however, could prevent employers from hiding behind a wall of silence, insulated by the failure of plan participants to divine that they ought to initiate communication about a modification of which they have no knowledge.

D. *Practical Effects on Employers*

Despite the burdens that business insists would result from imposition of an expanded fiduciary duty to disclose in ERISA cases, the actual effects would probably be limited because only potential plan changes being seriously considered would be subject to disclosure. That same standard is currently being used to determine whether information has been misrepresented to plan participants, so no greater burden of proof would be required. That is, as noted in *Fischer*, whether statements constitute affirmative misrepresentations is a question for the trier of fact. If an affirmative misrepresentation is found, whether it is "material" is "a mixed question of law and fact" based on whether "there is a substantial likelihood that it would mislead a reasonable employee in making an informed decision."[90] Whether a plan is under "serious consideration" at a given time is made relevant to materiality.[91] "All else equal, the more seriously a plan change is being considered, the more likely a misrepresentation, e.g., that no change is under consideration, will pass the threshold of materiality."[92] Silence would be evaluated against similar criteria and would be highly fact specific.

Further, while a company might decide that in some instances it is advisable to inform all plan participants of impending modifications, in

90. Fischer v. Philadelphia Elec. Co., 994 F.2d 130, 135 (3rd Cir. 1993), *cert. denied*, 114 S. Ct. 622 (1993).

91. *Id.*; *cf.* Berlin v. Michigan Bell Tel. Co., 858 F.2d 1154, 1163-64 (6th Cir. 1988).

92. *Fischer*, 994 F.2d at 135. This is similar to the materiality test in cases involving securities transactions, where materiality of facts relating to a particular event depends upon "'both the indicated probability that the event will occur and the anticipated magnitude of the event . . . .'" Basic Inc. v. Levinson, 485 U.S. 224, 238 (1988) (quoting SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968)).

general the employer is likely to be able to identify the participants or classes of participants which would be most affected by the changes. It could provide immediate notification about proposed changes in retirement options, for example, only to those employees scheduled for retirement in the next two years, etc. Other employees could be informed following ERISA statutory disclosure requirements.

Naturally, a company might decide that a continuing flow of information to all participants would be the surest way to limit liability, and though the cost of that information pipeline might be significant, it is unlikely to prove as devastating as businesses have suggested. Benefit plans are rarely revised several times annually, and it is not at all uncommon for plans to designate a specific period during which plan changes for the following year are announced. Such "pre-implementation" announcements may in many cases be deemed sufficient disclosure to preclude a claim of breach of fiduciary duty. Furthermore, the costs associated with continuing notification would almost certainly be less than those of litigation.

Finally, a company which considered the costs of complying with an affirmative duty to disclose to be too high could always opt instead to sever the responsibilities of plan sponsor and plan administrator. By giving up the advantages of wearing two hats, an employer could also free itself of the burdens.

V. CONCLUSION

Courts should continue along the path of several recent circuit and district court decisions toward requiring increased accountability and disclosure from ERISA employers which choose to function both as pension plan sponsors and administrators. While the disclosure required in a given situation will be a mixed question of law and fact, there should be a presumption that communication triggers fiduciary duty and that fiduciary duty presumes an obligation to disclose as outlined in the common law of trusts.

Employer silence about material facts should be viewed as misleading communication, and therefore as a possible breach of fiduciary duties, particularly when that silence substantially impairs an affected employee's ability to make an informed decision regarding his rights and benefits.

Finally, companies which would find the duty to disclose overly burdensome should not function in the dual capacities of sponsor and administrator. Courts should clearly indicate that it is the employer's responsibility to insure that it is not put in a position of compromising its fiduciary duties to either its shareholders or plan participants. The courts must reiterate that employers which opt to wear two hats may find that there is always a cap on their heads.

Mary O. Jensen