

# CLOSING THE GAP: SAFEGUARDING PARTICIPANTS' RIGHTS BY EXPANDING THE FEDERAL COMMON LAW OF ERISA

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## I. BETRAYAL WITHOUT REMEDY

Insurance companies have little incentive under current state or federal law to pay, in good faith, disputed medical or pension benefit claims under plans governed by the Employee Retirement Income Security Act of 1974 (ERISA).<sup>1</sup> Current law also does not sufficiently deter employers and plan administrators from misrepresenting current or future benefits under an ERISA-governed plan. Because ERISA preempts all state laws that "relate to" an employee benefit plan,<sup>2</sup> participants<sup>3</sup> may not sue an insurer under state law for improperly denying a claim.<sup>4</sup> Neither can a participant sue an employer or plan administrator under state law for misrepresentation.<sup>5</sup> Also preempted is the participant's right to bring a state law claim based

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1. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1988).

2. 29 U.S.C. § 1144 (1988); See *District of Columbia v. Greater Washington Bd. of Trade*, 113 S. Ct. 580 (1992); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-47 (1987); *Shaw v. Delta Air Lines Inc.*, 463 U.S. 85, 96-97 (1983). ERISA's definition of an "employee benefit plan," contained in § 3(3), 29 U.S.C. § 1002(3), includes pension and welfare plans.

3. References to "participants" also include "beneficiaries."

4. *Pilot Life*, 481 U.S. at 57.

5. *Degan v. Ford Motor Co.*, 869 F.2d 889 (5th Cir. 1989).

on breach of contract,<sup>6</sup> negligence,<sup>7</sup> emotional distress,<sup>8</sup> outrageous and fraudulent denial of coverage,<sup>9</sup> unfair insurance practices,<sup>10</sup> tortious interference,<sup>11</sup> and bad faith.<sup>12</sup> ERISA's preemption clause is "deliberately expansive"<sup>13</sup> and "conspicuous for its breadth."<sup>14</sup> As the Seventh Circuit put it: "Congress has blotted out (almost) all state law on the subject of pensions, so that a complaint about pensions [or welfare plans] rests on federal law no matter what label its author attaches."<sup>15</sup>

Preemption of state law claims would be logical if ERISA provided a remedy sufficient to deter bad faith claims denial and fraudulent misrepresentation. However, ERISA does not offer such a deterrent. A participant whose claim has been wrongfully denied can bring a suit under ERISA section 502(a)(1)(B)<sup>16</sup> to recover the benefit which is due under the plan, but section 502(a)(1)(B) does not authorize other legal or equitable relief. A participant who is the victim of fraudulent misrepresentation can sue for breach of fiduciary duty under ERISA section 409(a) to restore losses to the plan, but any benefits recovered are paid to the plan, not to the participant who sued.<sup>17</sup> In *Massachusetts Mutual Life Insurance Co. v.*

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6. *Kuhl v. Lincoln Nat'l Health Plan, Inc.*, 999 F.2d 298 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 694 (1994); *Cromwell v. Equicor-Equitable HCA*, 944 F.2d 1272, 1275 (6th Cir. 1991), *cert. dismissed*, 113 S. Ct. 2 (1992); *Powell v. Chesapeake & Potomac Tel. Co.*, 780 F.2d 419, 421-22 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986); *Shaw v. International Ass'n of Machinists & Aerospace Workers Pension Plan*, 563 F. Supp. 653, 658-59 (C.D. Cal. 1983), *aff'd* 750 F.2d 1458 (9th Cir.), *cert. denied*, 471 U.S. 1137 (1985).

7. *Vartanian v. Monsanto Co.*, 14 F.3d 697 (1st Cir. 1994) (preempting state claim of negligent misrepresentation); *Greany v. Western Farm Bureau Life Ins. Co.*, 973 F.2d 812, 818-20 (9th Cir. 1992); *Cromwell*, 944 F.2d at 1275; *Ramirez v. Inter-Continental Hotels*, 890 F.2d 760, 762-63 (5th Cir. 1989).

8. *Kuhl*, 999 F.2d at 303-04; *Powell*, 780 F.2d at 421-22.

9. *Settles v. Golden Rule Ins. Co.*, 715 F. Supp. 1021, 1023 (D. Kan. 1989), *aff'd*, 927 F.2d 505 (10th Cir. 1991).

10. *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489, 493-94 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989).

11. *Kuhl*, 999 F.2d at 302-03.

12. *Tomczyk v. Blue Cross & Blue Shield United*, 715 F. Supp. 914, 917 (E.D. Wis. 1989), *aff'd*, 951 F.2d 771 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 2274 (1992); *Davidian v. Southern Calif. Meat Cutters Union & Food Employees Ben. Fund*, 859 F.2d 134, 135 (9th Cir. 1988).

13. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987).

14. *FMC v. Holliday*, 498 U.S. 52, 58 (1990).

15. *Bartholet v. Reishauer A.G.*, 953 F.2d 1073, 1075 (7th Cir. 1992).

16. 29 U.S.C. § 1132(a)(1)(B) (1988). This section allows a participant or beneficiary to sue "to recover benefits due to him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." *Id.*

17. 29 U.S.C. § 1109(a) (1988). ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (1988) authorizes a participant or beneficiary to sue for "appropriate relief" under § 409. Recovery under § 409(a) inures

*Russell*,<sup>18</sup> the Supreme Court dealt a double blow to participants: the Court denied recovery of extra-contractual compensatory and punitive damages under ERISA section 409(a)<sup>19</sup> and held that recovery under section 409 is limited to the plan, and does not authorize recovery to individual participants.<sup>20</sup> This ruling has made lower courts reluctant to award these damages<sup>21</sup> under section 502(a)(2) and (3).<sup>22</sup> More recently, in *Mertens v. Hewitt Associates*,<sup>23</sup> the Supreme Court dealt the penultimate blow and held that ERISA section 502(a)(3) does not permit recovery of

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to the benefit of plan, not the participant. See discussion *infra* at notes 18-20.

18. 473 U.S. 134 (1985).

19. *Id.* at 144. In his concurrence, Justice Brennan interpreted the majority opinion as leaving open the question "whether and to what extent extracontractual damages are available under § 502(a)(3)." *Id.* at 150 (Brennan, J., concurring).

20. *Id.* at 144.

21. See *Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821, 824-25 (1st Cir.), *cert. denied*, 488 U.S. 909 (1988); *Lee v. Burkhart*, 991 F.2d 1004, 1011 (2d Cir. 1993); *Pane v. RCA Corp.*, 868 F.2d 631 (3d Cir. 1989); *U.S. Steel Mining Co. v. District 17*, 897 F.2d 149, 153 (4th Cir. 1990); *Reinking v. Philadelphia Am. Life Ins. Co.*, 910 F.2d 1210, 1219 (4th Cir. 1990); *Powell v. Chesapeake & Potomac Tel. Co.*, 780 F.2d 419, 424 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters.*, 793 F.2d 1456, 1462-64 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034, 479 U.S. 1089 (1987); *Medina v. Anthem Life Ins. Co.*, 983 F.2d 29, 32 (5th Cir.), *cert. denied*, 114 S. Ct. 66 (1993); *Corcoran v. United HealthCare, Inc.*, 965 F.2d 1321, 1334-35 (5th Cir.), *cert. denied*, 113 S. Ct. 812 (1992); *Varhola v. Doe*, 820 F.2d 809, 817 (6th Cir. 1987); *Harsch v. Eisenberg*, 956 F.2d 651, 660 (7th Cir.), *cert. denied*, 113 S. Ct. 61 (1992); *Kleinhans v. Lisle Sav. Profit Sharing Trust*, 810 F.2d 618, 626-27 (7th Cir. 1987); *Kuhl v. Lincoln Nat'l Health Plan, Inc.*, 999 F.2d 298, 304-05 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 694 (1994); *Sokol v. Bernstein*, 803 F.2d 532, 534 (9th Cir. 1986); *Alexander v. Anheuser-Busch Co.*, 990 F.2d 536, 539-40 (10th Cir. 1993); *LaFoy v. HMO Colorado*, 988 F.2d 97 (10th Cir. 1993); *McRae v. Seafarers' Welfare Plan*, 920 F.2d 819 (11th Cir. 1991); *United Steelworkers v. Connors Steel Co.*, 855 F.2d 1499, 1508-10 (11th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989); *Amos v. Blue Cross-Blue Shield*, 868 F.2d 430, 431 n.2 (11th Cir.), *cert. denied*, 493 U.S. 855 (1989).

In *Mertens v. Hewitt Assocs.*, 113 S. Ct. 2063 (1993), Justice White, in a dissenting opinion, noted that courts are split on whether punitive damages may be recovered under ERISA § 502(a)(2). *Mertens*, 113 S. Ct. at 2076, 2077 n.6 (White, J., dissenting). Compare *Kuntz v. Reese*, 760 F.2d 926, 938 (9th Cir. 1985), *vacated on other grounds*, 785 F.2d 1410 (9th Cir.), *cert. denied*, 479 U.S. 916 (1986) (allowing punitive damages) with *Sommers Drug Stores*, 793 F.2d at 1463 (disallowing punitive damages). See also *Cox v. Eichler*, 765 F. Supp. 601, 610-11 (N.D. Cal. 1990) (finding punitive damages available under § 502(a)(2) but not under § 502(a)(3)). In *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144 n.12 (1985), the Supreme Court reserved judgment on whether punitive damages are recoverable by a plan from a fiduciary under § 502(a)(2).

22. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988), authorizes civil suits by participants and beneficiaries:

(A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

23. 113 S. Ct. 2063 (1993).

money damages.<sup>24</sup> It remains to be seen how the final blow will be dealt—the Supreme Court has not yet ruled on the availability of punitive damages under section 502(a)(2).

Despite ERISA's stated goal of safeguarding the rights of plan participants<sup>25</sup> and "providing for appropriate remedies, sanctions, and ready access to the Federal courts,"<sup>26</sup> the participant whose claim has been wrongfully, or even fraudulently denied, is left without a remedy. A participant who has been the victim of fraudulent misrepresentation with respect to plan benefits has no remedy. The participant is caught in the vortex of an ever-expanding preemptive black hole,<sup>27</sup> unregulated by ERISA, and unprotected by state law.

The plight of these remediless participants has not gone unnoticed. In 1991, Senator Howard Metzenbaum and Representative Howard Berman introduced legislation that would allow participants to recover extra-contractual damages from insurance companies which wrongfully deny benefits under ERISA plans.<sup>28</sup> During congressional hearings, participants

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24. *Id.*

25. *See generally* 29 U.S.C. § 1001(a)(1988).

26. *Id.* § 1001(b). *See also* H.R. REP. No. 533, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4655 (noting that "intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts.").

27. *See United Wire, Metal & Machine Health & Welfare Fund v. Morristown Memorial Hosp.*, 995 F.2d 1179, 1197 (3d Cir.) ("Since no law exists in a vacuum and arguably many laws could be held to 'relate to' ERISA plans, without some limits Section 514(a) [ERISA's preemption clause] could become a legal blackhole with an attractive force no state law could resist."), *cert. denied*, 114 S. Ct. 382 (1993).

28. S. 794, 102d Cong. 1st Sess. (1991); H.R. 1602, 102d Cong., 1st Sess. (1991). Both versions of the bill would have amended ERISA to provide that:

nothing in this title shall be construed to relieve or exempt any insurance company or other insurer from any provision of the statutory or common law of any state to the extent that such provision provides a remedy against insurance companies or other insurers who, in the administration of an employee benefit plan or in the processing of insurance claims thereunder, engage in unfair insurance claims practices in connection with such claims, except that nothing in this clause shall be construed to relate to remedies against plan sponsors.

In the 103rd Congress, Representative Berman took a different approach. He sponsored the Health Insurance Claims Fairness Act of 1993. H.R. 1881, 103d Cong., 1st Sess. (1993). The Act would establish a claims resolution board which would administer an early resolution program for claims under employee welfare benefit plans. Welfare claims disputes would be submitted to the early resolution program for resolution through mediation. The Act would lift ERISA's preemption clause with respect to any state law that "provides sanctions against insurance contractors for unfair claims settlement practices." H.R. 1881, § 6(a).

Representative Berman's bill has been dwarfed by the health care reform legislation pending in Congress. Most of the major health care reform bills have grievance or mediation provisions which may protect participants and beneficiaries. Undoubtedly, these provisions will change as the legislative proposals develop.

and beneficiaries testified on abuses by insurers.<sup>29</sup> A mother testified on behalf of her son, a plan beneficiary:

This is my son Devon. He is 5 years old and has been afflicted since birth with Spinal Muscular Atrophy . . . a progressive, degenerative neurological disease . . . .

I had always had difficulty convincing Allstate to pay for necessary equipment. . . . However, the existence of insurance never seemed to be in doubt and we always felt we were covered and in "good hands" . . . .

In 1989, we were informed that Allstate was terminating the group's policy and with it Devon's only hope of continuing to receive vital medical care. A one year extension of benefits was provided under the policy, but after one year, Devon would be dropped by the "good hands" people. Allstate didn't care that Devon would die without insurance, let alone that it was against California law to deny coverage for Devon's condition . . . .

I was told in no uncertain terms that Allstate's actions were motivated by money alone and "Allstate would be better off if Devon died."

Currently, under ERISA, there is no incentive for Allstate or other carriers to act properly, legally and morally. Too many of them have the same attitude as was expressed to me by Allstate's representatives. Why pay claims in a timely fashion or at all, when at worst that failure or delay will result in merely having to pay what the policy offered to begin with?<sup>30</sup>

Once hailed as ERISA's "crowning achievement,"<sup>31</sup> the preemption clause has been demoted to a "veritable Sargasso Sea of obfuscation."<sup>32</sup> The preemption clause has become a convenient defense for unscrupulous insurance companies and employers. In the words of Judge Birch of the Court of Appeals for the Eleventh Circuit: "An employer in this circuit can now hoodwink a long time employee and leave him stranded without any

29. *The ERISA Preemption Amendments of 1991: Hearings on S. 794 Before the Subcomm. of the Senate Comm. on Labor and Human Resources*, 102d Cong., 1st Sess. 93 (1991) (statement of Cindy and Devon Ferguson).

30. *Id.* These complaints were echoed by plaintiffs' attorney:

The law of bad faith breach of contract was created by state courts as a remedy where insurance companies and others unreasonably refuse to pay when required by contract. Without the threat of large damage claims for bad-faith behavior, many insurance companies would prefer to sit back and watch the insured attempt to collect. At the worst, the company will have to pay later what it should have paid earlier. The insured may even be persuaded to settle for less than the amount specified in the insurance contract. Even better—from the insurance company's view—the insured may die before a jury gets to hear about his pain and suffering.

William Carr and Robert Liebross, *Wrongs Without Rights: The Need for a Strong Federal Common Law of ERISA*, 4 STAN. L. & POL'Y REV. 221, 223-24 (1992/1993).

31. 120 CONG. REC. 29,197 (1974) (statement of Rep. Dent).

32. *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, 717 (2d Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3625 (U.S. Mar. 9, 1994).

recourse whatsoever.”<sup>33</sup> Judge Birch noted “that ‘any court forced to enter the ERISA preemption thicket sets out on a treacherous path.’”<sup>34</sup> He admonished, “obviously the Supreme Court needs to do some serious bushhogging in the ERISA preemption thicket.”<sup>35</sup>

Judge Hutchinson of the Third Circuit has, perhaps, best described the problem:

The feeling of unfairness is palpable. Hopefully, it will not be beyond the power of the court and Congress to dispel that sense of injustice . . . . Logic may be the law’s tool but its heart is justice, and the public’s demand for concrete justice will not be contained by the straitjacket of inflexible rules.<sup>36</sup>

Until legislation is enacted to fill in the “regulatory vacuum” created by ERISA’s preemption clause,<sup>37</sup> or until the Supreme Court does its “serious bushhogging,” plan participants must rely on the federal common law of ERISA to provide remedies. Although courts have recognized and developed federal common law with respect to ambiguous or conflicting plan provisions, courts have been reluctant to create federal common law based on oral representations and unambiguous plan language. This Article will explore the current boundaries of the federal common law of ERISA and will urge the expansion of these boundaries to protect plan participants who have been betrayed without a remedy.<sup>38</sup>

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33. *Sanson v. General Motors Corp.*, 966 F.2d 618, 623 (11th Cir. 1992) (Birch, J., dissenting), *cert. denied*, 113 S. Ct. 1578 (1993).

34. *Id.* at 625 (quoting *Gonzales v. Prudential Ins. Co.*, 901 F.2d 446, 451-52 (5th Cir. 1990)).

35. *Id.* It appears that Justice Stevens would agree with this assessment. In a dissenting opinion in *District of Columbia v. Greater Washington Board of Trade*, 113 S. Ct. 513 (1992), Justice Stevens criticized the majority’s decision that ERISA preempts a workers’ compensation law provision that required employers who provide health insurance for their employees to provide equivalent health insurance for injured workers eligible for workers’ compensation benefits. Justice Stevens stated:

The statute at issue in this case does not regulate even one inch of the preempted field, and poses no threat whatsoever of conflicting and inconsistent state regulation. By its holding today the court enters uncharted territory. Where that holding will ultimately lead, I do not venture to predict. I am persuaded, however, that the Court has already taken a step that Congress neither intended nor foresaw.

*Id.* at 588.

36. *Smith v. Hartford Ins. Group*, 6 F.3d 131, 146 (3d Cir. 1993) (Hutchinson, J., dissenting).

37. Daniel Fox & Daniel Schaffer, *Semi-Preemption in ERISA: Legislative Process and Health Policy*, 7 AM. J. TAX POL’Y 47, 48 (1988).

38. *See Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989). *Degan* coined the phrase “Betrayal Without Remedy” to describe the legal conclusion that ERISA precludes enforcement of oral modifications and that promissory estoppel is not an available remedy. The court describes this conclusion as an “unhappy denouement.” *Id.*

## II. CROSSING THE SARGASSO SEA

The goal of preemption was to prevent a patchwork of state laws regulating employee benefits.<sup>39</sup> By preempting state laws that "relate to" employee benefit plans, Congress could ensure uniform regulation of employee benefit plans.<sup>40</sup> Because ERISA's preemption clause is so broad, federal courts are empowered to develop a federal common law of ERISA.<sup>41</sup> But the preemption of state law regulating employee benefit plans has created a regulatory vacuum which most courts are unwilling to fill in accordance with Congress' mandate.<sup>42</sup>

ERISA regulates most, but not all, aspects of employee benefit plans. For example, ERISA contains detailed reporting and disclosure requirements.<sup>43</sup> ERISA also provides a comprehensive fiduciary duty section which regulates the conduct of plan trustees and administrators.<sup>44</sup> Although ERISA establishes minimum participation,<sup>45</sup> vesting,<sup>46</sup> benefit accrual,<sup>47</sup> and funding<sup>48</sup> standards for pension plans, ERISA does not

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39. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987). In *Coyne*, the Court observed: ERISA's pre-emption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities. A patch-work scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them. Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations.

*Id.*

40. The Fifth Circuit has noted that "[t]his sweeping pre-emption of state law is consistent with Congress's decision to create a comprehensive, uniform federal scheme for the regulation of employee benefit plans." *Corcoran v. United HealthCare, Inc.*, 965 F.2d 1321, 1329 (5th Cir.), *cert. denied*, 113 S. Ct. 812 (1992). See *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987).

41. *Corcoran*, 965 F.2d at 1335. See also *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1499 (9th Cir. 1984).

42. Courts have recognized that it makes "little sense to adopt a state law rule, which Congress has chosen to preempt, as a matter of federal common law." *Evans v. Safeco Life Ins. Co.* 916 F.2d 1437, 1439 (9th Cir. 1990). See also *City of Milwaukee v. Illinois*, 451 U.S. 304, 319 (1981) ("The establishment of . . . a self-consciously comprehensive program by Congress . . . strongly suggests that there is no room for courts to attempt to improve on that program with federal common law.") (referring to the 1972 Amendments to the Federal Water Pollution Control Act).

43. 29 U.S.C. §§ 1021-1031 (1988).

44. *Id.* §§ 1101-1114.

45. *Id.* § 1052.

46. *Id.* § 1053.

47. *Id.* § 1054.

48. *Id.* §§ 1081-1086.

contain similar requirements for medical and other welfare plans.<sup>49</sup>

Congress expected that ERISA would leave some gaps in regulation.<sup>50</sup> During congressional hearings, Senator Javits said that "it is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans."<sup>51</sup> The Ninth Circuit has recognized the duty of federal courts to develop a federal common law of ERISA: "Congress realized that the base, however detailed, of these statutory provisions would not be sufficient to establish a comprehensive regulatory scheme. It accordingly empowered the courts to develop, in light of reason and experience, a body of federal common law governing employee benefit plans."<sup>52</sup>

Recent legislative history encourages courts to develop federal common law to provide remedies beyond those specifically listed in ERISA section 502:

The Committee believes that the legislative history of ERISA and subsequent expansions of ERISA support the view that Congress intended for the courts to develop a Federal common law with respect to employee benefit plans, including the development of appropriate remedies, even if they are not specifically enumerated in section 502 of ERISA . . . [T]he Committee has, over the years, considered the option of amending the statute to encompass

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49. *Id.* § 1051(1).

50. *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1470 (11th Cir. 1986), *cert. denied*, 418 U.S. 1016 (1987). The court described the "gap" caused by preemption:

The employees protest that to hold that ERISA preempts this fraud claim, while also holding that ERISA does not prohibit the wrong the employees feel they have suffered, leaves a "gap" in the law. That is exactly the result that obtains when Congress determines that federal law should govern a broad area to the exclusion of state regulation and chooses not to prohibit the actions formerly prohibited by state law. It is the very conflict between the federal scheme and state law that is to be avoided through preemption. To argue that Congress has created a "gap" in the law does not undermine the reasoning on which a finding of preemption is based.

*Id.* See also *Pohl v. National Benefits Consultants*, 956 F.2d 126, 128 (7th Cir. 1992) ("The fact that ERISA does not provide a substitute remedy reflects not a senseless gap in the statute but a determination to carry through the policy we have described by confining participants to the entitlements spelled out in writing."). But in *Chemung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12, 18 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 3014 (1992), the court said: "[C]ongress wanted courts to fill any gaps in the statute by looking to traditional trust law principles."

51. 120 CONG. REC. 29,942 (1974) (statement of Sen. Javits).

52. *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1499 (9th Cir. 1984) (citations omitted). See also *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983); *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1297 (5th Cir. 1989); *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989); *Reid v. Connecticut Gen. Life Ins. Co.*, No. 93-2969, 1994 WL 56007 (8th Cir. Feb. 28, 1994) (not yet released for publication); *Nachwalter v. Christie*, 805 F.2d 956, 959 (11th Cir. 1986).

specifically several additional remedies. In light of the legislative history on this issue, however, the Committee believes such action is unnecessary. The Committee reaffirms the authority of the Federal courts to shape legal and equitable remedies to fit the facts and circumstances of the cases before them, even though those remedies may not be specifically mentioned in ERISA itself. In cases in which, for instance, facts and circumstances show that the processing of legitimate benefit claims has been unreasonably delayed or totally disregarded by an insurer, an employer, a plan administrator, or a plan, the Committee intends the Federal Courts to develop a Federal common law of remedies, including (but certainly not limited to) the imposition of punitive damages on the person responsible for the failure to pay claims in a timely manner.<sup>53</sup>

Even with this strong legislative history, courts have been slow to develop a federal common law of ERISA. Some courts have refused to consider this recent legislative history.<sup>54</sup> Other courts have developed federal common law relying on "ERISA's broad preemption provision [which] makes it clear that Congress intended to establish employee benefit plan regulation as an exclusive federal concern, with federal law to apply exclusively, even where ERISA itself furnishes no answer."<sup>55</sup>

If Congress legislates interstitially and leaves state law undisturbed, federal courts have little authority to fashion rules under federal common law.<sup>56</sup> If, however, Congress expressly sweeps away state law, as it did when it enacted ERISA, courts have greater authority to fashion common-law remedies. This will be discussed further in Part III.

#### *A. Accuracy is Not a Lot to Ask: Estoppel If a Summary Conflicts with the Plan*

Employee benefit disputes often arise when a participant relies, to her detriment, on a provision in a summary plan description (SPD) which conflicts with the actual plan document. For example, the SPD might place a cap of \$1,500 per year for dental care; this cap might conflict with the

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53. COMM. ON THE BUDGET, HOUSE OF REPRESENTATIVES, H.R. REP. NO. 247, 101st Cong., 1st Sess. 56 (1989), reprinted in 1989 U.S.C.A.N. 1906, 1948.

54. *McRae v. Seafarers' Welfare Plan*, 920 F.2d 819, 822-23 (11th Cir. 1991). See also *Medina v. Anthem Life Ins. Co.*, 983 F.2d 29, 31 (5th Cir.) ("Had Congress intended to develop ERISA remedies additional to the ones it specifically crafted, it has had ample opportunity to enact such legislation. Since Congress has not translated its intent into law, we are loathe to take this initiative on our own."), cert. denied, 114 S. Ct. 66 (1993).

55. *In re White Farm Equip. Co.*, 788 F.2d 1186, 1191 (6th Cir. 1986).

56. *PM Group Life Ins. Co. v. Western Growers Assurance Trust*, 953 F.2d 543, 546 (9th Cir. 1992).

plan document which limits dental care to \$1,000 per year. If the participant reads the SPD and relies on it when scheduling dental appointments, the plan must adhere to the provisions contained in the SPD.<sup>57</sup>

ERISA requires the plan administrator to provide an SPD to participants and beneficiaries.<sup>58</sup> The SPD must contain certain information about the plan<sup>59</sup> and must "be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan."<sup>60</sup> The SPD must describe the plan's eligibility requirements,<sup>61</sup> the plan benefits,<sup>62</sup> and any circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture, or

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57. If the SPD is not distributed to the plan participant, the plan may be estopped from applying plan provisions which forfeit benefits. In *Hillis v. Waukesha Title Co.*, 576 F. Supp. 1103, 1109 (E.D. Wis. 1983), the court stated that "where a plan participant is reasonably unaware of a benefit forfeiture clause, and where the plan administrator fails to take any steps to advise the participant of the forfeiture clause, the forfeiture may not be enforced against the participant." In *Lee v. Burkhart*, 991 F.2d 1004 (2d Cir. 1993), the Second Circuit held that failure to provide participants with an SPD is a breach of fiduciary duties. *Id.* at 1011. Similarly, if the plan contains an exclusion, but the summary does not, the benefit plan may be estopped from applying the exclusion. *Zittrouer v. Uarco Inc. Group Ben. Plan*, 582 F. Supp. 1471 (N.D. Ga. 1984). See also *Genter v. Acme Scale & Supply Co.*, 776 F.2d 1180 (3d Cir. 1985).

58. 29 U.S.C. § 1022(a)(1) (1988).

59. See *id.* § 1022(b). ERISA provides that the SPD shall contain, among other information:

The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or part (including procedures required under section 503 of this Act).

See 29 C.F.R. § 2520.102-3 (1992) for further detail.

60. 29 U.S.C. § 1022(a)(1) (1988). The SPD must be clear: It "does no good unless an employee can read and digest it." *Stahl v. Tony's Bldg. Materials, Inc.*, 875 F.2d 1404, 1409 (9th Cir. 1989). Although "[t]he regulations specify a large number of topics that a plan summary description must cover, . . . [they] say little about what it must explain in discussing each topic. . . . These regulations reflect the reasonable interpretation that descriptions must describe all aspects of a plan, but must remain concise so that employees will read them." *Id.*

61. 29 C.F.R. § 2520.102-3(j) (1992).

62. *Id.* § 2520.102-3(j)(1)-(2).

suspension of benefits.<sup>63</sup> The SPD is the “key document in disputes over benefits entitlement.”<sup>64</sup> If a conflict exists between the SPD and the plan, courts will estop the plan from enforcing the plan provision and will allow the SPD to “effectively become the terms of the plan.”<sup>65</sup>

In *Heidgerd v. Olin Corp.*, the Second Circuit held that the SPD is the “employee’s primary source of information regarding employee benefits, and employees are entitled to rely on the descriptions contained in the summary.”<sup>66</sup> If the plan and SPD conflict, the SPD must control; any other conclusion “would defeat the purpose of providing the employees with summaries.”<sup>67</sup> As the Eleventh Circuit has noted: “It is of no effect to publish and distribute a plan summary booklet designed to simplify and explain a voluminous and complicated document, and then proclaim that any inconsistencies will be governed by the plan. Unfairness will flow to the employee for reasonably relying on the summary booklet.”<sup>68</sup>

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63. *Id.* § 2520.102-3(f).

64. Edward B. Miller & Marc A. Dorenfeld, *ERISA: Adequate Summary Plan Descriptions*, 14 HOUS. L. REV. 835, 835 (1977).

65. *Id.* at 848. See also STEPHEN BRUCE, PENSION CLAIMS: RIGHTS AND OBLIGATIONS 390 (1988).

In *Flacche v. Sun Life Assurance Co. of Can.*, 958 F.2d 730, 736 (6th Cir. 1992), the Sixth Circuit stated:

Given the SPD’s important role under the ERISA framework, it is natural for courts to hold the SPD controlling when it conflicts with the plan itself. ERISA embraces a pragmatic approach: employees are unable to comprehend the technical terms of the plan itself, so the courts have found the SPD, which must be written comprehensibly, to be controlling. The comprehensible terms of the SPD take precedence over the incomprehensible, technical terms of the plan itself. This approach creates a strong incentive to write the SPD carefully, and it gives beneficiaries an understandable document upon which they can rely.

*Id.*

In *Senkier v. Hartford Life & Accident Ins. Co.*, 948 F.2d 1050, 1051 (7th Cir. 1991), the Seventh Circuit stated that ERISA’s requirement that the plan administrator provide an SPD to plan participants and beneficiaries “entitles the participant to rely on the summary plan document, and if he does the plan is estopped to deny coverage. But only if there is a contradiction between the summary plan document and the policy.”

66. *Heidgerd v. Olin Corp.*, 906 F.2d 903, 907 (2d Cir. 1990). See also *Pierce v. Security Trust Life Ins. Co.*, 979 F.2d 23, 27 (4th Cir. 1992).

67. *Heidgerd*, 906 F.2d at 908. In *Fuller v. FMC Corp.*, 4 F.3d 255 (4th Cir.), cert. denied, 114 S. Ct. 1062 (1994), the Fourth Circuit held that:

While we agree with the district court that the SPD could have made the termination benefit crystal clear by using the same language as that used in the plan itself, if that were the legal requirement, then the purpose of the summary would be frustrated—an SPD required to use the same words as a plan would be nothing different than the plan itself.

*Id.* at 261.

68. *McKnight v. Southern Life & Health Ins. Co.*, 758 F.2d 1566, 1570 (11th Cir. 1985). An SPD must, by necessity, be a summary: “Larding the summary with minutiae would defeat that document’s function: to provide a capsule guide in simple language for employees.” *Herrmann v. Cencom Cable*

More recently, in *Aiken v. Policy Management Systems Corp.*,<sup>69</sup> the Fourth Circuit held that “representations in [an] SPD control over inconsistent provisions in an official plan document.”<sup>70</sup> The Court quoted *Fuller v. CBT Corp.*,<sup>71</sup> in which the Seventh Circuit plainly stated: “In the event of a conflict between the handbook and plan, the former may trump—clearly so, when it is the employee relying on the handbook, for it is hardly realistic to expect him to read further.”<sup>72</sup>

In *Hansen v. Continental Insurance Co.*,<sup>73</sup> the Fifth Circuit held that if a conflict exists between an ambiguous provision in an SPD, and unambiguous language in a plan, “the ambiguity in the summary plan description must be resolved in favor of the employee and made binding on the drafter.”<sup>74</sup> The court stated that the “burden of uncertainty created by careless or inaccurate drafting” must be borne by the drafter of the plan, who is better able to bear the burden than the employee who is “ill equipped to bear the financial hardship that might result from a misleading or confusing document.”<sup>75</sup> The court emphasized: “Accuracy is not a lot to ask. And it is especially not a lot to ask in return for the protection afforded by ERISA’s preemption of state law causes of action—causes of action which threaten considerably greater liability than that allowed by ERISA.”<sup>76</sup>

If a participant relies on an SPD, knowing that it is inaccurate,<sup>77</sup> most

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*Assocs., Inc.*, 978 F.2d 978, 984 (7th Cir. 1992).

The SPD is not required to cover every contingency: “The description, instead, should provide information about the general circumstances in which benefits could be lost . . . . It need not discuss every imaginable situation in which such events or actions might occur, but it must be specific enough to enable the ordinary employee to sense when there is a danger that benefits could be lost or diminished.” *Stahl v. Tony’s Bldg. Materials, Inc.*, 875 F.2d 1404, 1408 (9th Cir. 1989).

69. 13 F.3d 138 (4th Cir. 1993).

70. *Id.* at 140.

71. 905 F.2d 1055, 1060 (7th Cir. 1990).

72. *Id.*

73. 940 F.2d 971 (5th Cir. 1991).

74. *Id.* at 982.

75. *Id.* The Court noted that if the rule favored the plan over the SPD, then “before a participant in the plan could make any use of the summary, she would have to compare the summary to the policy to make sure that the summary was unambiguous, accurate, and not in conflict with the policy. Of course, if a participant has to read and understand the policy in order to make use of the summary, then the summary is of no use at all.” *Id.* at 981-82. See also *Maxa v. John Alden Life Ins. Co.*, 972 F.2d 980, 984-85 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1048 (1993).

76. *Hansen*, 940 F.2d at 982.

77. *Flacche v. Sun Life Assurance Co. of Can.*, 958 F.2d 730 (6th Cir. 1992) is a case in which the participant would seem to have known the SPP was inaccurate. Before retirement Flacche was advised that he would receive benefits of \$2,861 per month. Instead, after getting a bonus of \$471, he

courts refuse to apply estoppel principles.<sup>78</sup> In *Branch v. G. Bernd Co.*,<sup>79</sup> the Eleventh Circuit held that a participant must show reliance in order to recover based on an SPD that conflicts with the plan document. The court noted that “[t]he First and Third Circuits have expressly held that a beneficiary who seeks to prevent an insurer from enforcing terms in its plan that are inconsistent with those of the plan summary must show reliance on the summary.”<sup>80</sup> Although the Eleventh Circuit had not yet expressly held that a participant must prove reliance on the misleading SPD to recover, in a prior decision the court had stressed the importance of reliance in cases interpreting conflicting provisions.<sup>81</sup> The court noted that “when a beneficiary fails to read or rely on the summary, whether it is accurate or not, the beneficiary also prevents full appraisal of the rights under the plan. Beneficiaries must do their part if Congress’s objective is

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received \$4,846. Surely Flacche should have wondered about the differential of nearly \$2,000. After making overpayments of \$30,000, the plan reduced Flacche’s benefits to correct the error. Flacche sued, claiming that he relied on the higher amount when deciding whether to retire. The court held that “[t]he reduction in benefits about which the Flacches complain was undertaken to correct an ongoing violation of the plan (overpayment of benefits to Mr. Flacche), not to violate the plan.” *Id.* at 736.

78. The First, Third, Fourth, Eighth, and Eleventh Circuits require reliance. *Bachelor v. Communications Satellite Corp.*, 837 F.2d 519, 522-23 (1st Cir. 1988); *Govoni v. Bricklayers Int’l Union Local No. 5 Pension Fund*, 732 F.2d 250, 252 (1st Cir. 1984); *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310, 1319 n.8 (3d Cir.), *cert. denied*, 111 S. Ct. 2856 (1991); *Aiken v. Policy Management Sys. Corp.*, 13 F.3d 138 (4th Cir. 1993) (holding that plaintiff must show reliance or prejudice); *Fuller v. FMC Corp.*, 4 F.3d 255, 261-62 (4th Cir.), *cert. denied*, 114 S. Ct. 1062 (1994); *Pierce v. Security Trust Life Ins. Co.*, 979 F.2d 23, 30 (4th Cir. 1992); *Maxa*, 972 F.2d at 984; *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1520 (8th Cir. 1988), *cert. denied*, 489 U.S. 1051 (1989); *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1579 (11th Cir. 1992). The Eighth Circuit has defined reliance: “Evidence of detrimental reliance must show that the plaintiff took action, resulting in some detriment, that [he] would not have taken had [he] known [that the terms of the plans were otherwise] . . . or that he failed, to his detriment, to take action that he would have taken had he known that the terms of the plan were otherwise.” *Maxa*, 972 F.2d at 984 (quoting *Monson v. Century Mfg. Co.*, 739 F.2d 1293, 1302 (8th Cir. 1984)).

The Second Circuit had considered but has not explicitly required reliance. *See Heidgerd v. Olin Corp.*, 906 F.2d 903, 907-08 (2d Cir. 1990).

The Sixth Circuit does not require reliance. *See Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134 (6th Cir. 1988) (dictum).

The Seventh Circuit has interpreted ERISA’s SPD requirement to allow “the participant to rely on the summary plan document, and if he does the plan is estopped to deny coverage.” *Senkier v. Hartford Life & Accident Ins. Co.*, 948 F.2d 1050, 1051 (7th Cir. 1991). *See also Mason & Dixon Lines, Inc. v. Glover*, 975 F.2d 1298, 1305 (7th Cir. 1992).

79. 955 F.2d 1574 (11th Cir. 1992).

80. *Id.* at 1578.

81. *See McKnight v. Southern Life & Health Ins. Co.*, 758 F.2d 1566, 1571 (11th Cir. 1985) (holding that the participant “was justified in relying on the summary booklet to determine his pension rights”).

to be met."<sup>82</sup> The court held that the beneficiary must prove reliance on the SPD before the employer will be estopped from enforcing the terms of a plan that conflicts with the SPD.<sup>83</sup> In this case, the beneficiary did not meet his burden of proof: he was completely apathetic to the terms of the plan and no evidence was offered to prove that the beneficiary or the administrator of his estate even saw the SPD.

As a precaution against inadvertent conflicts between the plan and SPD, plans often attempt to avoid the binding effect of the SPD by including a disclaimer. Disclaimers typically state that in the event of a conflict between the plan and SPD, the plan will control.<sup>84</sup> Courts have uniformly held that such disclaimers are ineffective.<sup>85</sup> In *Hansen*, the Fifth Circuit held that "[t]o give effect to . . . a disclaimer would wholly undermine the rule that statements in the summary plan description are binding. If the insurer could escape the binding effect of the summary simply by adding a disclaimer . . . the insurer could escape the requirement of an accurate and comprehensive summary."<sup>86</sup>

In *Zittrouer v. Uarco Inc. Group Benefit Plan*,<sup>87</sup> the court vehemently criticized the use of a disclaimer to avoid the plan's disclosure requirements:

The fact that defendant's summary plan included the quoted disclaimers does not relieve the defendant of the statutory requirements of disclosure. To allow a plan to avoid statutory requirements of disclosure by including

82. *Branch*, 955 F.2d at 1579.

83. *Id.*

84. For example, a disclaimer might say:

[T]he purpose of this summary is to describe the Plan to you in nontechnical terms. It is intended to give you enough information to answer most of the questions you are likely to have. However, if we covered every detail of the Plan, it would no longer be a summary, but as technical as the full text itself; so if you have a specific question you should consult the Plan document.

*Anderson v. Alpha Portland Indus., Inc.*, 752 F.2d 1293, 1300 n.13 (8th Cir. 1985) (en banc), *cert. denied*, 471 U.S. 1102 (1985). Or, a disclaimer written in legalese might say:

This booklet is not a part of and does not modify or constitute any provisions of the plan described herein, nor does it alter or affect in any way the rights of any participant under the plan. The plan and all descriptions and outlines thereof are governed by the formal plan document. A copy of this plan is on file at the office of the company and may be inspected, upon request, during the normal business hours of any regular working day.

*Trombly v. Marshall*, 502 F. Supp. 29 (D.D.C. 1980). *Trombly* has been vacated by an unpublished order filed on June 12, 1980.

85. *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 982 (5th Cir. 1991); *Anderson v. Alpha Portland Indus., Inc.*, 752 F.2d 1293, 1299 n.13 (8th Cir. 1985) (en banc), *cert. denied*, 471 U.S. 1102 (1985). *Contra Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1224 (9th Cir. 1984).

86. 940 F.2d at 982.

87. 582 F. Supp. 1471 (N.D. Ga. 1984).

disclaimers of this sort would negate one of ERISA's major goals, protection of participants and beneficiaries. The court holds that disclaimers of this sort are invalid in light of ERISA's requirements of disclosure.<sup>88</sup>

The court emphatically stated that the defendant's failure to include a description of the circumstances that may result in loss of benefits "is at best gross negligence and at worst intentional deception through concealment or inaction."<sup>89</sup>

Recently, some courts have recognized that a cause of action exists against a plan for failure to furnish a sufficiently accurate and comprehensive SPD, as required by ERISA section 102(a)(1).<sup>90</sup> In *Brumm v. Bert Bell NFL Retirement Plan*,<sup>91</sup> the Eighth Circuit held that an SPD "must not mislead, misinform, or fail to inform participants and beneficiaries of the requirements of the full plan."<sup>92</sup> Perhaps more courts will follow the Eighth Circuit's lead.

### B. Interpretation of Ambiguous Plan Provisions

Benefit disputes also arise when a participant, after reading an ambiguous provision in the SPD, consults with his employer or the plan administrator for interpretation. After the participant relies to his detriment on the interpretation of the plan, he seeks to estop the plan from applying an inconsistent interpretation.

*Williams v. Bridgestone/Firestone, Inc.*<sup>93</sup> illustrates this problem. Williams was a participant in the Bridgestone/Firestone medical plan. In 1986, he injured his back in a motor vehicle accident and underwent back surgery.<sup>94</sup> Williams returned to work. In April 1988, however, his doctor advised him that he required further surgery. The surgery might leave him

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88. *Zittrouer*, 582 F. Supp. at 1475.

89. *Id.*

90. 29 U.S.C. § 1022(a)(1) (1988). See *Long v. Flying Tiger Line, Inc., Fixed Pension Plan for Pilots*, 994 F.2d 692, 695 (9th Cir. 1993) (dicta) (stating that "any claim relating to the construction of a pension plan can be transformed into a claim that a summary plan description was insufficiently accurate or complete"); *Brumm v. Bert Bell NFL Retirement Plan*, 995 F.2d 1433 (8th Cir. 1993).

91. 995 F.2d 1433 (8th Cir. 1993).

92. *Id.* at 1439. 29 C.F.R. § 2520.102-2(b)(1991) provides: "The format of the summary plan description must not have the effect of misleading, misinforming or failing to inform participants and beneficiaries." See *Maxa v. John Alden Life Ins. Co.*, 972 F.2d 980, 984 (8th Cir. 1992), cert. denied, 113 S. Ct. 1048 (1993); *Stahl v. Tony's Bldg. Materials, Inc.*, 875 F.2d 1404, 1406-09 (9th Cir. 1989); *Genter v. Acme Scale & Supply Co.*, 776 F.2d 1180, 1185 (3d Cir. 1985).

93. 954 F.2d 1070 (5th Cir. 1992).

94. *Id.* at 1071.

disabled.<sup>95</sup>

The surgery time was flexible: it could have been performed any time between April and August. Williams discussed the scheduling of his surgery with his supervisor. His supervisor encouraged him "to schedule the surgery on April 12, 1988, as this would be during a slack time of business for the . . . store . . . and it was therefore the best time" from his employer's perspective.<sup>96</sup>

At the time of the surgery, Williams had accumulated almost five years of service with Bridgestone/Firestone and had accumulated three weeks of vacation.<sup>97</sup> This was crucial to Williams as the plan provided that an employee with less than five years of service who became totally disabled would continue to receive medical benefits for only two years after the date of disability. If the employee had accumulated five years of service before becoming disabled, he would receive medical benefits until his sixty-fifth birthday.<sup>98</sup> Because Williams was just two weeks shy of five years of service and because he knew the surgery might render him disabled, he sought additional information on the plan's policy of allowing vacation time to be added to actual service to determine total years of service for medical coverage.<sup>99</sup> His supervisor told him that "due to his earned and accrued vacation time, [he] would be considered to have more than five (5) years of employment service time with Bridgestone/Firestone as of the surgery date of April 12, 1988."<sup>100</sup> Williams relied on this assurance when scheduling his surgery.<sup>101</sup> The surgery rendered Williams disabled and his medical benefits were extended for two years instead of until age sixty-five as Williams had anticipated. Williams sued.

The Fifth Circuit reversed the district court's order granting Bridgestone/Firestone's motion for summary judgment and dismissing Williams' claim. The court recognized Williams' claim for promissory estoppel and stated that if Bridgestone/Firestone's policy was to calculate years of service by including unused, accrued vacation time, then Williams was discriminated against in violation of the terms of the plan. The Fifth Circuit remanded the case because a genuine issue of material fact existed

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95. *Id.*

96. *Id.* at 1072.

97. *Id.*

98. *Williams*, 954 F.2d at 1072.

99. *Id.*

100. *Id.*

101. *Id.*

as to Bridgestone/Firestone's policy of calculating years of service.<sup>102</sup>

Courts are careful to distinguish interpretations of ambiguous plan provisions from oral modifications of unambiguous provisions.<sup>103</sup> In *Kane v. Aetna Life Insurance Co.*,<sup>104</sup> the Eleventh Circuit examined a plan provision that specified when dependents became eligible for medical benefits under the plan. The plan language was unclear as to when coverage would begin for an infant who was hospitalized at birth and then adopted by the plan participant. A plan representative advised Mrs. Kane that the infant would be covered under the plan when formal legal adoption proceedings commenced.<sup>105</sup> Relying on this interpretation, the parents adopted the infant and submitted claims for medical services rendered after adoption. The insurer denied the claims, stating that medical claims relating to continuous hospitalization are not covered if the hospitalization began before the effective date of coverage.<sup>106</sup> Kane sued.

The Eleventh Circuit held that the representations made by the insurer to Mrs. Kane were plan interpretations, not modifications.<sup>107</sup> The court held that under federal common law, the insurer was estopped from interpreting the plan provision contrary to its earlier oral interpretation made to Mrs. Kane.<sup>108</sup>

In *Alday v. Container Corp. of America*, the Eleventh Circuit summarized its decision in *Kane*: "[A] federal common law claim of equitable estoppel may be applied where (a) the provisions of the plan at issue are ambiguous such that reasonable persons could disagree as to their meaning or effect, and (b) representations are made to the employee involving an

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102. Judge Duhé dissented, claiming that the phrase "5 or more years of service" was not ambiguous. *Id.* at 1074 (Duhé, J., dissenting). He stated:

In my view, the correct result in this case is terribly inequitable. Faced with these difficult facts, the majority has avoided our precedent [in *Rodrique v. Western & S. Life Ins. Co.*, 948 F.2d 969 (5th Cir. 1991)] and hidden its holding that the phrase "5 years is ambiguous."

Unlike the deconstructionists at the forefront of modern literary [and legal] criticism, the courts [should] still recognize the possibility of an unambiguous text.

*Id.* at 1075 (quoting *Ideal Mut. Ins. Co. v. Last Days Evangelical Ass'n*, 783 F.2d 1234, 1238 (5th Cir. 1986)).

103. *Kane v. Aetna Life Ins. Co.*, 893 F.2d 1283 (11th Cir.), *cert. denied*, 498 U.S. 890 (1990); *Russo v. Health, Welfare & Pension Fund, Local 705, Int'l Bhd. of Teamsters*, 984 F.2d 762 (7th Cir. 1993). See *infra* subpart II(C) for a more complete discussion of oral modifications.

104. 893 F.2d 1283 (11th Cir.), *cert. denied*, 498 U.S. 890 (1990).

105. *Id.* at 1284.

106. *Id.* at 1285.

107. *Id.* at 1286.

108. *Id.* See also *Simmons v. Southern Bell Tel. & Tel. Co.*, 940 F.2d 614 (11th Cir. 1991).

oral interpretation of the plan."<sup>109</sup> Both conditions must be met in order for plaintiffs to prove an equitable estoppel claim based on ambiguous plan provisions.<sup>110</sup>

*Smith v. Hartford Insurance Group* is the Third Circuit's most recent decision on the interpretation of ambiguous language.<sup>111</sup> Smith required continuous skilled nursing care. When her plan converted to a self-insured plan, she enrolled in the new plan after receiving assurances that the coverage for nursing home care under the new plan was identical to the old plan.<sup>112</sup> The new plan refused to provide coverage and the Smiths sued, alleging that the employer was estopped to deny its representations.<sup>113</sup>

The Third Circuit concluded that ERISA section 502(a)(3)<sup>114</sup> "permits an ERISA beneficiary to recover benefits under an equitable estoppel theory, upon establishing a material representation, reasonable and detrimental reliance upon the representation, and extraordinary circumstances."<sup>115</sup>

The court held that the plan language was ambiguous and estopped the plan from denying its representation that coverage of skilled nursing care was identical under the two plans. The court emphasized the ambiguous nature of the contract terms: "[t]hus, our recognition of the Smiths' estoppel claim is not an effort to 'amend' a plan outside the scope . . . of ERISA."<sup>116</sup> The court noted that "[p]rompt and accurate disclosure" of the plan terms would have prevented the dispute:<sup>117</sup>

Were we to construe these ambiguous terms against the Smiths on summary judgment absent such disclosure, we would be holding an insured to constructive knowledge of an insurer's unfavorable post-hoc interpretation of the insured's rights. Such a result would frustrate accepted principles of

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109. 906 F.2d 660, 666 (11th Cir. 1990) (citing *Kane v. Aetna Life Ins. Co.*, 893 F.2d 1283, 1286-87, *cert. denied*, 498 U.S. 890 (1990)), *cert. denied*, 498 U.S. 1026 (1991).

110. *Simmons v. Southern Bell Tel. & Tel. Co.*, 940 F.2d 614, 618 (11th Cir. 1991).

111. 6 F.3d 131 (3rd Cir. 1993).

112. *Id.* at 134. The "old" plan covered skilled nursing care up to a maximum lifetime benefit of \$1 million. The new plan only paid for 180 days of skilled nursing care. *Id.*

113. The Smiths also alleged that the oral and written representations constituted an employee welfare benefit plan which would be enforceable under ERISA. The court held that the oral and written representations did not constitute an informal plan. *Id.* at 136. See *infra* notes 190-92 and accompanying text discussing *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982).

114. 29 U.S.C. § 1132(a)(3) (1988).

115. *Smith*, 6 F.3d at 137 (citing *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310, 1319 (3d Cir. 1991)).

116. 6 F.3d at 140.

117. *Id.* at 141.

insurance contract interpretation<sup>118</sup> and the central goals of ERISA.<sup>119</sup>

The Ninth Circuit has frequently noted, in dicta, that federal common law may estop a plan from denying a prior interpretation of ambiguous plan language.<sup>120</sup> However, participants frequently have not fared well in the Ninth Circuit.

In *Greany v. Western Farm Bureau Life Insurance Co.*, the Ninth Circuit expressly held that a plan "can never be equitably estopped where payment would conflict with the written agreement."<sup>121</sup> Estoppel only applies to ambiguous provisions, not oral modifications. The court stated that equitable estoppel cannot be applied so as to enlarge a participant's rights beyond the unambiguous language of the plan.<sup>122</sup> Because the plan was unambiguous, the court refused to apply equitable estoppel.<sup>123</sup>

This result appears particularly harsh in light of the facts. In anticipation of resigning, Patrick Greany, an insurance salesman, investigated available insurance options. Through his employer, he applied for coverage with Western States Life Insurance Company. Coverage was to commence on September 1, 1983.<sup>124</sup> Mr. Greany also requested a quote from his current insurer, Lincoln National. The form Lincoln National sent to Greany indicated that his group coverage had terminated on August 1, 1993. Later, an "error" was noticed, and Lincoln National advised Greany that his coverage would lapse on August 31. On August 26, Mrs. Greany delivered a premature baby with severe medical problems. On August 29, Greany notified Lincoln National of the birth of his daughter and a representative confirmed coverage through August 31.<sup>125</sup>

About a week later, Lincoln National realized that the plan had been amended, effective April 1, 1982, to terminate coverage on the last day of employment, rather than giving a thirty-one day extension of coverage.<sup>126</sup>

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118. The court cited *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534 (9th Cir.), *cert. denied*, 498 U.S. 1013 (1990), in which the court adopted the doctrine of *contra proferentum* in ERISA cases because insurance policies "are almost always drafted by specialists employed by the insurer." *Id.* at 540. See *infra* note 148 and accompanying text.

119. *Smith*, 6 F.3d at 141.

120. See, e.g., *Davidian v. Southern Cal. Meat Cutters Union & Food Employees Benefit Fund*, 859 F.2d 134, 136 (9th Cir. 1988) (dictum); *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091, 1096 (9th Cir. 1985) (dictum).

121. *Greany*, 973 F.2d at 822. See also *Davidian*, 859 F.2d at 136.

122. *Greany*, 973 F.2d at 822.

123. *Id.*

124. *Id.* at 814.

125. *Id.* at 815.

126. *Id.*

Lincoln National advised Greany that his coverage had terminated on August 1. Clearly, the plan was unambiguous: the insurer erred in conveying the correct information to the participant and apparently a copy of the plan amendment was not provided to Greany.<sup>127</sup> Yet, the Court held that the federal common law of estoppel did not apply because the plan was unambiguous: "A mistake in referring to an outdated form to determine eligibility does not rise to the level of an interpretation of the plan's provisions justifying application of the equitable estoppel doctrine."<sup>128</sup> The court did not discuss cases such as *Berlin*<sup>129</sup> or *Eddy*,<sup>130</sup> to be discussed later in subpart III(B), which indicate that a plan administrator has a duty to provide complete and accurate information to plan participants. Perhaps this argument would have been successful in *Greany*.

More recently, a participant's hopes for recovery on an equitable estoppel theory in the Ninth Circuit have been dashed by the court's decision in *Watkins v. Westinghouse Hanford Co.*<sup>131</sup> The Ninth Circuit reconsidered the availability of equitable estoppel in ERISA cases, in view of the Supreme Court's decision in *Mertens v. Hewitt Associates*.<sup>132</sup> The issue in *Mertens* was whether ERISA section 502(a)(3) "authorizes suits for money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty."<sup>133</sup> The Supreme Court held that the term "equitable relief" can also refer to those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages).<sup>134</sup> The Supreme Court did not specifically limit "equitable relief" to injunctions, mandamus, and restitution, but rather held that money damages are legal, not equitable relief.<sup>135</sup> Yet, the Ninth Circuit interpreted *Mertens* as holding "that the term 'other equitable relief' encompasses *only* the traditional forms of equitable relief, i.e. an injunction, mandamus, or restitution."<sup>136</sup> The Ninth Circuit held that after

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127. *Id.* at 814.

128. *Id.* at 822.

129. *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988).

130. *Eddy v. Colonial Life Ins. Co. of America*, 919 F.2d 747 (D.C. Cir. 1990).

131. 12 F.3d 1517 (9th Cir. 1993). The Ninth Circuit had previously stated the doctrine of equitable estoppel is applicable in pension cases. *Dockray v. Phelps Dodge*, 801 F.2d 1149, 1155 (9th Cir. 1986); *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091, 1096 (9th Cir. 1985).

132. 113 S. Ct. 2063 (1993).

133. *Id.* at 2066.

134. *Id.* at 2069.

135. *Id.*

136. 12 F.3d at 1528.

*Mertens*, an equitable estoppel claim will survive only if it falls within one of ERISA's six enumerated civil enforcement provisions.<sup>137</sup> The court concluded that the participants' claim for equitable estoppel did not fall within any of the six civil enforcement provisions and denied their claim for equitable estoppel.

This decision presents a serious obstacle to plan participants. Participants who sue for equitable estoppel cannot easily fall under any of the six enumerated provisions. Section 502(a)(1)(B) authorizes a participant to sue "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan[.]"<sup>138</sup> Of course, if a participant is suing to enforce an oral modification, he has no explicit rights under the terms of the plan since he is seeking to enforce an interpretation of the plan that is at odds with the terms of the plan. If, however, he is seeking to enforce an oral interpretation of an ambiguous plan provision, the suit may be authorized under section 502(a)(1)(B). Section 502(a)(2)<sup>139</sup> allows a participant to sue for breach of fiduciary duty under section 409, a possible alternate theory to estoppel, but as previously noted, many courts deny recovery of extra-contractual damages under this section, and the Supreme Court has not yet ruled on the availability of such damages under this section. The participant could sue under section 502(a)(3)<sup>140</sup> "to obtain other appropriate equitable relief" to redress violations of terms of the plan. However, the participant faces two obstacles: the terms of the plan do not authorize recovery if the participant is suing to enforce an oral modification and monetary damages are unavailable. Section 502(a)(4)<sup>141</sup> is not helpful as it allows a participant to sue only if the plan has not provided her with a statement of accrued benefits, and sections 502(a)(5)<sup>142</sup> and (a)(6)<sup>143</sup> only authorize suits brought by the Secretary of Labor. Section 502(a)(1)(A)<sup>144</sup> only authorizes suits for the \$100 a day penalty provided under section 502(c).

A participant could sue under section 502(a)(1)(B) to enforce the terms of the plan by alleging that because the plan is ambiguous, the court

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137. *Id.*

138. 29 U.S.C. § 1132(a)(1)(B) (1988).

139. 29 U.S.C. § 1132(a)(2) (1988).

140. 29 U.S.C. § 1132(a)(3) (1988).

141. 29 U.S.C. § 1132(a)(4) (1988).

142. 29 U.S.C. § 1132(a)(5) (1988).

143. 29 U.S.C. § 1132(a)(6) (1988).

144. 29 U.S.C. § 1132(a)(1)(A) (1988).

should, under the principles of federal common law, construe the ambiguity in the participant's favor. If confronted with ambiguous plan language, most courts have applied the insurance rule of *contra proferentum* or similar principles of contract interpretation.<sup>145</sup> Under this rule, ambiguities are resolved in favor of the insured.<sup>146</sup> The rule is based on the contract construction principle "that when one party is responsible for the drafting of an instrument, . . . any ambiguity will be resolved against the drafter."<sup>147</sup> The comparison of ERISA plans to insurance plans is appropriate:

Insurance policies are almost always drafted by specialists employed by the insurer. In light of the drafters' expertise and experience, the insurer should be expected to set forth any limitations on its liability clearly enough for a common layperson to understand; if it fails to do this, it should not be allowed to take advantage of the very ambiguities that it could have prevented with greater diligence . . . . [A]n insurer's practice of forcing the insured to guess and hope regarding the scope of coverage requires that any doubts be resolved in favor of the party who has been placed in such a predicament.<sup>148</sup>

In *Kunin v. Benefit Trust Life Insurance Co.*,<sup>149</sup> the Ninth Circuit considered whether *contra proferentum* should be adopted under the federal common law of ERISA. The court declined to rule directly on the issue

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145. *Pizzuti v. Polaroid Corp.*, 985 F.2d 13, 14 (1st Cir. 1993) (applying "'common-sense canons of contract interpretation'"); *Masella v. Blue Cross & Blue Shield*, 936 F.2d 98, 107 (2d Cir. 1991); *Hesley v. Belden & Blake Corp.*, 2 F.3d 1249, 1258 (3d Cir. 1993); *Glocker v. W.R. Grace & Co.*, 974 F.2d 540, 544 (4th Cir. 1992); *Ramsey v. Colonial Life Ins. Co.*, 12 F.3d 472 (5th Cir. 1994); *McNeilly v. Bankers United Life Assurance Co.*, 999 F.2d 1199, 1201 (7th Cir. 1993); *Hickey v. A.E. Staley Mfg.*, 995 F.2d 1385, 1389 (7th Cir. 1993); *Phillips v. Lincoln Nat'l Life Ins. Co.*, 978 F.2d 302, 311-12 (7th Cir. 1992); *Delk v. Durham Life Ins. Co.*, 959 F.2d 104, 105-06 (8th Cir. 1992); *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 540 (9th Cir.), *cert. denied*, 498 U.S. 1013 (1990); *Blair v. Metropolitan Life Ins. Co.*, 974 F.2d 1219, 1222 (10th Cir. 1992) (resolving ambiguity in the participant's favor). *Contra Rodriguez-Abreu v. Chase Manhattan Bank, N.A.*, 986 F.2d 580, 586 (1st Cir. 1993) (noting that "we generally do not construe ambiguous terms against the drafter"); *Maxa v. John Alden Life Ins. Co.*, 972 F.2d 980 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1048 (1993) (stating that *contra insurer* rule is preempted by ERISA); *Allen v. Adage, Co.*, 967 F.2d 695, 701 (1st Cir. 1991); *Jung v. FMC Corp.*, 755 F.2d 708, 713 (9th Cir. 1985) (declining to apply *contra proferentum* in case involving language of a collective bargaining agreement).

146. *Kunin*, 910 F.2d at 539.

147. *Id.*

148. *Id.* at 540. See also *Phillips v. Lincoln Nat'l Life Ins. Co.*, 978 F.2d 302, 314 (7th Cir. 1992) ("Insurers should not be permitted to exploit policy term ambiguities, which they could have avoided, to deny coverage to an unsuspecting insured.").

149. *Kunin*, 910 F.2d at 539-40.

of federal common law,<sup>150</sup> but held that the rule of *contra proferentum* applied.<sup>151</sup> The court noted that “[i]ndeed, it would take a certain degree of arrogance to controvert an opinion held with such unanimity in [all of] the various states and to adopt a contrary view as the federal rule.”<sup>152</sup> Likewise, in *Heasley v. Belden & Blake Corp.*,<sup>153</sup> the Third Circuit stated:

Adoption of *contra proferentum* as a federal common law rule in ERISA insurance cases makes sense because “to do otherwise ‘would require us to . . . [give] less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted,’ a result that would be at odds with the congressional purposes” of ERISA.<sup>154</sup>

### C. *Disappearing Promises*:<sup>155</sup> *Oral Modifications of Unambiguous Plan Provisions*

#### 1. *Interpretation vs. Modification*

Courts have distinguished cases involving interpretations of ambiguous plan documents from oral amendments or modifications of unambiguous provisions. Although courts will consider extrinsic evidence when interpreting an ambiguous plan provision, courts will not allow the modification of unambiguous provisions through consideration of extrinsic evidence. Typically, courts have held that because ERISA requires a plan to be put in writing,<sup>156</sup> equitable estoppel is not available to plaintiffs when oral amendments to or modifications of employee plans governed by ERISA are involved.<sup>157</sup> As a general rule, courts have held that “estoppel

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150. The court noted the difficulty with ruling on this issue. *Id.* at 539-40. Some courts have held that the rule of *contra proferentum* is preempted by ERISA. *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489, 494 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989).

151. 910 F.2d at 540.

152. *Id.*

153. 2 F.3d 1249 (3d Cir. 1993).

154. *Id.* at 1257 (quoting *Masella*, 936 F.2d at 107 and *Firestone*, 489 U.S. at 113-14).

155. “When benefits are thus reduced or snatched away, the promises those employees thought their employers had made to them disappear.” *Smith v. Hartford Ins. Group*, 6 F.3d 146 (3d Cir. 1993) (Hutchinson, J., dissenting).

156. 29 U.S.C. § 1102(a)(1) (1988).

157. *Kane v. Aetna Life Ins. Co.*, 893 F.2d 1283, 1285 (11th Cir.) (dictum), *cert. denied*, 498 U.S. 890 (1990). See also *Leiding v. FDIC*, 940 F.2d 1538 (10th Cir. Aug. 12, 1991), No. 90-5078, 1991 WL 154047 at \*2 (unpublished opinion); *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986). In *National Cos. Health Benefit Plan v. St. Joseph’s Hosp., Inc.*, 929 F.2d 1558 (11th Cir. 1991), the Eleventh Circuit explained:

This rule safeguards ERISA’s underlying policy of protecting the interests of employees and their beneficiaries in employee benefit plans; allowing informal written or oral amendments to a plan would make it impossible for employees to rely on these plans because their benefits

may not be invoked to enlarge or extend coverage specified in a contract."<sup>158</sup>

This distinction was made clear in *Kane v. Aetna Life Insurance Co.*<sup>159</sup> In *Kane*, the Eleventh Circuit held that "the federal common law of equitable estoppel is not available to plaintiffs in cases involving oral amendments to or modifications of employee benefit plans governed by ERISA because ERISA specifically addresses these issues."<sup>160</sup> However, because the court found that the representations made were interpretations, not modifications, the court held that the plan was estopped from denying its prior representation. In *Novak v. Irwin Yacht & Marine Corp.*,<sup>161</sup> the Eleventh Circuit again emphasized the difference between modifications and interpretation. The court explained: "For a representation to be an interpretation of a plan, the relevant provisions of the plan must be ambiguous, that is to say, 'reasonable persons could disagree as to [the provisions'] meaning and effect."<sup>162</sup> As discussed in the previous section, if the plan is ambiguous, a court will evaluate extrinsic evidence to "interpret" rather than "modify" the plan. Interpretations of ambiguous plan provisions do not violate ERISA's writing requirement<sup>163</sup> or the rule that "estoppel may not be used to create contractual liability where no contract originally existed."<sup>164</sup>

## 2. Writing Requirement

One of the most common rationales courts employ when denying oral modifications of plans is the ERISA requirement that plans be in writing. ERISA section 402(a)(1)<sup>165</sup> requires employee benefit plans to be "established and maintained pursuant to a written instrument." ERISA section 402(b)(3)<sup>166</sup> further requires the plan document to describe the formal procedures by which the plan can be amended. Because ERISA requires

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could be radically affected by funds dispersed to others pursuant to these informal agreements. *Id.* at 1571.

158. *Kane*, 893 F.2d at 1285 n.3.

159. *Id.* See *Russo v. Health, Welfare, & Pension Fund, Local 705*, 984 F.2d 762, 767-68 (7th Cir. 1993) (discussing interpretation/modification distinction); *Thomason v. Aetna Life Ins. Co.*, 9 F.3d 645, 650 (7th Cir. 1993) (same).

160. *Kane*, 893 F.2d at 1285. See *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986).

161. 986 F.2d 468 (11th Cir. 1993).

162. *Id.* at 472 (quoting *Kane*, 893 F.2d at 1285).

163. See generally *Kane*, 893 F.2d at 1285-86.

164. *Id.* at 1285 n.3.

165. 29 U.S.C. § 1102(a)(1) (1988).

166. 29 U.S.C. § 1102(b)(3) (1988).

plans to be in writing, courts have routinely held that oral amendment or modification of ERISA plans is prohibited.<sup>167</sup> In *Coleman v. Nationwide Life Insurance Co.*, the court reasoned that if oral modifications of unambiguous plans were allowed, it would impermissibly "override the explicit terms of an established ERISA benefit plan."<sup>168</sup> The court rejected the participant's claim that the insurer's statements interpreted, not modified, the plan.<sup>169</sup> The Court refused to apply estoppel principles to a written plan, noting that courts normally should be reluctant to deviate from written contractual terms.<sup>170</sup> The court held that the adoption of

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167. *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988) (holding that "an ERISA welfare plan is not subject to amendment as a result of informal communications between the employer and plan beneficiaries"); *Chambless v. Masters Pension Plan*, 772 F.2d 1032, 1041 (2d Cir. 1985), cert. denied, 475 U.S. 1012 (1986); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1163 (3d Cir. 1990); *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116, 120 (4th Cir. 1980) (stating that informal or unauthorized modification of pension plans is impermissible under ERISA); *Audio Fidelity Corp. v. PBGC*, 624 F.2d 513 (4th Cir. 1980) (finding oral testimony inadmissible to vary the unambiguous terms of an ERISA pension plan); *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989) (stating that "ERISA mandates that [a] plan itself and any changes made to it [are] to be in writing"); *Gordon v. Barnes Pumps, Inc.*, 999 F.2d 133, 137 (6th Cir. 1993) (finding written plan terms may not be modified or superseded by oral assurances or other extrinsic evidence); *Musto v. American Gen. Corp.*, 861 F.2d 897, 910 (6th Cir. 1988), cert. denied, 490 U.S. 1020 (1989) (stating that "a written employee benefit plan may not be modified or superseded by oral undertakings on the part of the employer"); *Boyer v. Douglas Components Corp.*, 986 F.2d 999, 1005 (6th Cir. 1983) (holding that "[t]he written terms of the plan documents control and cannot be modified or superseded by the employer's oral undertakings"); *Russo v. Health, Welfare & Pension Fund, Local 705*, 984 F.2d 762, 767 (7th Cir. 1993); *Vershaw v. Northwestern Nat'l Life Ins. Co.*, 979 F.2d 557, 559 (7th Cir. 1992) (finding that "the policies underlying ERISA require a preference for written over oral contract terms"); *Lister v. Stark*, 890 F.2d 941 (7th Cir. 1989), cert. denied, 498 U.S. 1011 (1990); *Reiherzer v. Shannon*, 581 F.2d 1266, 1267 n.1 (7th Cir. 1978); *Alexander v. Anheuser-Busch Cos.*, 990 F.2d 536, 539 (10th Cir. 1993) (holding that the language of the plan controls over oral and written misrepresentations); *Miller v. Coastal Corp.*, 978 F.2d 622, 624-25 (10th Cir. 1992) (holding that coverage of an ERISA plan may not be expanded by informal oral or written communications under the theory of estoppel), cert. denied, 113 S. Ct. 1586 (1993); *Straub v. Western Union Tel. Co.*, 851 F.2d 1262, 1265 (10th Cir. 1988) (holding that "no liability exists under ERISA for purported oral modifications of the terms of an employee benefit plan"); *Johnson v. Central States, Southeast and Southwest Areas Pension Funds*, 513 F.2d 1173, 1174-75 (10th Cir. 1975) (stating that benefits may not be enforced according to informal agreements in a booklet and a letter that are inconsistent with the terms of a written plan); *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986) (holding that "ERISA precludes oral modifications of employee benefit plans").

168. 969 F.2d 54, 59 (4th Cir. 1992), cert. denied, 113 S. Ct. 1051 (1993). See also *Singer v. Black & Decker Corp.*, 964 F.2d 1449, 1453-54 (4th Cir. 1992) (Wilkinson, J., concurring). *Accord* *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1165 n.10 (3d Cir. 1990); *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1296-97 (5th Cir. 1989); *Musto*, 861 F.2d at 910; *Straub v. Western Union Tel. Co.*, 851 F.2d 1262, 1265-66 (10th Cir. 1988); *Nachwalter*, 805 F.2d at 959-61.

169. *Coleman*, 969 F.2d at 59.

170. *Id.* at 56.

estoppel principles:

would require this court to rewrite the contract of insurance. While a court should be hesitant to depart from the written terms of a contract under any circumstances, it is particularly inappropriate in a case involving ERISA, which places great emphasis upon adherence to the written provisions in an employee benefit plan.<sup>171</sup>

The court rejected a participant's claim that her insurer was estopped from denying her benefits because the insurer had misrepresented that she had coverage.<sup>172</sup> The court stated that if it were to accept the participant's claim, "the written plan would no longer be the benchmark in an action under ERISA."<sup>173</sup>

The court noted that "[f]ederal common law . . . does not grant federal courts *carte blanche* authority to 'use state common law to re-write a federal statute.'"<sup>174</sup> Not only does ERISA require plans to be "established and maintained pursuant to a written instrument,"<sup>175</sup> but the written instrument must describe the formal procedures by which the plan can be amended.<sup>176</sup>

Similarly, in *Musto v. American General Corp.*,<sup>177</sup> the Sixth Circuit noted:

It is not always easy to determine exactly what a benefit plan says even when the language of the plan has been reduced to writing. If the terms of these often complex plans could be made to depend upon evidence as to oral statements that may not have been worded very precisely in the first place, that may have been made many years earlier, and that cannot be proved except through the testimony of lay witnesses whose memories will seldom be infallible and who, being human, may have tended to hear what they wanted to hear, the degree of certainty that Congress sought to provide for would be utterly impossible to attain.<sup>178</sup>

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171. *Id.*

172. *Id.* at 57.

173. *Id.* at 56.

174. *Id.* at 58 (quoting *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985, 992 (4th Cir. 1990) (quoting *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986))).

175. 29 U.S.C. § 1102(a)(1) (1988).

176. *Id.* § 1102(b)(3).

In *Elmore v. Cone Mills Corp.*, 6 F.3d 1028, 1034 (4th Cir. 1993) (citing *Miller v. Coastal Corp.*, 978 F.2d 622, 624 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1586 (1993)), the court held that "only promised benefits adopted in accordance with the amendment procedures outlined in the formal plan documents will suffice to incorporate the promised benefits into the plan."

177. 861 F.2d 897 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989).

178. *Musto*, 861 F.2d at 910. *See also* *Hammond v. Fidelity & Guar. Life Ins. Co.*, 965 F.2d 428, 429 (7th Cir. 1992). In *Hammond*, the Seventh Circuit stated:

In *Singer v. Black & Decker Corp.*,<sup>179</sup> the Fourth Circuit held that “resort to federal common law generally is inappropriate when its application would conflict with the statutory provisions of ERISA, discourage employers from implementing plans governed by ERISA, or threaten to override the explicit terms of an established ERISA benefit plan.”<sup>180</sup> In his concurring opinion, Judge Wilkinson expressed reluctance to expand the terms of the plan through the adoption of federal common law: “Federal common law does not provide a backdoor through which these statutory requirements may be evaded, and attempts to import state common law principles such as equitable or promissory estoppel to alter and undermine written obligations have been consistently rebuffed by the courts.”<sup>181</sup>

In a recent case on estoppel, *Elmore v. Cone Mills Corp.*,<sup>182</sup> the Fourth Circuit continued to follow *Coleman* and *Singer*. Although this opinion has been vacated and the case will be reconsidered, it provides a useful analysis. The court stated its belief that the concerns expressed in *Coleman* and *Singer* “apply equally to written pre-plan promises made by an authorized company official regarding pension plans,”<sup>183</sup> and refused to apply estoppel to enforce pre-plan promises regarding benefits to be established under an ERISA plan.<sup>184</sup> However, the Fourth Circuit left the door open for possible adoption of an equitable remedy: “Perhaps under the proper fact pattern a federal common law fraud theory could be

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it is not always easy to determine what a benefit plan says even when the language of the plan has been reduced to writing. More often than not these instruments are long, complex and far from complete—and the federal judiciary is inevitably left with the burden of clearing any unanticipated semantic disputes.

*Id.*

179. 964 F.2d 1449 (4th Cir. 1992).

180. *Id.* at 1452.

181. *Id.* at 1453-54 (Wilkinson, J., concurring).

182. 6 F.3d 1028 (4th Cir. 1993), *opin. vacated, reh'g en banc granted*, No. 92-1362, 1993 U.S. App. LEXIS 33294 (4th Cir. Dec. 13, 1993).

183. *Id.* at 1037. The court stated:

If pre-plan statements concerning the proposed terms of a soon-to-be adopted plan were enforced then “the written plan would no longer be the benchmark in an action under ERISA,” employers would no longer know what their obligations were under their benefit plans, and employees would be harmed when the actuarial soundness of the employee benefit plans was destroyed by groups of employees claiming benefits for which no contributions were made.

*Id.* (citations omitted).

184. *Id.*

incorporated into ERISA's statutory scheme."<sup>185</sup>

Judge Murnaghan dissented.<sup>186</sup> He rejected, as "unwarranted," the "majority's emphasis on adherence to written plans."<sup>187</sup> Although ERISA expresses a preference for written plans, Judge Murnaghan noted that "ERISA does not insist on a written plan when the promise of bringing it about is still in gestation."<sup>188</sup>

Although ERISA requires that plans be in writing, courts have often held that a plan is not required to be written.<sup>189</sup> In *Donovan v. Dillingham*,<sup>190</sup> the Eleventh Circuit held that: "in determining whether a plan, fund or program (pursuant to a writing or not) is a reality, a court must determine whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits."<sup>191</sup> If so, the plan need not be in writing. A logical extension of *Dillingham* would be to allow oral modifications of ERISA plans if a reasonable person can ascertain the scope of the modification.<sup>192</sup> In *Elmore v. Cone Mills Corp.*,<sup>193</sup> the dissent relied on *Dillingham* and noted that "the written plan does not play such an exalted role in the statutory scheme that its mere existence and a fiduciary's adherence to its terms provide an excuse for permitting serious prior misrepresentations . . . ."<sup>194</sup>

### 3. Actuarial Soundness

A second reason courts generally refuse to allow modifications of unambiguous plan provisions is to protect the actuarial soundness of the

185. *Id.* at 1037 n.17 (citing *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 133-35 (3d Cir. 1993)).

186. 6 F.3d at 1040 (Murnaghan, J., dissenting).

187. *Id.* at 1045.

188. *Id.*

189. *Modzelewski v. Resolution Trust Corp.*, 14 F.3d 1374, (9th Cir. 1994) (unpublished opinion); *Smith v. Hartford Ins. Group*, 6 F.3d 131, 136 (3rd Cir. 1993); *Deibler v. UFCW Local 23*, 973 F.2d 206, 209 (3d Cir. 1992); *Williams v. Wright*, 927 F.2d 1540, 1543-49 (11th Cir. 1991); *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1504 (9th Cir. 1985). *See also Henglein v. Informal Plan for Plant Shutdown Benefits*, 974 F.2d 391, 399-400 (3d Cir. 1992).

190. 688 F.2d 1367 (11th Cir. 1982)(en banc).

191. *Dillingham*, 688 F.2d at 1373.

192. *See Elmore v. Cone Mills Corp.*, 6 F.3d 1028, 1035 (4th Cir. 1993), *opin. vacated, reh'g en banc granted*, No. 92-1362, 1993 U.S. App. LEXIS 33294 (4th Cir. Dec. 13, 1993), in which the court acknowledged that an informal plan may give rise to recovery of promised benefits, but held that the plan at issue was not an independent informal plan that met the requirements of *Dillingham*.

193. 6 F.3d 1028 (4th Cir. 1993).

194. *Id.* at 1045 (Murnaghan, J., dissenting).

plan.<sup>195</sup> In *Cleary v. Graphic Communications International Union Supplemental Retirement & Disability Fund*,<sup>196</sup> the First Circuit noted that “[c]ourts have frequently refused to apply estoppel principles to require payment of pension funds, usually referring to the basic policy of protecting the actuarial soundness of pension plans.”<sup>197</sup> The “actuarial soundness” argument is clearly subject to attack with respect to welfare plans because welfare plans are not even subject to funding standards under ERISA.<sup>198</sup> More recent cases have instead emphasized the “financial integrity” of the plan. For example, in *Pohl v. National Benefits Consultants, Inc.*,<sup>199</sup> the Seventh Circuit recognized that “[o]ne of ERISA’s purposes is to protect the financial integrity of pension and welfare plans by confining benefits to the terms of the plans as written.”<sup>200</sup> In *Coleman v. Nationwide Life Insurance Co.*,<sup>201</sup> the Fourth Circuit noted:

The financial integrity of a group health insurer could be quickly compromised if courts compelled the insurer to assume risks for which no premium was ever paid. Moreover, if courts allowed estoppel to be used to modify ERISA plans, plan assets could also be chewed up in costly, litigious disputes over what informal modifications may have been made to a written instrument.<sup>202</sup>

Yet, in *Aitken v. IP & GCU-Employee Retirement Fund*,<sup>203</sup> the Ninth Circuit ruled that the plan’s actuarial soundness was irrelevant. The court stated that because the dispute involved the payment of retirement benefits in accordance with the terms of the plan (and not punitive damages), concerns about jeopardizing the plan’s actuarial soundness were misplaced.

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195. See *Coleman*, 969 F.2d at 59. See also *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1300 (6th Cir.), *reh’g en banc denied*, Nos. 89-6405, 89-6406, 1991 U.S. App. LEXIS 26,627 (6th Cir. Nov. 5, 1991); *Black v. TIC Inv. Corp.*, 900 F.2d 112, 115 (7th Cir. 1990); *Phillips v. Kennedy*, 542 F.2d 52, 55 n.8 (8th Cir. 1976).

196. 841 F.2d 444 (1st Cir. 1988).

197. *Id.* at 447 (citing *Chambless v. Masters Pension Plan*, 772 F.2d 1032, 1041 (2d Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986)). See also *Kwatcher v. Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957, 963 (1st Cir. 1989); *Thurber v. Western Conference of Teamsters Pension Plan*, 542 F.2d 1106, 1109 (9th Cir. 1976); *Phillips*, 542 F.2d at 55 n.8.

198. See Kimberly A. Kralowec, Comment, *Estoppel Claims Against ERISA Employee Benefit Plans*, 25 U.C. DAVIS L. REV. 463, 532-34 (1992).

199. 956 F.2d 126 (7th Cir. 1992).

200. *Id.* at 128. See also *Hammond v. Fidelity & Guar. Life Ins. Co.*, 965 F.2d 428, 429 (7th Cir. 1992).

201. 969 F.2d 54 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1051 (1993).

202. *Id.* at 60.

203. 604 F.2d 1261 (9th Cir. 1979).

The court stated:

We perceive no substantial danger to the actuarial soundness of the defendant fund if they are required to pay retirement benefits to the plaintiff in accordance with the terms of the retirement plan agreement. . . . Plaintiff may end up receiving more in benefits from the Fund than the Fund has received as a result of his contributions, or he may receive less; this is the expected actuarial risk which the Pension Fund takes with all participants.<sup>204</sup>

#### 4. *The Exceptions*

A court's decision in a case involving an oral or written representation which conflicts with the unambiguous plan hinges on many subjective issues. First, the court must determine whether the plan indeed is unambiguous. As the dissent noted in *Williams v. Bridgestone/Firestone, Inc.*,<sup>205</sup> courts sometimes find that plan language is ambiguous in order to avoid the harsh result that would occur if the court found that the language was unambiguous.<sup>206</sup> A second subjective issue is whether the representation interprets or modifies the contract. In *Kane*,<sup>207</sup> the court emphasized the difference between interpretations and modifications, but again, this distinction is not always clear. The Seventh Circuit has commented on the difficulty in distinguishing between modifications and interpretations.<sup>208</sup> The third subjective question is whether the facts of the case are particularly inequitable.<sup>209</sup> Some courts have used federal common law to counteract the harsh effects of inequitable legal results.

Although most circuit courts of appeals have refused to apply estoppel principles when a plan is unambiguous,<sup>210</sup> some courts have carved out

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204. *Aitken*, 604 F.2d at 1268. The fund refused to pay benefits to Aitken, a participant in a multiemployer plan and the owner of a printing business. Aitken enrolled in the plan and remitted contributions on his behalf as an employee. The fund refused to pay Aitken pension benefits when they realized that he was a sole proprietor and, thus, ineligible to participate in the plan. *Id.* at 1263-64.

205. 954 F.2d 1070 (5th Cir. 1992).

206. *Id.* at 1074 (Duhé, J., dissenting).

207. *Kane v. Aetna Life Ins. Co.*, 893 F.2d 1283, 1285-86 (11th Cir.), *cert. denied*, 498 U.S. 890 (1990).

208. *Thomason v. Aetna Life Ins. Co.*, 9 F.3d 645, 650 (7th Cir. 1993).

209. *Compare* *Flacche v. Sun Life Assurance Co. of Can. (U.S.)*, 958 F.2d 730, 736 (6th Cir. 1992) (denying estoppel when faced with particularly unsympathetic facts) *with* *Smith v. Hartford Ins. Group*, 6 F.3d 131 (3d Cir. 1993) (applying estoppel when faced with sympathetic facts).

210. *Cleary v. Graphic Communications Int'l Union Supplemental Retirement and Disability Fund*, 841 F.2d 444 (1st Cir. 1988); *Lee v. Burkhart*, 991 F.2d 1004, 1010 (2d Cir. 1993); *Chambless v. Masters Pension Plan*, 772 F.2d 1032, 1041 (2d Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986); *Haerberle v. Board of Trustees*, 624 F.2d 1132, 1139 (2d Cir. 1980); *Gridley v. Cleveland Pneumatic*

exceptions under which a plan will be estopped from denying representations contrary to unambiguous plan language. Often, as cases from the Second and Third Circuits clearly demonstrate,<sup>211</sup> exceptions exist when extraordinary circumstances are present.<sup>212</sup>

In a footnote in *Phillips v. Kennedy*,<sup>213</sup> the Eighth Circuit stated that “[t]he actuarial soundness of pension funds is, absent extraordinary circumstances, too important to permit trustees to obligate the fund to pay pensions to persons not entitled to them under the express terms of the pension plan.”<sup>214</sup> The Third Circuit relied on this dicta in *Rosen v. Hotel & Restaurant Employees & Bartenders Union*,<sup>215</sup> to hold that the plan was estopped from denying Rosen his pension.

Although Rosen’s employer was required to contribute to a multiemployer pension fund, the employer never remitted any contributions to the fund on Rosen’s behalf.<sup>216</sup> When Rosen discovered this, he paid the full amount owed on his behalf by his employer.<sup>217</sup> The plan administrator accepted this payment.<sup>218</sup> Rosen assumed that his pension was secure.<sup>219</sup>

When Rosen initially submitted his retirement application, the pension fund denied it because he had not yet reached the minimum retirement age of sixty-two. When he reached age sixty-two, Rosen reapplied, and again his application was denied because his employer had not remitted contributions on his behalf. The Fund rejected Rosen’s payment of five

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Co., 924 F.2d 1310 (3d Cir.), *cert. denied*, 111 S. Ct. 2856 (1991); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3d Cir. 1990); *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1051 (1993); *Rodrigue v. Western & Life Ins. Co.*, 948 F.2d 969, 971 (5th Cir. 1991); *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1296-97 (5th Cir. 1989); *Sutter v. BASF Corp.*, 964 F.2d 556 (6th Cir. 1992); *Vershaw v. Northwestern Nat’l Life Ins. Co.*, 979 F.2d 557 (7th Cir. 1992); *Greany v. Western Farm Bureau Life Ins. Co.*, 973 F.2d 812, 822 (9th Cir. 1992); *Meadows v. Cagle’s, Inc.*, 954 F.2d 686, 690-91 (11th Cir. 1992); *Alday v. Container Corp. of America*, 906 F.2d 660 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Nachwalter v. Christie*, 805 F.2d 956 (11th Cir. 1986).

211. *Gridley*, 924 F.2d at 1318-19; *Lee*, 991 F.2d at 1009.

212. *Rosen v. Hotel & Restaurant Employees & Bartenders Union*, 637 F.2d 592, 598 (3d Cir.), *cert. denied*, 454 U.S. 898 (1981).

213. 542 F.2d 52 (8th Cir. 1976).

214. *Id.* at 55 n.8. *See also* *Thurber v. Western Conference of Teamsters Pension Plan*, 542 F.2d 1106, 1109 (9th Cir. 1976).

215. 637 F.2d 592 (3d Cir. 1981).

216. *Id.* at 595.

217. *Id.*

218. *Id.*

219. *Id.*

years earlier as an attempt to cure his employer's delinquencies. Payment, with interest, was returned.<sup>220</sup>

The Third Circuit held that Rosen detrimentally relied on the plan's acceptance of his payment of delinquent contributions, and therefore, the plan was estopped from refusing to give him credit for the contributions. The court noted that by his actions, Civatte, a trustee of the fund, created an estoppel against the plan:

Civatte met with Rosen and discussed the threat to his pension by his employer's failure to contribute; Civatte gave Rosen a tabulation of his employer's arrearages . . . ; Rosen made out a check for \$419.20—the total amount of his employer's arrearages; Civatte deposited this money into the account of the Local 111 pension fund. At this point Rosen had every reason to believe that his payment had brought his pension up-to-date. Under the circumstances Rosen's detrimental reliance of Civatte's action was clearly reasonable.<sup>221</sup>

The court flatly stated that no actuarial concerns were present in Rosen's case;<sup>222</sup> Rosen contributed the same amount as the employer was required to pay. Because Rosen relied to his detriment on the fund's implied assurance that his pension was not in jeopardy, the fund was estopped to deny the benefit. The court cited with approval *Scheuer v. Central States Pension Fund*.<sup>223</sup>

The *sui generis* nature of the pension agreement . . . should not immunize it from the equitable principles that govern similar agreements. The rising ethical standards in business relations which the estoppel doctrine is designed to enforce are no less needed in the administration of pension funds . . . If anything, estoppel is appropriate here. The complexity of the typical fund agreement and the trustees' freedom to decide as they wish make it unlikely that workers will disregard promises made to them.<sup>224</sup>

The Third Circuit has narrowly construed the "extraordinary" circumstances that give rise to equitable estoppel.<sup>225</sup> To date, *Rosen* is the only case in which the court has found "extraordinary circumstances."

The Eighth Circuit has proceeded cautiously since it first announced the "extraordinary circumstances" test in the infamous footnote in *Phillips v.*

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220. *Id.*

221. *Id.* at 597.

222. *Id.* at 598 n.9.

223. 358 F. Supp. 1332 (E.D. Wis. 1973).

224. *Rosen*, 637 F.2d at 598 (quoting *Scheurer*, 358 F. Supp. at 1338).

225. See *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310 (3d Cir.), *cert. denied*, 111 S. Ct. 2856 (1991); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1165 n.10 (3d Cir. 1990).

*Kennedy*.<sup>226</sup> Recently, in *Slice v. Norway*,<sup>227</sup> the court noted that it had not yet decided whether principles of estoppel could be applied in an ERISA case. The Eighth Circuit remanded to the district court to determine whether a remedy exists under ERISA.<sup>228</sup>

The Sixth Circuit has taken a different approach. The Sixth Circuit allows equitable estoppel against welfare funds but refuses to apply estoppel against retirement funds.<sup>229</sup>

In *Sutter v. BASF Corp.*, the Sixth Circuit refused to apply estoppel principles to an oral misrepresentation concerning retirement benefits.<sup>230</sup> Plaintiffs inquired as to benefit amounts before retirement. When they retired, however, the benefit amounts were considerably less than previous calculations. Plaintiffs sued their employer, alleging that the employer was bound to pay the higher amounts.

The court refused to allow an oral modification of the plan: "[t]he written plan controls, and the employer cannot be estopped on the basis of oral representations."<sup>231</sup> The court concluded that the misrepresentations were from "honest mistakes."<sup>232</sup> The court held that plaintiffs had no grounds to recover unless they could prove that the employer acted in bad faith.<sup>233</sup>

In *Armistead v. Vernitron Corp.*,<sup>234</sup> the court took a different approach. Faced with the claims of a group of retirees who sued their employer, Vernitron Corporation, for failing to provide them with retiree health and life benefits, the court held that the employer was equitably estopped to deny these benefits.<sup>235</sup>

The court recognized the general rule that employee benefit plans cannot be orally modified.<sup>236</sup> The court noted the Eleventh Circuit's concerns

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226. 542 F.2d 52, 55 n.8 (8th Cir. 1976).

227. 978 F.2d 1045 (8th Cir. 1992).

228. *Id.* at 1047. See *Farley v. Benefit Trust Life Ins. Co.*, 979 F.2d 653, 659 (8th Cir. 1992).

229. See *Sutter v. BASF Corp.*, 964 F.2d 556, 563 (6th Cir. 1992) (denying recovery under promissory estoppel theory for misrepresentations concerning retirement plan); *Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir.) (estoppel with respect to retiree health benefits), *reh'g en banc denied*, Nos. 89-6405, 89-6406, 1991 U.S. App. LEXIS 26,627 (6th Cir. Nov. 5, 1991).

230. 964 F.2d 556, 563 (6th Cir. 1992).

231. *Id.*

232. *Id.*

233. *Id.*

234. 944 F.2d 1287 (6th Cir.), *reh'g en banc denied*, Nos. 89-6405, 89-6406, 1991 U.S. App. LEXIS 26,627 (6th Cir. Nov. 5, 1991).

235. *Id.* at 1300.

236. *Id.* at 1299.

that "if oral modifications were permitted, the rights of other plan participants would be jeopardized by unrecorded oral agreements between plan officers and favored plan participants."<sup>237</sup> Because the financial security of retirement funds could be undercut by preferential disbursements to participants, Congress required that plan amendments be in writing.<sup>238</sup>

The court noted that concerns about the financial stability of the plan apply primarily to retirement benefits, not welfare benefits.<sup>239</sup> Because pension contributions are calculated on the basis of actuarial assumptions, a change in the terms of the plan may affect the actuarial assumptions. However, insured welfare plans are not determined actuarially. The employer pays premiums based on a risk analysis. Therefore, the Sixth Circuit held that with respect to insured welfare benefit plans, estoppel will not frustrate congressional intent. The court held that because the insurance benefits were unfunded, there was no concern for the actuarial soundness of the plan, and equitable estoppel was appropriate.<sup>240</sup>

The Seventh Circuit adopted a similar approach in *Black v. TIC Investment Corp.*,<sup>241</sup> a case concerning a severance plan. The court noted that although pension plans have strict funding, vesting, and benefit accrual standards, welfare funds have no such requirements.<sup>242</sup> With respect to unfunded welfare plans, "there is no particular fund that is depleted by paying benefits. Thus there is no need for concern about the plan's actuarial soundness."<sup>243</sup>

In contrast, the Third and Fourth Circuits have refused to draw a distinction between pension and welfare benefit plans.<sup>244</sup> The Third

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237. *Id.*

238. *Id.* at 1300. The Sixth Circuit found that *Nachwalter* meant that:

Congress's purpose in requiring that benefit plans be in writing can only be served if the plan is enforced as written. When a party is estopped from asserting a right in a written plan, the plan as enforced is not the same as the plan as written. For this reason, ERISA would seem to preclude application of equitable estoppel to disputes over benefit plans under the statute.

*Id.*

239. *Id.*

240. *Id.* In *Kaniewski v. Equitable Life Ins. Soc'y*, No. 92-3604, 1993 WL 88200, at \* 5 (6th Cir. Mar. 26, 1993) (unpublished opinion), the Sixth Circuit summarized its prior ruling in *Armistead*: "[W]here an employee welfare benefit plan, such as health insurance, was at issue, and where the actuarial soundness of the fund was not implicated, the principles of equitable estoppel under the federal common law [are] . . . applicable." *Id.*

241. 900 F.2d 112 (7th Cir. 1990).

242. *Id.* at 115.

243. *Id.*

244. *Hozier*, 908 F.2d at 1163; *Salomon v. Transamerica Occidental Life Ins. Co.*, 801 F.2d 659, 660-61 (4th Cir. 1986); *Holland v. Burlington Indus., Inc.*, 772 F.2d 1140, 1147 (4th Cir. 1986).

Circuit has said: "When Congress wanted to exempt welfare plans from regulations it imposed on pension plans, it knew full well how to do so."<sup>245</sup>

### 5. *Multiemployer Plans*

Courts also consider multiemployer plans in a different light from single employer plans.<sup>246</sup> Courts typically disallow estoppel in multiemployer pension plans. The rationale is that multiemployer Taft-Hartley funds involve one plan to which many, perhaps hundreds, of employers contribute. Multiemployer plans are typically set up in unionized occupations in which the employees rotate jobs among various union employers. Although the employee changes from job to job (for example, in construction-related jobs), each employer makes contributions into the multiemployer plan on behalf of the employee. The plan is jointly administered by union and employer representatives. Courts have expressed concerns about applying estoppel in a plan under which so many different employers could potentially bind the plan:

To allow one employer to bind the fund to pay benefits outside the strict terms of the Plan would be to make all the employers pay for one employer's misrepresentations, and to the extent that such payments damage the actuarial soundness of the Plan, it hurts all the employees as well.<sup>247</sup>

In *Black v. TIC Investment Corp.*,<sup>248</sup> the Seventh Circuit found that because the plan was a single employer plan and there was "no danger that others associated with the Plan can be hurt,"<sup>249</sup> estoppel was appropriate. The court said, "There is no reason for the employee who reasonably relied to his detriment on his employer's false representations to suffer."<sup>250</sup> Therefore, the Court held that "estoppel principles are applicable to claims for benefits under unfunded single-employer welfare benefit plans."<sup>251</sup>

More recently in *Russo v. Health, Welfare & Pension Fund, Local*

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245. *Hozier*, 908 F.2d at 1163.

246. *Black v. TIC Inv. Corp.*, 900 F.2d 112, 115 (7th Cir. 1990). See also BRUCE, *supra* note 65, at 404.

247. *Black*, 900 F.2d at 115. This potential problem can be eliminated by only permitting estoppel based on representations made by plan representatives, not employer representatives.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* The Court expressed "no opinion as to the application of estoppel principles in other situations." *Id.*

705,<sup>252</sup> the Seventh Circuit noted that the concerns about actuarial soundness raised in *Black* “would argue against applying estoppel to a multi-employer funded pension plan.”<sup>253</sup>

Yet in *Scheuer v. Central States Pension Fund*,<sup>254</sup> a district court held that a jury question existed as to whether a multiemployer plan should be estopped from denying benefits under the theory of apparent agency when the plan accepted contributions and the union’s business agent represented that coverage would be provided to an independent contractor.<sup>255</sup> And in *Hurd v. Hutnik*,<sup>256</sup> a district court held that contributing employers to a multiemployer plan were required to continue making contributions after the plan was terminated in favor of single employer plans because the employers had misrepresented that retirees would get lifetime benefits.<sup>257</sup>

#### D. *Harsh Results: Participants Left Without a Remedy*

This is a hard case—hard not in the sense that it is legally difficult or tough to crack, but in the sense that it requires us, like the court below, to deny relief to a plaintiff for whom we have considerable sympathy. We do what we must, for “it is the duty of all courts of justice to take care, for the general good of the community, that hard cases do not make bad law.”<sup>258</sup>

Many courts have described the plight of participants who have been “betrayed without remedy.”<sup>259</sup> Most courts have held that ERISA preempts state law claims even if a plaintiff is left without recourse.<sup>260</sup> One court bluntly stated that appellant “seems to argue that because he has

252. 984 F.2d 762 (7th Cir. 1993).

253. *Id.* at 767 n.4.

254. 358 F. Supp. 1332 (E.D. Wis. 1973).

255. *Id.* at 1340.

256. 419 F. Supp. 630 (D.N.J. 1976).

257. *Id.* at 656. See also *Rosen v. Hotel & Restaurant Employees & Bartenders Union Pension Fund*, 637 F.2d 592 (3d Cir.), *cert. denied*, 454 U.S. 898 (1981).

258. *Burnham v. Guardian Life Ins. Co. of America*, 873 F.2d 486, 487 (1st Cir. 1989) (quoting *United States v. Clark*, 96 U.S. 37, 49 (1877) (Harlan, J., dissenting) (quoting Lord Campbell in *East Indian Co. v. Paul*, 7 Moo. P.C.C. 111)).

259. *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989).

260. Cases in which courts have found no remedy include *Sanson v. General Motors Corp.*, 966 F.2d 618, 622 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1578 (1993); *First Nat’l Life Ins. v. Sunshine-Jr. Food Stores*, 960 F.2d 1546, 1550 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1045 (1993); *Lee v. E.I. DuPont de Nemours & Co.*, 894 F.2d 755, 757 (5th Cir. 1990); *Lister v. Stark*, 890 F.2d 941, 946 (7th Cir. 1989), *cert. denied*, 498 U.S. 1011 (1990). However, in *Vartanian v. Monsanto Co.*, 14 F.3d 697 (1st Cir. 1994), the First Circuit held that a former employee had standing to sue as a participant, in part, because ERISA precludes “all other judicial recourse” and preemption would “clearly frustrate Congress’ intention to remove jurisdictional and procedural obstacles to such claims.” *Id.* at \* 5.

no remedy, we must find ERISA doesn't apply. Under the law, however, ERISA preempts state law claims even if the plaintiff is left without a remedy.<sup>261</sup> In order to show the inequities caused by the gap left by ERISA's preemption clause, this Article will examine a few of the cases with the harshest results.

*Corcoran v. United HealthCare, Inc.*,<sup>262</sup> is a particularly troublesome case. "Florence Corcoran, a long-time employee of South Central Bell Telephone Company" became pregnant.<sup>263</sup> She was a participant in Bell's Medical Assistance Plan, a self-funded plan.<sup>264</sup> The plan was

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261. *Dockter v. Aetna Life Ins. Co.*, No. 91-56029, 1993 WL 55150, at \*2 (9th Cir. March 3, 1993), *cert. denied*, 114 S. Ct. 310 (1993).

See also *Lister*, 890 F.2d at 946 ("[T]he availability of a federal remedy is not a prerequisite for federal preemption."); *Lee v. Burkhart*, 991 F.2d 1004, 1011-12 (2d Cir. 1993) ("Distasteful as it is to conclude that people who prudently secured insurance may be left nevertheless exposed to the risk, this suit does not open an avenue to recovery."); *Custer v. Pan American Life Ins. Co.*, 12 F.3d 410, 418-19 (4th Cir. 1993) (Plaintiff's contention "that ERISA provides no remedy . . . leaving a gap is, in our view immaterial . . . . The Act's preemption clause does not place the analysis on whether remedies are provided by the Act, but rather on whether the action relates to any employee benefit plan."); *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6 (2d Cir. 1992) ("Similarly unavailing is appellant's argument that ERISA preemption will leave him with no adequate remedy . . . . Other circuits addressing this issue have held that the preclusion of remedy does not bar the operation of ERISA preemption."). *But see Perry v. P\*I\*E Nationwide, Inc.*, 872 F.2d 157, 162 (6th Cir. 1989) (finding that preemption should apply to a state law claim only if Congress has provided a remedy for the wrong asserted), *cert. denied*, 492 U.S. 1093 (1990).

The Ninth Circuit recently rejected a participant's claim that this gap is unconstitutional and violates the Seventh Amendment's right to a jury trial in suits at common law. *Spinelli v. Gaughan*, 12 F.3d 853, 858 (9th Cir. 1993). The participant claimed that "Congress may not take away a plaintiff's legal claim under state law and replace it with a federal claim that is only equitable in nature." *Id.* The Court responded: "Congress surely can preempt a state cause of action, be it legal or equitable: This is the very nature of federal supremacy. Once Congress has chosen to preempt the state claim, it's free to give affected individuals a full federal claim, a claim providing only for remedies limited to equity, a damages claim only, or no claim at all." *Id.* Under precedent in most jurisdictions, this leaves participants with "no claim at all." *Id.*

262. 965 F.2d 1321 (5th Cir.), *cert. denied*, 113 S. Ct. 812 (1992).

263. *Id.* at 1322.

264. Self-funded plans create another disturbing problem which could be the subject of an entire article. Motivated by escalating health insurance premiums, record numbers of employers have canceled their medical policies and converted to self-insured plans. The primary reason cited for conversion to self-insurance is that self-insured plans are not subject to state regulation, which drives up the cost of providing medical coverage.

ERISA's preemption clause encourages plan sponsors to self-insure health benefits. Insurance companies which issue health policies are subject to state mandated benefit laws while self-insured plans are not required to comply with these laws. ERISA § 514(a) preempts all state laws which relate to an ERISA-covered employee benefit plan. 29 U.S.C. § 1144 (1988). The insurance saving clause, found in ERISA § 514(b)(2)(A), provides that nothing in ERISA "shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." 29

administered by Blue Cross.<sup>265</sup>

In her last months of pregnancy, Corcoran's obstetrician advised that she have complete bed rest for the remainder of her pregnancy.<sup>266</sup> Mrs. Corcoran applied for temporary disability under Bell's plan but benefits were denied.<sup>267</sup> Her obstetrician advised the plan that Corcoran had a "high risk pregnancy."<sup>268</sup> Again, Bell denied the disability benefits.<sup>269</sup> Bell solicited a second opinion from another obstetrician. The second doctor did not examine Mrs. Corcoran; he reviewed her medical records.<sup>270</sup> In fact, Mrs. Corcoran and her obstetrician did not even know that a second opinion had been sought.<sup>271</sup> The second doctor stated that Bell "would be at considerable risk by denying her doctor's recommendation."<sup>272</sup>

By order of her obstetrician, Mrs. Corcoran was hospitalized near the end of her pregnancy so that her doctor could monitor the fetus continuously.<sup>273</sup> The obstetrician sought precertification for the hospital stay, as required by the plan's Quality Care Program, which is administered by United HealthCare.<sup>274</sup> United HealthCare determined that Mrs. Corcoran did not need to be hospitalized, and authorized ten hours per day of home nursing care.<sup>275</sup> Mrs. Corcoran entered the hospital on October 3, 1989. When United HealthCare did not precertify her stay, she returned home on October 12.<sup>276</sup> Almost two weeks later, during a time "when no nurse was on duty, the fetus went into distress and died."<sup>277</sup>

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U.S.C. § 1144(b)(2)(A) (1988). In *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), the Supreme Court held that a state law that required an insurer to provide mandated mental health benefits was not preempted by ERISA, as it fell within the saving clause. *Id.* at 758. However, the Court noted that ERISA's deemer clause subjects insured and self-insured plans to different regulation. *Id.* at 747. The deemer clause provides that an ERISA-governed employee benefit plan shall not be deemed an insurance company. 29 U.S.C. § 1144(b)(2)(B) (1988). As a result, insured plans are treated differently from self-insured plans. Insured plans are subject to state regulation while self-insured plans are not governed by state insurance laws.

265. *Corcoran*, 965 F.2d at 1323.

266. *Id.* at 1322.

267. *Id.*

268. *Id.*

269. *Id.*

270. 965 F.2d at 1323.

271. *Id.*

272. *Id.*

273. *Id.* at 1322-23.

274. *Id.* at 1323.

275. 965 F.2d at 1324.

276. *Id.*

277. *Id.*

The Corcorans sued Blue Cross and United HealthCare for wrongful death under state law.<sup>278</sup> The district court granted summary judgment for Blue Cross and United HealthCare, stating that ERISA preempts state court claims that "relate to" employee benefit plans.<sup>279</sup> Because Blue Cross and United HealthCare would have played no role in Mrs. Corcoran's pregnancy but for the ERISA plan, the district court held that the claim was preempted: "because the ERISA plan was the source of the relationship between the Corcorans and the defendants, the Corcorans' attempt to distinguish United [HealthCare's] role in paying claims from its role as a source of professional medical advice was unconvincing."<sup>280</sup> The court also rejected the Corcorans' argument that they were entitled to compensatory or consequential damages for emotional distress or other claims beyond medical expenses covered by the plan.<sup>281</sup>

The Fifth Circuit affirmed.<sup>282</sup> The Corcorans had sued under a Louisiana wrongful death statute which allows parents to sue for the wrongful death of their unborn children and imposes liability on health care providers who fail to meet an applicable standard of care.<sup>283</sup> The Fifth Circuit noted that this was a case of first impression whether the Louisiana wrongful death statute allows recovery against a negligent utilization review company.<sup>284</sup>

First, the court looked at the preemption issue. The court held that the wrongful death claim brought by the Corcorans did not fall under a law

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278. The Corcorans alleged that "Blue Cross wrongfully denied appropriate medical care, failed adequately to oversee the medical decisions of United, and failed to provide United with Mrs. Corcoran's complete medical background. They alleged that United wrongfully denied the medical care recommended by Dr. Collins [Corcoran's obstetrician] and wrongfully determined that home nursing care was adequate for her condition." *Id.* at 1326. Later the Corcorans dropped the claims against Blue Cross. *Id.*

279. 965 F.2d at 1325.

280. *Id.*

281. *Id.* at 1338. The court also noted that "a prerequisite to recovery under § 502(a)(3) is a violation of the terms of ERISA itself. ERISA does not place upon the defendants a substantive responsibility in connection with the provision of medical advice which, if breached, would support a claim under § 502(a)(3)." *Id.* at 1326.

282. *Id.* at 1339.

283. LA. CIV. CODE ANN. art. 2315 (West 1979); *Danos v. St. Pierre*, 402 So. 2d 633, 637-38 (La. 1981); *Chivleatto v. Divinity*, 379 So. 2d 784, 786 (La. Ct. App. 1979).

284. The court noted that California is the only state that has expressly permitted suits against a utilization review company based on a negligent decision as to the medical care provided. *Corcoran*, 965 F.2d at 1327. *See, e.g., Wilson v. Blue Cross*, 271 Cal. Rptr. 876, 883-84 (Cal. Ct. App. 1990); *Wickline v. State*, 239 Cal. Rptr. 810, 819 (Cal. Ct. App. 1986) (recognizing liability of insurance company, but placing primary liability with treating physicians), *cert. granted*, 727 P.2d 753 (Cal. 1986); *review dismissed and cause remanded*, 741 P.2d 613 (Cal. 1987).

“specifically designed” to affect ERISA plans.<sup>285</sup> However, the claim has “an effect on” an ERISA plan.<sup>286</sup> The court ruled that because United HealthCare made medical decisions in the context of making a decision about the availability of benefits under the plan, the wrongful death action was preempted by ERISA.<sup>287</sup>

The court noted that the:

absence of a remedy under ERISA’s civil enforcement scheme for medical malpractice committed in connection with a plan benefit determination does not alter our conclusion. While we are not unmindful of the fact that our interpretation of the pre-emption clause leaves a gap in remedies within a statute intended to protect participants in employee benefit plans, the lack of an ERISA remedy does not affect a pre-emption analysis.<sup>288</sup>

The court concluded that “[t]he result ERISA compels us to reach means that the Corcorans have no remedy, state or federal, for what may have been a serious mistake. This is troubling . . . .”<sup>289</sup> The court called for “a reevaluation of ERISA so that it can continue to serve its noble purpose of safeguarding the interests of employees.”<sup>290</sup>

Another case that resounds with unfairness is *Sanson v. General Motors Corp.*, an Eleventh Circuit case.<sup>291</sup> Sanson, an employee at General Motors’ Lakewood plant, was contemplating retirement. He asked whether a special retirement program would be offered to employees of the Lakewood plant and was advised that no such benefits would be offered. Relying on this representation, Sanson retired.<sup>292</sup> Shortly after Sanson retired, GM offered the special retirement program to certain Lakewood employees.<sup>293</sup> When Sanson discovered this, he called GM and demanded that his retirement benefits be increased to include the special benefits.<sup>294</sup> GM refused his request, and Sanson sued to recover the enhanced benefits and compensatory and punitive damages.

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285. The wrongful death statute “neither make[s] explicit reference to nor [is] premised on the existence of an ERISA plan.” *Corcoran*, 965 F.2d at 1329.

286. *Id.*

287. *Id.* at 1331. “In our view, United [HealthCare] makes medical decisions as part and parcel of its mandate to decide what benefits are available under the Bell plan.” *Id.* at 1332.

288. *Id.* at 1333 (citations omitted).

289. *Id.* at 1338.

290. *Id.* The court acknowledged that this task is allocated “to Congress, not the courts.” *Id.* at 1339.

291. 966 F.2d 618 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1578 (1993).

292. *Id.* at 619.

293. *Id.*

294. *Id.*

Initially, the district court held that the state law claim was not preempted.<sup>295</sup> "The fact that the misrepresentations concerned the availability of an employee benefit plan is only incidental to plaintiff's claim. . . . [Therefore] plaintiff's claim for intentional misrepresentation is not preempted by ERISA."<sup>296</sup> Subsequently, the United States Supreme Court issued its decision in *Ingersoll-Rand Co. v. McClendon*,<sup>297</sup> and the district court reconsidered. Based on *Ingersoll-Rand*, the court held that Sanson's claim for fraudulent misrepresentation was preempted by ERISA.<sup>298</sup>

The Eleventh Circuit affirmed. The court considered Sanson's argument that "there must be some avenue whereby an individual who is defrauded out of pension benefits can obtain a remedy."<sup>299</sup> The court rejected Sanson's plea to create a federal common-law fraud under ERISA. The court noted: "[t]he Supreme Court has previously considered and rejected such an extension of the remedies guaranteed under ERISA."<sup>300</sup>

The Court also rebuffed Sanson's contention that "Congress specifically contemplated that federal courts, in the interests of justice, would engage in interstitial lawmaking in ERISA cases in much the same way as the courts fashioned a federal common law of labor relations under § 301 of the LMRA."<sup>301</sup> The Court refused to create a federal common-law remedy for Sanson.<sup>302</sup>

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295. *Id.*

296. *Id.*

297. 498 U.S. 133 (1990).

298. *Sanson*, 966 F.2d at 620.

299. *Id.* at 621.

300. *Id.* at 622. In *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987), the Supreme Court observed that:

The detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.

*Id.*

301. *Sanson*, 966 F.2d at 622. See *Kwatcher v. Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957, 966 (1st Cir. 1989).

302. *Sanson*, 966 F.2d at 622. Other courts have created federal common law. See *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985, 994 (4th Cir.), *cert. denied*, 498 U.S. 982 (1990) (creating federal common-law rule on unjust enrichment to recover monies advanced to plan participant); *Whitworth Bros. Storage Co. v. Central States, Southeast & Southwest Areas Pension Fund*, 794 F.2d 221 (6th Cir.), *cert. denied*, 479 U.S. 1007 (1986) (creating federal common law to find cause of action for employer to recover payments mistakenly made to fund).

Judge Birch dissented. He noted that "this case represents the point at which the preemption tide should be stayed. A finding of preemption in this case not only fails to further any such protective policy, . . . [it] stands the entire statutory scheme on its proverbial head."<sup>303</sup> Judge Birch continued:

I do not subscribe to the view that for every wrong there must necessarily be a remedy. However, where there is a remedy (here a state fraud action), I find it is difficult to comprehend, in a common sense way, how a law enacted to protect the very class of individuals into which the appellant squarely fits can be construed to deny him such a preexisting remedy.<sup>304</sup>

Another disturbing case is *Olson v. General Dynamics Corp.*,<sup>305</sup> a Ninth Circuit case. Olson was a long-time employee of General Dynamics.<sup>306</sup> In 1986, General Dynamics sold a division to Amex Systems, Inc. Olson was an employee in the division that was sold.<sup>307</sup> At the time of the sale, executives of both companies told Olson and other employees that they would be offered jobs with Amex.<sup>308</sup> Amex's president told Olson and other employees: "I commit to you that in no way will you be injured. On the bottom line, you will be equal or better to [sic] your present position."<sup>309</sup>

Olson accepted Amex's offer of employment in April 1986. In June 1988, Olson retired. Upon retirement, he received benefits that were less than he expected and less than the level of benefits represented to him at the time of the sale. He brought a common-law fraud claim for misrepresentation against his former employers.

The district court held that ERISA preempted Olson's fraud claim and the Fifth Circuit affirmed.<sup>310</sup> The court stated: "Given the Supreme Court's directive that ERISA's preemption provision is to be construed broadly, it is difficult to see how Olson's fraud claim could be found not to 'relate to' an employee benefit plan."<sup>311</sup> Judge Reinhardt, concurring,

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303. *Sanson*, 966 F.2d at 623 (Birch, J., dissenting).

304. *Id.* at 623 n.2. Judge Birch stated: "I am concerned that by adopting such a judicial construction, a court could interpret its way into the province of the legislative branch, and in so doing thwart what Congress set out to accomplish in the first place." *Id.*

305. 960 F.2d 1418 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2968 (1992).

306. *Id.* at 1419.

307. *Id.*

308. *Id.*

309. *Id.*

310. 960 F.2d at 1420.

311. *Id.* at 1421.

observed that:

Because of the passage of ERISA, Olson is left without a remedy. Unfortunately, his fate is not unique.<sup>312</sup>

....

As the court's decision in this case illustrates, however, a statute designed to safeguard employee retirement benefits has, all too frequently, been used to deprive employees of rights they previously enjoyed under state law while failing to provide any comparable federal remedy.<sup>313</sup>

....

The proliferation of ERISA preemption cases, in my view, raises a question as to whether ERISA is having an effect that is substantially contrary to that intended by those who favored its adoption. This a matter which Congress may wish to examine carefully.<sup>314</sup>

### III. RIGHTING WRONGS: EXPANDING FEDERAL COMMON LAW AND ENACTING LEGISLATION TO SAFEGUARD PARTICIPANTS' RIGHTS

#### A. *Application of Federal Common Law Theories Such as Estoppel*

In *International Resources, Inc. v. New York Life Insurance Co.*,<sup>315</sup> the Sixth Circuit succinctly stated: "ERISA will not preempt state law claims based on wrongs for which ERISA provides no remedy. However, where rights are guaranteed by ERISA, the remedy for such rights under ERISA is exclusive."<sup>316</sup> The court refused to preempt a claim alleging that a

312. *Id.* at 1423 (Reinhardt, J., concurring).

313. *Id.* at 1423-24.

314. *Id.* at 1424.

In a dissenting opinion in another case Judge Murnaghan stated:

I am loathe to conclude that a company may, with impunity, make representations to its employees about a benefits plan—with the implicit purpose of assuring employees that their benefits will be enhanced if a proposed leveraged buy-out is successful—and then renege on those promises when the LBO is effectuated and the plan is adopted. The majority's approach allows (and perhaps invites) employers to make promises to employees about a plan still in gestation thereby eliciting desired behavior, and then disallow those promises and hide behind the protection of a written plan which does not incorporate the promises made. Such a result would make a mockery of the most fundamental canon of the ERISA statutory scheme—that [of fiduciary responsibility].

*Elmore v. Cone Mills Corp.*, 6 F.3d 1028, 1042 (4th Cir. 1993), *vacated*, 1993 U.S. App. LEXIS 33,294 (4th Cir. Dec. 13, 1993) (Murnaghan, J., dissenting).

315. 950 F.2d 294 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 294 (1992).

316. *Id.* at 298 (citing *Perry v. P\*I\*E Nationwide, Inc.*, 872 F.2d 157, 162 (6th Cir. 1989), *cert. denied*, 493 U.S. 1093 (1990)). *See also* *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968, 454 U.S. 1084 (1981).

conversion policy did not conform to state law.<sup>317</sup> Most courts do not take such an expansive position. However, courts have applied federal common law in ERISA cases in a variety of matters, with respect to indemnity and contribution,<sup>318</sup> return of overpaid employer contributions,<sup>319</sup> unjust enrichment,<sup>320</sup> contra proferentum,<sup>321</sup> piercing the corporate veil,<sup>322</sup> set-off,<sup>323</sup> restitution,<sup>324</sup> and coordination of benefits.<sup>325</sup>

Many courts also have applied estoppel to prevent inequitable results under ERISA.<sup>326</sup> As the court stated in *Hurd v. Hutnik*,<sup>327</sup> “[a] court

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317. *International Resources*, 950 F.2d at 300.

318. *Cullen v. Riley (In re Masters Mates & Pilots Pension Plan & IRAP Litigation)*, 957 F.2d 1020, 1029 (2d Cir. 1992); *Chemung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12, 16, 18 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 3014 (1992). *But see Call v. Sumitomo Bank*, 881 F.2d 626 (9th Cir. 1989).

319. *UIU Severance Pay Trust Fund v. Local Union No. 18-U*, 998 F.2d 509 (7th Cir. 1993); *Malden Mills Indus., Inc. v. Alman*, 971 F.2d 768, 774 (1st Cir. 1992); *Jamail, Inc. v. Carpenters Dist. Council Pension & Welfare Trusts*, 954 F.2d 299, 304 (5th Cir. 1992); *Kwachter v. Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957, 966 (1st Cir. 1989); *Plucinski v. I.A.M. Nat’l Pension Fund*, 875 F.2d 1052, 1054-55 (3d Cir. 1989); *Whitworth Bros. Storage Co. v. Central States, Southeast and Southwest Areas Pension Fund*, 794 F.2d 221 (6th Cir.), *cert. denied*, 479 U.S. 1007 (1986); *South Cent. United Food & Commercial Workers Union v. C & G Markets, Inc.*, 836 F.2d 221 (5th Cir.), *cert. denied*, 486 U.S. 1056 (1988).

320. *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985, 993 (4th Cir.), *cert. denied*, 498 U.S. 982 (1990); *Airco Indus. Gases v. Teamsters Health & Welfare Pension Fund*, 618 F. Supp. 943, 950 (D. Del. 1985). *Contra Morales v. Pan Am. Life Ins. Co.*, 914 F.2d 83, 87 (5th Cir. 1990); *Lea v. Republic Airlines, Inc.*, 903 F.2d 624, 632 (9th Cir. 1990); *Elmore v. Cone Mills Corp.*, 6 F.3d 1028, 1038 (4th Cir. 1993) *opin. vacated, reh’g en banc granted*, 1993 U.S. App. LEXIS 33,294 (4th Cir. Dec. 13, 1993).

321. *See cases cited supra* note 145.

322. *United Elec., Radio and Machine Workers v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1092 (1st Cir. 1992); *Massachusetts Laborers’ Health & Welfare Fund v. Starrett Paving Corp.*, 845 F.2d 23, 27 (1st Cir. 1988).

323. *Coar v. Kazimir*, 990 F.2d 1413, 1418 (3d Cir.), *cert. denied*, 114 S. Ct. 179 (1993).

324. *Luby v. Teamsters Health, Welfare, & Pension Trust Funds*, 944 F.2d 1176, 1186 (3d Cir. 1991). *But see British Motor Car Distribs., Ltd. v. San Francisco Automotive Indus. Welfare Fund*, 882 F.2d 371, 377 (9th Cir. 1989).

325. *PM Group Life Ins. Co. v. Western Growers Assurance Trust*, 953 F.2d 543, 547 (9th Cir. 1992) (“Adoption of a uniform federal rule avoids such confusion and expense, and thus best serves the purposes of ERISA.”); *Reinforcing Iron Workers v. Michigan Bell Tel. Co.*, 746 F. Supp. 668, 670-71 (E.D. Mich. 1990).

326. *Rosen v. Hotel & Restaurant Employees & Bartenders Union*, 637 F.2d 592, 598 (3d Cir.), *cert. denied*, 454 U.S. 898 (1981); *Black v. TIC Investment Corp.*, 900 F.2d 112, 114 (7th Cir. 1990); *Landro v. Glendenning Motorways*, 625 F.2d 1344, 1355 (8th Cir. 1980) (applying promissory estoppel); *Aitken v. IP&GCU-Employer Retirement Fund*, 604 F.2d 1261 (9th Cir. 1979); *Bolton v. Construction Laborers’ Pension Trust*, 954 F.2d 1437, 1440 (9th Cir. 1992); *Dockray v. Phelps Dodge Corp.*, 801 F.2d 1149, 1155 (9th Cir. 1986) (case remanded to determine if plan administrator was

of equity will not permit the reasonable and justified expectations of . . . employees, knowingly wielded by the employers for whom they labored for so many years, to be frustrated . . . ."<sup>328</sup> Typically, in order to prove estoppel, the participant must show:

- (1) conduct or language amounting to a representation of material fact;
- (2) awareness of the true facts by the party to be estopped;
- (3) an intention on the part of the party to be estopped that the representation be acted on, or conduct toward the party asserting the estoppel such that the latter has a right to believe that the former's conduct is so intended;
- (4) unawareness of the true facts by the party asserting the estoppel; and
- (5) detrimental and justifiable reliance by the party asserting estoppel on the representation.<sup>329</sup>

Lack of reliance often bars recovery on estoppel claims.<sup>330</sup> In *Nachwalter v. Christie*,<sup>331</sup> the district court refused to apply estoppel principles because the participant was familiar with the terms of the plan.<sup>332</sup> Reliance may be inferred if an employee continues to work after a representation as to benefits has been made.<sup>333</sup>

Most estoppel cases have failed because the participant did not meet her or his burden of proof.<sup>334</sup> However, a few courts provide guidance on the development of estoppel under the federal common law of ERISA.

estopped). *But see* *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517 (9th Cir. 1993), a post-*Mertens* case in which the Ninth Circuit reconsidered equitable estoppel in light of *Mertens v. Hewitt Assocs.*, 113 S. Ct. 2063 (1993). See BRUCE, *supra* note 65, at 402-403, for discussion of circumstances under which estoppel has been granted by district courts.

327. 419 F. Supp. 630 (D.N.J. 1976).

328. *Id.* at 655.

329. *Tregoning v. American Community Mut. Ins. Co.*, No. 92-2253, 1993 WL 522368, at \*4 (6th Cir. Dec. 17, 1993) (citing *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1298 (6th Cir. 1991)).

330. See *Russo v. Health, Welfare & Pension Fund, Local 705*, 984 F.2d 762, 768 (7th Cir. 1993) (holding that "estoppel arises when one party has made a misleading representation to another party and the other has reasonably relied to his detriment on that representation") (quoting *Black v. TIC Investment, Corp.*, 900 F.2d 112, 115 (7th Cir. 1990)). See also *Vershaw v. Northwestern Nat'l Life Ins. Co.*, 979 F.2d 557, 559 (7th Cir. 1992); *Gordon v. ILWU-PMA Benefit Funds*, 616 F.2d 433, 439 (9th Cir. 1980).

331. 611 F. Supp. 655 (S.D. Fla. 1985), *aff'd*, 805 F.2d 956 (11th Cir. 1986).

332. *Id.* at 663-64.

333. See *Monson v. Century Mfg. Co.*, 739 F.2d 1293, 1304 (8th Cir. 1984); *Novembre v. Local 584 Pension Fund, 4 Employee Benefits Cas. (BNA) 1286 (D.N.J. 1981)*, *aff'd*, 691 F.2d 491 (3d Cir. 1982), *cert. denied*, 459 U.S. 1172 (1983).

334. See, e.g., *Tregoning v. American Community Mut. Ins. Co.*, No. 92-2253, 1993 WL 522368, at \*5 (6th Cir. Dec. 17, 1993); *Cleary v. Graphic Communications Int'l Union Supplemental Retirement & Disability Fund*, 841 F.2d 444, 448 (1st Cir. 1988); *Lodge v. Shell Oil Co.*, 747 F.2d 16 (1st Cir. 1984); *Haeberle v. Board of Trustees* 624 F.2d 1132, 1139 (2d Cir. 1980).

In *Thomason v. Aetna Life Insurance Co.*,<sup>335</sup> the Seventh Circuit held that courts may develop a federal common law of ERISA “only where ERISA itself ‘does not expressly address the issue before the court.’”<sup>336</sup> While courts may incorporate state common law “as a basis for new federal common law,”<sup>337</sup> state law is relevant only if it is consistent with the congressional concerns underlying ERISA. The court noted: “The ultimate objective is not to fulfill policy objectives of state law but to fulfill the congressional command embodied in the language and structure of the federal statute.”<sup>338</sup> The court cautioned that the federal common law of ERISA will not always provide a remedy for a state law that has been preempted.<sup>339</sup>

In *Nash v. Trustees of Boston University*,<sup>340</sup> the First Circuit allowed the affirmative defense of fraud-in-the-inducement to be asserted against a plan participant. Nash, a tenured professor at Boston University, was notified by the University that his program would be discontinued and he would be discharged if no suitable position was available.<sup>341</sup> After receiving this notice, Nash received an offer of employment from the Rhode Island School of Design. He then commenced negotiations with Boston University over early retirement. Although representatives of Boston University specifically asked Nash about the Rhode Island job, Nash misrepresented the status of the job offer. He said, “I kept them

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335. 9 F.3d 645 (7th Cir. 1993).

336. *Id.* at 647 (quoting *Nachwalter v. Christe*, 805 F.2d 956, 949 (11th Cir. 1986)). In *Jones v. UOP*, Nos. 93-2046, 93-2205, 1994 WL 20660 (7th Cir. Jan. 27, 1994), the Seventh Circuit reaffirmed that estoppel is appropriate under certain circumstances. *Id.* at \* 4. However, Judge Posner cautioned that: “The statute is plain and severe and ought not be stretched beyond what is possible with the use of familiar, clear, tested, administrable doctrines—such as equitable estoppel—for preventing the evasion of legal duties.” *Id.*

337. *Jones*, Nos. 93-2046, 93-2205, 1994 WL 20660, at \*4.

338. *Id.* (quoting *Fox Valley & Vicinity Construction Workers Pension Fund v. Brown*, 897 F.2d 275, 284 (7th Cir.) (Easterbrook, J., dissenting), *cert. denied*, 498 U.S. 820 (1990)). See also *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985 (4th Cir.), *cert. denied*, 498 U.S. 982 (1990). In *Waller*, the court stated that:

Despite the power of federal courts to fill in the interstices of ERISA, we must respect the fact that Congress in creating ERISA has ‘established an extensive regulatory network and has expressly announced its intention to occupy the field.’ Accordingly, we must proceed cautiously in creating additional rights under the rubric of federal common law, and remember that we do not possess *carte blanche* authority to ‘use state common law to re-write a federal statute.’

*Id.* at 992 (citations omitted).

339. *Id.*

340. 946 F.2d 960 (1st Cir. 1991).

341. *Id.* at 961.

waiting too long; they are talking to another candidate."<sup>342</sup> In the meantime, Nash accepted the Rhode Island job. Two weeks later, Boston University agreed to pay Nash \$88,230 in early retirement benefits.

Nash sued Boston University for breach of contract and for a violation of ERISA. The University claimed fraud-in-the-inducement as an affirmative defense. The First Circuit allowed the defense under federal common law. The court recognized that Congress, in enacting ERISA, intended that federal courts "would engage in interstitial lawmaking" in order to achieve justice.<sup>343</sup>

The court held that the "legislative purpose and public policy activating ERISA would be advanced by accommodating the affirmative defense of fraud-in-the-inducement within the developing reserve of federal common-law."<sup>344</sup> The court noted that if a common-law remedy were not recognized an unscrupulous employer could bind an employer to a fraudulently induced contract.<sup>345</sup>

In *Black v. TIC Investment Corp.*,<sup>346</sup> the Seventh Circuit applied estoppel. Black was employed by White Farm Equipment Company and was a participant in the company's severance plan. In 1980, the corporation filed for bankruptcy and suspended its severance plan. Later that year, the company was sold to TIC Investment Corporation.

In 1981, Black was notified that the severance plan would be terminated. Later, he was terminated and was offered the opportunity to immediately receive two month's salary continuation or to file a claim in bankruptcy court for \$18,469 in severance pay. Black filed a bankruptcy claim. His employer objected to his claim, and it was still pending in the bankruptcy court at the time of this hearing.

Black sued, claiming that TIC Investment Corporation breached its fiduciary duty by objecting to his bankruptcy claim, and therefore, was

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342. *Id.* at 962.

343. *Id.* at 965. The court quoted *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957), a case arising under section 301 of the Labor Management Relations Act:

[Some legal problems] will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem.

*Nash*, 946 F.2d at 965.

344. *Id.*

345. *Id.* at 966. "We are . . . loath to think that Congress meant to institutionalize . . . permitting employee participants to sponge off an employer's good-faith bevvues." *Id.* (quoting *Kwatcher v. Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957, 966 (1st Cir. 1989)).

346. 900 F.2d 112 (7th Cir. 1990).

estopped to deny the validity of his claim. The court first looked at ERISA and determined that ERISA did not regulate the case. The court found that "there is no good reason to breach the general rule that misrepresentations give rise to an estoppel. There is no reason for the employee who reasonably relied to his detriment on his employer's false representations to suffer."<sup>347</sup> The court held that estoppel principles were applicable to claims for benefits under an unfunded single employer welfare benefit plan.<sup>348</sup>

The court's rationale in these estoppel cases is in line with congressional intent, as expressed in the legislative history of ERISA:

In the absence of adequate federal standards, the participant is left to rely on the traditional equitable remedies of the common law of trusts . . . .

The fact that statutory rules exist says little as to their efficacy in adjusting inequities that are visited upon plan participants [who] . . . lose their benefits not because of some violation of federal law, but rather because of the manner in which the plan is executed. . . . Courts . . . are reluctant to apply concepts of equitable relief or to disregard technical document wording.<sup>349</sup>

Congress intended that courts would adopt broad remedies to redress violations of ERISA. The legislative intent was "to provide the full range of legal and equitable remedies available in both state and federal courts . . . ."<sup>350</sup>

More recent legislative history is even clearer: "Federal courts [have authority] to shape legal and equitable remedies to fit the facts and circumstances of the cases before them, even though those remedies may not be specifically mentioned in ERISA itself."<sup>351</sup>

Certainly, legislative history supports the adoption of federal common-law remedies under ERISA. Hard cases do not have to make bad law; courts can create a remedy for the participant who has been unfairly wronged and is caught in the gap between preempted state law and nonexistent federal law.

### B. *Breach of Fiduciary Duty Under ERISA*

Another avenue of recourse for participants is to file a suit for breach of

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347. *Id.* at 115.

348. *Id.*

349. H.R. REP. NO. 533, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4643.

350. *Id.* at 4655. See also *id.* at 4839 (stating that goal is to provide "adequate remedies"). See *id.* at 4871 (concerning remedies in general).

351. COMM. ON THE BUDGET, HOUSE OF REPRESENTATIVES, 101ST CONG., 1ST SESS. 55 (to accompany H.R. 3299 (1989)).

fiduciary duty under ERISA. As previously discussed, ERISA section 502(a)(2), in conjunction with section 409, authorizes a participant to sue for a breach of the fiduciary duty described in section 404(a). However, although the Supreme Court has not yet ruled on the availability of extra-contractual damages under section 502(a)(2), most courts have denied recovery of such damages. Another deterrent is the Supreme Court's decision in *Massachusetts Mutual Life Insurance Co. v. Russell*, in which the Supreme Court held that section 409(a) only provides relief to the plan and not to individual participants.<sup>352</sup> Many circuits have rejected participant claims for breach of fiduciary duty because the participant cannot recover under ERISA section 409.<sup>353</sup>

Some participants have avoided this result by directly alleging violations of ERISA section 404(a)(1), the prudence rule,<sup>354</sup> instead of section 409.<sup>355</sup> Justice Brennan, in a concurring opinion in *Russell*,<sup>356</sup> held that "[s]ection 502(a)(3) authorizes the award of 'appropriate equitable relief' directly to a participant or beneficiary to 'redress' any act or practice which violates any provision of this title"<sup>357</sup> such as a breach of the fiduciary duties set forth in section 404(a).<sup>357</sup> In *Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund*, the Third Circuit recently relied on Justice Brennan's concurring opinion in *Russell* and held that a participant can recover for breach of fiduciary duty under sections "404(a) and 502(a)(3)(B) for failure to provide complete and accurate material information to its beneficiaries."<sup>358</sup> The court did not discuss *Mertens*,

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352. 473 U.S. 134, 140-44 (1985). The Supreme Court held that "the entire text of § 409 persuades us that Congress did not intend that section to authorize any relief [for breach of fiduciary duty] except to the plan itself." *Id.*

353. *Hozier v. Midwest Fasteners Inc.*, 908 F.2d 1155, 1162 n.7 (3d Cir. 1990); *Tregoning v. American Community Mutual Ins. Co.*, 12 F.3d 79 (6th Cir. 1993); *Richards v. General Motors Corp.*, 991 F.2d 1227 (6th Cir. 1993); *Bryant v. Int'l Fruit Prod. Co.*, 886 F.2d 132 (6th Cir. 1989); *Anweiler v. American Elec. Power Service Corp.*, 3 F.3d 986 (7th Cir. 1993); *Harsch v. Eisenberg*, 956 F.2d (7th Cir.), *cert. denied*, 113 S. Ct. 61 (1992); *Watkins v. Westinghouse Hanford*, 12 F.3d 1517 (9th Cir. 1993); *Williams v. Caterpillar, Inc.*, 944 F.2d 658 (9th Cir. 1991); *Sokol v. Bernstein*, 803 F.2d 532, 535 (9th Cir. 1987); *Simmons v. So. Bell Tel. & Tel. Co.*, 940 F.2d 614, 617 (11th Cir. 1991); *Local Union 2134, United Mine Workers v. Powhatan Fuel, Inc.*, 828 F.2d 710 (11th Cir. 1987).

354. 29 U.S.C. § 1104(a)(1) (1988).

355. *Bixler v. Central Penn. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1299 (3d Cir. 1993), *cert. denied*, 113 S. Ct. 2416 (1993); *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130 (3d Cir. 1993); *Drennan v. General Motors Corp.*, 977 F.2d 246 (6th Cir. 1993); *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154 (6th Cir. 1988); *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747 (D.C. Cir. 1990).

356. 473 U.S. 134 (1985).

357. *Id.* at 153.

358. 12 F.3d 1292, 1298-99, 1301 (3d Cir. 1993).

in which the Supreme Court held that money damages are not available under section 502(a)(3).

The Seventh Circuit took a slightly different approach in *Anweiler v. American Electric Power Service Corp.*,<sup>359</sup> a post-*Mertens* case. The court held that a participant who was claiming a breach of fiduciary duty “cannot attempt to restyle her action as a personal claim for benefits [under section 502(a)(1)(B)] when she has continually alleged a breach of fiduciary duty.”<sup>360</sup> Thus, the participant could not sue under section 502(a)(1)(B). However, the court allowed plaintiff’s claim under 502(a)(3), which allows a participant to sue “to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or . . . to obtain the appropriate equitable relief . . . to redress such violations.” The court relied on the Supreme Court’s ruling in *Mertens* to “hold that an individual may seek equitable relief from a breach of fiduciary duty under section [502](a)(3).”<sup>361</sup> The participant sought a constructive trust, which is a form of equitable relief under 502(a)(3).<sup>362</sup>

Some courts have allowed participants to sue for breach of fiduciary duty based on inaccurate statements made to plan participants. In *Anweiler*,<sup>363</sup> the Seventh Circuit held that fiduciaries may not “mislead plan participants or misrepresent the terms or administration of a plan.”<sup>364</sup> In *Fischer v. Philadelphia Electric Corp.*,<sup>365</sup> the Third Circuit held that a fiduciary may not make affirmative misrepresentations about changes to an employee benefit plan:<sup>366</sup> “Put simply, when a plan administrator speaks, it must speak truthfully.”<sup>367</sup>

In *Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund*,<sup>368</sup> the Third Circuit broadly construed the duty of a fiduciary to speak truthfully. Mrs. Bixler, the widow of a plan participant, sued her husband’s

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359. 3 F.3d 986 (7th Cir. 1993).

360. *Id.* at 992.

361. *Id.* at 993.

362. *Id.*

363. 3 F.3d 986 (7th Cir. 1993).

364. *Id.* at 991. See also *Vartanian v. Monsanto Co.*, 14 F.3d 697 (1st Cir. 1994); *Drennan v. General Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 2416 (1993); *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988); *Rosen v. Hotel & Restaurant Employees & Bartenders Union*, 637 F.2d 592, 599-600 (3d Cir.), *cert. denied*, 454 U.S. 898 (1981).

365. 994 F.2d 130 (3d Cir.), *cert. denied*, 114 S. Ct. 622 (1993).

366. *Id.* at 134-35.

367. *Id.* at 135.

368. 12 F.3d 1292 (3d Cir. 1993).

former employer, among others, for breach of fiduciary duty.<sup>369</sup> Soon after Mr. Bixler's death, but within the election period for continuation coverage, Mrs. Bixler called the employer to ask about death benefits.<sup>370</sup> The general manager, Mr. Welsh, advised her that she was not entitled to a death benefit.<sup>371</sup> Although she did not ask about continuation coverage, the court concluded that if the general manager:

knew that Mr. Bixler's death left Mrs. Bixler with substantial unpaid medical expenses and that she could receive reimbursement for those expenses under [the employer's] . . . plan by signing and returning the COBRA [continuation] notice that Welsh had sent to her husband, we believe the failure to advise her of the available benefits might be found to be a breach of fiduciary duty despite the fact that her inquiry was limited to the availability of a death benefit.<sup>372</sup>

The court remanded, holding that if the employer was a fiduciary, then it had "a duty to convey complete and accurate information that was material to Mrs. Bixler's circumstance," even if her circumstance was broader than her inquiry.<sup>373</sup>

Likewise, in *Eddy v. Colonial Life Insurance Co. of America*,<sup>374</sup> the Court of Appeals for the District of Columbia Circuit noted that "[t]he duty to disclose material information is at the core of a fiduciary's responsibility."<sup>375</sup> The court held that "a fiduciary must convey complete and correct material information to a beneficiary."<sup>376</sup> Noting that this duty to provide complete and correct information is not novel,<sup>377</sup> the court cited Judge Cardozo: "A beneficiary, about to plunge into a ruinous course of dealing, may be betrayed by silence as well as by the spoken word."<sup>378</sup> The court held that once the participant advised the insurance company of his predicament, the insurer, "Colonial Life was required to do more than simply *not misinform*, Colonial Life also had an affirmative obligation to *inform*—to provide complete and correct material information on [the participant's] . . .

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369. *Id.* at 1296.

370. *Id.* at 1302.

371. *Id.*

372. *Id.*

373. *Id.* at 1302-03.

374. 919 F.2d 747 (D.C. Cir. 1990).

375. *Id.* at 750.

376. *Id.*

377. *Id.* at 751.

378. *Globe Woolen Co. v. Utica Gas & Electric Co.*, 121 N.E. 378, 380 (N.Y. 1918).

status and options.<sup>379</sup> The trend toward requiring complete and accurate information is growing, especially in the Third Circuit.

### C. *Legislative Reform*

Although participants can, under limited circumstances, successfully sue based on equitable estoppel or breach of fiduciary duty, the ultimate protection for participants must come from legislative reform. As mentioned previously, Senator Metzenbaum and Representative Berman have introduced legislation that would exclude from ERISA's preemption provision unfair claims practices by insurers. But the legislation needs to be broadened to protect participants from fraudulent misrepresentation.

This issue needs to be clearly addressed in the legislative proposals for national health care. It also must be included as an amendment to ERISA to cover retirement plans and to cover medical plans that will remain governed by ERISA after national health care legislation is adopted.

The legislation must exempt from ERISA's preemption provision unfair claims practices regulated by state insurance law, tort claims of fraudulent misrepresentation, and tort claims of negligence relating to the administration of an employee benefit plan. The legislation also must allow extra-contractual and punitive damages. Without these damages, unscrupulous employers, administrators, and insurers will not be sufficiently deterred.

Undoubtedly this will increase the costs of providing benefits. The increased liability is, however, no different to calculate than actuarial assumptions, such as mortality rates, or increased risks factors in insured medical plans. It is a cost of doing business that must be factored into the cost of the plan. Just as a plan can predict and increase funding when a plan changes its terms (as when the plan adds coverage for a specific high-cost therapy), the plan can predict and allocate funds for the costs of making misrepresentations, calculation errors, and unfair claims practices.

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379. *Eddy*, 919 F.2d at 751.

In *Elmore v. Cone Mills Corp.*, 6 F.3d 1028, 1037 n.17 (4th Cir. 1993), *vacated*, 1993 U.S. App. LEXIS 33294 (4th Cir. Dec. 13, 1993), the majority implied that it might consider a federal common-law fraud claim based on misrepresentation. The dissent expanded:

Communications that are misleading, unreliable, unrealistic, or premature, and which, furthermore, extract reliance or a performance by employees, should, just as obviously, be discouraged. Under ERISA the duty of administrators and employers to be forthright and honest in whatever communications they have with present or future plan participants, at all stages of the development of the plan, is paramount.

*Id.* at 1047 (Murnaghan, J., dissenting).

See also *Long v. Flying Tiger Line, Inc.*, 994 F.2d 692, 694 (9th Cir. 1993). In *Long*, the Ninth Circuit implied that a cause of action may exist for an inaccurate or incomplete summary plan. *Id.*

Legislative reform would help achieve ERISA's goal of safeguarding the rights of plan participants and providing appropriate remedies. It also would be consistent with legislative intent as described in recent legislative history.

#### IV. CONCLUSION

Even members of the Supreme Court have recognized that ERISA has been interpreted to "deprive beneficiaries of the remedies they enjoyed prior to the statute's history."<sup>380</sup> In *Mertens*, a sharply divided Supreme Court held that money damages are not available under ERISA section 502(a)(3).<sup>381</sup> Justice White, in a dissenting opinion joined by Chief Justice Rehnquist, Justice Stevens, and Justice O'Connor, criticized the majority's conclusion as "rest[ing] on transparently insufficient grounds."<sup>382</sup> The dissent described the majority's interpretation of ERISA as "perverse,"<sup>383</sup> and stated that the majority's opinion took away remedies that existed prior to ERISA.<sup>384</sup>

ERISA, a statute designed to protect the rights of plan participants and beneficiaries, must not be construed to deprive participants of remedies against unscrupulous insurers, administrators, and employers. The Supreme Court has systematically eroded the rights of plan participants, first, by broadly defining the boundaries of the preemption clause, and second, by denying participants extra-contractual and punitive damages under sections 409 and 502(a)(3).

The tide must be stayed. Courts must seize the opportunity to fill in ERISA's gaps with federal common law. Absent further congressional enactments, federal courts are the only protectors of participants who have been "betrayed without a remedy."

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380. *Mertens*, 113 S. Ct. at 2078 (White, J., dissenting) (Justice White's dissent was joined by Rehnquist, Stevens, O'Connor.).

381. *Id.* at 2068.

382. *Id.* at 2078.

383. *Id.*

384. *Id.*

