

## ERISA FIDUCIARY LITIGATION

By: Bryan D. Bolton \*

Although the Supreme Court has rarely rendered decisions expanding participant and beneficiary claims under the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. §§ 1001-1461 (1997), the Court did just that in *Variety Corp. v. Howe*, 516 U.S. 489, 116 S. Ct. 1065, 134 L. Ed. 2d 130 (1996).<sup>i</sup> In *Variety*, the Court expanded both the scope of fiduciary duty and the claims available for a breach of that duty. In light of that expansion, and the onslaught of fiduciary litigation following *Variety*, this paper focuses on certain topics of interest for ERISA plan administrators and other ERISA fiduciaries.

### **A. The Significance of *Variety***

Variety Corporation transferred certain of its less profitable divisions to a separately incorporated subsidiary, Massey Combines.<sup>ii</sup> In an attempt to avoid the fallout of mass layoffs and mass rehiring of employees from the transferred divisions, Variety’s management conducted meetings to persuade employees to voluntarily transfer their employment and benefit plans. The “basic message” conveyed in those meetings was that the employees’ benefits would remain secure. In fact, Massey Combines was insolvent from its inception. After a disastrous first year, the company entered receivership and the employees lost their non-pension benefits. The employees sued their former, and still solvent, plan for the benefits they would have received had they not switched employers and plans. Their claim was brought under ERISA §502(a)(3),

---

\* Mr. Bolton is a founding partner in Funk & Bolton, P.A., an “AV”-rated law firm concentrating primarily on the representation of insurers, managed care organizations, and ERISA plans. Mr. Bolton is in charge of litigation at the firm. Mr. Bolton gratefully acknowledges the efforts of Steven L. Tiedemann, an associate at the firm, for his assistance in the preparation of this paper.

U.S.C. § 1132(a)(3) for “appropriate equitable relief . . . to redress” ERISA violations, including the duty of loyalty imposed on plan fiduciaries.

The *Varity* litigation placed three issues before the Court. First, does ERISA §502(a)(3), 29 U.S.C. § 1132(a)(3) authorize an individual claim for relief for breach of fiduciary duty? Second, did Varity, when it disseminated information regarding plan viability at the employee meetings, act as an ERISA plan fiduciary? Third, if Varity was acting as a fiduciary, did its actions during the employee meeting amount to a breach of that duty?

1. Personal Claims Against Fiduciaries Under ERISA § 502(a)(3) Are Permitted

In *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985), the Supreme Court seemed to limit personal actions against fiduciaries, holding that actions for fiduciary breach under §§ 409, 502(a)(2), 29 U.S.C. §§ 1109, 1132(a)(2) required plaintiffs to proceed “in a representative capacity on behalf of the plan as a whole.” *Id.* at 142, n.9. Although the question of whether ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) permitted individual relief was specifically left open, *id.*, at 139, n.5, the holding in *Russell* suggested that only the plan entity could recover for breach of fiduciary duty. *Id.* at 140.

Notwithstanding the Court’s prior decision in *Russell*, *Varity*, specifically addressing claims under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), determined that a private cause of action for breach of fiduciary duty may arise under this “catch all” provision. The *Varity* dissent disagreed based upon both the conflict with *Russell* and the structure of § 502. *Varity, supra* (Thomas, J. dissenting).

The difference between the majority and the dissent turned on the construction of that portion of § 502 providing for civil enforcement remedies. The majority determined that each

section in § 502(a) stands independent and provides an independent basis for a civil action. The dissent argued that the exclusive remedy for breach of fiduciary duty is in § 502(a)(2).<sup>iii</sup> The clear holding, however, is that an individual may bring a personal claim for equitable relief under § 502(a)(3). The Court termed this section a “catch all” that provides appropriate individual equitable relief for violation of ERISA provisions, including breach of fiduciary duty.

## 2. Expansion of Fiduciary Liability

*Variety* also expanded the potential liability for employers acting as plan fiduciary. This, of course, should concern all non-employer fiduciaries because of ERISA’s co-fiduciary liability, discussed *infra* at § C. The definition of an ERISA fiduciary is set forth in § 3(21)(A)(iii) and has consistently been interpreted to mean that a person who engages in plan-related or benefit-related conduct is a fiduciary to the extent he or she has discretionary authority to administer the plan. *Mutual Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 114 S. Ct. 517, 126 L. Ed. 2d 524 (1993) (the phrase “to the extent” is used by Congress to make clear that, to some extent, the actions not included in the definition are excluded.) *Variety* extends fiduciary status to employers who undertake to communicate with employees regarding corporate financial strength and plan viability for non-vested, non-pension welfare benefits.

Despite the fact that the statements made to the employees by *Variety* were of the kind often made by employers regarding corporate financial health,<sup>iv</sup> the Court determined that *Variety* was acting in a fiduciary capacity when making statements at the meetings. The Court determined that *Variety* had an ERISA fiduciary duty to be truthful during a meeting with its employees regarding plan viability. “Conveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued plan participation, would seem to be an exercise of a power ‘appropriate’ to carrying out an important

plan purpose.” *Varity, supra*. Although the entire meeting was not clearly within the definition of fiduciary acts, the Court determined that Varity was exercising a discretionary plan function when it disseminated the erroneous information at the employee meeting. *Id.*

Before *Varity*, it appeared that an employees’ perception regarding the role of the employer, as fiduciary or settlor, was not relevant to the determination of whether the employer was acting as a fiduciary. The statutory text controlled. An employer either was or was not a statutory fiduciary. Interestingly, in *Varity*, the Court agreed with the District Court that reasonable employees attending the meeting could have thought that Varity was communicating with them both in its capacity as employer and plan administrator. The employees could have postulated that the company was in the best position, and had the expert knowledge necessary, to accurately comment on the viability of the new plan. The Supreme Court, therefore, considered the employees’ subjective belief as to the role of the employer relevant in the determination of the employer’s fiduciary status. The Court went on to conclude that the District Court’s factual findings regarding the content of the employee meeting provided sufficient support for the legal determination that Varity was acting as a plan fiduciary when it commented on the proposed transfer to the new plan. *Varity* places employers, and other fiduciaries, in the precarious position of considering the subjective perception of participants when considering their exposure to fiduciary liability.

## **B. Post-*Varity* Decisions**

### **1. Participant Must Show Economic Harm For Fiduciary Breach.**

The Seventh Circuit, in *Mira v. Nuclear Measurements Corp.*, 107 F.3d 466 (7<sup>th</sup> Cir. 1997), held that, except in limited circumstances, a plaintiff asserting a personal claim for breach of fiduciary duty must show economic loss.<sup>v</sup> The *Mira* plaintiffs were a Nuclear Measurement

Corporation employee and her family who were covered by an ERISA plan. Nuclear Measurement, in its capacity as its own plan administrator, experienced a cash flow problem and failed to make several premium payments to the plan's health insurance provider. When one of the Mira family needed dental services, their insurance was denied for failure to pay premiums. After Nuclear Measurement learned of the policy lapse, it issued reinstatement forms to all employees and paid the outstanding premiums. Despite Mira's refusal to sign the reinstatement form, the coverage for all employees, including the Miras, was backdated to the date of lapse and the Miras' claim for benefits was approved and payment was made.

The Court determined that the Miras could not, and did not, plead an economic loss. The Miras attempted to proffer a claim that they had lost "opportunity costs." The Miras claimed that they had suffered an economic loss because the Miras lost the opportunity to use the money that was otherwise supposed to pay their portion of the premiums. The Court dismissed the "opportunity costs" claim because the Miras already had "been made whole by the reinstatement of the plan and the payment of outstanding insurance claims." *Id.*, at 473.

## 2. Compensatory Damages Remain Non-Equitable Relief

Although imaginative plaintiffs have sought to expand *Varity* to include compensatory damages within the phrase "appropriate equitable relief" under § 502(a)(3), the courts have demurred. See *McLeod v. Oregon Lithoprint, Inc.*, 102 F.3d 376, 379 (9<sup>th</sup> Cir. 1996), *cert. denied*, \_\_\_ U.S. \_\_\_, 117 S. Ct. 1823, 137 L. Ed. 2d 1030 (1997). In *McLeod*, the Court was faced with a remand in light of *Varity, supra*. Originally, Pamela J. McLeod had asserted a claim for breach of fiduciary duty. The Court had held that Ms. McLeod was barred from bringing an individual claim for fiduciary breach and could assert her claim only in a representative capacity. *McLeod*, 102 F.3d at 377-78. *Varity* effectively overturned that

holding. On remand, Ms. McLeod asserted that *Varity* supported her claim for compensatory damages as “appropriate equitable relief” under § 502(a)(3). The Court of Appeals disagreed.

Ms. McLeod unsuccessfully argued that the language employed in *Varity* provided an opportunity to reevaluate prior decisions excluding compensatory damages as a means of relief for breach of fiduciary duty. Although the *Varity* Court did state that courts should “keep in mind the ‘special nature and purpose of employee benefit plans’ and will respect the ‘policy choices reflected in the inclusion of certain remedies and the exclusion of others,’” *Varity*, 116 S. Ct. at 1079 (internal citations omitted), it did not compel a finding that compensatory damages are “appropriate equitable relief.” The Ninth Circuit reasoned that nothing in *Varity* altered the holding in *Mertens v. Dewitt Assocs.*, 508 U.S. 248, 113 S. Ct., 2063, 2072, 124 L. Ed. 2d 161 (1993) that compensatory damages are not available under 502(a)(3).

3. If Relief Is Available For The Entire Plan Under § 502(a)(2), An Individual May Not Seek Relief Under § 502(a)(3)

In *Ream v. Frey*, 107 F.3d 147, 152 (3d Cir. 1997), Jeffrey Ream sought relief under § 502 after discovering that his pension plan no longer existed. Relief under § 502(a)(1) was not available because Mr. Ream had not been denied a benefit or right under the plan. See discussion of standing *infra* at § D(2). Furthermore, he could not bring a representative action on the behalf of the plan because the plan no longer existed. Mr. Ream, therefore, was relegated to a personal action pursuant to § 502(a)(3) for “appropriate equitable relief.” The Court, deciding Mr. Ream was entitled to restitution, stated in *dicta* that, if the plan exists, then recovery should be sought on the plan’s behalf pursuant to § 502(a)(2), not for individual recovery under § 502(a)(3). This makes sense because a recovery for the entire plan, under § 502(a)(2), should make the individual participants whole.

4. An Individual Claim Under § 502(a)(3) Is Not An Alternative For Bringing A § 502(a)(1) Claim For Plan Benefits

---

Numerous *amici* weighed in on the *Varity* appeal, expressing concern over the artful packaging of a beneficiary’s “denial of benefits” claim as a claim for “breach of fiduciary duty.” The *amici* questioned whether a beneficiary, by artful pleading, could circumvent the deference otherwise granted to a plan administrator’s benefits determination. If this were permitted, *amici* argued, then plan administrators could be held to higher and potentially differing standards based solely on the characterization of claim.

The *Varity* Court decided that the circumstances proposed by *amici* were unlikely to materialize. *Varity, supra*. The Court reasoned that, “where Congress elsewhere provided adequate relief for a beneficiary’s injury, there will likely be no need for further equitable relief.” *Id.* at 1079. The Court, therefore, implicitly determined that, if adequate relief is available elsewhere in ERISA, then an individual claim pursuant to § 502(a)(3) will not lie because ERISA only permits “appropriate” equitable relief.

Several circuit courts have seized the opportunity to limit attempts to refashion benefit claims as fiduciary litigation. In *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9<sup>th</sup> Cir. 1997), for example, the Court determined that *Varity* created, in § 502(a)(3), a mere “catchall” provision that provides relief only for injuries that are not otherwise adequately addressed elsewhere in § 502. The *Forsyth* plaintiffs’ complaint asserted numerous claims, including two ERISA claims. One of the ERISA claims was a contractual claim for denial of benefits, and the other sought recompense for a breach of fiduciary duty. The Court determined that, because the plaintiffs were entitled to relief under § 502(a)(1), any equitable relief under 502(a)(3) would be “inappropriate.” *Id.* at 1475. The claim under § 502(a)(3), therefore, was not allowed.

The Sixth Circuit, in *Weiner v. Klais and Co., Inc.*, 108 F.3d 86, 91, n.10 (6<sup>th</sup> Cir. 1997), tangentially addressed this issue in a footnote. In *Wiener*, the plaintiff brought, *inter alia*, claims for benefits and breach of fiduciary duty. The issue before the Court was whether the plaintiff had exhausted his administrative remedies in both actions. The Court determined that it need not reach the exhaustion of remedies issue because the breach of fiduciary claim was not cognizable. The Court held that the breach of fiduciary duty claim was essentially duplicative of the claim for benefits and was more appropriately brought pursuant to § 502(a)(1).

Finally, in *Wald v. Southwestern Bell Corp. Customcare Medical Plan*, 83 F.3d 1002, 1006 (8<sup>th</sup> Cir. 1996), the Eighth Circuit decided that, when a plaintiff is provided adequate relief by her right to bring a § 502(a)(1)(B) action, she may not garner equitable relief under § 502(a)(3). Karen Wald asserted claims for wrongful denial of benefits and equitable relief for breach of fiduciary duty. Both claims were founded upon the alleged failure of the plan administrator to review a claim. The trial court dismissed count II because it was deemed “futile.”<sup>vi</sup> The Eight Circuit affirmed, holding that count II was futile because the relief provided in count I forestalled plaintiff’s attempt to invoke § 502(a)(3).

##### 5. What Fiduciaries Must Disclose And When They Must Disclose It

In *Varity’s* wake, the courts have confronted some new, and a few previously litigated, claims for breach of fiduciary duty under § 502(a)(3). The *Varity* Court made clear that, at least in some circumstances, dissemination of a factual misrepresentation may be sufficient to state a breach of fiduciary duty claim under § 502(a)(3). Subsequent litigants have sought to define the circumstances under which such a duty arises and what amounts to a misrepresentation.

a. Misrepresentations and Omissions Regarding Plan Features

Controversies involving misrepresentations regarding plan features usually result from a plan participant's act, or failure to act, with regard to the plan based upon the participant's erroneous perception of plan options. These litigants often allege that they were not completely informed, or were misinformed, concerning their retirement options or the effect of electing certain options. The question confronting courts has been whether omissions or misrepresentations concerning retirement options amount to a breach of fiduciary duty.<sup>vii</sup>

The *Varity* decision made clear that an employer's intentional misrepresentation regarding the viability of a plan was a breach of an ERISA fiduciary's duty. In that case, management intentionally concocted a scheme to convince plan participants to transfer to the plan of an insolvent subsidiary. The Supreme Court determined that the employer's fiduciary duty prohibited the employer from participating "in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense." *Varity, supra*. Indeed, by such actions, the employer breached its obligation to "discharge [its duty] with respect to the plan solely in the interest of the participants and beneficiaries." § 404(a).

The Supreme Court, in *Varity*, never seriously questioned whether a blatant misrepresentation, if made by a plan fiduciary, would breach a duty of loyalty. Instead, the focus was on whether the employer was, at the time the statements were made, acting as a fiduciary or employer/settlor. Many of the misrepresentation cases that have followed *Varity*, however, lack evidence of obvious or intentional misrepresentation. This, of course, has caused courts to further refine the circumstances that may give rise to a breach of fiduciary duty.

A classic example of a misrepresentation by omission case is *Estate of Becker v. Eastman Kodak Co.*, 120 F.3d 5 (2d Cir. 1997). Carol Becker, a sixteen-year employee of Eastman

Kodak Company, was a participant in a retirement plan. Kodak had advertised that, as of September 1, 1990, retiring employees could elect to receive their benefits in a one-time lump sum. Before that date, an annuity was the only retirement option. Ms. Becker, terminally ill with cancer, attended an appointment with a Kodak retirement counselor after the lump sum announcement. During that appointment, the counselor failed to mention the lump sum option. Based upon the incomplete information given at the meeting, Ms. Becker decided to postpone her retirement and opted for long-term disability benefits.

On October 20, 1991, Ms. Becker's health deteriorated significantly. Ms. Becker decided to retire and asked the counselor for information about the lump-sum option. Becker opted for the lump-sum option with an effective date of November 1, 1991. Becker died on October 29, 1991. Because she was not yet retired, her husband did not receive the lump-sum payout of \$212,620.00. Instead, he received a monthly survival benefit of \$103.42 per month. Ms. Becker's estate brought an action claiming, *inter alia*, a breach of fiduciary duty. The claim asserted that Kodak had a duty to notify Ms. Becker of what would happen if she died between the filing of her election to retire and the date of retirement.

Significantly, the Summary Plan Description (SPD) did not explain that an employee does not retire until they survive the "effective date" of retirement. Although the Second Circuit determined that the terms of an SPD need not "anticipate every possible idiosyncratic contingency that might affect a particular participant's or beneficiary's status," *Estate of Becker*, 120 F.3d at 9 (quoting *Lorenz v. Employee Retirement Plan of the Spree & Hutchinson Co.*, 896 F.2d 228, 236 (7<sup>th</sup> Cir. 1990)), the possibility of death between the date of election and the "effective date" of retirement was not such an idiosyncratic contingency. The Court determined

that omitting that information, coupled with the failings of the retirement counselor, amounted to a breach of fiduciary duty.

Likewise, in *Jordan v. Federal Express Corp.*, 116 F.3d 1005 (3d Cir. 1997), a participant brought suit claiming a breach of fiduciary duty by an employer. Mr. Jordan's predicament arose from the termination of his marriage after his retirement from Federal Express's predecessor. The Federal Express plan, in which Mr. Jordan was a participant, had three options. Under the first, Mr. Jordan would receive the largest monthly payment possible, but the payments would terminate on his death. The second would pay a reduced monthly payment, but upon death, would pay 50% of the reduced benefit to the surviving spouse. Finally, a third option paid the smallest monthly benefit, but would continue paying in full to a surviving spouse. Mr. Jordan was informed of these options and he selected the second.

Mr. Jordan alleges that, at the time he made his retirement selection, he was experiencing marital difficulties and anticipated that he might change his retirement selection at a later date. Mr. Jordan claimed that he was not informed, as later proved to be the case, that he could not alter his selection after retirement. Mr. Jordan brought an ERISA § 502(a)(3) claim for breach of fiduciary duty for failure to properly disclose the permanent nature of his retirement selection.<sup>viii</sup>

The issue facing the Court was not whether a prohibition against such post-retirement alterations was proper. Such a policy is necessary to avoid manipulation of annuity disbursements by participants after the benefit amounts have been established. Instead, Jordan's claim asserted that the prohibition was not properly disclosed to him in violation of the plan administrator's fiduciary duty. *Jordan*, 116 F.3d at 1016. The trial court did not reach the fiduciary duty issue because, pursuant to the pre-*Varity* case law, the Court dismissed Jordan's

individual § 502(a)(3) claim. On remand, the Third Circuit determined that, if the omission were deemed “material,” then Mr. Jordan could state a § 502(a)(3) action.

A statement is “material” if “there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed retirement decision.” *Jordan*, 116 F.3d at 1012 (*quoting In re Unisys*, 57 F.3d 1255, 1264, n.18. (3d Cir. 1995)). After strongly suggesting that the irrevocability of the retirement election is material, the Court remanded the case for further consideration. *Jordan*, 116 F.3d at 1017.

In *Shea v. Esensten*, 107 F.3d 625 (8<sup>th</sup> Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 119 S. Ct. 297, 139 L. Ed. 2d 229 (1997), the plaintiff sued for failure to disclose an “anti-referral” payment scheme between her late husband’s welfare plan and her late husband’s treating physician. Dianne Shea, on the behalf of her husband’s estate and herself, alleged that the plan breached its fiduciary duty to disclose certain features of its provider agreements. The late Mr. Shea was an employee of Seagate Technologies, Inc. for many years. Seagate contracted with a health maintenance organization (“HMO”), defendant Medic, to provide health coverage. Medic, in turn, contracted with doctors to provide medical services as “primary care doctors” (“PCDs”). The PCDs served as gatekeepers for specialty care.

Unbeknownst to Mr. Shea, Medic’s contracts with the PCDs created financial incentives to minimize specialty care. The PCDs were rewarded for not giving referrals and penalized if they gave too many. Mr. Shea’s PCD did not recommend referral to a cardiologist for Mr. Shea, who was suffering from a heart ailment. After Mr. Shea died, Mrs. Shea alleged that, had her husband known of the anti-referral provisions, he would have disregarded his PCD’s advice and sought care from a cardiologist. This care, Mrs. Shea alleged, would have assured her husband’s

survival. Instead, he died at the age of forty because his doctor convinced him that he was “too young and did not have enough symptoms” for specialized care. *Shea*, 107 F.3d at 627.

The Court determined that the incentive program, contained in an extra-plan document, was material from a participant’s perspective. Mr. Shea, therefore, had a right to know of the referral-discouraging practice. ERISA fiduciaries, the Court determined, have a duty to speak out if they know that silence might be harmful. *Shea*, 107 F.3d at 629; *Bixler v. Central Penn. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993).

b. Notification of Plan Changes Upon Participant Inquiry

Many fiduciary claims have arisen in the context of participants’ remorse when they retire before an announcement of early retirement plan incentives. Courts that have confronted such cases have focused on two issues. First, when is a plan fiduciary under a duty to notify participants of a contemplated plan change? Second, does such a duty require affirmative action or merely a truthful response to participant inquiries?

The plaintiffs in *Muse v. IBM*, 103 F.3d 90 (6<sup>th</sup> Cir. 1996), *cert. denied*, \_\_\_ U.S. \_\_\_, 117 S. Ct. 1844, 137 L. Ed. 2d 1048 (1997), sought relief for an alleged breach of fiduciary duty by IBM, their employer and plan administrator. In pursuit of a nationwide restructuring, IBM instituted several changes to their plan known as Voluntary Transition Payment Plans. One program offered one week of salary for every six months of service for participants who retired before a set date. A second program, offered later, had similar benefits. The third program provided that certain employees, within five years of retirement, could take a five-year leave of absence and then retire with full benefits. Finally, a fourth plan doubled the benefits of the first plan and gave an additional \$25,000 cash bonus. This lucrative fourth plan was the subject of the *Muse* case.

The *Muse* plaintiffs alleged that they “would have chosen to participate in the superior benefit plan had IBM not negligently or intentionally misrepresented to the plaintiffs that no further early retirement plans would be offered.” *Muse*, 103 F.3d at 493. The Court held that there generally is no duty to disclose the terms of a plan change to participants or beneficiaries until the change is implemented. “Until a plan is adopted, there is no plan, only the possibility of one.” *Id.* “Insisting on disclosure during the formulation of a plan prior to its adoption would increase the likelihood of confusion on the part of beneficiaries. At the same time, management would be unduly burdened by the continued uncertainty of what to disclose and when to disclose it.” *Id.*

The *Muse* Court recognized the so-called “serious consideration” exception to disclosure. Generally there is no fiduciary duty as to plans not yet in effect, but after “serious consideration” of a plan change, a duty to be truthful attaches. Without providing a concrete definition of “serious consideration,” the Court allowed that the exception does not apply until the “company focuses on a particular plan for a particular purpose.” *Id.* at 95. In *Muse*, that moment did not occur until after IBM sold the plant employing the plaintiffs. After that sale, the buyer notified IBM of the need for more downsizing. It was not until after that notice that IBM focused on the fourth plan for the purpose of meeting the buyer’s request. All plaintiffs retired before this “serious consideration” of the plan change occurred. The Court, therefore, affirmed the entry of summary judgment in favor of IBM.

In *Fisher v. Philadelphia Elec. Co.*, 96 F.3d 1533 (3d Cir. 1996) (“Fisher II”), *cert. denied*, \_\_\_ U.S. \_\_\_, 117 S. Ct. 1247, 137 L. Ed. 2d 329 (1997), the Third Circuit devised a novel definition for “serious consideration” that has been accepted by almost every other circuit. *See, e.g., Vartanian v. Monsanto*, No. 97-1556, 1997 U.S. App. LEXIS 35324 (1<sup>st</sup> Cir. 1997)

(affirming District Court’s decision that the *Fischer* test applied and that the plan was not under “serious consideration”); *Hockett v. Sun Co., Inc.*, 109 F.3d 1515 (10<sup>th</sup> Cir. 1997) (reversing District Court’s finding of breach of fiduciary duty because duty had not attached due to lack of “serious consideration”); *but see Ballone v. Eastman Kodak Co.*, 109 F.3d 17 (2d Cir. 1997) (“serious consideration” is merely one factor to consider in the analysis of the materiality of misrepresentations. In the Second Circuit, the Court also will consider how much the statement misrepresents the current state of the deliberations regarding the plan change, the relationship of trust between the fiduciary and the participant, whether the participant had other sources of accurate information, and the specificity of the alleged misstatement). The *Fischer II* Court, and most others, consider “serious consideration” to exist when “(1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change.” *Fischer II*, 96 F.3d at 1539 (noting that the test is not a bright-line rule and requires fact-specific analysis).

In *Fischer II*, and cases following its lead, courts seem to desire to keep participants informed without subjecting management to a surfeit of meaningless disclosures. Forcing disclosure early in the process will result in harm to employers and employees. Employers waste resources if compelled to provide continuous disclosures. Employees, on the other hand, will see fewer incentive programs offered because of the cost of an early disclosure requirement. *See Fischer II*, 96 F.3d at 1540-41 .

In most of the cases cited above, the courts did not decide whether participant inquiry concerning anticipated plan changes was a prerequisite to the disclosure requirement. In *Muse*, 103 F.3d at 493, the plaintiffs asserted that the company affirmatively misrepresented that no further plan change would occur. In *Hockett*, 109 F.3d at 1518, and *Fischer II*, 93 F.3d at 1537,

the plaintiffs specifically inquired about the availability of future changes to the plan or other benefit packages. Finally, in *Vartanian*, 1997 U.S. App. LEXIS 35324, at \*10, n.4., the Court specifically stated that the issue was not presented.

Some courts have recognized a possibility of an affirmative duty to inform beneficiaries of contemplated plan changes. *Anweiler v. American Elec. Power Serv. Corp.*, 3 F.3d 986, 991 (7<sup>th</sup> Cir. 1993); *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 750 (D.C. Cir. 1990). In such cases, courts have recognized a general fiduciary duty to disclose information when remaining silent would betray the participant or beneficiary. The *Anweiler* Court relied upon *Eddy* for its position that a duty exists when a beneficiary asks for information and even when he or she does not. *Anweiler, supra*. *Eddy* recalls the oft-quoted words of Judge Cardoza that a beneficiary “may be betrayed by silence as well as by spoken word.” *Eddy, supra; Globe Woolen Co. v. Utica Gas & Elec. Co.*, 121 N.E. 378, 380 (N.Y. 1918) (interpreting fiduciary’s obligation to disclose without inquiry under common law) (Cardoza, J.). Neither *Anweiler* nor *Eddy*, however, were “plan change” cases. Rather, each case involved a failure to disclose a feature of an existing plan and how that feature would affect the participant.

The case that most directly considered the issue specifically decided that, absent inquiry, a fiduciary has no duty to disclose changes in the plan before the changes are adopted. *Pocchia v. NYNEX*, 81 F.3d 275, 278 (2d Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 117 S. Ct. 302, 136 L. Ed. 2d 220 (1996), *see also Payonk v. HMW Indus., Inc.*, 883 F.2d 221, 229 (3d Cir. 1989); *Stanton v. Gulf Oil Corp.*, 792 F.2d 432,435 (4<sup>th</sup> Cir. 1986). The *Pocchia* Court determined that “[u]ntil a plan is adopted, there is no plan, simply the possibility of one. Insisting on voluntary disclosure during the formulation of a plan and prior to its adoption would, we think, increase the likelihood of confusion on the part of beneficiaries and, at the same time, unduly burden management . . . .”

*Pocchia*, 81 F.3d at 278. Part of the Court’s analysis rests upon a realization that plan changes often contemplate “future improvement of a ... plan if necessary [staffing] reductions do not occur through retirement or resignations. If fiduciaries were required to disclose such a business strategy, it would fail. Employees simply would not leave ... .” *Id.* at 279 (internal citations omitted).

Another recent opinion, *Sprague v. General Motors Corp.*, Nos. 94-1896, 94-1897, 94-1898, 94-1937, 1998 U.S. App. LEXIS 84, at \*44-\*48 (6<sup>th</sup> Cir. 1998) (en banc), addressed the duty of a fiduciary to notify a plan participant that the plan, by its terms, allows for future amendment and termination. During a pre-retirement briefing, Robert Sprague was told that his health benefits would be “paid-up” for life. Although he had been informed at other times that his welfare benefits could be changed or terminated at any time, Mr. Sprague asserted that his employer had breached its fiduciary duty to properly inform him that his health plan could be altered.

The Court determined that General Motors did not misrepresent the nature of the plan. The Court recognized that, under *Varity*, General Motors was a fiduciary when it informed Mr. Sprague about his benefits. Nevertheless, there was no breach of a fiduciary duty because General Motors did not misrepresent the terms of the plan. Mr. Sprague was correctly informed that, unless the terms of the plan were altered or terminated pursuant to the provisions of the plan, he would receive his health benefits for the rest of his life. The plan documents sufficiently informed Mr. Sprague of the possibility of change to the plan and the oral representation was not a misstatement of those terms. Simply put, General Motors was not required, at the beginning of every new communication to the participants, to remind them of the revocable nature of the plan and its benefits. *Id.* at \*45-\*47.

### C. Trends in Co-Fiduciary Litigation

As detailed above, the *Varity* decision has spawned a new wave of fiduciary litigation seeking relief under § 502(a)(3). *Varity*, based upon its facts and its consideration of the duality of the roles played by the employer, might not directly affect a multi-employer plan administrator. Nevertheless, multi-employer plans, in addition to their direct liability for breach of fiduciary duty, might be liable for breach of the employer's duty under § 1105(a). The *Varity* decision indirectly requires that all plan fiduciaries, including multi-employer plan administrators, prudently monitor who, how, and when plan information or representations are made to employees. See Frank P. Vander Ploeg, *Role-Playing Under ERISA: The Company as "Employer" and "Fiduciary"*, 9 DePaul Bus. L. J. 259 (1997) (reviewing the general implications of *Varity*).

Another co-fiduciary liability concern is the availability of indemnification and/or contribution. Although no express statutory authority exists for a claim for contribution between ERISA fiduciaries, the courts that have considered this issue have focused on the availability of a federal common law claim for contribution. Some courts, for instance, have held that a federal common law claim for contribution can be maintained because Congress did not specifically address this issue. See *Chemung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12, 14-15 (2d Cir. 1991) (recognizing federal common law claim for contribution among co-fiduciaries), *cert. denied*, 505 U.S. 1212, 112 S. Ct. 3014, 120 L.Ed.2d 887 (1992); *Free v. Briody*, 732 F.2d 1331 (7<sup>th</sup> Cir. 1984) (same); *Green v. William Mason & Co.*, 976 F. Supp. 298 (D.N.J. 1997) (same); *Duncan v. Santaniello*, 900 F. Supp. 547, 551 (D. Mass. 1995) (same); *Maher v. Strachan Shipping Co.*, 817 F. Supp. 43, 44 (E.D. La. 1993) (same). Other courts have decided that no right to contribution exists because Congress, with its vast knowledge of the law of trusts,

would have included such claims had it intended to do so. *See Call v. Sumitomo Bank of Ca.*, 881 F.2d 626 (9<sup>th</sup> Cir. 1989) (refusing to recognize federal common law claim for contribution among co-fiduciaries); *Kim v. Fujikawa*, 871 F.2d 1427 (9<sup>th</sup> Cir. 1989) (same); *Schloegel v. Boswell*, 766 F. Supp. 563 (S.D. Miss. 1991) (same); *Mutual Life Ins. Co. of New York v. Yampol*, 706 F. Supp. 596 (N.D. Ill. 1989) (same); *Daniels v. National Employee Benefit Serv., Inc.*, 877 F. Supp. 1067, 1073 (N.D. Ohio 1995) (same).

In light of *Varity*, a District Court in California has narrowly interpreted the Ninth Circuit's holding in *Kim* and *Call*. *See Youngberg v. Bekins Co.*, 930 F. Supp. 1396, 1399 (E.D. Cal. 1996). In *Youngberg*, the Court refused to follow *Kim* and *Call* because the claims in those cases were founded on § 502(a)(2). The *Youngberg* Court decided that a co-fiduciary may bring an action for contribution under § 502(a)(3), the “catch-all” provision successfully employed in *Varity*.

#### **D. Procedural Developments**

##### **1. Pursuit and Exhaustion of Plan Remedies**

The general requirement under ERISA that a participant exhaust plan procedures before bringing suit has been slowly eroded by numerous exceptions. *See Wilczynski v. Lumberman Mut. Cas. Co.*, 93 F.3d 397 (7<sup>th</sup> Cir. 1996) (no exhaustion requirement when there is a lack of access to process or when plaintiff can prove access would be futile); *Henderson v. Bodine Aluminum*, 70 F.3d 958 (8<sup>th</sup> Cir. 1995) (no requirement when life-threatening illness); *Variety Children's Hosp. v. Century Medical Health Plan*, 57 F.3d 1040 (11<sup>th</sup> Cir. 1995) (exhaustion generally required but exceptions exist); *Diaz v. United Agric. Employee Welfare Benefit Plan & Trust*, 50 F.3d 1478 (9<sup>th</sup> Cir. 1995) (exhaustion not required by any specific portion of statute); *Goldstein v. Kellywood Corp.*, 933 F. Supp. 1082 (N.D. Ga. 1996) (employee need not exhaust if

he can show futility); *Ingram v. Travelers Ins. Co.*, 897 F. Supp. 1160 (N.D. Ind. 1995), *aff'd*, 1996 U.S. App. LEXIS 1668 (7<sup>th</sup> Cir. 1996) (not required where exhaustion would have caused statute of limitations to expire); *Burriss v. IASD Health Services Corp.*, 1995 U.S. Dist. LEXIS 15913, 19 Employee Benefits Cas. 2680 (BNA) (S.D. Iowa 1995) (exhaustion only required when the plan specifically states).

Historically, most exhaustion of remedy cases have been decided in the context of claims for benefits. This is because the requirement to exhaust plan remedies contained in the plan applied to the individual claimants. Before *Varity*, most viable claims brought by an individual, at least an individual not acting in a representative capacity, were § 502(a)(1) claims for benefits. After *Varity*, however, an individual may bring a claim for breach of fiduciary duty under § 502(a)(3). This has forced courts to determine whether plan remedies must be exhausted before an individual action for breach of fiduciary duty can be maintained.

Those cases that have determined that exhaustion is required in fiduciary litigation generally have not distinguished between § 502(a)(1) benefit claims and § 502(a)(3) claims for fiduciary breach. See *Brown v. Star Enterprise*, 881 F. Supp. 257, 258 (E.D. Tex. 1995) (deciding without mention of the underlying ERISA claim that “plaintiffs asserting an ERISA cause of action must exhaust their administrative remedies before bringing action in federal court”). Other cases differentiate between claims for benefits, *i.e.* § 502(a)(1), and claims for statutory violations, *i.e.* § 502(a)(3). See *Fujiwaka v. Gushiken*, 823 F.2d 1341, 1345 (9<sup>th</sup> Cir. 1987), *cert. denied*, 487 U.S. 1240, 108 S. Ct. 2913, 101 L. Ed. 2d 945 (1988) (exhaustion not required when the issue is whether a violation of the statute has occurred); *Rucker v. Pacific FM, Inc.*, 806 F. Supp. 1453, 1460 (N.D. Cal. 1992) (acknowledging general requirement of exhaustion but allowing that where claim rests on breach of fiduciary duty, the exhaustion

requirement is waived). Indeed, a plaintiff may argue that exhaustion of plan remedies is not required for a claim for breach of fiduciary duty because (i) it would be futile to have the fiduciary review his or her own conduct; or (ii) the fiduciary has committed statutory violations. See Clifford Cantor, *Fiduciary Liability in Emerging Health Care*, 9 DePaul Bus. L. J. 189, 211 (1997).

## 2. Standing As A Plan Participant

One issue in an action for benefits under § 502(a)(1) or for breach of fiduciary duty under § 502(a)(2) or § 502(a)(3) is whether the plaintiff is a “participant” at the time suit was filed. An ERISA “participant” is “any employee or former employee of an employer ... who is or may become eligible to receive a benefit of any type from an employee benefit plan ... .” 29 U.S.C. § 1002(7). A plaintiff who “was entitled to benefits under the Plan at the time he filed his complaint” has standing as a “participant” under ERISA. *Crotty v. Cook*, 121 F.3d 541, 547 (9<sup>th</sup> Cir. 1997).

Despite its authoritative edict, *Crotty* did not entirely settle the issue. Later, in *Schultz v. PLM International, Inc.*, No. 96-16255, 1997 U.S. App. LEXIS 29063 (9<sup>th</sup> Cir. 1997), the Court considered whether a plaintiff who had received his vested termination benefit before the lawsuit had standing to seek damages and “residual assets” that were, arguably, not vested benefits. See *Borst v. Chevron Corp.*, 36 F.3d 1308, 1311 (5<sup>th</sup> Cir. 1994) (supplying definition of “residual assets” and differentiating between “residual assets” and “vested benefits”). During the pendency of the action, certain residual assets were turned over to the plaintiff. The plaintiff’s lawsuit, therefore, became primarily one for damages, not benefits. Nevertheless, the Court determined that the standing requirement only mandated that the plaintiff be a “participant” at the time of the filing of his action and Mr. Schultz was a “participant” on the day he filed his

complaint. *Schultz*, 1997 U.S. App. LEXIS 29063, at \*8; *but see Schultz*, 1997 U.S. App. LEXIS 29063, at \*11-\*19 (Aldisert, J. dissenting) (claiming that the majority misinterpreted the facts and instead should have found that Schultz received “every cent of his vested benefits in his account prior to filing suit” and a suit should not stand on a claim for “residual assets” that could revert to the employer).

### 3. Trends in Fiduciary Status

Several post-*Varity* cases have further defined fiduciary status. In *Lopresti v. Terwillinger*, 126 F.3d 34 (2d Cir. 1997), for example, the plaintiffs brought an action against John and Donald Terwillinger for breach of fiduciary duty. The Terwillingers, in differing degrees of culpability, utilized ERISA plan funds to pay their company’s creditors. The District Court determined that the Terwillingers were not fiduciaries because they did not manage the funds. The Second Circuit reversed because “an individual may be an ERISA fiduciary by . . . ‘exercising any authority or control respecting management or disposition of [plan] assets.’” *Lopresti, supra* (quoting 29 U.S.C. § 1002(21)(A)(i)). Although the Terwillingers did not manage the ERISA funds, when they exercised control over the funds and disposed of the assets, they were acting as fiduciaries.

In the multi-employer plan context, the recent case of *Walling v. Brady*, 125 F.3d 114 (3d Cir. 1997), instructs that, in most circumstances, the same rules of fiduciary duty apply to both multi-employer plans and single-employer plans. Joseph Walling represented a class of disgruntled retirees. The trustees of a multi-employer pension fund decided to distribute a surplus to current recipients. They altered the existing pension plan by providing an across-the-board 5% increase. Additionally, a \$100-per-month allowance was given to each pension recipient who also participated in the multi-employer welfare fund. This allowance was targeted

to compensate for a recently mandated \$100-per-month payment required for participation in the welfare plan. Mr. Walling represented the class of pension recipients who did not participate in the welfare plan. The pension plan was a defined-benefit plan requiring the employers and the pension fund to share liability for the fund's obligations. *Walling*, 125 F.3d at 115. The gravamen of his claim was that the Trustees' disproportionate allocation of the surplus was a breach of fiduciary duty.

Much of the analysis in *Walling* deals with the difference between multi-employer and single-employer plans. The Court wrestled with the Supreme Court's decision in *Lockheed Corp. v. Spink*, \_\_\_ U.S. \_\_\_, 116 S. Ct. 1783, 135 L. Ed. 2d 153 (1996). In *Lockheed*, the Court explained that "[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries." *Lockheed*, 116 S. Ct. at 1789. The Supreme Court, therefore, did not distinguish between multi-employer plans single-employer plans. What is not clear, however, is whether that failure was intentional or a product of the facts in *Lockheed*, i.e., Lockheed administered a single-employer plan.

The *Walling* Court determined that the distinction between multi-employer and single-employer plans, on the specific facts of the case, was not relevant because the pension plan in *Walling* did not have a finite asset pool and was able to incur unfunded liabilities. If the plan had a fixed asset pool, then making a disbursement of funds to one group of pensioners to the detriment of another group may have resulted in a breach of fiduciary duty. *Walling*, 125 F.3d at 117. In this case, however, there appeared no reason to make a distinction between plan types, and the general rule set forth in *Lockheed* applied.

**E. Qualified Domestic Order Cases**

Two recent cases have addressed the roles of ERISA plans in the enforcement of, and administration under, Qualified Domestic Relations Orders (QDRO's). The state court case of *In Re Marriage of Oddino*, 16 Cal. 4<sup>th</sup> 67 (1997), addressed two issues. First, the Court considered whether state courts have subject matter jurisdiction to decide the status of a state court's order under ERISA. Second, the Court considered whether an order is a QDRO if it requires a plan to pay the non-employee spouse a portion of the employee spouse's early retirement benefits without factoring in that the employee spouse has not actually retired.

Under the plan in question, if an employee reached a certain level of combined age and service, he or she could retire early without any actuarial reduction in benefits. The employee spouse was still working at the time the QDRO ordered payments to begin. The plan administrator interpreted the QDRO as not requiring full payment. Instead, the administrator reduced the monthly annuity payable to the non-employee spouse by actuarial factors that assumed that the employee spouse would not retire until his 65<sup>th</sup> birthday.

First, with little surprise, the Court held that state courts have concurrent jurisdiction to determine whether a domestic relations order is a QDRO under ERISA. *Id.* at 74; *see also Laborers Pension Trust Fund for Northern Ca. v. Livingston*, 816 F. Supp. (N.D. Cal. 1993). Second, the Court determined that the special early retirement plan that provided for unreduced benefits at early retirement for some employees amounted to an "employer subsidy" for early retirement. Such a program could not be ordered paid under a QDRO while the employee continued to work. *In Re Marriage of Oddino*, 16 Cal. 4<sup>th</sup> at 84. To order otherwise would require the employer to pay a portion of the early retirement subsidy to the non-employee spouse while the employee spouse continued to work. Simply put, the employer would pay a portion of

the early retirement subsidy to the non-employee spouse without getting the benefit, *i.e.*, the early retirement of its employee and the resultant reduction in payroll.

In *Metropolitan Life Ins. Co. v. Marsh*, 119 F.3d 415 (6<sup>th</sup> Cir. 1997), the Court determined the proper disposition of life insurance proceeds governed by ERISA. The terms of a divorce decree determined certain terms of distribution of the insurance proceeds. The issue before the Court was whether the divorce decree was a QDRO. If not, then it was preempted by ERISA. The Court determined that the divorce decree substantially complied with the statute and, therefore, was a QDRO. Interestingly, the Court determined that “literal compliance” was not required when Congress apparently intended to give effect only to clear, unambiguous state domestic relations orders. *Id.* at 422.

#### **F. Attorney Conflicts In The Representation of Employers and Plan Administrators**

In what may be harbinger of future litigation, the Court in *In Re Long Island Lighting Co.*, 129 F.3d 268 (2d Cir. 1997), addressed evidentiary issues stemming from the “two hats” worn by employers and plan administrators. After *Varity*, employers need to remain cognizant of their dual roles of fiduciary and settlor. An employer acts as a fiduciary when it administers a plan. Of course, when it is not administering a plan, it is not a fiduciary. This seems clear enough, but the problems in *In Re Long Island Lighting Co.* arose when the employer hired the same attorney to render advice on plan administration and on non-administrative plan functions.

The petitioners sought to discover certain written communications between the employer and its attorney concerning issues not involving plan administration. The employer, predictably, asserted the attorney-client privilege. Petitioners, however, asserted a novel argument in response to that privilege. Petitioners argued that, when the employer sought advice as a fiduciary, the attorney acted as attorney for the plan and its beneficiaries. Petitioners argued

that, since the employer used the same attorney for fiduciary and non-fiduciary matters, the privilege was “blown.” *Id.* at 269.

The Court, relying in part on the uncontested factual finding that the documents sought by petitioners were not even “close to fiduciary” in nature, determined that the privilege was not waived. The Court found that the use of the same attorney did not defeat “invocation of the attorney client privilege with respect to communication with its attorneys on non-fiduciary matters.” *Id.* The Court’s decision, therefore, was limited to petitioners’ attempt to garner access to communication on non-fiduciary matters. Plan administrators, as well as their attorneys, should consider the nature of every communication and the advice rendered. The decision in *In Re Long Island Lighting Co.* may be the first in a host of cases addressing potential conflicts of interest and waiver of attorney-client privilege.

45800.003:15693

<sup>i</sup> The Supreme Court, of course, has decided some cases in favor of participants. The Court, for example, has determined that benefits held for the benefit of participants and beneficiaries are not reachable by a bankruptcy trustee, *Patterson v. Shumate*, 504 U.S. 753, 112 S. Ct. 2242, 119 L. Ed. 2d 519 (1992), and that plan assets cannot be withheld to recoup sponsor claims against a participant, *Guidry v. Sheet Metal Workers Nat'l. Pension Fund*, 93 U.S. 365, 110 S. Ct. 680, 107 L. Ed. 2d (1990).

<sup>ii</sup> Varsity also unilaterally transferred, without notice or permission, the existing benefit obligations of over 4,000 workers who had retired prior to the reorganization.

<sup>iii</sup> The relevant portions of the statute read:

Sec. 502. (a) A civil action may be brought—

\* \* \*

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [entitled “Liability for Breach of Fiduciary Duty”];

(3) by a participant, beneficiary, or fiduciary (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; . . .

ERISA § 502(a), 29 U.S.C. § 1132(a).

<sup>iv</sup> The statements made included: “I believe that with the continued help and support of you we can make Massey Combines Corporation the kind of successful business enterprise we all want to work for.” “Despite the depression which persists in the North American economy, I am excited about the future of Massey Combines Corporation.” “We are all very optimistic that our new company, has a bright future, and are excited by the new challenges facing all of us.” *Varsity Corp. v. Howe*, 516 U.S. 489, 116 S. Ct. 1065, 134 L.Ed.2d 130 (1996).

<sup>v</sup> In *Leigh v. Engle*, 727 F.2d 113 (7<sup>th</sup> Cir. 1984), the fiduciaries invested the plan’s assets in their own companies. Although the investments returned 72% in capital appreciation plus dividends, the Court determined that the personal stake of the fiduciaries in the investment was the source of breach and, therefore, the action could be maintained despite the absence of economic harm to the plan or its participants and beneficiaries.

<sup>vi</sup> The Court has discretion in determining whether to permit a plaintiff to amend his complaint. *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962); see, e.g., *New Beckley Mining Corp. v. International Union, United Mine Workers of Am.*, 18 F.3d 1161, 1164 (4<sup>th</sup> Cir. 1994) (acknowledging that an appellate court’s standard of review of a District Court’s decision to deny a motion to amend a complaint was abuse of discretion standard). The Court may refuse

to allow leave to amend when the proposed changes would be futile. *Foman*, 371 U.S. at 182; *New Beckley Mining Corp.*, 18 F.3d at 1164. Furthermore, if a proposed amendment cannot withstand a motion to dismiss, the motion to amend should be denied as futile. *Perkins v. United States*, 55 F.3d 910, 917 (4<sup>th</sup> Cir. 1995).

<sup>vii</sup> The reader should not confuse such actions with the viable avenues of relief for violation of the statutory disclosure and reporting requirements found in § 502(a)(1)(A) and § 502(a)(4). We are here concerned with § 502(a)(3) claims for breach of fiduciary duty founded upon failure to disclose or misrepresentation.

<sup>viii</sup> The claimant also brought a § 502(a)(3) action for failure to adhere to ERISA's strict reporting and disclosure requirements. As previously indicated, no such claim exists under § 502(a)(3) because adequate remedies lie elsewhere in ERISA. *See supra* at § B(5)(a).