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# ERISA Plan Changes

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*Recently hit with unexpected financial constraints, Acme Company begins to investigate various cost reduction measures. Under one cost reduction strategy, the Acme Company would reduce its long-term labor costs by offering an enhanced retirement package to those employees opting to retire within a given period. Another cost reduction plan would require all current retirees to pay their health insurance premiums. The current plan document guarantees that the company will not reduce or eliminate retiree benefits. Elsewhere in the plan document, a less conspicuous statement reserves to the company the right to amend or terminate the plan, but only if deemed necessary.*

*Six days prior to retirement, John, an employee of Acme Company, makes inquires regarding the possibility of obtaining a more lucrative retirement package. Acme Company declines John's solicitation. A month after John retires, Acme Company offers current employees a more lucrative retirement package than provided to John. In addition, the company informs current retirees that, beginning next month, it will require all retirees to pay their entire health insurance premiums. Has Acme Company breached its contractual or fiduciary duty to John?* [1]

## INTRODUCTION

The Employee Retirement Income Securities Act of 1974 (ERISA)[2] establishes general fiduciary duties for employers administering employer-sponsored retirement plans.[3] ERISA leaves the responsibility to the courts to develop specific duties through the common law of trusts.[4]

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1. Fact pattern is inspired by *Hockett v. Sun Co., (R&M)*, 109 F.3d 1515 (10th Cir. 1997) and *Chiles v. Ceridian Co.*, 95 F.3d 1505 (10th Cir. 1997).

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

3. ERISA §§ 401-414, 29 U.S.C. §§ 1101-1114 (fiduciary responsibility provisions); *see* Steven Davi, Note, *To Tell the Truth: An Analysis of Fiduciary Disclosure Duties and Employee Standing to Assert Claims Under ERISA*, 10 ST. JOHN'S J. LEGAL COMMENT. 625, 638 (1995). Under ERISA

> a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting managment 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 . . . .

ERISA § 3(21), 29 U.S.C. § 1002(21); *see also* 29 C.F.R. §§ 2509.75-5 to .75-6 (1997) (providing questions and answers relating to fiduciary status).

4. Edward E. Bintz, *Fiduciary Responsibility Under ERISA: Is There Ever a Fiduciary Duty to Disclose?*, 54 U. PITT. L. REV. 979, 984-85 (1993). For pre-ERISA cases in which the courts relied on the common law of trusts, see *Lix v. Edwards*, 147 Cal. Rptr. 294, 298-99 (Cal. Ct. App. 1978), *Erion v. Timken Co.*, 368 N.E.2d 312, 317 (Ohio Ct. App. 1976), and *Branch v. White*, 239 A.2d 665, 671 (N.J. Super. Ct. App. Div. 1968).

Not surprisingly, this broad grant of judicial discretion results in inconsistent judicial interpretations.[5] An employer's legal obligations in making and disclosing plan amendments is one area in which the courts strive to establish a consistent rule of law.[6]

This survey examines three cases decided by the Tenth Circuit during the survey period[7] in which participants vehemently objected to various plan changes made by their employers. Part I examines *Hockett v. Sun Co., (R&M)*,[8] in which the Tenth Circuit adopted the "serious consideration" test.[9] This test requires employers to disclose all benefit plan changes under serious consideration by management.[10] Part II examines *Chiles v. Ceridian Corp.*,[11] in which the Tenth Circuit allowed an amendment to an employer-sponsored welfare program that provided for a prospective plan change, even though the original plan guaranteed that the employer would make no such changes.[12] Part III examines the Tenth Circuit's decision in *Lindsay v. Thiokol Corp.*,[13] which upheld a plan

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5. *See* Bintz, *supra* note 4, at 990 (commenting on the unsettled nature of case law addressing a fiduciary's duty to disclose proposed plan changes); Henry H. Rossbacher et al., *ERISA's Dark Side: Retiree Health Benefits, False Employer Promises and the Protective Judiciary*, 9 DEPAUL BUS. L.J. 305, 333 (1997) ("[T]he lower court decisions have varied widely, some circuits even denying that plan beneficiaries and participants have the right to enforce fiduciaries' duties under ERISA."); Davi, *supra* note 3, at 638 (noting that circuit courts disagree on the fiduciary's disclosure requirements for plan amendments proposed but not implemented). *Compare, e.g.*, Nachwalter v. Christie, 805 F.2d 956, 960 (11th Cir. 1986) (recognizing that ERISA does not provide a remedy when an employer provides only oral or informal promises and later fails to fulfill these representations), *with* Berlin v. Michigan Bell Tel. Co., 858 F.2d 1154, 1163-64 (6th Cir. 1988) (misleading communications to participants constitutes breaches of fiduciary duty).

6. *Compare* Barnes v. Lacy, 927 F.2d 539, 544 (11th Cir. 1991) (holding that a company did not breach its duty by failing to notify an employee of amendment provisions in the plan), *and* Payonk v. HMW Indus., Inc., 883 F.2d 221, 229 (3d Cir. 1989) (ruling that an employer's lawful termination decisions, absent misrepresentation designed to mislead employees, is not covered under ERISA), *and* Kytle v. Stewart Title Co., 788 F. Supp 321, 323 (S.D. Tex. 1992) (stating that the fulfillment of ERISA reporting requirements is all that is necessary to uphold its fiduciary duties), *with* Fischer v. Philadelphia Elec. Co., 994 F.2d 130, 135 (3d Cir. 1993) (holding that a failure to disclose considerable efforts being undertaken to implement a retirement benefits program constituted breach of fiduciary duty under ERISA), *and* Drennan v. General Motors Corp., 977 F.2d 246, 252 (6th Cir. 1992) (stating that the company had a fiduciary duty to keep participants informed so they could make appropriate decisions), *and* Eddy v. Colonial Life Ins. Co. of Am., 919 F.2d 747, 750-51 (D.C. Cir. 1990) (holding that the company had a fiduciary duty to inform all participants of their options when the benefit program was canceled), *and* Berlin v. Michigan Bell Tel. Co., 858 F.2d 1154, 1163-64 (6th Cir. 1988) (asserting that the fiduciary had a duty to avoid misrepresentations once the company gave serious consideration to a plan), *and* Peoria Union Stock Yards Co. Retirement Plan v. Penn Mut. Life Ins. Co., 698 F.2d 320, 326 (7th Cir. 1983) (stating that lying is inconsistent with the fiduciary duty owed under ERISA).

7. This survey period covered cases from September, 1996 to August, 1997.

8. 109 F.3d 1515 (10th Cir. 1997).

9. *Hockett*, 109 F.3d at 1523.

10. *Id.* at 1522.

11. 95 F.3d 1505 (10th Cir. 1996).

12. *Chiles*, 95 F.3d at 1512.

13. 112 F.3d 1068 (10th Cir.), *cert. denied*, 118 S. Ct. 168 (1997).

amendment changing the retirement age from sixty-five to sixty-seven, thereby reducing the benefits to current retirees.[14]

## I. DISCLOSURE OF PLAN AMENDMENTS

### A. *Background*

ERISA is the legislature's attempt to balance the competing interest of the employee and employer in company sponsored benefit plans.[15] On one hand, ERISA must protect benefits promised to employees.[16] On the other hand, it cannot excessively burden employers or increase their exposure to litigation as to discourage companies from implementing the plans.[17] Unfortunately, neither Congress nor the courts provide specific guidance to employers attempting to navigate this litigious area of employment law.[18]

Instead of enumerating the employer's fiduciary responsibilities, ERISA relies on the common law of trusts to define the general scope of responsibility.[19] ERISA defines three common law of trust principles by requiring employer-fiduciaries to: (1) comply with the statute's "prudent person" rule, (2) act solely for the interests of the plan's participants and beneficiaries, and (3) act for the exclusive purpose of providing benefits to plan participants and their beneficiaries.[20] Not surprisingly, when

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14. *Lindsay*, 112 F.3d at 1068.

15. *See* Bryan L. Clobes, *In the Wake of* Varity Corp. v. Howe*: An Affirmative Fiduciary Duty to Disclose Under ERISA*, 9 DEPAUL BUS. L.J. 221, 222-23 (1997) (arguing that courts should read ERISA's fiduciary provisions to effectuate the enforcement of fiduciary standards in such a way as not to discourage employers from offering benefits plans); Davi, *supra* note 3, at 638 ("Legislators intended ERISA both to protect the interests of employee benefit plan participants and altemately to avoid undue hardships on the private pension plan system."); *see also* Varity Corp. v. Howe, 116 S. Ct. 1065, 1070 (1996) (noting that when determining ERISA's fiduciary duties, courts must account for the competing congressional purposes of offering enhanced protection for employees and Congress's opposing interest in encouraging employers to provide benefit plans).

16. *Varity Corp.*, 116 S. Ct. at 1070; Clobes, *supra* note 15, at 222-23; Davi, *supra* note 3, at 638.

17. *See* Clobes, *supra* note 15, at 223; Davi, *supra* note 3, at 638.

18. *See* Clobes, *supra* note 15, at 222; *see also supra* notes 5-6 and accompanying text.

19. *Varity Corp.*, 116 S. Ct. at 1070; Central States, Southeast & Southwest Areas Pension Fund v. Central Transp., Inc., 472 U.S. 559, 570 (1985); H.R. CONF. REP. NO. 93-1280, at 295 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5076 ("The labor law provisions apply rules and remedies similar to those under traditional trust law to govem the conduct of fiduciaries."); H.R. REP. NO. 93-533, at 11 (1974), *reprinted in* 1974 U.S.C.C.A.N 4639, 4649 ("The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts."); Bintz, *supra* note 4, at 984.

20. Davi, *supra* note 3, at 640-41; *see* Berlin v. Michigan Bell Tel. Co., 858 F.2d 1154, 1162 (6th Cir. 1988) (recognizing the three elements as ERISA duties). As set forth in section 404(a) of ERISA:

> (1) . . . 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;

courts apply these broad principles to determine if a fiduciary must disclose plan changes, inconsistent judicial opinions frequently result.[21]

The Supreme Court has refused to address the issue of whether ERISA obligates the disclosure of plan changes by the plan's fiduciary.[22] In fact, only recently did the Supreme Court recognize, in *Varity Corp. v. Howe*,[23] that an individual may recover damages for breach of fiduciary duties under ERISA.[24] Prior to *Varity*, the Court interpreted ERISA as authorizing damages only to the plan as a whole, and not to participants in their individual capacity.[25] ERISA section 502(a)(3) authorizes the court to award "other appropriate equitable relief" for violations of ERISA's fiduciary duties or other terms of the plan.[26] According to the Court, the breadth of "other equitable relief" encompasses individual relief for breach of fiduciary duties.[27]

In keeping with the Court's current track record, the *Varity* Court did not clarify the fiduciary's responsibility to disclose plan changes.[28] As a result, the lower courts' decisions remain on a continuum of disarray due to the combination of the ambiguity of fiduciary requirements under ERISA and the Court's unwillingness to address the issue.[29] For example,

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> (B) 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 use in the conduct of an enterprise of a like character and with like aims . . . .

ERISA § 404(a), § 29 U.S.C. § 1104(a) (1994).

21. *See supra* note 6 and accompanying text (providing list of decisions evidencing the inconsistency of judicial opinions in this area); *cf. 3rd Circuit Addresses Disclosure Duties: Round Two of the* Fischer *and* Kurz *Cases*, 5 No. 6 ERISA Litig. Rep. 3, 3 (1997) [hereinafter *Fischer & Kurz*] (arguing that the test employed by the Third Circuit to determine when ERISA requires disclosure of plan changes is "unhelpful and likely only to produce more uncertainty and more litigation").

22. *See Varity Corp.*, 116 S. Ct. at 1065 ("Because the breach of this duty [of loyalty] is sufficient to uphold the decision below, we need not reach the question of whether ERISA fiduciaries have any fiduciary duty to disclose truthful information on their own initiative, or in response to employee inquires."); Fischer v. Philadelphia Elec. Co., 96 F.3d 1533 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 1247 (1997); Trenton v. Scott Paper Co., 832 F.2d 806 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988); Amato v. Western Union Int'l, Inc., 773 F.2d 1402 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986); Moore v. Reynolds Metals Co. Retirement Program for Salaried Employees, 740 F.2d 454 (6th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985).

23. 116 S. Ct. at 1065.

24. *Id.* at 1076-79 (holding ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) authorizes a civil action for individual relief).

25. *See* Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140 (1985) (holding that ERISA §502(a)(2), 29 U.S.C. § 1132(a)(2) does not provide for equitable or remedial relief on an individual basis, but only for the plan as a whole); *see also Varity Corp.*, 116 S. Ct. at 1076 (distinguishing *Russell* from *Varity* in that *Russell* sought relief under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) whereas the plaintiffs in *Varity* sought individual damages under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)).

26. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1994); *see Varity Corp.*, 116 S. Ct. at 1076.

27. *Varity Corp.*, 116 S. Ct. at 1076-77 (analyzing scope of ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)).

28. *See* Clobes, *supra* note 15, at 222.

29. *See* Bintz, *supra* note 4, at 981 (noting that no clear framework for analyzing a fiduciary's duties to disclose under ERISA has emerged from recent court decisions); *Fischer & Kurz*, *supra*

in *Porto v. Armco, Inc.*,[30] the Eighth Circuit Court of Appeals held that plan fiduciaries do not have any disclosure requirements beyond those specifically enumerated by ERISA.[31] The Eighth Circuit's holding represents one end of the disclosure spectrum exhibited among the judicial circuits.

In contrast to the *Porto* court's refusal to recognize a fiduciary duty to inform a participant of a plan change upon satisfaction of ERISA's disclosure requirements, the District of Columbia Circuit Court of Appeals, in *Eddy v. Colonial Life Insurance Co.*, concluded that a fiduciary must not only comply with ERISA disclosure requirements, but maintains an affirmative duty to provide additional information regarding a plan's options.[32]

In *Berlin v. Michigan Bell Telephone Co.*,[33] the Sixth Circuit formulated the "serious considerations" test which may strike a balance between *Porto* and *Eddy*.[34] The Sixth Circuit Court of Appeals held that a plan's fiduciary must "seriously consider" a plan change before any misstatement by the plan's fiduciary will be considered material.[35] After the refinements made to the test by the Third Circuit, the "serious consideration" test has become the answer to the disclosure question for a host of circuits.

Until *Fischer v. Philadelphia Electric Co. (Fischer II)*,[36] courts narrowly interpreted the test, recognizing the duty not to make material mis-

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note 21, at 3; Rossbacher et al., *supra* note 5, at 333 (noting that lower court decisions vary widely, some even denying that participants have the right to enforce ERISA's fiduciary duties). *But see* Clobes, *supra* note 15, at 221 (arguing that a recent trend among the courts is to impose an affirmative fiduciary duty to disclose pending plan changes).

30. 825 F.2d 1274, 1276 (8th Cir. 1987). In *Porto*, the plaintiff made an irrevocable election to defer the withdrawal of investment from the company pension plan. 825 F.2d at 1274-75. Subsequently, the company amended the plan allowing revocation of the once irrevocable decision to defer withdrawal. *Id.* at 1275. The plan administrator notified current participants in the plan but failed to notify past retirees. *Id.*

31. *Id.* at 1276; *see* Bintz, *supra* note 4, at 988 ("The express language of ERISA provides little indication as to whether there is ever a fiduciary duty to disclose information to participants and beneficiaries."). However, based on ERISA's legislative history and the pre-ERISA common law, "there is no well-grounded basis on which wholly to exclude a duty to disclose from ERISA's fiduciary requirements." *Id.* at 989. *But see* Kytle v. Stewart Title Co., 788 F. Supp. 321, 324 (S.D. Tex. 1992) (holding that notification to the participant or beneficiary within 210 days of the end of the plan-year in which the amendment was made fulfilled the plans' duties under ERISA's reporting and disclosure rules).

32. *Eddy v. Colonial Life Insurance Co.*, 919 F.2d 747, 750 (D.C. Cir. 1990).

33. 858 F.2d 1154 (6th Cir. 1988).

34. *Berlin*, 858 F.2d at 1163-64; *see supra* notes 22-29 and accompanying text (discussing the Supreme Court's refusal to address disclosure obligations under ERISA).

35. *Berlin*, 858 F.2d at 1164.

36. 96 F.3d 1533 (1996). As discussed subsequently, *Fischer v. Philadelphia Electric Co. (Fischer I)*, 994 F.2d 130 (3rd Cir. 1993), reversed and remanded the district court's decision for a determination as to whether Philadelphia Electric made affirmative material misrepresentations to Fischer. *Fischer II* again reversed and remanded the district court's determination on remand with clarified instructions as to the applicability of the serious consideration test. Since *Fischer II* ade-

representations regarding the seriously considered plan changes, but declining to create a duty to disclose anything at all regarding the possibility of future amendments.[37]

The *Fischer* court noted that the concept of serious consideration recognizes and moderates the opposing interests of the employee's right to information and the employer's need to operate on a day-to-day basis.[38] When balancing these interests, the court must determine the materiality of the consideration by focusing on the degree of seriousness with which a company considers a change.[39] A greater degree of seriousness results in a greater likelihood that a court will view the misrepresentation as material.[40] To evaluate the degree of seriousness, the court recognized a three part test, finding "serious consideration . . . 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."[41] An analysis should jointly consider all three elements of the test since the factors "interact and coalesce to form a composite picture of serious consideration."[42] Upon satisfaction of this test, the company will be deemed as seriously considering the plan change, and any contrary statements made will constitute material misrepresentations.[43]

The examination of a "specific proposal" attempts to distinguish serious consideration from mere evaluation of management's options.[44] Although a specific proposal may contain several options and vary somewhat from the initial proposal, the seriously considered proposal is one that is "sufficiently concrete to support consideration by senior management."[45]

The second element of serious consideration, "discussions of implementation," also distinguishes the process of gathering data from serious consideration, allowing senior management to become involved in the evaluation process without trigging a duty of disclosure.[46] The Third

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quately discusses the factual bases and procedural history of the case, the following discussion relies upon the text of *Fischer II*. *Kurz v. Philadelphia Elec. Co.*, 96 F.3d 1544 (3d Cir. 1996), was a companion case to *Fischer II*. Based on nearly identical facts, the issues and holding were identical to *Fischer II*. *Compare Fischer II*, 96 F.3d at 1533, *with Kurz*, 96 F.3d at 1544. As such, this survey only refers to the *Fischer II* decision despite the applicability of either decision for the following propostions.

37. Bintz, *supra* note 4, at 995-96.

38. *Fischer II*, 96 F.3d at 1539. The court recognized that corporations continually review their benefit packages and the unreasonableness of disclosing every facet of these ongoing activities. *Id.*

39. *Id.* at 1538-39.

40. *Id.*

41. *Id.* at 1539.

42. *Id.*

43. *Id.* at 1538-41.

44. *Id.* at 1539-40.

45. *Id.* at 1540.

46. *Id.*

Circuit classified activities such as gathering data, interaction of company personnel and senior management, and hiring of outside consultants as preliminary discussions as opposed to discussions for implementation.[47] Only when the discussion turns to the practicalities of implementation does the consideration become serious.[48]

"Consideration by senior management," the final factor of the serious consideration test, focuses on the specific cadre of management maintaining the authority to implement the proposal.[49] The analysis extends beyond a quorum of the board of directors to that level of management responsible for making recommendations on such issues to those directors.[50]

The Third Circuit emphasized that the serious consideration test is not a "bright line rule."[51] The court acknowledged that it limits judicial inquiry to the later stages of corporate decision-making and does not turn on any single factor, but should remain flexible and fact specific in the analysis of the interaction of the factors.[52] It is within this context of the Third Circuit's articulation of the "serious consideration" test that the Tenth Circuit decided *Hockett v. Sun Co.*

### B. Hockett v. Sun Co., (R&M)[53]

#### 1. Facts

The plaintiff in *Hockett*, a former employee of Sun Refining and Marketing Company (Sun), retired prior to the announcement of new early retirement program.[54] Hockett submitted his official and irrevocable request for early retirement on June 7, 1991, effective July 1, 1991.[55] During this period, Sun evaluated various downsizing strategies, including a new early retirement incentive program.[56] Unsatisfied with the original incentive program, Hockett directed specific inquires to the

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47. *Id.*; *see also Fischer & Kurz, supra* note 21, at 5 (stating that Judge Roth considered the second factor critical in distinguishing between preliminary discussions of alternatives and the serious considerations of implementation).

48. *Fischer II*, 96 F.3d at 1540.

49. *Id.*; *see also Fischer & Kurz, supra* note 21, at 5 (recognizing that requiring disclosure at this stage strikes a compromise between the extremes of discussion by lower level management at one extreme and approval of the board of the directors at the other extreme).

50. *Fischer II*, 96 F.3d at 1540.

51. *Id.*

52. *Id.*

53. 109 F.3d 1515 (10th Cir. 1997).

54. *Hockett*, 109 F.3d at 1518. Sun Refining and Marketing Company is a subsidiary of Sun Company. *Id.* This survey refers to the companies collectively as "Sun." *See id.* at 1524 n.2 (discussing the court's references solely to Sun, but their consideration of the activities of both Sun Company and Sun Refining and Marketing Company).

55. *Id.* at 1518.

56. *Id.* at 1519-20. Sun Company granted a 2½% incentive retirement program expiring on July 1, 1997. *Id.* at 1518-19.

plan's fiduciary regarding the possibility of obtaining a "retirement package."[57] The plan's fiduciary did not affirmatively respond to Hockett's request and Hockett subsequently retired on July 1, 1991.[58] On August 28, 1991, Sun offered a new early retirement package to employees retiring between September 1 and October 15.[59] Since Hockett terminated his employment prior to August 28, 1991, Sun refused to allow him to participate in the retirement program.[60] As a result, Hockett instituted an action for breach of a fiduciary duty.[61] The district court held that Sun was seriously considering the adoption of an early retirement program when Hockett made inquires regarding the same.[62] As such, Sun breached its fiduciary duty by materially misrepresenting the possibility of an early retirement program.[63]

2. Decision

The Tenth Circuit, in adopting the Third Circuit's interpretation of serious consideration, reversed the lower court's determination that Sun seriously considered adopting the new plan and materially misrepresented its non-existence to Hockett.[64] According to the Tenth Circuit, "serious consideration of a plan amendment does not exist until (1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change."[65] Applying this test to Hockett's complaint, the Tenth Circuit rejected Hockett's contention that the plan fiduciary supplied him with materially inaccurate information.[66]

According to the Tenth Circuit, the serious consideration test appropriately limits the burden on employers by reducing the instances in

57. *Id.* at 1519. Hockett's inquiry into a retirement "package" was in reference to a more lucrative early retirement program than the 2½% incentive retirement program offered by Sun at that time. *Id.*

58. *Id.* In response to the plaintiff's request for a retirement package, the vice president of Human Resources and Administration, the plan's fiduciary, told the plaintiff that he would "check into it and see what he could do." *Id.* The plan's fiduciary never provided further response to the plaintiff's inquiry. *Id.*

59. *Id.* at 1520. The added benefits in the new early retirement package included "crediting the employees with (1) an additional three years of age and service, (2) severance payments equal to three weeks of base pay for every completed year of service, and (3) a bonus." *Id.*

60. *Id.* at 1521.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 1523; *see* Fischer v. Philadelphia Elec. Co. (*Fischer II*), 96 F.3d 1533, 1539 (3d Cir. 1996) (articulating the Third Circuit's interpretation of serious consideration).

65. *Hockett*, 109 F.3d at 1523 (internal quotation marks omitted) (citing *Fischer II*, 96 F.3d at 1539).

66. *Id.* at 1525.

which an employer must disclose their tentative intentions.[67] The test also reduces the risk that competitors will use strategic business information released to comply with ERISA to detrimentally impair the business goals of the organization.[68] At the same time, the test benefits employees by not discouraging employers from improving, or even offering, the plans.[69] Employers are also less likely to lay off employees because too few employees retire under the original plan, opting instead to wait for a retirement sweetener.[70]

Applying the test to *Hockett*, the court did not find the intersection of the serious consideration factors until late July or early August, a period subsequent to Hockett's retirement.[71] The court disagreed with Hockett's argument that Sun's internal documentation evidenced serious consideration prior to his inquiry regarding a retirement package.[72] In addition, assuming that Sun was relatively certain prior to Hockett's inquiry that they would offer the new early retirement program, a determination recognizing serious consideration did not necessarily follow.[73] A plaintiff must conclusively establish each of the three elements of serious consideration before a fiduciary's duty of disclosure arises.[74] In support of this position, the court further noted that the record did not include any "fresh cost-analysis or actuarial work."[75] While noting that satisfaction of

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67. *Id.* at 1523 (arguing that less restrictive disclosure requirements would unduly burden the employer by having to produce a "constant, ever-changing stream of information" that only confuses and misleads employees).

68. *Id.*

69. *Id.* ("Changing circumstances . . . might require an employer to sweeten its severance package, and the employer should not be forever deterred from giving its employees a better deal merely because it did not clearly indicate to a previous employee that a better deal might one day be proposed." (quoting Swinney v. General Motors Corp., 46 F.3d 512, 520 (6th Cir. 1995)).

70. *Id.* The court argued that employers only offer enhanced retirement plans when not enough people retired under the original plan. *Id.* (citing Pocchia v. NYNEX Corp., 81 F.3d 275, 279 (2d Cir. 1996). This strategy would necessarily fail if employers were required to disclose their intentions before the old plan is given a chance, since employees would forego retiring until the implementation of the enhanced plan. *Id.* "If fiduciaries were required to disclose such a business strategy, it would necessarily fail. Employees simply would not leave if they were informed that improved benefits were planned if workforece reductions were insufficient." *Id.* (quoting *Pocchia*, 81 F.3d at 279).

71. *Id.* at 1524.

72. *Id.* at 1525. The internal company documentation is a "prime example of preliminary exploration and evaluation" that falls outside serious consideration. *Id.*

73. *Id.* at 1524-25. Hockett relied on internal company discussions and memoranda by upper management to establish serious consideration. *Id.* In addition, Hockett concluded that Sun's announcement of future downsizing plans suggested company officials knew at that time that a change in the early retirement program would be necessary to accomodate the downsizing. *Id.* at 1524. The court found these types of activities as "prime example[s] of preliminary exploration and evaluation." *Id.* at 1525.

74. *Id.* at 1524-25.

75. *Id.* The court refers to "fresh costs" as the cost-analysis information that would usually be completed prior to seriously considering plan to offer an early retirement program. *Id.*

the test does not require this type of work, the court recognized that it is unlikely the company seriously considered the plan in its absence.[76]

C. *Other Circuits*

In *Ballone v. Eastman Kodak Co.*,[77] retirees asserted that the defendant intentionally misled the plaintiff that the company was not seriously considering an enhanced retirement package.[78] The district court held that Kodak was not seriously considering the retirement package before the plaintiffs retired, precluding a judicial determination that the Kodak statements materially misled the plaintiffs.[79] Overruling the district court, the Second Circuit Court of Appeals held that the lower court misconstrued the serious consideration test.[80]

The Second Circuit disagreed with the district court's ruling that materiality necessarily requires serious consideration.[81] In the appellate court's view, whenever the fiduciary of a plan speaks, the fiduciary "may not actively misinform its plan beneficiaries about the availability of future retirement benefits . . . regardless of whether or not it is seriously considering future plan changes."[82] The materiality of the misstatements depends on the nature and context of the assurances.[83] The determination of the materiality of false factors depends on how significantly the statement misrepresented the present status of internal deliberations, whether the employee knew of other information that eliminated some of the negative effect of the misrepresentation, and the specificity of the assurance.[84]

Additionally, the court refused to recognize a cause of action based upon the "mispredictions" of future events.[85] A viable claim may exist based upon false statements that promise or guarantee future benefits, especially when supported with statements of fact, provided those guarantees are not so unrealistic as to become unbelievable to the reasonable person.[86] After issuing this guidance, the Second Circuit remanded the case to the district court to determine if Kodak made material misstatements and whether the plaintiffs relied upon those misstatements.[87]

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76. *Id.*
77. 109 F.3d 117 (2d Cir. 1997).
78. *Ballone*, 109 F.3d at 121.
79. *Id.* at 122.
80. *Id.* at 120, 125-26.
81. *Id.* at 122-24.
82. *Id.* at 124; *see* Jeanne L. Bakker & Edward T. Ellis, *ERISA Fiduciary Duty Litigation After* Varity Corporation v. Howe, *in* CURRENT DEVELOPMENTS IN EMPLOYMENT LAW 117, 125 (ALI-ABA Course of Study, July 17, 1997) (discussing fiduciary's duty to speak "truthfully").
83. *Ballone*, 109 F.3d at 124.
84. *Id.* at 125.
85. *Id.* (citing Mullings v. Pfizer, Inc., 23 F.3d 663, 669 (2d. Cir. 1994)).
86. *Id.*
87. *Id.*

In contrast to the Second Circuit, the Sixth Circuit requires more than a simple misstatement and reliance for a breach of a fiduciary duty to occur. In *Muse v. International Business Machines Corp.*,[88] the plaintiffs were former employees who contended that, prior to their retirement, they made inquiries regarding the possibility of an early retirement program.[89] The plaintiffs alleged their supervisors indicated that the company would not offer an expanded early retirement program in the near future and, relying upon the supervisor's negative response, the plaintiffs retired.[90] IBM subsequently offered a superior benefit plan within a few months of the plaintiff's retirement.[91] The plaintiffs contended that the inaccurate information provided by the fiduciary during a period of serious consideration of plan change violated ERISA's fiduciary requirements.[92]

The Sixth Circuit held that IBM's serious consideration of an enhanced retirement plan triggered its fiduciary duties, but IBM did not breach this duty since they did not intentionally deceive the plaintiff through engaging in a "targeted plan" to deceive the plaintiffs.[93] Therefore, according to the Sixth Circuit, unless the employer devises a scheme to intentionally deceive the employee, the employer's actions will not breach the fiduciary requirements of ERISA.[94]

D. *Analysis*

Without guidance from the Supreme Court, it is not surprising to find the circuit court decisions scattered along a continuum—with some circuits only requiring compliance with ERISA's reporting provision while other circuits require an affirmative act.[95] The *Fischer II* and *Hockett* decisions fall in the middle of these extremes, giving employers a relatively clear guide to determine their duties under ERISA.

In *Fischer II*, the Third Circuit held that a plan administrator has a fiduciary responsibility to avoid making any material misstatements to

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88. 103 F.3d 490 (6th Cir. 1996).

89. *Muse*, 103 F.3d at 492. IBM offered early retirement incentives in the past, prompting the plaintiffs, knowing of these past inducements, to inquire into whether IBM would reinstitute such incentives in the future. *Id.*

90. *Id.*

91. *Id.* at 492-93.

92. *Id.* at 493; *see* ERISA §§ 401-414, 29 U.S.C. §§ 1101-1114 (1994) (fiduciary responsibility provisions); *supra* notes 16-27 and accompanying text (discussing ERISA's statutory requirements in the area of fiduciary responsibility).

93. *Muse*, 103 F.3d at 495.

94. Bakker & Ellis, *supra* note 82, at 126.

95. *Compare, e.g.*, Porto v. Armco, Inc., 825 F.2d 1274, 1276 (8th Cir. 1987) (requiring fiduciaries to comply only with ERISA's enumerated requirements), *with* Eddy v. Colonial Life Inc. Co., 919 F.2d 747, 750 (D.C. Cir. 1990) (recognizing an affirmative duty to provide information beyond ERISA's enumerated requirements). For a discussion of this continuum, see *supra* notes 30-52 and accompanying text.

plan participants.[96] Similarly, the *Hockett* decision indicated that in the Tenth Circuit an employer has a fiduciary duty to inform participants of plan changes in response to employee inquires when that employer seriously considers the additional benefits.[97]

The Sixth Circuit utilized a narrower approach to the serious consideration test in *Berlin*.[98] More recently, in *Muse*,[99] the Sixth Circuit further restricted the serious consideration test. The court stated that a "targeted plan" to deceive the participants must exist before the actions of an employer breach a fiduciary duty.[100] Other circuits have not applied, or explicitly rejected, the Sixth Circuit's approach to the serious consideration test.[101]

The Second Circuit specifically rejected the bright-line rule established in *Berlin*.[102] In *Ballone*,[103] the court held that regardless of how seriously a company considers a plan change, the plan administrator must always speak truthfully to plan participants.[104] This interpretation also appears in accordance with the Supreme Court's decision in *Varity*.[105] Although the Supreme Court has not expressly blessed the serious consideration text, the circuit courts appear to agree on the propriety of the general approach.

While relatively settled on the serious consideration approach, the circuits still vary widely in their application of the test. As a result, corporations must consult their district court's decisions to determine what types of disclosure the particular jurisdiction requires. To be safe, a corporation with operations in conflicting districts should follow the district with the more stringent disclosure requirements, unless they prefer a date in court. Concededly, inconsistent law is not good law. However, until the Supreme Court addresses the serious consideration test and its application, corporations must cope with the law and its inefficiencies.

## II. THE ILLUSIONARY PROMISES OF EMPLOYEE WELFARE PLANS

Congress enacted ERISA, in part, to preempt state regulation of employee benefit plans and to provide a comprehensive federal regulatory scheme that would protect benefits promised to employees, retirees,

96. Fischer v. Philadelphia Elec. Co. (*Fischer II*), 96 F.3d 1533, 1538 (3d Cir. 1996).
97. Hockett v. Sun Co., (R&M), 109 F.3d 1515, 1522 (10th Cir. 1997).
98. Berlin v. Michigan Bell Telephone Co., 858 F.2d 1154 (6th Cir. 1988).
99. Muse v. International Business Machines Corp., 103 F.3d 490 (6th Cir. 1996).
100. *Id.* at 495.
101. *See, e.g.*, Ballone v. Eastman Kodak Co., 109 F.3d 117, 123 (2d Cir. 1997) (rejecting the *Berlin* approach).
102. *Ballone*, 109 F.3d at 123-24.
103. *Id.* at 117.
104. *Id.* at 124.
105. Varity Corp. v. Howe, 116 S. Ct. 1065, 1073-75 (1996).

and their beneficiaries.[106] In so doing, ERISA distinguishes between employee pension and welfare plans.[107] A welfare plan is any program that provides medical benefits to employees, while a pension plan provides retirement income.[108] ERISA requires that pension plans include nonforfeiture or vested policies, a requirement not paralleled in ERISA's approach to welfare benefit plans.[109] As such, employers remain generally free to unilaterally adopt, amend, or terminate welfare benefit plans.[110] ERISA also requires employers to maintain welfare plans in accordance with a formal written plan document (master plan document") and provide the covered employees with a Summary of Plan Description (SPD) describing the plan.[111] In contrast to the complex language of the master plan document, employers must write SPDs in easily understandable language.[112] Frequently, disputes arise due to discrepancies between the

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106. *See* ERISA § 514(a), 29 U.S.C. § 1144(a) (1994) ("[T]he provision of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ."); Rossbacher et al., *supra* note 5, at 306 (discussing ERISA preemption).

107. *Compare* ERISA § 3(1), 29 U.S.C. § 1002(1) (1994) (defining "welfare benefit plan"), *with* ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A) (1994) (defining "employee benefit pension plan"); *see infra* note 108 (providing text of these definitions).

108. Section 3 of ERISA defines a "welfare benefit plan" as:

> [A]ny plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or scholarship funds, or prepaid vacation benefits, appreticeship or other training programs, or day care centers, scholarship funds or prepaid legal services . . . .

ERISA § 3(1), 29 U.S.C. § 1001(1) (1994). Section 3 of ERISA defines an "employee benefit pension plan" as:

> [A]ny plan, fund, or program . . . established or maintained by an employer or by any employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A) (1994).

109. ERISA §§ 201–211, 29 U.S.C §§ 1051-1061 (stating ERISA vesting requirements applicable to pension plans); ERISA § 201(1), 29 U.S.C. § 1051 (1994) (providing express language excluding welfare benefit plans from ERISA's vesting provisions); *see also* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223, 1228 (1995); Massachusetts v. Morash, 490 U.S. 107, 119 (1989); *In re* Unisys Corp. Retiree Med. Benefit "ERISA" Litig., 58 F.3d 896, 901 (3d Cir. 1995) (summarizing Congressional motivation for rejecting vesting requirements of welfare benefit plans); Gable v. Sweetheart Cup Co., 35 F.3d 851, 855 (4th Cir. 1994) (noting that ERISA exempts welfare benefit plans from vesting requirements); DeVoll v. Burdick Painting, Inc., 35 F.3d 408, 411 (9th Cir. 1994) (stating that "[f]ederal law does not prohibit an employer from altering the package of medical benefits" offered to employees).

110. *Curtiss-Wright Corp.*, 115 S. Ct. at 1228; Jensen v. SIPCO, Inc., 38 F.3d 945, 949 (8th Cir. 1994); *see also* Adams v. Avondale Indus., Inc., 905 F.2d 943, 947 (6th Cir. 1990) ("[A] company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan.").

111. ERISA § 102(a)(1), 29 U.S.C. § 1022(a)(1) (1994).

112. *See Curtiss-Wright Corp.*, 115 S. Ct. at 1230-31 (noting that ERISA requires an SPD to "be written in a manner calculated to be understood by the average plan participant" (quoting ERISA § 102(a)(1), 29 U.S.C. 1022(a)(1)).

formal plan document and the SPD—a situation flowing from the employer's exercise of its ability to unilaterally amend welfare program.[113]

A. *Background*

The increase in medical costs beyond the expectations of corporate America and increased global competition have encouraged corporations to reduce costs by amending welfare programs unilaterally.[114] In addition, recent financial accounting standards now require all businesses to record the expense of providing the future retirement benefits against current earnings. The Financial Accounting Standards Board, Statement Number 106 (FAS 106) requires companies to record millions, and even billions, of dollars worth of expenses that reduce current earnings.[115] Searching for ways to reduce benefit expenses, employers more often than not turn to their welfare benefit plans for savings.

Welfare plans are a likely source for benefit reductions for several reasons. ERISA does not require the vesting of welfare plan benefits.[116] Corporations faced with enormous employee welfare costs and unfavorable accounting treatment turn to their welfare benefit plans to unilaterally reduce benefits more frequently than ever before.[117] By 1994, more

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113. Rossbacher et al., *supra* note 5, at 315.

114. Roger C. Siske et al., *What's New in Employee Benefits*, *in* PENSION, PROFIT SHARING, WELFARE, AND OTHER COMPENSATION BENEFITS 1, 195 (ALI-ABA Course of Study, Oct. 3, 1996).

115. EMPLOYERS' ACCOUNTING FOR POSTRETIREMENT BENEFITS OTHER THAN PENSIONS, Statement of Financial Accounting Standards No. 106, ¶¶ 16-78 (Financial Accounting Standards Bd. 1991); *see* Siske, *supra* note 114, at 195 (noting that increased costs coupled with the Financial Accounting Standards Board's Statement 106, which requires employers to account for non-pension benefits on an accrual basis, prompted employers to reduce or terminate benefits); *see also* Amy Harmon, *Ford Charge Will Result in Record Loss*, L.A. TIMES, Dec. 17, 1992, at D1 (reporting that in December, 1992, Ford, Chrysler, and General Motors faced unfunded employee benefit obligations of more than 28 billion dollars, with their respective shares listed at 7½ billion, 4 billion, and 18 billion). With medical bills this high, no wonder corporate America searched for means to decrease expenditures related to employee benefits.

116. ERISA § 201(1), 29 U.S.C. § 1051(1) (1994) (excluding welfare benefit plans from required vesting provisions); *see* Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223, 1228 (1995); Massachusetts v. Morash, 490 U.S. 107, 119 (1989); *see In re* Unisys Corp. Retiree Med. Benefit "ERISA" Litig., 58 F.3d 896, 901 (3d Cir. 1995); Gable v. Sweetheart Cup Co., 35 F.3d 851, 855 (4th Cir. 1994); DeVoll v. Burdick Painting, Inc., 35 F.3d 408, 411 (9th Cir. 1994); Land v. Chicago Truck Drivers Union (Independent) Health & Welfare Fund, 25 F.3d 509, 514 (7th Cir. 1994); Smith v. Hartford Ins. Group, 6 F.3d 131, 136 (3d Cir. 1993); Alexander v. Primerica Holdings, Inc., 967 F.2d 90, 95 (3d Cir. 1992); Reichelt v. Emhart Corp., 921 F.2d 425, 430 (2d Cir. 1990); Alday v. Container Corp. of Am., 906 F.2d 660, 663 (11th Cir. 1990).

117. *See* Rossbacher et al., *supra* note 5, at 308. One commentator examined some instances of the effects of FAS 106, noting:

> McDonnell Douglas Corporation cited FAS 106 as the reason for termination of health benefits of more than 8,000 non-union retirees. . . . Philip Lighting Division's decision to modify health insurance coverage for retirees under age sixty-five was precipitated by FAS 106. Similarly, Unisys Corporation decided to phase out retiree health benefits paid by the company when it determined its FAS 106 liability to be $170 million.

than one-half of the companies in the United States modified their welfare plans in response to FAS 106.[118] The stampede of corporations unilaterally reducing benefits resulted in a large increase in ERISA litigation.[119]

The majority of ERISA litigation over welfare plans concerns the employer's unilateral reduction or elimination of health care benefits despite past promises by employers that they would not undertake such action.[120] Most frequently, these disputes focus on the inconsistent language between the SPD and the more technical language of the master plan document.[121] Less frequently, the dispute centers on various written or oral representations made by management.[122]

The SPD is the primary communication to the participants concerning the benefits offered by the plan.[123] ERISA requires employers to write the document in easily understandable language and send a copy to every participant.[124] Many SPDs contain language which unambiguously guarantees that the participant will receive health care benefits for some period of time and then states, usually less conspicuously, that the employer reserves the right to unilaterally terminate or reduce the benefits offered by the plan.[125] When this occurs, participants fight back in court by asserting claims based upon violations of ERISA, estoppel, breach of fiduciary duties, and breach of contract.[126] However, a recent Supreme Court decision significantly diminished the effect of these claims.[127]

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Gregory J. Ossi, Comment, *It Doesn't Add Up: The Broken Promises of Lifetime Health Benefits, Medicare, and Accounting Rule FAS 106 Do Not Equal Satisfactory Medical Coverage for Retirees*, 13 J. CONTEMP. HEALTH L. & POL'Y 233, 240 (1996) (footnotes omitted).

118. *Firms Changing Benefits in Response to FAS 106, Buck Consultants Reports*, 21 Pens. & Ben. Rep. (BNA) No. 48, at 2269 (Dec. 5, 1994).

119. Rossbacher et al., *supra* note 5, at 308; Ossi, *supra* note 117, at 241; *cf.* Siske et al., *supra* note 114, at 195-96 (discussing several recent cases).

120. *See* Marilyn J. Ward Ford, *Broken Promises: Implementation of Financial Accounting Standards Board Rule 106, ERISA, and Legal Challenges to Modification and Termination of Postretirement Health Care Benefit Plans*, 68 ST. JOHN'S L. REV. 427, 444 (1994); Rossbacher et al., *supra* note 5, at 315.

121. *See, e.g.*, Moore v. Metropolitan Life Insur. Co., 856 F.2d 488, 490-92 (2d Cir. 1988) (addressing the effect of inconsistencies between a master plan document and a SPD); *see also* Rossbacher et al., *supra* note 5, at 315.

122. *See, e.g.*, Krishan v. McDonnell Douglas Corp., 873 F. Supp. 345, 350 (C.D. Cal. 1994) (refusing to recognize oral and informal communications as SPDs); *see also* Rossbacher et al., *supra* note 5, at 315.

123. As recognized in *Curtiss-Wright Corp. v. Schoonejongen*, "[a] written plan is to be required in order that every employee may, *on examining the plan documents*, determine exactly what his rights and obligations are under the plan." 115 S. Ct. 1223, 1230 (1995) (quoting H.R. REP. NO. 93-1280, at 297 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 5077-78).

124. ERISA § 104(b)(1), 29 U.S.C. § 1024(b)(1) (1994).

125. Rossbacher et al., *supra* note 5, at 314-16.

126. Ossi, *supra* note 117, at 243.

127. *Id.* at 242-43; *see also* Belanger v. Wyman-Gordon Co., 888 F. Supp. 9, 12 (D. Mass. 1995) (employers "are generally free under ERISA, for any reason at any time, to adopt, modify or terminate welfare plans" (quoting *Curtiss-Wright Corp.*, 115 S. Ct. at 1228)).

In *Curtiss-Wright Corp. v. Schoonejogen*,[128] the Supreme Court placed the burden on the employee to show that welfare benefits vested.[129] The Supreme Court held that the statement, "[t]he Company reserves the right at any time to amend the plan and from time to time to modify or amend . . . any or all provisions of the provisions of the Plan," establishes an amendment procedure that satisfies the ERISA provisions.[130] The Court viewed ERISA as requiring welfare plans to provide a "'procedure for amending [the] plan' and '[a procedure] for identifying the persons who have authority to amend the plan'" in the SPD.[131] The Court noted that the definition section of ERISA defines a "person" to include the term "company."[132] The Court found this fact significant since granting "the Company" amendment authority rules out others who also might have the authority to make plan amendments.[133] Having found that the plan adequately identified the persons with the authority to amend the plan in accordance with the first requirement of section 402(b)(3), the Court addressed the "more difficult" question of whether the statement contained in the SPD established a procedure for making plan amendment.[134]

Most significant in the *Curtiss-Wright* holding was the Court's finding that the statement in Curtiss-Wright's SPD identified a procedure by which the Company could unilaterally amend the plan.[135] As stated by the Court, "the plan may be amended by a unilateral company decision to amend, and only by such a decision—and not, for example, by the unilateral decision of a third-party trustee or upon the approval of the union."[136] Although the procedure for amending the plan is simple, the Court found this procedure appropriate given the relative simplicity of the Curtiss-Wright plan.[137] As such, more detailed plans may require more complicated amendment procedures.[138]

The Court's holding in *Curtiss-Wright* eliminates another avenue by which employees may attempt to hold employers to their word.[139] Noticeably absent from the Court's opinion was an analysis of the effect of the promises made by Curtiss-Wright to provide health care coverage for

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128. 115 S. Ct. at 1223, *rev'g* 18 F.3d 1034, 1036 (3rd Cir. 1994). This survey utilizes both the Supreme Court and the Third Circuit's discussion to establish the basic facts leading up to the dispute.

129. *Curtiss-Wright Corp.*, 115 S. Ct. at 1231; *see* Ossi, *supra* note 117, at 250-56.

130. *Id.* at 1227-28 (1995) (satisfying ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3)) (alteration in original) (quoting the Curtiss-Wright SPD's reservation clause).

131. *Id.* at 1228 (alteration in original) (quoting ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3)).

132. *Id.*; *see* ERISA § 3(9), 29 U.S.C. § 1002(9) (1994).

133. *Curtiss-Wright Corp.*, 115 S. Ct. at 1228.

134. *Id.*; *see* ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3) (1994).

135. *Curtiss-Wright Corp.*, 115 S. Ct. at 1229.

136. *Id.*

137. *Id.*

138. *Id.*; *see* Ossi, *supra* note 117, at 253.

139. Ossi, *supra* note 117, at 253-54.

retirees.[140] This fact appears to leave the door open for employees to pursue breach of contract claims based on bargained for promises of lifetime coverage, thereby vesting the benefits.[141] The Supreme Court recently held that a promise made by an employer may vest benefits, indicating that an ERISA breach of contract claim may maintain some validity.[142] However, a virtually unanimous federal judiciary denies these claims through decisions resting on technical failures and policy reasons.[143]

The Sixth Circuit appears to have also adopted a pro-employer approach to ERISA. In *Sprague v. General Motors Corp.*,[144] the Sixth Circuit Court of Appeals held that individuals who retired with plans containing an unambiguous reserved right to amend the plan will lose on any estoppel claim, since there can be no justifiable reliance in those cases.[145] Therefore, any unambiguous reservation clause will always trump any statement in a SPD that promises lifetime benefits.[146] These holdings not only spell bad news the advocates of retirees, but also for Chiles.

## B. Chiles v. Ceridian Corp.[147]

### 1. Facts

Ceridian Corporation, formerly Control Data Corporation (hereinafter referred to solely as "Ceridian"), maintained an employee Long Term Disability Plan (LTD Plan or Plan) that expressly provided, in both the master plan document and the SPD, that all qualified long-term disability participants would receive health care insurance fully funded by Ceridian.[148] In September, 1989, Ceridian sold a division to Seagate Technologies.[149] Subsequent to the sale, Ceridian informed the plaintiffs that the company expected to continue to pay health care premiums as provided under the initial program, but Ceridian "reserved the right to change or cancel it at any time."[150]

The plaintiffs were former employees of the division sold to Seagate who were receiving benefits under the LTD Plan. The Plan provided the

140. *Id.* at 253.

141. Rossbacher et al., *supra* note 5, at 312.

142. *See* Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co., 117 S. Ct. 1513, 1516 (1997).

143. Rossbacher et al., *supra* note 5, at 310.

144. 92 F.3d 1425 (6th Cir. 1996), *aff'd in part and rev'd in part on reh'g en banc*, 133 F.3d 388, 403 (6th Cir. 1998) (reversed and remanded on unrelated matters).

145. *Sprague*, 92 F.3d at 1441; *see also* Musto v. American Gen. Corp., 861 F.2d 897, 906 (6th Cir. 1988) (holding that an employer's statement that coverage would continue after retirement with no contribution from the retiree did not promise "lifetime 'paid-up' medical insurance" but merely described the plan as it existed at that time).

146. Ossi, *supra* note 117, at 256.

147. 95 F.3d 1505 (10th Cir. 1997).

148. *Chiles*, 95 F.3d at 1508.

149. *Id.*

150. *Id.* at 1509.

plaintiffs with company-sponsored medical, life, and, dental benefits entirely funded by Ceridian. The benefits were to continue as long as the plaintiffs remained disabled as defined under the Plan.[151] However, in 1992, the company informed the plaintiffs that beginning in 1993, Ceridian would amend the LTD Plan to require the plaintiffs to pay the same amount of health insurance premiums as active employees.[152] Both Ceridian and the plaintiffs relied on plan documents to support their rights under the plan.[153]

According to the SPD for the LTD Plan and the Health Care Plan, Ceridian promised to pay the health care premiums of employees while they remained disabled as defined by the plan.[154] A chart in the SPD restated the promise of continued health care coverage while on disability while the master plan document for the LTD Plan did not specifically mention health care coverage.[155] However, the master plan promised, notwithstanding the termination of the LTD Plan, continued benefits under the plan while the employee remained disabled.[156] Furthermore, the plaintiffs pointed to the SPD of the dental and life insurance plans which also promised coverage while on long-term disability, as further extrinsic evidence of Ceridian's intent to vest health care coverage in the plaintiffs.[157] In contrast to this seemingly clear language, Ceridian pointed to their reserved right to amend the Plan as conclusive evidence that they promised no vested benefits.[158]

Inconsistent with the promises to provide fully funded benefit coverage, all of the SPDs of the aforementioned plans included the following language: Ceridian "expects to continue the [Long Term Disability/Health/Dental/Life] Plan indefinitely, but must reserve the right to change or discontinue it if it becomes necessary."[159] The master plan document contains a similar reserved right to amend the plan only if "deemed advisable" by Ceridian.[160] Based on their reserved right, Ceridian amended the LTD Plan to require LTD members to pay the same amount of health care premiums as working Ceridian employees.[161] As a result, the plaintiffs brought an ERISA action seeking relief for Ceridian's breach of contract and breach of fiduciary duties.[162] In granting a

151. *Id.*
152. *Id.*
153. *Id.* at 1508.
154. *Id.* at 1509.
155. *Id.*
156. *Id.* (stating that a participant who is disabled upon the termination of date of the plan "shall continue to receive beneifts in accordance with the terms of the Plan").
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*

summary judgment motion in favor of Ceridian, the district court held that the reserved amendment right gave Ceridian nearly complete discretion to amend the Plan.[163]

2. Decision

On appeal, the plaintiffs made three assertions: (1) The LTD Plan's benefits vested upon the retiree's qualification for the LTD Plan and remained vested as long as the retirees qualified for LTD benefits; (2) regardless of whether the LTD benefits vested upon qualification, the benefits vested upon the termination of the plan, which occurred when Control Data sold Imprimis to Seagate Technologies; and (3) regardless of the validity of the arguments contained in (1) and (2), a question of material fact existed as to whether it became "necessary" for Ceridian to terminate the plan.[164]

The Tenth Circuit noted that the plaintiffs carry the burden of proving that the defendant intended or agreed to vest the plaintiff with the benefits, since welfare benefits do not statutorily vest under ERISA.[165] In addressing the plaintiff's first assertion, the court recognized the central issue focused on whether the reservation clause, read in tandem with the promise of life time benefits, was ambiguous with respect to the plaintiff's rights under the LTD Plan[166] Ironically, the court relied on the Plan's promise not to terminate the benefits in holding that the Plan had, in fact, unambiguously reserved the right to amend the plan.

The termination provision stated that "[i]f the group Long-Term Disability Plan terminates and if on the date of such termination your are totally disabled, your [LTD] benefits and your claim for such benefits will continue as long as you remain totally disabled."[167] The court reasoned that the provision's contemplation of a situation in which the Plan unilaterally terminated indicated that the drafters did not intent to grant the participants vested benefits for life.[168] From this language, the court inferred that the LTD Plan reserved the right of the employers to make other Plan changes as well.[169] The Plan's requirement that amendments would bind all participants supported this inference.[170] Since the proviso was a clear and unambiguous statement reserving the right to terminate or amend the Plan, the court held these statements adequately rejected the plaintiff's assertion that the benefits vested upon qualification for the LTD Plan.[171] However, this did not necessarily preclude the plaintiff's

163. *Id.* at 1510.
164. *Id.*
165. *Id.* (citing Houghton v. SIPCO, Inc., 38 F.3d 953, 957 (8th Cir. 1994)).
166. *Id.* at 1511-12.
167. *Id.*
168. *Id.*
169. *Id.* at 1512.
170. *Id.* at 1512-13.
171. *Id.* at 1514.

second argument which asserted that the benefits vested upon Plan termination.[172]

The ERISA provisions regarding the procedure for the termination of the welfare plans is fairly sparse.[173] However, the court found that several changes to the LTD Plan instituted by the company indicated the termination of the old Plan and the start-up of the new Plan.[174]

In addition to recognizing the plan's termination, the plaintiff's argument also requires a finding that the Plan unambiguously vested the LTD benefits upon termination by Ceridian. Examining the termination clause, the court read the Plan to unambiguously vest the long-term disability benefits upon termination.[175] ERISA does not require the vesting of benefits in welfare plans, and therefore, vesting becomes an "extra-ERISA commitment" that the Company must expressly state in clear and unambiguous language.[176] The court found the termination clause was to meet the "extra-ERISA" requirement, and therefore, vest the long-term disability benefits upon the termination of the plan.[177] Yet, the defendants further argued that the LTD Plan promised "benefits," which do not include health care benefits as the retirees assert.[178]

The LTD Plan SPD stated that the company promised to pay premiums on company-sponsored "benefits" while the employee remained on the LTD Plan, but did not define the term "benefits."[179] Unable to determine the benefit entitlements under LTD Plan, the court remanded the case to the district court to conduct a fact-finding analysis of the scope of "benefits" under the LTD Plan's SPD.[180]

C. *Other Circuits*

One year after the *Chiles* decision, the Eighth Circuit Court of Appeals offered its view on the Ceridian Plans. In *Barker v. Ceridian*

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172. *Id.*

173. *Id.* at 1515 ("ERISA provides strict obligations and procedures regarding termination of pension plans, but provides no guidelines to determine when a plan terminates." (internal citation omitted)).

174. *Id.* Indications of termination included the appointment of new trustees, the acquiring company becoming the administrator, Ceridian's transfer of money to fund the new Plan, and LTD Plan liability transfer to the acquiring company. *Id.*

175. *Id.*

176. *Id.* at 1515.

177. *Id.*

178. *Id.* at 1516-17.

179. *Id.*

180. *Id.* at 1519.

*Corp.*,[181] the Eighth Circuit made Ceridian honor their promises to employees.[182]

The facts in *Barker* mirror those of *Chiles* with respect to the language of the plans and the provisions used in each plan.[183] Barker asserted that Ceridian's amendment to the Long Term Disability Plan (LTD Plan or Plan) violated ERISA.[184] The District Court of Minnesota granted summary judgment for Ceridian, holding that the Plan contained an unambiguous reserved right to amend or terminate.[185] On appeal, Barker argued that the district court erred in granting summary judgment because evidence existed that created a genuine issue of material fact.[186]

On examination of the SPD, the court noted that it contained conflicting language.[187] At one point in the document, the SPD promised lifetime coverage for insurance premiums while on disability, while at the same time, it reserved the right to amend or terminate the Plan.[188] The court also found conflicting language in the reservation clauses of the different plans. The LTD Plan provided that if Ceridian terminated the Plan, the company would continue to provide benefits for those on long-term disability.[189] In contrast, the reservation of rights statement contained in the medical, life, and dental benefit plans only stated that Ceridian might change or discontinue the plans if it became necessary.[190]

A review of the SPD for the LTD Plan indicated that the Plan itself made numerous representations indicating that Ceridian would pay the premiums.[191] The SPD contained references to the other benefits plans and, furthermore, charts in the SPD expressly provided that Ceridian would pay the premiums for the health, dental, and life insurance programs while the participant remained on long term disability.[192] Ceridian argued that the LTD Plan was merely an income protection plan and the insurance payments would not come from such a plan.[193]

The Eighth Circuit noted that disclosure of a plan's terms represents one of ERISA's main goals.[194] Recognizing the importance of the SPD in

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181. 122 F.3d 628 (8th Cir. 1997).

182. For the first class action against the Ceridian Corporation alleging wrongful termination of benefits, see *Chiles v. Ceridian Corp.*, 95 F.3d 1505 (10th Cir. 1997). *See supra* notes 147-80 and accompanying text (discussing *Chiles*).

183. *Compare Barker*, 122 F.3d at 630-32, *with Chiles*, 96 F.3d at 1508-10

184. *Barker*, 122 F.3d at 630.

185. *Id.* at 632.

186. *Id.*

187. *Id.* at 635.

188. *Id.*

189. *Id.*

190. *Id.* at 633.

191. *Id.* at 635.

192. *Id.* The court makes reference to the 1989 SPD which promised that the company would continue to pay the insurance premiums while participants remained on long-term disability.

193. *Id.* at 633-34.

194. *Id.* at 633.

achieving that goal, the Eighth Circuit accorded greater deference to the SPD when interpreting conflicting information between the master plan document and the SPD.[195] Since the SPD repeatedly guaranteed payment of premiums, the court found a reasonable person in the participant's position would believe the SPD.[196]

Relying on their recent decision in *Jensen v. SIPCO, Inc.*,[197] the court remanded the case to reconsider the plan's language as a whole, including extrinsic information.[198] On remand, the appellate court required the district court to determine, in light of all the information, whether Ceridian intended to vest employees with a right to insurance payments while on long term disability.[199]

Similar to the *Ceridian* cases, the Seventh Circuit addressed whether the defendant may unilaterally affect a reduction in welfare benefits in the face of a promise to provide lifetime health care coverage in *Diehl v. Twin Disc, Inc.*[200] Rejecting the lower court's holding that the benefits did not vest, the Third Circuit found that the promise of lifetime insurance coverage contractually vested.[201] As a result, Twin Disc could reduce, but could not eliminate, the benefits.[202]

In connection with the closure of a plant, Twin Disc negotiated a Shutdown Agreement with the union which promised the plaintiffs lifetime insurance benefits.[203] The agreement also contained a termination clause providing that the agreement shall end no later than "the end of the twelfth calendar month following the calendar month in which the last bargaining unit employee engaged in production is terminated."[204] Following Twin Disc's reduction of benefits from those promised in the Shutdown Agreement, the plaintiff instituted a suit for breach of contract, breach of an employee benefit plan, violation of fiduciary duties, and promissory estoppel.[205] The district court held that Twin Disc's separate insurance booklet unambiguously incorporated a reserved right to amend the plan into the Shutdown Agreement.[206] As a result, the district court held that Twin Disc could amend or terminate the plan.[207]

195. *Id.*
196. *Id.* at 634.
197. 38 F.3d 945 (8th Cir. 1994).
198. *Barker*, 122 F.3d at 638-39.
199. *Id.* at 639.
200. Diehl v. Twin Disc, Inc., 102 F.3d 301, 306 (7th Cir. 1996).
201. *Diehl*, 102 F.3d at 306-07.
202. *Id.* at 306.
203. *Id.* at 302.
204. *Id.* at 308.
205. *Id.* at 305.
206. *Id.*
207. *Id.*

The Seventh Circuit interpreted the Shutdown Agreement, which stated that retired employees "shall, notwithstanding any provision of the Insurance Agreement . . ., be entitled for the lifetime of the pension to the life insurance," as entitling retirees to just that, lifetime insurance coverage.[208] The Seventh Circuit rejected the district court's conclusion that the Shutdown Agreement incorporated the termination language of the insurance booklets.[209] Instead, the appellate court considered the Shutdown Agreement as an independent agreement with independent consideration, capable of modifying or supplanting prior contractual agreements.[210] While admitting that a participant must refer to the insurance agreement and insurance booklets in order to determine exactly what lifetime coverage the plan granted, the circuit court found the independence of the Shutdown Agreement rendered a finding as inappropriate that the termination clause in the insurance booklets should amend or supplant an entirely separate agreement.[211] As such, the court remanded the case to the district court to determine exactly what lifetime benefits had vested and to what extent, if any, could the company modify those benefits.[212]

The Second Circuit Court of Appeals addressed a similar dispute in *American Federation of Grain Millers v. International Multifoods Corp.*[213] International Multifoods amended its health care plan to require retired participants to pay a portion of the insurance premium.[214] Prior to the amendment, Multifoods paid the entire premium.[215] The American Federation of Grain Millers (AFGM) brought suit alleging vesting violations of the Labor Management Relations Act of 1947 and ERISA.[216] As to the ERISA claims, the plaintiff argued, in the alternative, that International improperly amended the plan by failing to include a reservation of right in the Summary Plan Description, failing to follow proper amendment procedures, and failing to give retirees proper notice of the amendment.[217]

The parties' collective bargaining agreement (CBA) stated, "[d]uring the time of this Agreement there shall be no reduction in the

208. *Id.* at 306.

209. *Id.*

210. *Id.* at 306-07.

211. *Id.*

212. *Id.* at 310-11.

213. 116 F.3d 976 (2d Cir. 1997).

214. *American Fed'n of Grain Millers*, 116 F.3d at 977.

215. *Id.*

216. *Id.*; *see* 29 U.S.C. § 185 (1994) (enforcement section of the Labor Management Relations Act of 1947); 29 U.S.C. § 1132 (1994) (ERISA's civil enforcement provision).

217. *American Fed'n of Grain Millers*, 116 F.3d at 978. ERISA requires that a SPD must be "sufficiently accurate and comprehensive to reasonably apprise . . . participants . . . of their rights and obligations under the plan." ERISA § 102(a)(1), 29 U.S.C. § 1022(a)(1) (1994). SPDs must also inform participants of the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." ERISA § 102(b), 29 U.S.C. § 1022(b).

schedule of benefits."[218] However, promising benefits for a certain period of time, "[d]uring the time of this Agreement," necessarily establishes that once the time period expires, so do the benefits.[219] Since the CBA expired prior to the amendment of the health plan, the court held that International did not violate the CBA.[220] With the expiration of the CBA, any medical benefits provided by International were purely gratuitous.[221]

Regarding the ERISA claims, the Second Circuit noted that the master plan documents unambiguously provided that International could "amend [the plan] at any time, without consent of the insured Employees or any other person having a beneficial interest in it."[222] Without disagreement from the plaintiffs, the court held the plan did not promise vested retiree benefits.[223] However, the plaintiffs argued that the SPD vested the medical benefits.[224] The Second Circuit's previous rulings held that in instances of conflict in terms, the SPD always prevails over the formal plan documents.[225] Since a reasonable person could interpret International's SPD as vesting medical benefits, the plaintiff argued that the benefits vested and were not subject to change.[226] The court disagreed.

According to the court, the statements in the SPD only provided that International would pay the current benefits because a reasonable person would not interpret any of the SPD statements to include a promise for indefinite benefits.[227] Furthermore, the SPD also expressly reserved International's right to terminate the plan.[228] The court held the employer's lack of a promise of vested benefits and the plan's unambiguous language reserving the right to terminate the plan required a finding that no vested benefits existed.[229]

AFGM argued that International's amendment procedures violated ERISA.[230] First, AFGM asserted that the SPD did not contain language

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218. *American Fed'n of Grain Millers*, 116 F.3d at 981.

219. *Id.*; *see also* LTV Steel Co. v. United Mine Workers (*In re* Chateaugay Corp.), 945 F.2d 1205, 1208 (2d Cir. 1991) ("[T]he parties are bound by the provisions of the Wage Agreement only as long as the Wage Agreement itself is effective.").

220. *American Fed'n of Grain Millers*, 116 F.3d at 981.

221. *Id.*

222. *Id.* at 982.

223. *Id.*

224. *Id.*

225. *Id.* (citing Heidgerd v. Olin Corp., 906 F.2d 903, 908 (2d Cir. 1990)).

226. *Id.*

227. *Id.* (noting that the SPD statements, "NO COST TO YOU" and "[t]he entire cost of the coverage is paid by Multifoods," gave no assurances of benefits to be paid in the future).

228. *Id.*

229. *Id.*; *see also* Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 491-93 (2d Cir. 1988) ("[A]bsent a showing tantamount to proof of fraud, an ERISA welfare plan is not subject to amendment as a result of informal communications between an employer and plan beneficiaries.").

230. *American Fed'n of Grain Millers*, 116 F.3d at 983 (arguing violation of ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3) (1994) (ERISA's plan amendment procedure provision)).

regarding the Plan's amendment procedure.[231] The court disagreed, stating that the SPD's reservation of the right to terminate the Plan sufficiently informed participants that International maintained the right to amend it.[232] AFGM also argued that the plan lacked a proper amendment procedure—a contention the court rejected because the SPD contained a provision allowing amendment by written agreement between the plan and the insurer.[233] Lastly, the court rejected AFGM's argument that the plan failed to give proper notice of the amendment, since AFGM sent notice a month after making the amendment.[234]

D. *Analysis*

The Tenth Circuit indicated in *Chiles* that when confronted with a SPD that contains an unambiguous reservation of right to terminate the plan and a promise to provide benefits indefinitely in the future, the termination rights should control.[235] Sometimes referred to as the Unisys approach, this determination is not unreasonable.[236] It represents a bright-line test the courts can apply uniformly. Although the application of the test is simplistic, understanding its logic is not.

One of ERISA's goals is to provide a means by which a participant can obtain information regarding benefits plans.[237] ERISA accomplishes this goal through the Summary Plan Description, which informs the participants of their rights under the plan.[238] ERISA also requires plan sponsors to write this document in language understandable to the lay person.[239] According to the court in *Chiles* and under the Unisys test, plan sponsors advance these goals by including diametrically opposed language in a document sent to participants.

Apparently, the lay person has the ability to use "interpretative gymnastics" to determine that a promise to continue benefits into in the future is really not a promise at all, but a contingent option—an option

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231. *Id.*; *see also* ERISA § 102(b), 29 U.S.C. § 1022(b) (requiring that SPDs must be sufficently complete and accurate to inform participants or their rights and obligations under the plan).

232. *American Fed'n of Grain Millers*, 116 F.3d at 983.

233. *Id.* at 983-84; *see also* ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3) (1994) (requiring all benefit plans to provide an amendment procedure).

234. *American Fed'n of Grain Millers*, 116 F.3d at 984; *see also* ERISA § 104(b)(1), 29 U.S.C. § 1024(b)(1) (1994) (requiring company to provide notice of material modification "not later than 210 days after the end of the plan year in which the change is adopted").

235. Chiles v. Ceridian Corp., 95 F.3d 1505, 1514 (10th Cir. 1996).

236. *In re* Unisys Corp. Retiree Med. Benefit "ERISA" Litig., 58 F.3d 896 (3d Cir. 1995).

237. *See* ERISA § 102(b), 29 U.S.C. § 1022(b) (1994) (requiring that SPDs must be sufficently complete and accurate to inform participants or their rights and obligations under the plan); H.R. REP. NO. 93-1280, at 297 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 5077-78 ("A written plan is to be required in order that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan.").

238. ERISA § 104(b)(1), 29 U.S.C. § 1024(b)(1); ERISA § 102(b), 29 U.S.C. § 1022(b) (requiring the publication and availability of SPDs).

239. ERISA § 102(a)(1), 29 U.S.C. § 1022(a)(1).

the employer can trigger at will.[240] To the Tenth Circuit, this "logic" promotes the lay person's understanding of the extent of benefits.[241]

In *Chiles*, the Tenth Circuit relied on the interpretive maxim, *expressio unius est exclusio alterius*, to find that the SPD contained a reserved right to terminate the plan.[242] Whether a lay person is familiar with the application of this "interpretative gymnastic" flip seems doubtful. Ironically, the Tenth Circuit applied this maxim to language in the SPD which the plaintiffs pointed to as vesting benefits.[243] The Tenth Circuit argued that, to a lay person, a promise to continue benefits after termination of the plan actually established that the plan reserved the right to discontinue the promised benefits.[244]

The plan states that "[i]f the group Long-Term Disability Plan terminates, and if on the date of such termination you are totally disabled, your Long-Term Disability benefits and your claim for such benefits will continue as long as you remain totally disabled as defined by the plan."[245] The court inferred from this phrase that the express listing of a qualification to Ceridian's ability to change the plan logically implies the reserved right to make other changes.[246] While perhaps reasonable to the legal scholar, it seems inappropriate to expect a lay person to read the same phase to understand why, at age sixty-five, he must now pay his own health insurance premiums.[247]

The Eighth Circuit's approach, as evidenced in *Barker*, appears more in line with the intent of ERISA.[248] While the facts in *Barker* are essentially the same as those in the Tenth Circuit's decision in *Chiles*, the two decisions illustrate very different outcomes. In *Barker*, the Third Circuit relied on the same phase in the SPD which the Tenth Circuit interpreted to give Ceridian the ability to amend the plan, to hold that the

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240. In *Diehl*, the Seventh Circuit refused to engage in the type of "interpretive gymnastics" used in *Chiles*. Diehl v. Twin Disc, Inc., 102 F.3d 301, 307 (7th Cir. 1996).

241. Chiles v. Ceridian Corp., 95 F.3d 1505, 1512 (10th Cir. 1996). Although the Tenth Circuit side steps the issue of what language controls when a "reserved right to amend" statement is found in the same document as a promise for continued benefits, the Tenth Circuit clearly endorses the *Unisys* approach. *Chiles*, 95 F.3d at 1512; *see also* Barker v. Ceridian Corp., 112 F.3d 628, 636 (8th Cir. 1997) (stating that *Chiles* followed the *Unisys* approach).

242. *Chiles*, 95 F.3d at 1512. The expression, translated as "the expression of one thing is the exclusion of another," is an interpretive tool used by the courts to determine ambigious meaning in statutes and other legal documents. *Id.*

243. *Id.* at 1513.

244. *Id.* at 1512.

245. *Id.*

246. *Id.*

247. A number of courts criticized the *Chiles* decison. *See* American Fed'n of Grain Millers v. International Multifoods Corp., 116 F.3d 976, 980-81 (2d Cir. 1997); Barker v. Ceridian Corp., 112 F.3d 628, 634 (8th Cir. 1997); Diehl v. Twin Disc, Inc., 102 F.3d 301, 307 (7th Cir. 1996).

248. *Barker*, 112 F.3d at 628; *see supra* note 237 and accompanying text (providing congressional expressions of intent).

benefits vested.[249] To reach this conclusion, the Third Circuit held that the phrase, read in conjunction with other language of the SPD, assured the participants of continued benefits. Quoting the Tenth Circuit's decision in *Chiles*, the Third Circuit reasoned that ERISA intended the SPD for the lay-person, who "should not be required to adopt the skills of a lawyer and parse specific undefined words throughout the entire document to determine" their intended meaning.[250] To find otherwise, would defeat the expressed intent of ERISA.

## III. DEFINING THE "NORMAL RETIREMENT" AGE

Much of the same corporate cost-cutting that negatively affects welfare plans, also affects pension benefit plans. However, unlike the welfare plans, ERISA requires pension plans to meet vesting requirements.[251] The general vesting requirements under ERISA require that participants earn or accrue benefits offered by a pension plan according to specific methods and time periods, [252] and that these benefits become nonforfeitable or vested at specific times.[253] As a result, ERISA limits an employer's ability to make changes to a pension plan to effectuate cost reduction measures much more than with welfare plans. However, an employer, may still make prospective plan amendments that do not reduce current benefits, but reduce the pension benefits payable in the future.[254]

### A. *Background*

In *Lindsay v. Thiokol Corp.*,[255] Thiokol asserted that changing the normal retirement age did not reduce vested benefits.[256] Thus, the issue presented in *Lindsay* focuses on whether a change in a pension plan's "normal retirement age" to an age greater than sixty-five violates ERISA.[257] Ruling on this issue, the Tenth Circuit relied, in part, on precedent established in *Johnson v. Franco*.[258] Similar to *Lindsay*, *Johnson* dealt with the effect of a plan amendment designed to reduce the future benefits offered.[259]

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249. *Barker*, 112 F.3d at 635.

250. *Id.* (quoting *Chiles*, 95 F.3d at 1517-18).

251. ERISA § 201, 29 U.S.C. § 1051 (1994) (ERISA's vesting coverage provision); *see* Rossbacher et al., *supra* note 5, at 305-06.

252. ERISA § 204(b)(1)(A), 29 U.S.C. § 1054(b)(1)(A) (1994); see also 26 U.S.C. § 411(b)(1)(A) (1994) (Internal Revenue Code's accrued benefits requirements).

253. ERISA § 203(a), 29 U.S.C. § 1053(a) (1994).

254. ERISA § 203(c), 29 U.S.C. § 1053(c).

255. Lindsay v. Thiokol Corp., 112 F.3d 1068 (10th Cir.), *cert. denied*, 118 S. Ct. 168 (1997).

256. *Lindsay*, 112 F.3d at 1069.

257. *Id.*

258. *Lindsay*, 112 F.3d at 1070 (citing *Johnson v. Franco*, 727 F.2d 442 (5th Cir. 1984)).

259. *Johnson*, 727 F.2d at 442-45. Future beneifts are benefits that the plan will provide to the participant if the participant remains in the plan until she reaches her vesting time period, at which time the benefits become nonforfietable. *Id.*

Johnson belonged to a pension plan created by the Nation Maritime Union that vested retirement benefits in employees accumulating at least twenty years of service.[260] The plan suspended payment of benefits prior to the time Johnson attained the age of sixty-five.[261] Johnson instituted an action under section 203(a) of ERISA, which states that "an employee's right to his normal retirement benefit is non-forfeitable upon the attainment of normal retirement age."[262]

Based on section 203(a) of ERISA, Johnson asserted that he attained normal retirement age at the time in which his retirement benefits vested—after his ten years of service.[263] Therefore, he claimed the termination of these benefits after vesting violated ERISA's non-forfeiture provisions.[264] The defendants argued that an individual did not reach the normal retirement age when the benefits vested, but when the participant attained the later of either the age of sixty-five or ten years of service.[265] The Fifth Circuit Court of Appeals agreed.[266]

Overruling the district court, the Fifth Circuit held that ERISA specifically defines the "normal retirement age" as the earlier of either the age defined by a plan as the normal retirement age or the age of sixty-five.[267] The court disagreed with the district court's reasoning that Johnson reached the normal retirement age prior to age sixty-five through the operation of his vested status under the plan.[268] Because Johnson had not reached normal retirement age of sixty-five as defined by both the plan and ERISA, ERISA's non-forfeitability provision afforded little protection. [269] Using similar reasoning, Lindsay asserted that ERISA's non-forfeitability provision prevented a plan from extending the definition of the normal retirement beyond the age defined by ERISA.[270]

260. *Id.* at 442.

261. *Id.* at 442-43.

262. ERISA § 203(a), 29 U.S.C. § 1053(a) (1994); *see Johnson*, 727 F.2d at 443.

263. *Johnson*, 727 F.2d at 444.

264. *Id.* at 442-43 (asserting violation of ERISA § 203(a), 29 U.S.C. § 1053(a)).

265. *Johnson*, 727 F.2d at 444 (citing the plan requirements prior to the adoption of the amendment).

266. *Id.* at 445.

267. *Id.*; *see* ERISA § 3(24), 29 U.S.C. § 1002(24) (1994) (defining "normal retirement age" as the earlier of: "(A) the time a plan participant attains normal retirement age under the plan, or (B) the later of (i) the time a plan participant attains 65, or (ii) the 5th anniversary of the time a plan participant commenced participation in the plan"); ERISA § 203(a), 29 U.S.C. § 1053(a) (requiring the nonforfeitability of pension plans upon the attainment of normal retirement age).

268. *Johnson*, 727 F.2d at 445-46

269. *Id.* at 446; *see* ERISA § 203(a), 29 U.S.C. § 1053(a) (1994).

270. Lindsay v. Thiokol Corp., 112 F.3d 1068, 1069-70 (10th Cir.), *cert. denied*, 118 S. Ct. 168 (1997); *see* ERISA § 203(a), 29 U.S.C. § 1053(a) (nonforfeitability requirements provision).

B. Lindsay v. Thiokol Corp.[271]

1. Facts

Lindsay was a former employee of Thiokol Corporation who took early retirement prior to a plan amendment that changed the normal retirement age from sixty-five to sixty-seven for purposes of calculating early retirement reductions.[272] As a result of the plan amendment, Lindsay and several other former employees received less retirement compensation than the plan would offer prior to the amendment.[273] The plaintiffs brought an action under ERISA's civil enforcement provision, asserting that "normal retirement" under ERISA may not exceed 65 years of age. ERISA requires that the "normal retirement age" can be no later than age sixty-five.[274]

ERISA defines the normal retirement age as the earlier of either the age defined by the plan, or the age of sixty-five.[275] ERISA further requires that certain benefits outlined in other sections of ERISA must vest at the normal retirement age or earlier, except for late joining participants.[276] Lindsay argued this definition establishes the retirement age at no more than sixty-five years of age.[277] Based on this assertion, Lindsay further argued that because the plan amendment reduced retirement benefits to the plaintiffs, the amendment also violated the following ERISA provisions: (1) the requirement that normal retirement benefits become nonforfeitable upon reaching the normal retirement age,[278] (2) the requirement that the plan participant begins receiving benefit payments upon reaching the normal retirement age,[279] and (3) the requirement that the accrued benefits payable at normal retirement age be equal to the normal retirement benefit.[280] On summary judgment, the district court held that since the plan met the minimum vesting requirements of ERISA, Thiokol's plan could define the normal retirement age differently than ERISA's statutory definition.[281]

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271. Lindsay v. Thiokol Corp., 112 F.3d 1068 (10th Cir.), *cert. denied*, 118 S. Ct. 168 (1997).

272. *Id.* at 1069.

273. *Id.*

274. *Id.*; *see* ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1994).

275. ERISA § 3(24), 29 U.S.C.§ 1002(24) (1994). ERISA also includes a clause addressing late-joining plan participants. *See supra* note 267 (providing text of ERISA's "normal retirement age" definition)

276. *See, e.g.*, ERISA § 203(a), 29 U.S.C. § 1053(a) (1994) (requiring the nonforfeitability of pension plans upon the attainment of normal retirement age).

277. *Lindsay*, 112 F.3d at 1070.

278. *Id.* at 1069; *see* ERISA § 203(a), 29 U.S.C. § 1053(a).

279. *Lindsay*, 112 F.3d at 1069; *see* ERISA § 206(a), 29 U.S.C. § 1056(a) (1994).

280. *Lindsay*, 112 F.3d at 1069; *see* ERISA § 204(b), 29 U.S.C. § 1054(b) (1994).

281. *Lindsay*, 112 F.3d at 1069.

2. Decision

The Tenth Circuit addressed the issue surrounding the amendment of the normal retirement age first, since Lindsay's other claims hinged on whether ERISA allows the normal retirement age to extend beyond the age of sixty-five.[282] The Tenth Circuit reasoned that even though ERISA uses age sixty-five as the normal retirement age, ERISA does not require a plan to adopt sixty-five as that normal retirement age.[283] The court did not find any language in ERISA indicating a congressional intent to restrict the normal retirement to age sixty-five.[284] ERISA does, however, require that plans meet certain accrual and vesting requirements when participant's reach age sixty-five, but does not require that all plans must define the normal retirement age at sixty-five.[285]

The accrual and benefit conditions of ERISA require a plan participant's accrued benefit must become non-forfeitable at age sixty-five,[286] and therefore, irreducible by a plan amendment.[287] ERISA defines accrued benefits as benefits earned by a plan participant and "expressed in the form of an annual benefit" that begins at the normal retirement age.[288] Thiokol's plan used the age sixty-seven as the benchmark from which to calculate all retirement benefits, while the plan uses age sixty-five to calculate the benefit's accrual and vesting amounts in accordance with ERISA.[289] Therefore, a participant retiring at age sixty-five receives 86.7% of what the plan calculates as the total earned benefit at age sixty-seven.[290] ERISA affords full protection to this calculated benefit.[291]

The Tenth Circuit noted that Lindsay will receive less in retirement benefits because Thiokol's amendment eliminated the *opportunity* to accrue early retirement subsidies.[292] Early retirement subsidies partially compensate the employee for the reduction in retirement benefits, since the plan must pay the benefit over a longer period of time.[293] The prior plan accrued these subsidies at specific rates, while the new plan eliminated the *further* accrual of the early retirement subsidies.[294] Since the

282. *Id.* at 1069-70.

283. *Lindsay*, 112 F.3d at 1070; *see* ERISA § 3(24), 29 U.S.C. § 1002(24) (1994).

284. Lindsay, 112 F.3d at 1070.

285. *Id.*; *see* ERISA § 203(a), 29 U.S.C. § 1053(a).

286. ERISA § 203(a), 29 U.S.C. § 1053(a).

287. ERISA § 203(c), 29 U.S.C. § 1053(c).

288. ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A) (1994); *see Lindsay*, 112 F.3d at 1070; *see also* ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3) (1994) (providing for the actuarial equivalent of the standard accrued benefits determination).

289. *Lindsay*, 112 F.3d at 1070.

290. *Id.* at 1071.

291. ERISA § 203(c), 29 U.S.C. § 1053(c) (protecting all accrued benefits from reduction); *see Lindsay*, 112 F.3d at 1071.

292. *Lindsay*, 112 F.3d at 1071.

293. *Id.*

294. *Id.*

Thiokol plan eliminated the prospective accrual of the subsidies and left the subsidies earned prior to the amendment intact, the plan did not violate the ERISA requirements.[295]

Having established that Thiokol could set the normal retirement age at an age other than sixty-five, the Tenth Circuit addressed the other ERISA violations asserted by Lindsay. Lindsay contended that the amendment violated section 203(a), requiring normal retirement benefits to become non-forfeitable upon reaching the normal retirement age, since the amendment provided that the benefits earned at age sixty-five were not forfeitable.[296] Although the amendment eliminated future benefits, it did not eliminate accrued or earned benefits, thereby satisfying the ERISA requirements.[297] The evidence also failed to support Lindsay's assertion that the amendment violated section 206(a).[298] This section of ERISA requires benefit payments to begin not later than sixty days after the close of the plan year in which the participant attains the earlier age of sixty-five or the normal retirement age.[299] Since Thiokol's plan commenced payment of the retirement benefits at age sixty-five, no violation of ERISA occurred.[300]

The court also recognized a flaw in Lindsay's argument that ERISA required the plan to pay those benefits that a sixty-five year old participant would have earned at age sixty-seven.[301] The section specifies the timing of benefit payments, not the amount.[302] Since the plan required the payment of the age sixty-five benefit at sixty-five, the plan satisfies the ERISA requirements.[303] Lindsay's last assertion that the plan violated section 204(b) of ERISA, requiring that the accrued benefit payable at normal retirement age equal the normal retirement benefit, failed on its face. Thiokol's plan required that the accrued benefit at age sixty-five equal the benefit under the plan commencing at age sixty-five.[304]

C. *Other Circuits*

In *Ahng v. Allsteel Inc.*,[305] the Seventh Circuit Court of Appeals corrected a previous erroneous ruling and fell in line with the majority of

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295. *Id.* at 1071-72; *see* ERISA § 204(g), 29 U.S.C. § 1054(g) (1994) (requiring the vesting of accrued early retirement benefits); *see also* Ahng v. Allsteel, Inc., 96 F.3d 1033, 1036 (7th Cir. 1996).

296. *Lindsay*, 112 F.3d at 1072; *see* ERISA § 203(a), 29 U.S.C. § 1053(a) (1994).

297. *Lindsay*, 112 F.3d at 1072.

298. *Id.*; *see* ERISA § 206(a), 29 U.S.C. § 1056(a) (1994).

299. ERISA § 206(a), 29 U.S.C. § 1056(a) (1994).

300. *Lindsay*, 112 F.3d at 1072.

301. *Id.*

302. ERISA § 206(a), 29 U.S.C. § 1056(a) (requiring benefit payments to begin no later than 60 days after the latest plan year in which the participant attains the age of 65, or the normal retirement age).

303. *Lindsay*, 112 F.3d at 1072.

304. *Id.*; *see* ERISA § 204(b), 29 U.S.C. § 1054(b).

305. 96 F.3d 1033 (7th Cir. 1996).

other circuits on the issue of whether early retirement benefits fall within the meaning of accrued benefits.[306] Prior to *Ahng*, the Seventh Circuit held in *Meredith v. Allsteel, Inc.*[307] that early retirement benefits do not fall within the meaning of "accrued benefits" as defined by ERISA.[308] Since ERISA only protects the accrued or earned pension benefits from reduction or elimination by amendment, the Seventh Circuit held that reducing or eliminating early retirement benefits did not violate ERISA.[309]

Section 204(g) of ERISA, as initially enacted, prohibited an employer from enacting amendments to pension plans that reduce benefits previously earned or accrued by employees.[310] The Retirement Equity Act of 1984 amended ERISA with the so-called "anti-cutback rule."[311] This rule provides that a plan may not eliminate or reduce the early retirement benefits or subsidies, unless the participant does not, or would not, meet the pre-amendment conditions of the early retirement benefit.[312] For example, a pre-amendment condition to early retirement benefits might require the participant to put in thirty years of service before eligibility for early retirement benefits occurs.[313] When a plan eliminates the early retirement benefit, only those participants who have, or will have, thirty years of service at the plan's normal retirement age will be eligible for

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306. *Ahng*, 96 F.3d at 1034.

307. 11 F.3d 1354 (7th Cir. 1993).

308. *Meredith*, 11 F.3d at 1359; *see* ERISA § 3(23), 29 U.S.C. § 1002(23) (1994) (defining accrued benefits as "the individual's accrued benefit determined under the plan and, except as provided in section 1054(c)(3) of this title, expressed in the form of an annual benefit commencing at normal retirement age"); *see also* ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3) (providing for the actuarial equivalent of the standard accrued benefits determination).

309. *Ahng*, 96 F.3d at 1034.

310. Employee Retirement Income Securities Act of 1974, Pub. L. No. 93-406, § 204(g), 88 Stat. 829, 862 (codified at 29 U.S.C. § 1054(g)) (amended 1984) ("The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan . . . .").

311. Retirement Equity Act of 1984, Pub. L. No. 98-397, sec. 301(b), § 204(g), 98 Stat. 1426, 1451 (codified at 29 U.S.C. § 1054(g)); *see Ahng*, 96 F.3d at 1034.

312. As amended, ERISA § 204(g) states:

> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) or 1441 of this title.
>
> (2) For purposes of paragraph (1), a plan amendment which has the effect of—
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> (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
>
> (B) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)). . . .

ERISA § 204(g), 29 U.S.C. §1054(g) (1994).

313. *Ahng*, 96 F.3d at 1036 (citing a similar example given in JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 142-43 (2d ed. 1995)).

the benefit.[314] As a result, a participant has the opportunity to "grow into" the benefit.[315] The Retirement Equity Act does not afford protection to those participants that will never meet the eligibility requirement.[316]

In the *Meredith* decision, the Seventh Circuit held that early retirement benefits were not "accrued benefits" as defined by section 204(g) of ERISA, and therefore, ERISA did not protect the benefits from amendments that reduced or eliminated the benefits entirely.[317] The court neglected to apply the anti-cutback rule that specifically applies to early retirement benefits.[318] Fortunately, *Ahng*, decided during the survey period, allowed the Seventh Circuit to redeem itself from the *Meredith* decision.

The plaintiffs in *Ahng* were either current employees or retirees of Allsteel satisfying the eligibility requirements for plan benefits.[319] Allsteel amended its pension plan in 1991 to eliminate an early retirement supplement that paid qualified retirees $900 a month until they reached the age of sixty-five.[320] Required to follow the erroneous decision in *Meredith*, the district court granted a summary judgment for the plaintiff, holding that section 204(g) only applies to accrued benefits, and not to early retirement benefits.[321]

The Seventh Circuit overruled the *Meredith* decision.[322] The court held that, as amended by the Retirement Equity Act of 1984, ERISA does not permit the reduction or elimination of early retirement benefits for those participants that meet, or will meet, the pre- amendment conditions of the plan.[323] With this holding, the Seventh Circuit corrected their previous ruling and brought their view on this issue back in line with the other circuits.[324]

Similarly, the Ninth Circuit corrected a previous ruling during the survey period when it ruled on *Richardson v. Pension Plan of Bethlehem*

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314. *Id.*

315. *Ahng*, 96 F.3d at 1036; *see* Hunger v. AB, 12 F.3d 118, 120 (8th Cir. 1993); Gillis v. Hoechst Celanese Corp., 4 F.3d 1137, 1143-46 (3d Cir. 1993); Harms v. Cavenham Forest Indus., Inc., 984 F.2d 686, 692 (5th Cir. 1993).

316. *Ahng*, 96 F.3d at 1036.

317. Meredith v. Allsteel, Inc., 11 F.3d 1354, 1359-60 (7th Cir. 1993); *see* ERISA § 204(g), 29 U.S.C. § 1054(g).

318. *Ahng*, 96 F.3d at 1036.

319. *Id.* at 1035.

320. *Id.*

321. *Id.* at 1036; *see* ERISA § 204(g), 29 U.S.C. § 1054(g).

322. *Ahng*, 96 F.3d at 1036-37.

323. *Id.*

324. *Id.*; *see, e.g.*, Richardson v. Pension Plan of Bethlehem Steel Corp. (*Richardson I*), 67 F.3d 1462, 1467-68 (9th Cir. 1995); Costantino v. TRW, Inc., 13 F.3d 969, 977 (6th Cir. 1994); Hunger v. AB, 12 F.3d 118, 120 (8th Cir. 1993); Gillis v. Hoechst Celanese Corp., 4 F.3d 1137, 1143-44 (3d Cir. 1993); Harms v. Cavenham Forest Indust., Inc., 984 F.2d 686, 692 (5th Cir. 1993); Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm., 953 F.2d 587, 590 (11th Cir. 1992); Amato v. Western Union Int'l, Inc., 773 F.2d 1402, 1410 (2d Cir. 1985).

*Steel Corp. (Richardson II).*[325] Bethlehem Steel sold their West Coast properties to Seattle Steel.[326] In connection with the sale, the parties entered into an agreement concerning the employee's rights to "shutdown" benefits.[327] The Pension Agreement between the Union and Bethlehem Steel contained a provision that awarded shutdown benefits to employees who satisfied certain age and service requirements and whose continuous service was broken because of permanent plant shutdown.[328]

A disagreement between Bethlehem Steel and the Union arose regarding whether the sale of the West Coast properties triggered the payment of the shutdown benefits.[329] Bethlehem Steel argued that the company's selling of the properties as a going concern did not interrupt employees' continuous service.[330] As such, the sale did not trigger the shutdown benefits provision.[331] The Union disagreed, arguing that sale constituted an interruption in service, triggering the payment of the shutdown benefits.[332]

In order to consummate the sale to Seattle Steel, Bethlehem Steel entered into a Memorandum of Settlement (MOS) with the Union that resolved the issue of the shutdown benefits.[333] In return for the Union's concession that the sale did not trigger the shutdown benefits, Bethlehem Steel agreed to make cash payments to union workers based on their length of service.[334] The MOS also provided that the shutdown benefits would remain in affect for forty-eight months after the sale.[335] This provision provided the union employees with a "safety net," protecting the employees if Seattle Steel failed during this time period.[336] Union workers ratified the MOS and Bethlehem Steel sold the properties to Seattle Steel.[337] More than five years later, after Seattle Steel failed and the company laid-off their West Coast employees, the laid-off employees filed suit under ERISA.[338]

The plaintiffs in *Richardson I* argued that the MOS violated section 204(g) since the MOS constituted an amendment to the Pension Plan

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325. 112 F.3d 982 (9th Cir. 1997).

326. *Richardson II*, 112 F.3d at 984.

327. *Id.* at 983-84. Additional benefits paid only upon a permanent shutdown of a plant are sometimes referred to as "shutdown benefits." *Id.*

328. *Id.*

329. *Id.* at 984.

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*; Richardson v. Pension Plan of Bethlehem Steel Corp. (*Richardson I*), 67 F.3d 1462 (9th Cir. 1995).

Agreement that reduced their accrued benefits.[339] As a result, they argued against the validity of the agreement.[340] The Plan Administrators argued that the MOS merely interpreted the Pension Plan Agreement.[341] Since section 204(g) only applies to amendments, this would render the ERISA provision inapplicable.[342] Agreeing with the defendants, the district court determined the MOS was not an amendment because it did not eliminate or reduce a benefit as required under section 204(g), and therefore, ERISA did not apply.[343]

On appeal, the Ninth Circuit overruled the district court and held that the MOS amended the Pension Plan Agreement.[344] The court noted that the MOS eliminated the shutdown benefits after the forty-eight month safety net period.[345] As such, the MOS modified the Pension Agreement from its original form, which provided shutdown benefit indefinitely.[346] Thus, the court viewed the MOS as an amendment and not a mere interpretation of the party's previous agreement.[347]

On rehearing, the Ninth Circuit relied on their previous decision in *Oster v. Barco of California Employees' Retirement Plan*,[348] to reverse their holding in *Richardson I*.[349] The appellate court agreed with the district court's opinion and found that the MOS was not an amendment, as defined under ERISA.[350]

In *Oster*, the Ninth Circuit read the word "amendment" in section 204(g) as a word of limitation since "Congress did not state that any change would trigger the . . . provisions; it stated that any change by amendment would do so."[351] As such, the *Richardson II* court held the

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339. *Richardson I*, 67 F.3d at 1465.

340. *Id.* at 1467

341. *Id.*

342. *Id.*; *see supra* note 312 (providing text of ERISA § 204(g), 29 U.S.C. §1054(g) (1994)).

343. *Richardson I*, 67 F.3d at 1467; *see* ERISA § 204(g), 29 U.S.C. § 1054(g) (defining a plan amendment).

344. *Id.* at 1467-68.

345. *Id.* at 1467.

346. *Id.* at 1467-68.

347. *Id. But see* Ethan Lipsig, *The 9th Circuit Weighs In on the Immutability of Plant Shutdown Benefits and, for Good Measure, Seemingly Broadens Fiduciary Breach Remedies For Individual Plaintiffs*, 4 No. 5 ERISA Litig. Rep. 21 (1995) (criticizing the court's holding).

348. 869 F.2d 1215 (9th Cir. 1988).

349. Richardson v. Pension Plan of Bethlehem Steel Corp. (*Richardson II*), 112 F.3d 982, 987 (9th Cir. 1997).

350. *Richardson II*, 112 F. 3d at 987. See ERISA § 204(g), defining an amendment which reduces accrued benefits as:

> (2) . . . a plan amendment which has the effect of—
>
> (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
>
> (B) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. . . .

ERISA § 204(g), 29 U.S.C. § 1054(g) (1994).

351. *Oster*, 869 F.2d at 1221 (quoting Stewart v. National Shopmen Pension Fund, 730 F.2d 1552, 1561 (D.C. Cir. 1983)).

agreement was "an interpretation resulting from a negotiated settlement over the application of the Plan's provisions to the sale to [Seattle Steel]."[352] The Ninth Circuit also noted that equitable considerations did not weigh in favor of the plaintiffs, since they entered into a negotiated settlement and received a forty-eight month safety net.[353] Therefore, the plaintiffs could not argue later that the safety net violated ERISA. Such an argument would allow the plaintiffs to convert the negotiated settlement into a perpetual safety net of shutdown benefits, thereby holding Bethlehem Steel indefinitely liable for any default by Seattle Steel.[354]

D. *Analysis*

The Tenth Circuit's decision in *Lindsay*, allowing employers to adopt cost reduction measures is not atypical in ERISA's long-litigated history.[355] *Lindsay* further aids employer's cost reduction efforts by creating another avenue by which employers may reduce benefits without violating ERISA's complex rules.

Although perhaps unjust to allow an employer to reduce benefits after the employees retire, the plan change in *Lindsay* is quite fair. As the court notes in *Lindsay*, the amendment reduces the plaintiff's benefits because the employees choose to take an early retirement.[356] The benefits originally promised by Thiokol's old plan remained intact.[357] The "reduction" in benefits to Lindsay and the other plaintiffs are the result of two factors.

First, the benefits are actuarially reduced since the company must pay benefits over a longer period of time.[358] However, the present value of the benefits do not change. The second factor relates to the early retirement subsidy offered by the plan.[359] The plan allowed Lindsay to earn additional benefits to help compensate for the actuarially reduced benefits.[360] The plan calculated these early retirement subsidies based on the

352. *Richardson II*, 112 F.3d at 987. *But see* Richardson *Redux: The 9th Circuit Avoids Determining When a Plant Shutdown Benefit is a Protected Benefit Under § 411(D)(6)*, 6 No. 3 ERISA Litig. Rep. 25, 26-27 (1997) (criticizing the court's holding).

353. *Richardson II*, 112 F.3d at 987-88.

354. *Id.* The plaintiffs also asserted that the agreement did not terminate the shutdown benefits and that General Pension Board for Bethlehem Steel violated their fiduciary duty under ERISA § 404(a)(1)(A)-(C), 29 U.S.C. § 1104(a)(1)(A)-(C) (1994). *Id.* at 988. Since these issues are ones of contract interpretation (and therefore not related to the subject under discussion) and a breach of fiduciary duty (which was summarily dismissed by the court), they are not further discussed in this survey.

355. *See* Rossbacher et al., *supra* note 5, at 307-08.

356. Lindsay v. Thiokol Corp., 112 F.3d 1068, 1071 (10th Cir.), *cert. denied*, 118 S. Ct. 168 (1997).

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.*

employee's number of years of service.[361] The amended plan eliminated the *opportunity* to accrue these benefits.[362] Lindsay incorrectly asserted that the amendment violated ERISA's accrual and vesting requirements because they reduced benefits earned.[363] The benefits that the plan will pay to Lindsay are no less than what he earned at his early retirement date and that Thiokol promised.

Based on the holdings in *Lindsay* and the other circuit decisions, employers must simply ensure that plan amendments do not reduce any benefits that accrued prior to the amendment.[364] This approach strikes a fair balance between the competing interests of the employer and employee. The unusually clear and objective ERISA standards free employers to reduce the cost of employee benefits without a significant fear of litigation. At the same time, ERISA protects employees from the reduction of benefits earned and promised by employers, although ERISA does not protect future opportunities to earn additional benefits.[365]

## CONCLUSION

The ERISA cases examined during the survey period litigated issues arising from an employer's decision to reduce benefits offered to its employees in order to effectuate cost reductions. When this occurs, courts must attempt to balance the party's competing interests under ERISA. Frequently, the court's decisions appear unfair or not based in well-reasoned logic. However, when reviewing these decisions, one must keep at the forefront of one's mind a primary purpose of ERISA, to promote the use of benefits plans by employers. Excessive restrictions on the ability of employers to make plan changes will encourage employers to eliminate the plans completely. Keeping this overriding purpose in mind, the courts' reasoning become much more understandable and justifiable.

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361. *Id.*

362. *Id.*

363. *Id.* at 1072; *see* ERISA § 203, 29 U.S.C. § 1053 (1994).

364. *See id.*.at 1071-72; *Employer Didn't Violate ERISA by Raising "Normal Retirement Age" to 67*, [Employee Benefits] Corp. Couns. Daily (BNA) (May 12, 1997).

365. *Lindsay*, 112 F.3d at 1070-72.