

HOW SECURE ARE YOUR LIFETIME BENEFITS?, *VALLONE V. CNA FINANCIAL*, 375 F.3D 623 (7TH CIR. 2004)*

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I. INTRODUCTION

Ahhh, retirement. The good life begins. A weight lifts off your shoulders as you leave work for that final time. You have your pension plan prepared and “lifetime” health care benefits for you and your spouse. But do you really have lifetime health care benefits? How carefully did you read the summary plan description? Did you see the reservation of rights clause? Many employees who read the clause may think that the employer’s right to change the plan pertains only to the amount of the deductible or the time allowance for an appeal. In fact, this clause allows the company to change anything within the plan or even terminate it.

In *Vallone v. CNA Financial Corp.*,¹ the Seventh Circuit ruled that employers may amend or terminate a retirement plan, provided the employers do not knowingly misrepresent the retirement plan, and they include a reservation of rights clause in at least one of the employees’ retirement plan documents.² Despite the fact that the law is currently settled in the Seventh Circuit, even the opinion’s author noted the uneasiness of its effects.³ Judge Cudahy said, “the law in this circuit is well-established, but this [ruling] does nothing to cushion the hardship of pensioners faced with a new drain on their limited resources.”⁴

The result of *Vallone* was correct according to Seventh Circuit precedent, but it fails to effectuate the purpose of ERISA. ERISA, the Employment Retirement Income Security Act of 1974, governs employee benefit plans.⁵ Section II of this Note will examine the history and pertinent components of

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1. 375 F.3d 623 (7th Cir. 2004), *cert denied*, *petition for cert. filed*, 2004 WL 2326794 (U.S. Oct. 13, 2004) (No. 04–502).

2. *Id.*

3. *Id.*

4. *Id.* at 626.

5. 29 U.S.C. §§ 1001–1461 (2000).

ERISA before looking at the Seventh Circuit's interpretation in comparison with other circuits. Section III will discuss the facts and opinion of *Vallone*. Section IV will consider the policy implications of *Vallone* and the effectiveness of ERISA on future health care benefit cases.

II. BACKGROUND

A. ERISA History

Before World War II, private pension fund growth was slow.⁶ It was not until Congress enacted the Railroad Retirement Act and the Social Security Act that people became interested in private pension plans.⁷ Earnings issues during World War II and the Korean War generated more interest in the cause.⁸ To address and regulate the increased use of private retirement plans as employee benefits, Congress passed several acts.⁹ The Labor Management Relations Act governed retirement fund administration when the fund was established and controlled by the labor organization and the employer.¹⁰ The Internal Revenue Code of 1954 governed tax deductions.¹¹ Finally, the Welfare and Pension Plans Disclosure Act required the plan administrator to make a description and annual report of the plan, file it with the Secretary of Labor, and when requested, send it to the beneficiaries and participants.¹²

None of these acts were without shortcomings. The Labor Management Act did not establish criteria for vesting of benefits or fiduciary conduct.¹³ The Internal Revenue Code did not protect the participants; its purpose was to create revenue and prevent tax evasion.¹⁴ The Welfare and Pension Plans Disclosure Act did not disclose all material information and gave no meaningful fiduciary standards.¹⁵ In addition, it required the participants to monitor the plan and

6. S. REP. NO. 93-127, at 6-8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4839-40.

7. *Id.*

8. *Id.*

9. *Id.*

10. Labor Management Relations Act of 1947, Pub. L. No. 80-101 (codified as amended at 29 U.S.C. § 141 (2000)).

11. I.R.C. §§ 401-404, 501-503 (1954) (current version at I.R.C. §§ 401-404, 501-503 (2004)).

12. 29 U.S.C. §§ 301-309 (1958), *repealed by* 29 U.S.C. §§ 1001-1461 (2000). *See also* S. REP. NO. 93-127 at 9 (1974), *reprinted in* 1974 U.S.C.C.A. 4843, 4840-41.

13. S. REP. NO. 93-127, at 10. A fiduciary is generally defined as "one who owes to another the duties of good faith, trust, confidence, and candor." BLACK'S LAW DICTIONARY 658 (8th ed. 2004).

14. S. REP. NO. 93-127, at 10-11. The IRS permits or prohibits a qualified status of a pension plan, consequently determining its status for tax purposes. *Id.*

15. *Id.* at 9.

protect their own interests.¹⁶ In response to these shortcomings, Congress proposed ERISA.¹⁷

Congress enacted ERISA under Article I, Section 8, clauses one and three of the U.S. Constitution.¹⁸ Section 8 gives Congress the power to tax and to regulate interstate commerce.¹⁹

The general purpose of ERISA was to rectify the ineffectiveness of the retirement income security system and to increase the number of participants in retirement programs.²⁰ In a speech to Congress on December 8, 1971, President Richard M. Nixon declared, “even one worker whose retirement security is destroyed by the termination of a plan is one too many.”²¹ ERISA was ultimately enacted in 1974.²²

B. ERISA Overview

ERISA has several interesting and complicated features.²³ ERISA employs the principle of preemption,²⁴ distinguishes pension from welfare plans,²⁵ and establishes a duty for fiduciaries.²⁶ It is this duty that has split the courts.²⁷

16. *Id.* at 9–10.

17. 29 U.S.C. §§ 1001–1461.

18. 29 U.S.C. § 1001(a); U.S. CONST. art. I, § 8, cl. 1, 3. Employee benefit plans “have become an important factor in commerce because of the interstate character of their activities . . . [and the] large volume of the activities . . . carried on by means of the mails and instrumentalities of interstate commerce . . . [I]t is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.” 29 U.S.C. § 1001(a).

19. U.S. CONST. art. I, § 8, cl. 1. “The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States[.]”. U.S. CONST. art. I, § 8, cl. 3. (The Congress shall have Power “To regulate commerce with foreign nations, and among the several States, and with the Indian tribes).

20. H.R. REP. NO. 93–533, at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2639; *see also* S. REP. NO. 93–383, at 3 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4889. ERISA is “designed to remedy certain defects in the private retirement system which limit the effectiveness of the system in providing retirement income security.” H.R. REP. NO. 93–533, at 1.

21. S. REP. NO. 93–127, at 12.

22. 29 U.S.C. §§ 1001–1461.

23. *Id.*

24. *Id.* § 1144(a).

25. *Id.* § 1002(1), (2).

26. *Id.* § 1002(21)(A).

27. *See* *Abbruscato v. Empire Blue Cross & Blue Shield*, 274 F.3d 90 (2d Cir. 2001); *In re Unisys Corp. Retiree Med. Benefit “ERISA” Litig.*, 57 F.3d 1255 (3d Cir. 1995); *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439 (6th Cir. 2002).

1. Preemption

Preemption requires federal law be asserted over state legislation of the same matter.²⁸ For ERISA purposes, ERISA provisions and case law are followed instead of applying state law.²⁹ Article VI of the Constitution provides that federal law made in pursuance of the Constitution “shall be the supreme Law of the Land.”³⁰ As it is with ERISA, Congress’s intent for preemption may be explicitly stated in the language of the statute.³¹ ERISA explicitly provides that it supercedes “any and all State laws insofar as they . . . relate to any employee benefit plan.”³² U.S. Senator Williams explained one reason for the broad preemption was to encourage consistency and uniformity throughout the nation.³³ U.S. Senator Javits added that, without this approach, there would be a “possibility of endless litigation over the validity of State action that might impinge on Federal regulation.”³⁴

The Supreme Court recently upheld ERISA’s preemption requirement.³⁵ In *Aetna Health Inc. v. Davila*, the Court said that allowing state claims to supplement ERISA § 502(a) would defeat Congress’s purpose.³⁶

Senator Javits intended the courts to develop federal common law to supplement ERISA.³⁷ Courts may develop federal common law only where ERISA is silent on the issue before the court.³⁸ Courts must also overcome the presumption that Congress intentionally omitted the issue from the statute.³⁹ Despite Senator Javits’s wish and the courts’ ability to develop common law,

28. BLACK’S LAW DICTIONARY 1216 (8th ed. 2004).

29. See *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004).

30. U.S. CONST. art. VI, cl. 2.

31. 29 U.S.C. § 1144(a) (2000).

32. *Id.*

33. 120 CONG. REC. 29933 (1974) (statement of Sen. Williams).

34. 120 CONG. REC. 29942 (1974) (statement of Sen. Javits).

35. *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004).

36. *Id.* Several courts have held that preemption does not apply when the plaintiff was deceived by the employer’s statements and actions. *Greenblatt v. Budd Co.*, 666 F. Supp. 735 (E.D. Penn. 1987); *Isaac v. Life Investors Ins. Co. of Am.*, 749 F. Supp. 855 (E.D. Tenn. 1990) (holding that because Congress did not provide a remedy for the alleged wrong, the claim for fraudulent misrepresentation is not preempted by ERISA).

37. 120 CONG. REC. 29942 (1974) (statement of Sen. Javits). “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 pensions plans.” *Id.*

38. *Thomason v. Aetna Life Ins. Co.*, 9 F.3d 645, 647 (7th Cir. 1993).

39. *Reich v. Rowe*, 20 F.3d 25, 32 (1st Cir. 1994).

federal judges have been reluctant to create common law pertaining to ERISA.⁴⁰

2. *Pensions Versus Welfare Plans*

ERISA divides plans into two categories: pension and welfare.⁴¹ Pension benefit plans provide employee retirement income or defer income until employment termination or beyond.⁴² The Code of Federal Regulations defines a pension plan as a “plan that is established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to his employees over a period of years, usually life, after retirement.”⁴³ Welfare benefit plans are established to provide for the beneficiaries; they include medical care, disability benefits, training programs, and the like.⁴⁴ ERISA treats these two types of plans differently.

a. Pensions Plans

Subchapter I of ERISA sets out prescribed rules for pension plans in four areas: (1) reporting and disclosure §§ 1021–1031, (2) participation and vesting §§ 1051–1061, (3) funding §§ 1081–1086, and (4) fiduciary responsibility §§ 1101–1114.⁴⁵ The duties of employers are extensive with respect to pension plans. Employers are required to provide a copy of the summary plan description within 120 days of its becoming subject to ERISA’s reporting rule and to file an annual report within 120 days after the close of the year.⁴⁶ ERISA offers several alternatives for minimum vesting; employers may choose from 100% immediate vesting, the “five-year cliff vesting” schedule, or the “seven-year graded vesting” schedule.⁴⁷

b. Welfare Plans

Welfare benefit plans are only required to meet the standards laid out for reporting and disclosure and fiduciary responsibility.⁴⁸ In fact, §§ 1051 and 1081

40. Ninamary Buba Maginnis, *The Trust About ERISA*, ATLA Annual Convention Reference Materials, Vol. 2 (July 2001).

41. 29 U.S.C. § 1002(1), (2).

42. *Id.* § 1002(2).

43. 26 C.F.R. § 1.401–1(b)(1)(i).

44. 29 U.S.C. § 1002(1).

45. *Id.* §§ 1021–1031, 1051–1061, 1081–1086, 1101–1114.

46. *Id.* §§ 1024(a)(1), (b)(1)(B).

47. *Id.* §§ 1052(a)(1)(B)(i), 1053(a)(2) (1994 & Supp. III 1997).

48. *Id.* §§ 1021–1031, 1051–1061, 1081–1086, 1101–1114.

specifically exclude welfare benefit plans.⁴⁹ These plans do not have to meet any funding requirements.⁵⁰ This means that welfare benefits under ERISA are not automatically vested, and the money contributed by the employer or the coverage provided is not an enforceable right for the employee.⁵¹

Congress chose to limit the requirements of pension plans, balancing “meaningful reform” with manageable costs.⁵² Congress reasoned it would put an immense burden on the employers to require the same duties of a welfare plan that it does of a pension plan and would discourage the employers from offering any type of retirement plan at all.⁵³ In addition, Congress thought employers needed the flexibility to change healthcare plans.⁵⁴ Plan administrators are unable to accurately predict medical costs due to “inflation, constant changes in medical practice and technology, and increases in the cost of treatment independent of inflation.”⁵⁵

In interpreting ERISA § 402(b)(3), the Supreme Court has determined the statute “does not create any substantive entitlement to employer-provided health care benefits.”⁵⁶ Generally, “employers . . . are . . . free under ERISA, for any reason at any time, to adopt, modify or terminate welfare plans.”⁵⁷ Thus, if welfare benefits are to vest, it must be expressly stated in the plan documents.⁵⁸

3. *Fiduciary Duty*

An employer who acts as an administrator or fiduciary with respect to pension and welfare plans owes a duty to participants.⁵⁹ ERISA defines a fiduciary as a person who:

49. *Id.* §§ 1051, 1081.

50. *Id.* §§ 1001–1461.

51. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).

52. S. REP. NO. 93–383, at 34 (1974), *reprinted in* 1974 U.S.C.C.A.N. at 4904.

53. *Id.* Employers were not required to participate in the pension plans. *Id.* To entice employers to do so, Congress realized it must take into account the additional costs to the employer. *Id.* If the employers were to reduce benefits due to the costs of pension plan participation, an act regulating pension plans would be useless. *Id.*

54. *In re Unisys Corp. Retiree Medical Benefit “ERISA” Litigation*, 58 F.3d 896, 901 (3d Cir. 1995).

55. *Id.* (citing *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988)).

56. *Curtiss-Wright*, 514 U.S. at 78.

57. *Id.*

58. *Pabst Brewing Co. v. Corrao*, 161 F.3d 434, 439 (7th Cir. 1998); *see also* *Inter-Modal Rail Employees Ass’n v. Atchison, Topeka, & Santa Fe Ry. Co.*, 520 U.S. 510, 514–15 (1997) (holding that an employer may not terminate employees’ rights if the rights are entitled under the plan, even though the employer may, in certain circumstances, amend or eliminate a welfare plan).

59. *Varity Corp. v. Howe*, 516 U.S. 489, 502 (1996).

(i) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) . . . renders investment advice . . . or has any authority or responsibility to do so, or (iii) . . . has any discretionary authority or discretionary responsibility in the administration of such plan.⁶⁰

There are several types of fiduciaries: (1) named fiduciaries, (2) trustees, (3) investment managers, and (4) administrators.⁶¹ A named fiduciary is the person named in the benefit plan who “control[s] and manage[s] the operation and administration of the plan.”⁶² A trustee is a person who, with few exceptions, exercises authority and discretion to manage the plan’s assets.⁶³ An investment manager is a fiduciary “who . . . manage[s], acquire[s], or dispose[s] of any asset of a plan.”⁶⁴ An administrator is responsible for the plan administration, including recordkeeping and overseeing benefit payments.⁶⁵

A fiduciary must “discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries.”⁶⁶ The Supreme Court has said that “[t]o participate knowingly . . . in deceiving a plan’s beneficiaries in order to save the employer money at the beneficiaries’ expense is not to act ‘solely in the interest of the participants and beneficiaries.’”⁶⁷

Congress has established remedies for ERISA violations. Section 1131 sets forth the criminal penalties for employers who violate the disclosure and reporting rules.⁶⁸ Furthermore, section 1132(a)(1)(B) allows a participant or beneficiary to bring a civil action “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.”⁶⁹

60. 29 U.S.C. § 1002(21)(A).

61. 29 U.S.C. § 1102(a)(1), 29 U.S.C. § 1103(a), 29 U.S.C. § 1002(38), 29 U.S.C. § 1002(16)(A).

62. 29 U.S.C. § 1102(a)(1).

63. *Id.* § 1103(a).

64. *Id.* § 1002(38).

65. *Id.* § 1002(16)(A). See also JAY CONISON, *EMPLOYEE BENEFIT PLANS IN A NUTSHELL* 14 (Thompson West 2003).

66. 29 U.S.C. § 1104(a)(1).

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

68. 29 U.S.C. § 1131. “Any person who willfully violates any provision of part 1 of this subtitle, or any regulation or order issued under any such provision, shall upon conviction be fined not more than \$100,000 or imprisoned not more than ten years or both.” *Id.*

69. *Id.* § 1132(a)(1)(B). ERISA defines participant as an “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 which covers employees . . . or whose beneficiaries may be eligible to receive any such benefit.” *Id.* § 1002(7). Beneficiary is defined as “a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.” *Id.* § 1002(8).

a. The Seventh Circuit's View of Fiduciary Duty

The Seventh Circuit has repeatedly held a breach of fiduciary duty occurs when fiduciaries “mislead plan participants or misrepresent the terms or administration of a plan.”⁷⁰ It requires the fiduciary to disclose the material facts of a plan even when the participant or beneficiary does not specifically ask.⁷¹ Nevertheless, not every mistake made with respect to disclosure will violate ERISA’s fiduciary requirements.⁷² Seventh Circuit courts determine violations according to whether the disclosure or nondisclosure was a result of negligence or intentional misrepresentation.⁷³

In *Frahm v. Equitable Life Assurance Society of the United States*,⁷⁴ retired Equitable Life Assurance Society (Equitable) employees filed a lawsuit after their former employer increased payment obligations with respect to their medical plans.⁷⁵ Equitable emphasized the opportunity for “lifetime” benefits but did not specifically say it reserved the right to change or terminate the benefits.⁷⁶ The Seventh Circuit determined that Equitable taught those in charge of the benefits to give correct advice and did not attempt to misinform the participants in order to make them relinquish their benefits.⁷⁷ The court declared, like Equitable’s non-disclosure of the right to terminate, “slipups in managing any complex enterprise are inevitable, and negligence . . . is not actionable.”⁷⁸

The Seventh Circuit has continually upheld the idea that fiduciary negligence is not actionable.⁷⁹ Thus, an employee will not prevail on a claim that an employer is liable because the employer negligently failed to disclose that welfare benefits could be altered.⁸⁰

70. *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574, 590 (7th Cir. 2000) (citing *Anweiler v. Am. Elec. Power Serv. Corp.*, 3 F.3d 986, 991 (7th Cir. 1993)).

71. *Id.* at 590.

72. *Id.*

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

74. *Id.*

75. *Id.* at 956.

76. *Id.* at 959.

77. *Id.*

78. *Id.*

79. *See, e.g., Beach v. Commonwealth Edison Co.*, 382 F.3d 656 (7th Cir. 2004); *Frahm v. Equitable Life Assurance Soc’y of the United States*, 137 F.3d 955 (7th Cir. 1998).

80. *Frahm*, 137 F.3d 955.

b. Other Circuits' Views of Fiduciary Duty

While the Seventh Circuit holds fast that negligence yields no cause of action, other federal circuit courts are not so quick to agree.⁸¹ The Second, Third, and Sixth Circuits allow for claims against an employer even if an employer's conduct with respect to notice of the ability to change a welfare plan does not rise to the level of intentional misrepresentation.⁸²

In *Abbruscato v. Empire Blue Cross & Blue Shield*,⁸³ the Second Circuit determined Empire Blue Cross may have violated its fiduciary duty by naming the life insurance benefit a "lifetime" benefit when it was not a benefit that would vest.⁸⁴ Even if the trier of fact determined Empire Blue Cross had not promised to vest the benefit, calling the benefit a lifetime benefit without mentioning that the benefit could be reduced or terminated at the employer's discretion, Empire Blue Cross may have violated its fiduciary duty.⁸⁵ The court found that because Empire Blue Cross may have been acting in a fiduciary capacity, there were genuine issues of material fact with regard to Empire Blue Cross's lifetime benefit description, and its failing to note its power to reduce or terminate the benefits at its discretion.⁸⁶

The Second Circuit in *Abbruscato* cited a Third Circuit decision that broadened the fiduciary duty beyond that of misrepresentation.⁸⁷ In *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*,⁸⁸ Unisys changed medical plans to compel retirees to pay the full cost of their premiums.⁸⁹ Despite a reservation of rights clause, the company management told the retirees the medical benefits would be provided for their lives and the lives of their spouses.⁹⁰ The Third Circuit determined that in addition to affirmatively misrepresenting a plan, a plan administrator who "fails to provide information when it knows that

81. *Id.*

82. See *Abbruscato v. Empire Blue Cross & Blue Shield*, 274 F.3d 90 (2d Cir. 2001); *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 57 F.3d 1255, 1264 (3d Cir. 1995); *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439 (6th Cir. 2002).

83. 274 F.3d 90 (2d Cir. 2001).

84. *Id.* at 103.

85. *Id.*

86. *Id.* at 102–03. On remand, the court ruled that Empire breached its contract and ordered it to reinstate the life insurance. *Abbruscato v. Empire Blue Cross & Blue Shield*, No. 99 Civ. 2970(BSJ), 2004 WL 2033086 (S.D.N.Y. Sept. 10, 2004). The court did not rule on the claim of breach of fiduciary duty. *Id.*

87. *Abbruscato*, 274 F.3d at 103 (citing *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 57 F.3d 1255, 1264 (3d Cir. 1995)).

88. 57 F.3d 1255.

89. *Id.* at 1258.

90. *Id.* at 1259–60.

its failure to do so might cause harm . . . breache[s] its fiduciary duty to individual plan participants and beneficiaries.”⁹¹ The district court in *Unisys* concluded the Unisys plan allowed termination of benefits, but Unisys employees had been promised lifetime benefits upon retirement.⁹² It was undisputed that Unisys knew the lifetime medical benefit was an important factor for those employees considering retirement.⁹³

In *James v. Pirelli Armstrong Tire Corp.*,⁹⁴ Pirelli established an early retirement program in order to reduce company expenses.⁹⁵ The plant manager and employee relations manager told those participating in the program that their medical benefits “would not change during their retirement.”⁹⁶ Retirement was defined as “during their lifetimes and the lives of their spouses unless the latter remarried.”⁹⁷ The Sixth Circuit held that a breach of fiduciary duty exists if the fiduciary provided misleading information “regardless of whether the fiduciary’s statements or omissions were made negligently or intentionally.”⁹⁸ The *James* standard of strict liability for misleading information has been affirmed in other Sixth Circuit cases and even in a Fifth Circuit case.⁹⁹

III. EXPOSITION OF THE CASE

A. Statement of Facts

In November of 1991, the Continental Insurance Company (Continental) offered a Voluntary Special Retirement Program (VSRP).¹⁰⁰ The program was formed to alleviate budget constraints.¹⁰¹ It was available to employees whose age in years combined with years of service totaled at least eighty-five.¹⁰²

91. *Id.* at 1264. *See also* Bixler v. Cent. Penn. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1300 (3d Cir. 1993) (comparing fiduciary duties to those of trustees in trust law and affirming that not only is there a duty to not misinform, but a duty to inform when silence would be harmful).

92. *Unisys*, 57 F.3d at 1264.

93. *Id.* at 1266.

94. 305 F.3d 439 (6th Cir. 2002).

95. *Id.* at 443.

96. *Id.*

97. *Id.* at 444.

98. *Id.* at 449 (quoting Krohn v. Huron Mem’l Hosp., 173 F.3d 542, 547 (6th Cir. 1999)).

99. *In re AEP ERISA Litig.*, 327 F. Supp. 2d 812, 819 (S.D. Ohio 2004); Ramsey v. Formica Corp., No. 1:04-CV-149, 2004 WL 1146334, *4 (S.D. Ohio Apr. 6, 2004); *In re Enron Corp. Sec., Derivative & “ERISA” Litig.*, 284 F. Supp. 2d 511, 556 (S.D. Tex. 2003).

100. Vallone v. CNA Fin. Corp., 375 F.3d 623, 626 (7th Cir. 2004).

101. *Id.*

102. *Id.*

Additional stipulations required the employees to be at least fifty-five years of age with a history of ten years with the company.¹⁰³ The package included: (1) a waiver of early retirement reduction factors usually associated with early retirement; (2) a social security supplement; (3) final pay based on the last sixty months of employment;¹⁰⁴ and (4) no reductions in the health care allowance (HCA), something that was normally deducted from those under sixty-two years of age with twenty-five years of service.¹⁰⁵ Continental Human Resource employees informed those who were qualified to participate in the program, both orally and in writing, that the HCA would be a “lifetime benefit.”¹⁰⁶

Michael J. Vallone (Vallone), Joyce E. Heidemann (Heidemann), and James J. O’Keefe (O’Keefe) were employed by Continental in late 1991.¹⁰⁷ They were among 347 Continental employees who opted to participate in the VSRP.¹⁰⁸ Continental’s recruitment of the 347 VSRP participants is estimated to have saved the company \$15.3 million.¹⁰⁹

In 1995, CNA Financial Corporation (CNA) acquired Continental.¹¹⁰ CNA continued to pay the HCA benefit until August 1998 when CNA informed the VSRP retirees via letter that CNA would deny payments beginning on December 31, 1998.¹¹¹ The plaintiffs complained, phoning and writing CNA officials, only to be told that the decision was final.¹¹²

B. Procedural History

Vallone, Heidemann, and O’Keefe brought this lawsuit as a class action on behalf of all VSRP participants.¹¹³ The plaintiffs’ claim contained five causes of

103. *Id.*

104. Brief of Plaintiffs-Appellants at 10–11, *Vallone v. CNA Fin. Corp.*, 375 F.3d 623 (7th Cir. 2004) (No. 98 C 7108).

105. Brief of Defendants-Appellees at 9, *Vallone v. CNA Fin. Corp.*, 375 F.3d 623 (7th Cir. 2004) (No. 98 C 7108).

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

107. *Id.*

108. *Id.*

109. Brief of Plaintiffs-Appellants, *supra* note 104, at 14.

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

111. *Id.* The elimination of the HCA benefit applied to all Continental retirees, not just those who opted to participate in the VSRP. Brief of Defendants-Appellees, *supra* note 105, at 3.

112. *Vallone*, 375 F.3d at 626. *See also* Brief of Plaintiffs-Appellants, *supra* note 104, at 8.

113. *Vallone*, 375 F.3d at 626–27. Two other VSRP participants, Bernard Serek and Thomas Jones, appealed to the Plan Administrator and later exhausted their administrative remedies. *Id.* at 627. Due to their appeals through the administrative process, the district court allowed the plaintiffs in *Vallone* to continue without seeking administrative remedy on the grounds that it would be futile to start at the administrative level. *Id.* CNA filed a motion for a protective order to limit discovery to the administrative record of Serek’s and Jones’s complaints. *Id.* The district court judged granted the

action: Counts I and II, violations of § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B) for failing to pay benefits; Count III, a breach of fiduciary duty in violation of § 404 of ERISA, 29 U.S.C. § 1104; Count IV, breach of contract under ERISA and federal common law; and Count V, equitable estoppel.¹¹⁴

CNA filed a motion for summary judgment on all counts.¹¹⁵ The district court judge granted summary judgment on Counts II, IV, and V.¹¹⁶ CNA later filed a second motion for summary judgment for Count III, which was also granted.¹¹⁷

The plaintiffs appealed the district court's decision to limit the discovery to the administrative record and appealed the summary judgment on all counts.¹¹⁸

C. VSRP Documents and Oral Representations

The parties disagreed as to what documents created the VSRP. All agreed that the VSRP contained six documents: (1) a calculation worksheet; (2) a payment election form; (3) a copy of the Brief Description of the Voluntary Special Retirement Program, including a question and answer brochure (Brief Description); (4) a guide entitled, "A Guide for Employees Considering Retirement During 1992" (1992 Guide); (5) an Acceptance/Rejection Form; and (6) a Retiree Benefit Elections Form.¹¹⁹

CNA believed that Continental's general retirement materials were also part of the VSRP.¹²⁰ These included: (1) the 1990 Comprehensive Health Care and Dental Plan of Continental; (2) "Your Benefits in 1991;" (3) "A Guide for Employees Considering Retirement During 1992;" and (4) "Retiree Benefits in 1991."¹²¹

The calculation worksheet allowed potential VSRP participants to determine the amount to be received from the benefit.¹²² It indicated the person's HCA would be \$465 per month until the age of sixty-five and \$180 per month

motion. Brief of Plaintiffs-Appellants, *supra* note 104, at 10–11.

114. *Vallone*, 375 F.3d at 626–27. Counts I and II were substantially similar, so the plaintiffs withdrew Count I. *Id.* at 627 n.1.

115. *Id.* at 627.

116. *Id.*

117. *Id.*

118. *Id.* The district court allowed additional discovery on Count III, breach of fiduciary duty, so the appeal for limited discovery only pertains to Counts, II, IV, and V. *Id.*

119. *Id.* at 628, *see also* Brief of Plaintiffs-Appellants, *supra* note 104, at 12; Brief of Defendants-Appellees, *supra* note 105, at 11.

120. *Vallone*, 375 F.3d at 627.

121. *Id.* at 627–28.

122. Brief of Plaintiffs-Appellants, *supra* note 104, at 12.

thereafter.¹²³ The payment election form suggested that a potential VSRP participant may choose to continue HCA benefits for his or her spouse after the retiree's death.¹²⁴ The Brief Description indicated that the election may affect the employee's choice of the HCA or the Health Care Contribution, another option available to retirees.¹²⁵ It also referred the reader to 1991 Summary Plan Description (SPD), the 1991 Guide, and the 1992 Guide.¹²⁶

The Brief Description did not specifically reserve Continental's right to amend or terminate the benefits, although there was a reservation of rights clause in the 1991 SPD, the 1991 Guide, and the 1992 Guide.¹²⁷ The reservation of rights clause was found in smaller font on page twelve of the 1992 Guide.¹²⁸ In significant part, it stated, "No right to continuing benefit programs is suggested in this newsletter; the Company reserves the right to change or terminate any of its benefit programs at its discretion, as well as to change its contributions."¹²⁹

The question and answer portion of the Brief Description referred any questions the retirees had about the program to human resource representatives.¹³⁰ The Retiree Benefits Election Form recommended those considering the VSRP should study the then-current "Guide for Employees Considering Retirement" to better understand the choices they were making.¹³¹ None of the six agreed-upon VSRP documents specifically discussed that the VSRP contained a reservation of rights clause.¹³²

The plaintiffs also claimed Continental made oral representations regarding the HCA's lifetime character.¹³³ Informational meetings were held across the United States to inform eligible employees of the program and answer any questions they might have.¹³⁴ The plaintiffs Vallone and O'Keefe attended such a meeting in Chicago where Vallone remembers an employee specifically asking if the benefit was a "lifetime" benefit.¹³⁵ The human resource representative

123. *Id.*

124. *Id.*

125. Brief of Defendants-Appellees, *supra* note 105, at 6–7, 11.

126. *Id.* at 11, *Vallone*, 375 F.3d 623. The 1991 SPD and 1991 Guide were not included with the other materials when soliciting the VSRP retirees.

127. Brief of Plaintiffs-Appellants, *supra* note 104, at 12–13; Brief of Defendants-Appellees, *supra* note 105, at 7–8, 12.

128. Cont'l Ins. 1992 Ret. Guide at 12, *Vallone*, 375 F.3d 623, R. 109–1, ex. 7 (copy on file with author).

129. Cont'l Ins. 1992 Ret. Guide at 12, *supra* note 128.

130. Brief of Plaintiffs-Appellants, *supra* note 104, at 12.

131. Brief of Defendants-Appellees, *supra* note 105, at 12.

132. *Vallone*, 375 F.3d at 628; *see also* Brief of Plaintiffs-Appellants, *supra* note 104, at 12–13.

133. *Vallone*, 375 F.3d at 628.

134. *Id.*

135. Brief of Plaintiffs-Appellants, *supra* note 104, at 13.

answered, “Yes.”¹³⁶ Heidemann, who retired as an assistant vice president of human resources of the Great Lakes region, testified that she was told the HCA was a “lifetime” benefit but that she could not remember anyone saying the benefits were irrevocable.¹³⁷

D. Decision and Rationale

The Court of Appeals affirmed the district court’s granting of summary judgment on all counts.¹³⁸ The parties did not disagree that the benefit was a lifetime benefit; however, they did differ as to what “lifetime” meant.¹³⁹ The Seventh Circuit determined that, in this instance, “lifetime” meant “good for life unless revoked or modified.”¹⁴⁰ Because the court defined the term in this manner, it found that the healthcare benefit, a welfare benefit, did not vest if the employer reserved the right to amend or terminate.¹⁴¹

In determining whether the VSRP contained a reservation of rights clause, the court returned to the documents included in the VSRP package.¹⁴² Because the cover memo referred to, and the package included, the 1992 Retirement Guide, the court consulted the guide, which closed with a reservation of rights clause.¹⁴³ The plaintiffs argued that the VSRP was not mentioned in the Guide; thus, the clause was not to be included.¹⁴⁴ The court dismissed this by highlighting references to the HCA mentioned in the Guide, noting that the VSRP did not create the HCA.¹⁴⁵

When ruling on the contract claim, the court referred to recent Seventh Circuit and Supreme Court decisions to support the preemption of state law by ERISA.¹⁴⁶ The court reasoned that even if it had found a contract, the claim for breach of that contract would have been preempted by ERISA.¹⁴⁷ In addition, the court would not allow a breach of ERISA contract claim because it was

136. *Id.*

137. *Vallone*, 375 F.3d at 628.

138. *Id.* at 626.

139. *Id.* at 628 n.2, 633.

140. *Id.* at 633.

141. *Id.* at 634–35. The Seventh Circuit has since ruled that “lifetime” is ambiguous if none of the retirement plan documents contain a reservation of rights clause. *Bland v. Fiatallis N. Am., Inc.*, 401 F.3d 779, 780 (7th Cir. 2005).

142. *Vallone*, 375 F.3d at 635–38.

143. *Id.* at 636.

144. *Id.* at 636–37.

145. *Id.*

146. *Id.* at 638–39 (citing *Aetna Health Inc. v. Davila*, 124 S.Ct. 2488, 2500–01 (2004)); *Klassy v. Physicians Plus Ins. Co.*, 371 F.3d 952, 957 (7th Cir. 2004).

147. *Vallone*, 375 F.3d at 639.

essentially the same as the denial of the ERISA benefit claim.¹⁴⁸ If such a claim were permitted, the court essentially would be allowing the plaintiffs to avoid limited review and restriction to the administrative record only.¹⁴⁹

To prevail on an estoppel claim, the court requires the plaintiffs prove: (1) a knowing misrepresentation; (2) made in writing; (3) with reasonable reliance on that misrepresentation by the plaintiffs; (4) to the plaintiffs' detriment.¹⁵⁰ The court relied on its own precedent, stating that oral representations are pertinent only if the representation is contrary to the written terms of the well-described plan.¹⁵¹ The court again referred to the stated reservation of rights clause in the retirement plan documents, saying there were "numerous, unambiguous provisions reserving CNA's right to amend, suspend, or terminate the health care subsidy."¹⁵² The court ruled that the plaintiffs had not shown either a knowing misrepresentation of fact or reasonable reliance.¹⁵³

When addressing the breach of ERISA fiduciary claim, the court initially addressed similar cases in other circuits.¹⁵⁴ The court quickly reviewed those cases before restating the Seventh Circuit's breach of fiduciary standards.¹⁵⁵ Citing *Anweiler v. American Electric Power Service Corp.*, the court found a breach of fiduciary duty exists when the fiduciaries intentionally mislead plan participants or misrepresent the terms of a plan.¹⁵⁶ Fiduciaries must inform participants or beneficiaries of material facts that affect the plan participants or beneficiaries whether or not they ask for the information.¹⁵⁷

The court swiftly disposed of the plaintiffs' claim that Continental ran a "campaign of disinformation."¹⁵⁸ Just because Continental wanted many eligible employees to enroll in the VSRP does not mean that it violated fiduciary duty, the court reasoned.¹⁵⁹ Continental had given all eligible employees the document

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* See *Bowerman v. Wal-Mart Stores*, 226 F.3d 574, 588 (7th Cir. 2000); see also *Plumb v. Fluid Pump Serv., Inc.*, 124 F.3d 849, 856 (7th Cir. 1997); *Vershaw v. Northwestern Nat'l Life Ins. Co.*, 979 F.2d 557, 559 (7th Cir. 1992); *Pohl v. Nat'l Benefits Consultants, Inc.*, 956 F.2d 126, 128 (7th Cir. 1992).

152. *Vallone*, 375 F.3d at 639.

153. *Id.* 639–40. The plaintiffs directed the court to *Abbruscato v. Empire Blue Cross & Blue Shield*, 274 F.3d 90 (2d Cir. 2001); *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 57 F.3d 1255 (3d Cir. 1995); and *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439 (6th Cir. 2002).

154. *Vallone*, 375 F.3d at 640.

155. *Id.*

156. *Id.* (citing *Anweiler v. Am. Elec. Power Serv. Corp.*, 3 F.3d 986, 991 (7th Cir. 1993)).

157. *Id.* at 640–41 (citing *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574, 590).

158. *Id.* at 641.

159. *Id.*

with the reservation of rights clause printed on it.¹⁶⁰ In addition, the court reasoned, Continental's failure to explicitly mention the right to amend or terminate may have been explained as much by "non-actionable negligence as by a disloyal intent."¹⁶¹ Referring to *Frahm*, the court stated that negligence in providing accurate information under ERISA is not actionable.¹⁶²

Finally, the *Vallone* court reiterated why it found a lack of evidence indicating that Continental intended to deceive its employees.¹⁶³ Packaging welfare benefits and pension benefits together was a common practice and did not signify that Continental tried to mislead employees.¹⁶⁴ The court also maintained that including the pension and welfare benefits in one retirement package does not obligate employers to inform employees that the welfare benefits are terminable.¹⁶⁵ It concluded with the rule that no warning of welfare benefits being terminable does not establish a breach of fiduciary duty.¹⁶⁶

IV. ANALYSIS

Based solely on the language of ERISA and *stare decisis* of the Seventh Circuit, the *Vallone* court's reasoning is sound. However, the court may have decided *Vallone* differently had it looked at the policy behind ERISA. Another trier of fact could have found a breach of fiduciary duty in *Vallone*. The *Vallone* opinion does not effectuate ERISA's purpose, and an amendment to the statute would avoid the unpleasant result that the *Vallone* opinion yields.

A. *Vallone* Is Consistent with ERISA and Prior Decisions of the Seventh Circuit

The Seventh Circuit Appellate Court produced no dissenting opinions in *Vallone*, finding that the decision did not create new law.¹⁶⁷ The Court based its decision on ERISA in general and prior decisions of the Seventh Circuit.¹⁶⁸

160. *Id.* at 635–38.

161. *Id.* at 641.

162. *Id.* at 642.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 626.

168. *Vallone*, 375 F.3d 623.

Vallone is consistent with the Supreme Court decisions in *Curtiss* and *Varity*.¹⁶⁹ In *Curtiss*, the Supreme Court stated that employers are usually allowed under ERISA “for any reason at any time” to amend or terminate welfare plans.¹⁷⁰ In *Varity*, the Supreme Court stated that intentionally deceiving beneficiaries to reduce expenses for the employer at the beneficiaries’ expense is not acting “solely in the interest of the participants” as ERISA requires.¹⁷¹ With these cases, it is not unreasonable that the Seventh Circuit interpreted the standard of the fiduciary duty narrowly, requiring the employer’s deception to be deliberate for a ruling in favor of the employees.¹⁷² Since *Vallone*, the Seventh Circuit has continued to support this strict view of fiduciary duty.¹⁷³

B. The Facts in *Vallone* Could Have Led to a Finding of Breach of Fiduciary Duty

It is still possible to find in favor of the plaintiffs using the strict interpretation. Based on the facts presented in *Vallone*, the court may have found there was a genuine issue of material fact as to the misrepresentation and reliance claims that would overcome the summary judgment hurdle.

1. *Misrepresentation: Lifetime Means . . . Lifetime?*

Another trier of fact could have reasonably found misrepresentation rising to the level of intentional misrepresentation. There was no dispute that Continental

169. *Id.*; *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995); *Varity v. Howe*, 516 U.S. 489 (1996).

170. *Curtiss*, 514 U.S. at 78. Traced back, this idea originates in *United Mine Workers of Am. Health and Ret. Funds v. Robinson*, 455 U.S. 562 (1982). The court was deciding issues pertaining to the fiduciary duty imposed by the Labor Management Relations Act, 29 U.S.C. § 186 (1947). The Fourth Circuit, in *Sutton v. Weirton Steel Div. of National Steel Corp.*, determined the fiduciary standards of the Labor Management Relations Act to be essentially the same as those in ERISA. 724 F.2d 406, 411 (4th Cir. 1983). The *Sutton* court held that Congress “has not prohibited an employer who is also a fiduciary from exercising the right accorded other employers to renegotiate or amend, may be These as the case changes . . . are not to be reviewed by fiduciary standards.” *Id.*

171. *Varity*, 516 U.S. at 506; 29 U.S.C. § 1104(a)(1).

172. *Vallone*, 375 F.3d at 642. “*Frahm* demonstrates a narrower interpretation of *Varity* than exists in other circuits. Specifically, while there is a duty to provide accurate information under ERISA, negligence in fulfilling that duty is not actionable [T]he employer must have set out to disadvantage or deceive its employees . . . in order for a breach of fiduciary duty to be made out.” *Id.*

173. See *Plummer v. Consol. City of Indianapolis*, 2004 WL 2278740 (S.D. Ind. Aug. 17, 2004); *Beach v. Commonwealth of Edison Co.*, 382 F.3d 656 (7th Cir. 2004); *Cortes v. Midway Games, Inc.*, 2004 WL 2367738 (N.D. Ill. Oct. 13, 2004); *Baker v. Kingsley*, 2004 WL 2397339 (7th Cir. 2004).

was telling the employees the HCA was a lifetime benefit.¹⁷⁴ Continental's definition of lifetime could persuade another trier of fact to rule in the plaintiffs' favor.

ERISA requires courts to "interpret the express terms of a plan 'in an ordinary and popular sense as would a person of average intelligence and experience.'"¹⁷⁵ In *Vallone*, the court adopted a cramped interpretation of "lifetime" as it pertained to Continental's lifetime HCA benefit.

Webster's Dictionary defines lifetime as "the period of time that someone lives."¹⁷⁶ Many people would also define lifetime as "until death." From these definitions, it is not difficult to see how someone would understand the HCA benefit to last until his or her death. Adding the calculation worksheet that informed participants of payments of "\$465 per month up to age 65 and \$180 per month *thereafter*,"¹⁷⁷ it is reasonable to infer the HCA would be paid until one's death.

The court's interpretation of lifetime, "good for life unless revoked or modified,"¹⁷⁸ does not correspond to Webster's definition.¹⁷⁹ The *Vallone* court supported its definition by applying the Whole Document Rule, which states that a document must be read in its entirety.¹⁸⁰ It then applied the Rule of Integration.¹⁸¹ This rule states that if a contract is made of several documents, the contract will be read as part of an "integrated whole . . . t[o] reconcile[conflicting] provisions."¹⁸² The court had previously held that when "'lifetime' benefits are granted by the same contract that reserves the right to change or terminate benefits, the 'lifetime' benefits are not vested."¹⁸³

174. *Vallone*, 375 F.3d at 628 n.2.

175. *Grun v. Pneumo Abex Corp.*, 163 F.3d 411, 420 (7th Cir. 1998) (citing *Pitcher v. Principal Mut. Life Ins. Co.*, 93 F.3d 407, 411 (7th Cir. 1996)).

176. NEW WEBSTER'S NEW WORLD COLLEGE DICTIONARY 781 (3d ed. 1997).

177. Cont'l Ins. VSRP Calculation Worksheet, *supra* note 128 (emphasis added).

178. *Vallone*, 375 F.3d at 633.

179. WEBSTER'S DICTIONARY, *supra* note 175, at 781.

180. *Vallone*, 375 F.3d at 633. (citing *UAW v. Rockford Powertrain, Inc.*, 350 F.3d 698, 704 (7th Cir. 2003)). "We must resolve the tension between lifetime benefits clause, and the plan termination and reservation of rights clauses, by giving meaning to all of them. Reading the document in its entirety, the clauses explain that although the plan in its current iteration entitles retirees to health coverage for the duration of their lives and the lives of their eligible spouses, the terms of the plan—including the plan's continued existence—are subject to change at the [employer's will]." *Id.*

181. *Id.*

182. *Id.* (citing *Diehl v. Twin Disc*, 102 F.3d 301, 307 (7th Cir. 1996)). "[W]hen potentially conflicting provisions coexist . . . within a single contract formed of several documents, the rule that contractual provisions be read as part of an integrated whole will lead a court to seek an interpretation that reconciles those provisions." *Id.*

183. *Id.* at 634–35, *see Rockford Powertrain, Inc.*, 350 F.3d at 704.

Applying these rules, the court determined because the HCA benefit was common to both the VSRP and the general retirement program, the benefits do not vest and are not “lifetime” in the ordinary sense.¹⁸⁴ Yet, with the noticeable difference in the definition of lifetime between Webster and the *Vallone* court, the court did reach the right conclusion. Many people do not read contracts as carefully as they should. When handed several documents and dozens of papers, one may be tempted to carefully read the main parts of the documents and skim the legalese and small print at the end of the documents. It is difficult to imagine that someone without legal training would be able to fully comprehend a reservation of rights clause and how a court would interpret such a clause.

Consequently, because the reservation of rights clause would not have significance to the ordinary reader, the *Vallone* court erroneously interpreted “lifetime” to be consistent with the right to amend. Instead, the court should have interpreted “lifetime” as forever without the right to amend. With that interpretation, the employer in *Vallone* would have intentionally misrepresented the VSRP and breached its fiduciary duty to the plaintiffs.

2. *Reliance on Medical Benefits*

The *Vallone* court said the plaintiffs could not show reasonable reliance on the HCA’s lifetime nature.¹⁸⁵ When eligible employees contemplate whether to participate in a retirement program, they likely weigh each aspect of the plan. Different employees place different values on each aspect. Upon deciding, employees are not required to inform the company which features were most enticing and why they chose as they did. Thus, how is a court supposed to determine that reasonable reliance could not be shown?

CNA argued that nothing prevented the retirees from purchasing supplemental health insurance outside of the retirement program.¹⁸⁶ While that is true, why would people on a fixed income purchase healthcare insurance, something that they thought they already had? Those who chose to enroll in the VSRP believed they had healthcare benefits that would last until they died. It would be unreasonable for them to “waste” money on identical benefits.

A different trier of fact could have found the plaintiffs relied on the HCA’s lifetime nature in deciding whether to retire early. Because the retirees relied on the lifetime nature of the benefits and did not secure alternative healthcare

184. *Vallone*, 375 F.3d at 634–35.

185. *Id.* at 640–41.

186. Brief of Defendants-Appellees, *supra* note 105, at 9.

insurance, the *Vallone* court could have found for the plaintiffs on their reliance claim.

C. The Better Standard Is Negligence or Strict Liability as Advanced by the Second, Third, and Sixth Circuits

The reality is that under the Seventh Circuit's strict approach to misrepresentation and fiduciary duty, companies are being over-protected under ERISA. The risk of error in a misrepresentation of plan documents is on the employees rather than employers even though employers are usually well-represented and their attorneys create the retirement plan documents. This does not seem to be what Congress intended when adopting ERISA. To better accomplish the wishes of Congress, other federal circuit courts take a different approach than *Vallone*.

1. Standards of the Second, Third, and Sixth Circuits

The Second, Third, and Sixth Circuits have less restrictive fiduciary duty standards.¹⁸⁷ These standards, if applied to *Vallone*, could have led to a result contrary to the Seventh Circuit's determination.

The standard of the Sixth Circuit is best demonstrated in *James*.¹⁸⁸ The Sixth Circuit has interpreted ERISA's fiduciary duty as having three elements.¹⁸⁹ The first is a duty of loyalty that requires decisions be made in the interests of the participants and beneficiaries.¹⁹⁰ The second requires the fiduciary act as a prudent person "with care, skill, prudence, and diligence."¹⁹¹ The last element requires the fiduciary to act "for the exclusive purpose" of providing benefits to the participants and beneficiaries.¹⁹² These duties are breached when the fiduciary gives materially misleading information "regardless of whether the fiduciary's statements or omissions were made negligently or intentionally."¹⁹³ If there is a substantial likelihood that a reasonable employee would rely on the information

187. See, e.g., *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439 (6th Cir. 2002); *Abbruscato v. Empire Blue Cross & Blue Shield*, 274 F.3d 90 (2d Cir. 2001); *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 57 F.3d 1255 (3d Cir. 1995).

188. *James*, 305 F.3d 439.

189. *Id.* at 448.

190. *Id.*

191. *Id.* at 448-49.

192. *Id.* at 449.

193. *Id.* (quoting *Krohn v. Huron Mem'l Hosp.*, 173 F.3d 542, 548 (6th Cir. 1999)).

to make an informed decision and be misled because of that information, then it is a material misrepresentation.¹⁹⁴

It is likely that, if the *Vallone* court had applied the rules set forth in *James*, the court would have found Continental breached its fiduciary duty by not informing the potential VSRP participants of the true qualities of the lifetime HCA. The failure to inform was a material misrepresentation because there was a substantial likelihood that a reasonable employee would rely on the information given to make an informed decision regarding the VSRP. It is irrelevant whether Continental intentionally or negligently excluded this piece of information under the Sixth Circuit's standard.

The Third Circuit in *Unisys* agrees that an administrator breaches its fiduciary duty when it affirmatively misrepresents or fails to provide necessary information when it knows that misrepresentation or omission might harm the participants or beneficiaries.¹⁹⁵ Unisys replaced one medical benefit plan in which the company paid the retirees' medical premiums with another medical benefit plan in which the retirees paid the full cost of the premiums.¹⁹⁶ The court distinguished *Unisys* from previous cases where it held a breach of fiduciary duty did not exist.¹⁹⁷ If a plan clearly explained the benefits in question, and if the administrator made no material misrepresentations, then the administrator would not have breached its duty.¹⁹⁸ The court further stated that an employer may satisfy ERISA but may still breach its fiduciary duty by "simultaneously or subsequently mak[ing] material misrepresentations."¹⁹⁹ It emphasized that the management in *Unisys* consistently misrepresented the nature of the medical benefits.²⁰⁰

Applying the standards set forth in the Third Circuit, the plaintiffs in *Vallone* would have prevailed on the summary judgment ruling. It is reasonable to assume the retirees relied on the lifetime quality of the HCA benefit. Thus, Continental breached its fiduciary duty by consistently claiming the HCA was a lifetime benefit. If judged in the Third Circuit, it does not matter that there was a reservation of rights clause because the plan did not clearly explain the company's ability to terminate the benefit, and the human resource representatives said the benefit was a lifetime benefit.

According to the *Vallone* court, the Second Circuit has interpreted ERISA's fiduciary standards the broadest.²⁰¹ In general, a fiduciary and an employer must

194. *Id.*

195. *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 57 F.3d 1255, 1264 (3d Cir. 1995).

196. *Id.* at 1258.

197. *Id.* at 1263–64.

198. *Id.* at 1264.

199. *Id.*

200. *Id.* at 1265.

201. *Vallone v. CNA Fin. Corp.*, 375 F.3d 623, 640 (7th Cir. 2004).

deal “fairly and honestly with its beneficiaries.”²⁰² In *Abbruscato*, the Second Circuit focused on the plain meaning understanding of “lifetime.”²⁰³ The Second Circuit determined a breach of fiduciary duty might exist if the employer labeled the benefit a “lifetime” benefit but failed to have the benefit vest.²⁰⁴ If the employer was not judged as having breached its duty to deal honestly with the beneficiaries, it may nonetheless have breached its duty when it did not inform the employees that it could reduce or terminate the benefit.²⁰⁵

If the *Vallone* court were to use the Second Circuit’s standard, it may have determined that Continental breached its fiduciary duty by not informing the retirees of the true character of the HCA. The benefit was called a “lifetime” benefit but the benefit did not vest.²⁰⁶ Continental did not discuss its right to terminate the HCA.²⁰⁷ Based on these key deficiencies, the Seventh Circuit, applying the Second Circuit’s standard, could have decided in favor of the plaintiffs.

2. Support Through the Restatement (Second) of Torts

While the law of torts does not govern ERISA claims due to preemption requirements, the tort definition of fraudulent misrepresentation is similar to the Second, Third and Sixth Circuits’ standards. Based on the standard in tort law, *Vallone* may have been decided in favor of the plaintiffs because the employer could be viewed as intentionally misrepresenting the plan.²⁰⁸ The Restatement (Second) of Torts provides that “one standing in fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by that relation.”²⁰⁹

The Restatement (Second) defines fraudulent misrepresentation as a misrepresentation in which the maker “knows or believes that the matter is not as he represents it to be.”²¹⁰ Generally, one is liable for fraudulent misrepresentations to those whom “he intends or has reason to expect to act . . . in reliance upon the misrepresentation.”²¹¹ Tort law provides that a fraudulent

202. *Abbruscato v. Empire Blue Cross & Blue Shield*, 274 F.3d 90, 102 (2d Cir. 2001) (quoting *Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 124 (2d Cir. 1997)).

203. *Abbruscato*, 274 F.3d 90.

204. *Id.* at 102–03.

205. *Id.* at 103.

206. *Vallone*, 375 F.3d at 637–38.

207. *Id.* at 628.

208. *Vallone*, 375 F.3d 623.

209. RESTATEMENT (SECOND) OF TORTS § 874 (1977).

210. *Id.* § 526.

211. *Id.* §§ 525, 531.

misrepresentation includes a statement that is true but is misleading because of the maker's failure to state an additional or qualifying matter.²¹² "A statement containing a half-truth may be as misleading as a statement wholly false."²¹³ To determine if a partial disclosure was a fraudulent misrepresentation, one must determine if the person making the statement knew or believed that the undisclosed statements would "affect the recipient's conduct in the transaction at hand."²¹⁴

The Restatement (Second) also includes a section on negligent misrepresentation.²¹⁵ This applies to someone who "in the course of his . . . profession or employment . . . in which he has a pecuniary interest, supplies false information for the guidance of others . . . is subject to liability . . . for their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information."²¹⁶

If the above rules had been applied to the facts of *Vallone*, the result may have been significantly different.²¹⁷ Continental knew the welfare benefit could be changed,²¹⁸ yet it still chose to call the HCA a "lifetime" benefit. This would meet the tortious definition of fraudulent misrepresentation because Continental would have known that "lifetime" does not mean forever, and its employees might rely on lifetime as forever.²¹⁹

The misrepresentation must also meet two additional criteria: (1) it must induce conduct, and (2) it must be reasonably relied upon.²²⁰ The VSRP sought to reduce costs to the company by enticing employees to take early retirement.²²¹ It did, in fact, induce conduct—347 Continental employees accepted the VSRP deal.²²² It was also reasonably relied upon in that the employees did not seek additional healthcare benefits.²²³ The employees assumed that they would receive the lifetime benefit until they or their spouses died.²²⁴ Though one may argue that the HCA benefit alone neither induced action nor was reasonably relied upon,

212. *Id.* § 529.

213. *Id.* § 529, comment a.

214. *Id.* § 529, comment b.

215. *Id.* § 552.

216. *Id.* § 552(1).

217. *Vallone v. CNA Fin. Corp.*, 375 F.3d 623 (7th Cir. 2004).

218. *Id.* at 629.

219. RESTATEMENT (SECOND) OF TORTS § 525 (1977).

220. *Id.*

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

222. *Id.*

223. Brief of Plaintiffs-Appellants, *supra* note 104, at 37.

224. *Vallone*, 375 F.3d at 633–34.

with the costs of healthcare expected to double by 2007,²²⁵ it is likely that Continental retirees considered the nature of the healthcare benefit highly significant to their retirement decision. If the employees thought their benefit would be taken away, they may have delayed retiring or acquired additional, supplemental health insurance.

With Continental management's knowledge that the HCA benefit could be terminated, but the lack of oral or explicit disclosure of the possibilities of amendment to the potential VSRP participants, it disclosed only a half-truth. In this situation, the half-truth was just as misleading as a false statement. It is unreasonable to think that the terminable quality of the HCA benefit would *not* affect the employees' conduct.²²⁶

Continental's disregard in informing its employees of the HCA's true character may also be likened to the tortious definition of negligent misrepresentation. Continental human resource employees, through their responsibilities at Continental, supplied false information about the true nature of the HCA benefit.²²⁷ The pecuniary interest condition is met through the human resource employees' salary. The company knew of the terminable aspect but failed to exercise reasonable care in communicating that information to the potential VSRP participants.

D. Policy

Policy dictates a different result from the result in *Vallone*.²²⁸ Despite noting its bitter effect on the pensioners, the Seventh Circuit has neglected to consider the policy implications of this "well-established" law.²²⁹ In response to a question about one of his least favorite aspects of being a federal appellate judge, Seventh Circuit Judge Richard A. Posner once stated it was the quality of the briefs, which is "pretty low."²³⁰ His advice to improve the briefs' quality was to "always explain the purpose of a rule that you want us [the appellate judges] to apply in your favor, because the purpose of a rule delimits its scope and guides its application; [and] always give us practical reasons for the results you are

225. AM. COLL. OF EMERGENCY PHYSICIANS, *THE UNINSURED: ACCESS TO MEDICAL CARE* (2003) (on file with author).

226. *Vallone*, 375 F.3d 623.

227. *Id.* at 628.

228. *Id.*

229. *Id.* at 626.

230. Interview with Richard A. Posner, 7th Cir. Judge, How Appealing's 20 Questions Site (Dec. 1, 2003), at http://legalaffairs.org/howappealing/20q/2003_12_01_20q-appellateblog_archive.html.

seeking.”²³¹ In applying Judge Posner’s advice, perhaps the plaintiffs in this case did not sufficiently emphasize the importance of ERISA’s policy.

1. *The Purpose of ERISA*

The *Vallone* result is not consistent with the ERISA’s purpose.²³² To better understand why ERISA and the *Vallone* opinion do not effectuate the purpose of Congress, we must examine how and why ERISA was created. In response to several Congressional reports²³³ and many instances of middle-aged workers losing their pension rights,²³⁴ in 1974, Congress passed Public Law 93–406, ERISA.²³⁵ ERISA’s main purpose was to improve the retirement income system, which would in turn encourage employers and employees to participate in the program.²³⁶ One of the authors of the bill, Senator Javits, explained the driving reasons for creating ERISA when presenting the bill to the Senate in January of 1973.²³⁷ The first reason was inadequate or nonexistent vesting provisions.²³⁸ Another reason was employees “not having full comprehension of their rights and obligations under their participating pension plans because of inadequate communication to them in booklets or other format of details of plans.”²³⁹

When reservation of rights clauses are interspersed throughout pages of retirement documents (or in documents to which the retirement package only refers), the ordinary person will find it difficult to determine his or her rights and

231. POSNER INTERVIEW, *supra* note 230.

232. *Vallone*, 375 F.3d 623.

233. 119 CONG. REC. 146 (1973) (statement of Sen. Javits). Sen. Javits mentioned four reports in his address. *Id.* The first was issued in 1965 from President Kennedy’s Cabinet Committee on Corporate Pension Funds. *Id.* It recommended vesting, funding, and fiduciary reform and additional study of insurance and portability. *Id.* The second report was issued in 1971 by the White House Conference on Aging. It recommended early vesting, portability, fiduciary and insurance requirements. *Id.* The third report was also issued in 1971. *Id.* This joint report by the Departments of Labor and Treasury suggested fiduciary standards and vesting requirements. *Id.* The last report, issued just weeks before the senator’s speech, was completed by a task force from the Department of Health, Education, and Welfare. *Id.* It recommended vesting and portability requirements. *Id.*

234. 119 CONG. REC. 147 (1973) (statement of Sen. Ribicoff). Sen. Ribicoff discussed witnesses that had presented testimony before the Senate Pension Study Subcommittee. *Id.* One witness, a thirty-two year employee of a company, was laid off three years before his pension rights vested. *Id.* He reminded the senators of the Studebaker Packard case, where Studebaker’s closing left 4,000 employees aged forty to sixty years old out of work and with only fifteen percent (15%) of what the company owed them. *Id.*

235. Employee Retirement Income Security Act of 1974, Pub. L. No. 93–406 (1974) (codified as amended at 29 U.S.C. §§ 1001–1461 (2000)).

236. H.R. REP. NO. 93–533, at 1 (1973). *See also* S. REP. NO. 93–383, at 3 (1973).

237. 119 CONG. REC. 145–46 (1973) (statement of Sen. Javits).

238. 119 CONG. REC. 145 (statement of Sen. Javits).

239. 119 CONG. REC. 145–46 (statement of Sen. Javits).

obligations. In *Vallone*, the reservation of rights clause was on the last page of a twelve-page document, which was in addition to thirteen other pages of memos, worksheets, and a question and answer brochure. While the documents of the general retirement also contained a reservation of rights clause, some Continental employees may not have understood the connection between the general retirement package and the VSRP.²⁴⁰ The situation in *Vallone* is exactly what ERISA was meant to prevent. Continental provided inadequate communication about the VSRP to the eligible employees.

2. *Effects on the Uninsured*

The increasing numbers of uninsured Americans demands a different result than the one found in the *Vallone* opinion.²⁴¹ There were forty-five million Americans without healthcare insurance in 2003.²⁴² The increasing number of uninsured Americans not only affects those without insurance but also the economy and country as a whole. While CNA's releasing its obligation to provide healthcare insurance for Continental retirees does not equate to a significant percentage of the total uninsured, imagine allowing every company to renege on its promise to provide health insurance. The aggregation would tremendously impact the economy and the healthcare industry. Changes in either ERISA or court opinions interpreting ERISA are needed to prevent such a negative impact.

a. Those Without Insurance

The *Vallone* opinion could increase the already large number of uninsured Americans. In 2004, the Institute of Medicine (IOM) released its findings from a three-year study on the health and economic consequences of people living without healthcare insurance.²⁴³ Those having health insurance were more likely

240. *Vallone v. CNA Fin. Corp.*, 375 F.3d 623, 636–37 (7th Cir. 2004). The court stated that because the lifetime HCA benefit was not unique to the VSRP, the reservation of rights clauses in the general retirement plan would also apply to the HCA benefit for the VSRP. *Id.*

241. *Vallone*, 375 F.3d 623.

242. Elise Gould, *The Chronic Problem of Declining Health Coverage: Employer-Provided Health Insurance Falls for Third Consecutive Year*, EPI ISSUE BRIEF (Economic Policy Institute, Washington, D.C.), Sept. 16, 2004, at 2, available at www.epinet.org/issuebriefs/202/ib202.pdf.

243. Dianne Miller Wolman & Wilhelmine Miller, *The Consequences of Uninsurance for Individuals, Families, Communities, and the Nation*, 32 J.L. MED. & ETHICS 397 (2004). This study focused on people with no insurance, thus excluding most people over the age of sixty-five because of their coverage by Medicare. *Id.* at 398. The findings in this study are still applicable to the Continental employees.

to be diagnosed with illnesses earlier and were more likely to receive proper treatment and management of chronic diseases.²⁴⁴ Due to their delayed diagnoses and care, those without insurance were more likely to die sooner than those with healthcare insurance.²⁴⁵ A person's overall well-being suffers from just a temporary lack of coverage.²⁴⁶ The deterioration is more pronounced in individuals aged fifty-five to sixty-five years old.²⁴⁷

Three hundred and forty-seven former Continental employees and their eligible dependents (not including all other Continental retirees) are now without healthcare insurance.²⁴⁸ Each of them faces the possibility of a decline in health due to the lack of healthcare benefits for a period of time and reduced benefits for the remainder of their lives.

Research also shows that many uninsured are unable to afford health insurance from the individual market.²⁴⁹ If insurers even offer coverage to the elderly, they charge higher premiums.²⁵⁰ Consequently, it would have been expensive, if not impossible, for former Continental employees to obtain health coverage for themselves and their dependents. This contradicts CNA's argument that "there is nothing that prevented Appellants or other Continental retirees from obtaining supplemental coverage on their own."²⁵¹

b. The Economy as a Whole

The *Vallone* opinion could have a negative impact on the economy as a whole. CNA's denial of healthcare benefits extends beyond the lives and families of those who lost the benefits; the lack of health insurance coverage affects the whole community, including those with health insurance. The IOM study explored the effects the uninsured had on local hospitals and doctors.²⁵² Many specialists are hesitant to work in the emergency rooms of cities and towns with high rates of the uninsured for fear they will not be paid.²⁵³ The total costs of healthcare of the uninsured totaled \$99 billion in 2001 with \$35 billion

244. *Id.* at 399.

245. *Id.* at 399–400. The Committee on Consequences of Uninsurance estimated that each year 18,000 people under age sixty-five die prematurely due to a lack of health insurance.

246. IOM Study: Uninsured Don't Get Needed Health Care. Public Health Reports (on file with author).

247. *Id.*

248. *Vallone v. CNA Fin. Corp.*, 375 F.3d 623, 626 (7th Cir. 2004).

249. *Wolman & Miller*, *supra* note 243, at 400.

250. *Id.*

251. Brief of Defendants-Appellees, *supra* note 105, at 32.

252. *Wolman & Miller*, *supra* note 243, at 401.

253. *Id.*

uncompensated.²⁵⁴ Projected uncompensated costs are expected to rise to \$50 billion in 2004.²⁵⁵ The federal, state, and local governments pay up to eighty-five percent (85%) of the uncompensated costs through subsidies to hospitals, clinics, and other providers.²⁵⁶

Those without insurance are likely to be in worse condition when they reach sixty-five and obtain Medicare coverage, thus increasing their costs to Medicare.²⁵⁷ Those without insurance are more likely to have their health affect their work, reduce their productivity, and claim disability.²⁵⁸ There is a higher incidence of mental illness in those without health insurance.²⁵⁹ The jail and prison populations are disproportionately filled with those with mental illnesses who have not properly treated their diseases.²⁶⁰ With concerns of bioterrorist attacks and dangerous infectious diseases, the uninsureds' delay in receiving healthcare only postpones detection and more rapidly spreads diseases during an epidemic.²⁶¹

It is not in the best interest of our country to allow companies like CNA to retract their guarantees of lifetime healthcare allowances. The costs to our hospitals, our elderly citizens, and our public health programs will be too great to start on the slippery slope of permitting courts to bless this type of corporate behavior.

E. Remedies

A possible solution to prevent results similar to *Vallone* is to amend ERISA. Perhaps if Congress, when originally enacting ERISA, had the foresight to see the problems faced today, it would have included more protection for welfare benefits in ERISA. It is unlikely that the Seventh Circuit will change its strict interpretation of fiduciary duty, so for the protection of the employees, Congress must amend ERISA.

Several attempts have already been made to remedy this situation. After Unisys released over 25,000 employees in his home state of Pennsylvania,

254. *Id.* at 402.

255. *Id.* at 403.

256. *Id.* at 402.

257. *Id.* at 403.

258. *Id.*

259. *Id.*

260. *Id.*

261. Lisa Greene, *Uninsured a Risk to Public Health*, ST. PETERSBURG TIMES, Dec. 7, 2003, available at <http://pqasb.pqarchiver.com/sptimes/483486881.html?MAC=a0acf850e72e9eb83f8267988993e660&did=483486881&FMT=FT&FMTS=FT&date=Dec+7,+2003&author=LISA+GREENE&p ub=St.+Petersburg+Times&printformat=&desc=Uninsured+a+risk+to+public+health>.

Senator Wofford introduced a bill to amend ERISA.²⁶² This proposed bill would require the plan to maintain the health benefits at the level established immediately before the termination until the court determines the proper action.²⁶³ It would also shift the burden to the employers to show that in ambiguous plan language, the termination or reduction of benefits would be allowed.²⁶⁴ While this bill was not enacted, almost two years later, two similar bills were proposed in the House and the Senate.²⁶⁵ Like Senator Wofford's bill, these also were not enacted.

While an ERISA overhaul may take a long time to enact, requiring employers to inform employees that benefits may be terminable or reducible does not require a long enactment period. This may be as simple as having the employees sign a basic form acknowledging the employer or plan administrator informed them that, despite a title of "lifetime" benefits, the benefits are not fixed. The employees must understand that these benefits are subject to change at the employer's discretion.

In the meantime, employees who are considering retirement should carefully read the SPD and the reservation of rights clause. The Department of Labor (DOL) has issued a brief describing the employer's ability to reduce or terminate health benefits.²⁶⁶ At the end of the brief, the DOL acknowledges the uncertainty of the law and suggests that it may be beneficial to seek the advice of an attorney.²⁶⁷

V. CONCLUSION

The Seventh Circuit has narrowly interpreted the fiduciary duty standard in regards to ERISA welfare benefits; however, this interpretation does not accomplish Congress's objective of protecting employees. By concluding that lifetime meant "good for life unless revoked"²⁶⁸ and that Continental employees

262. Gregory J. Ossi, *It Doesn't Add Up: The Broken Promises of Lifetime Health Benefits, Medicare, and Accounting Rule FAS 106 Do Not Equal Satisfactory Medical Coverage for Retirees*, 13 J. CONTEMP. HEALTH L. & POL'Y 233, 256 & n.195 (1996).

263. Retiree Health Benefits Protection Act, S. 1268, 103d Cong. (1993).

264. *Id.*

265. S. 588, 104th Cong. (1995); H.R. 1293, 104th Cong. (1995). The identical bills were sponsored by Senator Daschle and Representative Johnson, respectively.

266. Department of Labor, Pension and Welfare Benefits Administration, *Pension and Welfare Brief: Can the Retiree Health Benefits Provided by Your Employer Be Cut?* (Rev. Mar. 1998) at <http://library.findlaw.com/1999/Mar/8/126152.html>.

267. *Id.*

268. *Vallone v. CNA Fin. Corp.*, 375 F.3d 623, 633 (7th Cir. 2004).

did not rely on the HCA benefit,²⁶⁹ the Seventh Circuit disregarded Congress's intent and turned its back on those Congress intended to protect. The standards of the Second, Third, and Sixth Circuits, allowing for breaches of fiduciary duty for negligent misrepresentations, better realize ERISA's purpose.²⁷⁰ With these standards, employees like Vallone may be able to withstand court battles against large companies well-staffed with attorneys. Until ERISA is amended to favor employees above corporate success, it will be as ineffective as the plans that necessitated its creation.

269. *Id.* at 640.

270. *See, e.g.*, James v. Pirelli Armstrong Tire Corp., 305 F.3d 439 (6th Cir. 2002); Abbruscato v. Empire Blue Cross & Blue Shield, 274 F.3d 90 (2d Cir. 2001); *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 57 F.3d 1255 (3d Cir. 1995).