BNA, INC.

PENSION & BENEFITS

DAILY

Reproduced with permission from Pension & Benefits Daily, 130 PBD, 7/9/10, 07/09/2010. Copyright © 2010 by The Bureau of National Affairs, Inc. (800-372-1033) http://www.bna.com

Fiduciary Responsibility

Lead Us Not Into Misrepresentation: The Road From *Berlin to Unisys*

BY KEITH R. MCMURDY AND SARAH K. IVY

Keith R. McMurdy is a partner in Fox Rothschild's New York office. His practice focuses on labor and employment issues arising from the design, drafting and administration of employee benefits plans, and he represents benefit plans, plan sponsors, plan administrators, third-party administrators, and insurers. Sarah K. Ivy is an associate in Fox Rothschild's Exton, Pa. office. She focuses her practice primarily in the areas of corporate law, taxation, and executive compensation.

One of the most fascinating things about Section 404 of the Employee Retirement Income Security Act is that it is both remarkable in its relative brevity and yet exceedingly complicated.[1] In the simplest of interpretations, it provides that fiduciaries will act solely in the best interest of the plan. Yet it leaves open to interpretation a wide variety of real life circumstances for consideration. The duties are generally defined and subject to a reasonable standard of review, but the door is left open for a myriad of activities that may fit within the definition of a ''fiduciary duty.''

[1] 29 U.S.C. § 1104.

Over time, the duty to avoid ''misrepresentation'' to participants and beneficiaries has matured into one of the most recognized duties. This summary is not intended to argue the correctness of any particular position regarding this duty, but simply to track its maturation through some select cases to possibly shed some light on how fiduciaries can avoid breaching that duty.[2]

Berlin and Beyond

Certainly, *Berlin v. Michigan Bell Telephone Co.* was not the first case to address the possibility that misleading communications to plan participants could support a claim for breach of fiduciary duty, which the U.S. Court of Appeals for the Sixth Circuit acknowledged in its opinion.[3] But it is one of the first to clearly delineate that plan fiduciaries have the duty to ''not make misrepresentations, either negligently or intentionally, to potential plan participants.''[4]

Factually, *Berlin* arose over communications relating to a Management Income Protection Plan (''MIPP'') that purported to offer severance benefits to certain eligible retirees in an initial offering. The plaintiffs contended that various flyers and informational bulletins implied there would not be a second MIPP benefit option offered. The plaintiffs in this case retired after the first MIPP offering but before the second MIPP offering was made and were denied the second benefit. They contend that, had they been told a second MIPP offering was being considered, they would have delayed retirement until the second offering. The plaintiffs were ultimately denied benefits under the second MIPP offering and they brought suit for wrongful denial of benefits, as well as misrepresentation and breach of fiduciary duty.

While finding that there may be a duty to avoid miscommunication, the court did also affirm that there was no duty to affirmatively make communications. In sum, the company did not have to tell what might be happening in the future. The limitation was defined as one where ''if the plan administrator and/or plan fiduciary does communicate,'' material misrepresentations in that communication may constitute a breach of fiduciary duty.[5] Based on this decision, a wise fiduciary might conclude that the best course of action would be to say nothing (excepting, of course, those communications required by ERISA already).

Some time after *Berlin* was decided, the U.S. Court of Appeals for the Third Circuit issued its opinion in *Curcio v. John Hancock Mutual Life Insurance Co.*, where the claims of the plaintiff arose from oral misrepresentations regarding benefits under a supplemental life insurance policy.[6] In finding for the plaintiff, the court concluded that ''when a plan administrator speaks, it must speak truthfully.''[7] Thus, making an affirmative, material misrepresentation would subject a fiduciary to a claim for breach of fiduciary duty.

This decision continued the linear development of the idea that fiduciaries have a duty to communicate clearly and accurately, and that duty is encompassed within Section 404, though not specifically enumerated as such. A wise fiduciary, then, must commit to truthfulness in all disclosures.

In *Varity Corp. v. Howe*, the U.S. Supreme Court tackled the issue of whether a fiduciary who participated ''knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense'' would be engaging in a breach of fiduciary duty.[8] In ruling that fiduciaries are precluded from engaging in intentional misrepresentation, the court ultimately concluded that ''lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA.''[9]

While this was not necessarily the first case to address intentional misrepresentation as a beach of fiduciary duty, it is one that clearly confirms that there is a fiduciary duty to not make misrepresentations encompassed in Section 404 of ERISA. At the same time, the court did not conclude that silence on a particular issue was akin to an affirmative misrepresentation. Therefore, a wise fiduciary must not undertake to make a knowingly false representation.

Varity subsequently spawned a number of decisions, not the least of which is *Sprague v. General Motors Corp.*, which seems to approach ''misrepresentation'' from another angle.[10] The *Sprague* court considered the concept of misrepresentation within the confines of a perceived ''duty to disclose.''

In *Sprague*, the employer made representations regarding the future of a retiree medical plan without making specific reference to plan provisions providing that the plan could be amended or terminated at any time. First, the court concluded that while equitable estoppel can be a viable theory of recovery in ERISA cases, estoppel cannot apply to modify unambiguous plan provisions. Second, and most relevant to this discussion, was the conclusion that the duty to avoid miscommunication did create a duty to tell participants with every communication that the plan terms were subject to change.[11]

One of the most interesting components of *Sprague* is that the GM plans at issue contained language reserving the ability of the plan sponsor to amend or modify the plans at any time. The ''misrepresentation'' at issue was not that the plans would never change, but rather failing to confirm to the proposed class of retirees that a change could occur. The *Sprague* court took careful pains to acknowledge the fiduciary duty articulated in *Varity*, but then quickly distinguished it. The court noted that ''[t]here is, in our view, a world of difference between the employer's deliberate misleading of employees in Varity Corp. and GM's failure to begin every communication to plan participants with a caveat.''[12]

The caveat was the fact that terms could change at any time. Thus, were we to stop at *Sprague*, it would appear that the logical advice to a wise fiduciary would be

[2] This summary is limited in focus to decisions in the U.S. Courts of Appeals for the Third and Sixth Circuits primarily but the authors acknowledge a multitude of similar decisions in various jurisdictions that have reached similar results.

[3] 858 F.2d 1154, 10 EBC 1217 (6th Cir. 1988).

[4] *Id.* at 1164.

[5] *Id.*

[6] 33 F.3d 226, 18 EBC 1822 (3rd Cir. 1994).

[7] *Id.* at 238.

[8] 116 S. Ct. 1065, 1075, 19 EBC 2761 (1995).

[9] *Id., citing Peoria Union Stock Yards Co. Retirement Plan v. Penn Mutual Life Ins. Co.*, 698 F.2d 320, 326, 3 EBC 2590 (7th Cir. 1983).

[10] 133 F.3d 388, 21 EBC 2267 (6th Cir. 1998).

[11] *Id.* at 405.

[12] *Id.*

COPYRIGHT © 2010 BY THE BUREAU OF NATIONAL AFFAIRS, INC.

to always make truthful communications, but it is not always necessary to remind participants that the plan could change later, making the representations obsolete at some later date.

Subsequent to *Sprague*, the Sixth Circuit then considered a situation where, when questioned about plan terms, a company representative gave misleading answers. In *James v. Pirelli Armstrong Tire Corp.*, the court looked at a situation where plan beneficiaries were given inaccurate information about plan benefits in group meetings and exit interviews when questioned by the participants.[13] The court affirmed the concept that there was no fiduciary duty to disclose the possibility of future changes to the plans, but went on to raise the larger question left open in *Sprague*: had an early retiree asked about the possibility of future change and had the retiree received a misleading answer, would that be a breach of fiduciary duty?[14]

The court concluded that being asked and giving a misleading response was akin to voluntarily providing misleading information and would support a claim for breach of fiduciary duty. As such, a fiduciary would not be obligated to commit to avoiding future changes in the plan, but if asked, must be truthful that such changes could occur. Therefore, a wise fiduciary may not have to reveal all plan terms, but he or she must now make sure answers volunteered are full and accurate. There is an affirmative obligation to make mention of the ability to change terms if failure to mention that provision is misleading.

The *Unisys* Case

This eventually leads us to *In re Unisys Corp. Retiree Medical Benefits ERISA Litigation*, the last in a number of decisions from the Third Circuit addressing claims by Unisys Corp. retirees.[15] After a number of decisions, the remaining case was one where 14 retirees were maintaining a claim against Unisys for breach of fiduciary duty arising from a claim for lifetime participation in a retiree medical program. The court determined that Unisys was liable for breach of fiduciary duty, and in doing so, rather neatly and succinctly articulated the current status of a claim for misrepresentation.

First, the court articulated that there is not only a negative duty not to misinform, but also an affirmative duty to inform when the fiduciary knows that silence might be harmful.[16] Second, the court outlined that a claim for breach of fiduciary duty premised on misrepresentation generally requires four components: (1) acting in a fiduciary capacity, (2) affirmative misrepresentations or omissions, (3) materiality of the misrepresentation or omission, and (4) detrimental reliance by the participant or beneficiary.[17]

These points condense to show what the duty is and how it is measured to see if a breach occurred. This is very useful for a fiduciary to know because it lays out not only how a misrepresentation can occur, but also how to avoid it. It is not enough for a fiduciary to make a truthful statement if that statement is incomplete or subject to multiple interpretations. To avoid a breach of fiduciary duty claim, a fiduciary must make sure that silence, or more directly, a missing explanation, is not misinterpreted by participants. In sum, a fiduciary cannot assume understanding on the part of all beneficiaries receiving the communication.

The court then went further, articulating that a statement, while not technically false, could still be misleading, giving rise to a claim for breach of fiduciary duty. Definitive statements about the state of a plan can be misleading if they do not contain an acknowledgment that they can be modified or terminated at any time. Unisys failed to adequately disclose that changes could be made, thereby misleading participants to believe they would never change.[18]

As a result, it is no longer enough for a fiduciary to disclose information, or to have disclaimers in plan documents. It now appears that the true satisfaction of the fiduciary duty to avoid misrepresentation goes beyond merely providing information. It also includes a duty to make sure that participants are not confused by the information provided.

It should be noted that the ''misrepresentations'' made by Unisys were not ''affirmative misrepresentations.'' The Unisys plans contained reservation language allowing for amendment of the plans. Unisys represented that, at the time of retirement, no plan changes were anticipated but that was a factually accurate statement. Unisys simply did not stress the existence of the reservation to amend the plan with every communication. Instead, the court concluded that by using the word ''for life'' in communications to the retirees, the interpretation was one that the benefits were ''vested'' or ''guaranteed'' and could thus never be changed.[19] Thus, the ''misrepresentation'' occurred not affirmatively, but rather through omission in failing to point to the possibility of changes in the future to dispel any belief by the participants that benefits would never change.

The court's comments on the materiality of the misrepresentation are most telling. The court determined that Unisys knew of the confusion caused by inadequate disclosures—''confusion generated by its silence.''[20] It was therefore foreseeable that silence would be misleading, effectively creating an affirmative obligation to tell if not telling would mislead.

The obligation to avoid affirmative miscommunication as articulated in *Berlin* has matured into an affirmative obligation to seek out and avoid instances where misunderstandings by participants can occur without actual statements being made. The fiduciary duty has become one where fiduciaries must avoid confusion, not merely tell the truth.

Conclusion

So what of our wise fiduciary? How shall we counsel him or her to avoid a claim for breach of fiduciary duty for misrepresentation?

We now know there cannot be any affirmative misrepresentations or intentional misstatements. There

[13] 305 F.3d 439, 28 EBC 2601 (6th Cir. 2002) (181 PBD, 9/18/02; 29 BPR 2571, 9/24/02).
[14] 305 F.3d at 453, *citing Sprague*, 133 F.3d at 405-406.
[15] *Adair v. Unisys Corp. (In re Unisys Corp. Retiree Medical Benefits ERISA Litigation)*, 579 F.3d 220, 47 EBC 1929 (3d Cir. 2009) (169 PBD, 9/3/09; 36 BPR 2055, 9/8/09).
[16] *Id.* at 228.
[17] *Id.*

[18] *Id.* at 229.
[19] *Id.* at 231.
[20] *Id.* at 232.

cannot be any hiding of facts when questions by participants arise. There should not be any silence about plan provisions and any reservations to amend or terminate benefits, even when they are already contained in ERISA plan documents. And, there should be efforts to avoid confusion. A wise fiduciary should make sure every communication to participants covers all the bases, even if it seems that providing the information is duplicative.

 COPYRIGHT © 2010 BY THE BUREAU OF NATIONAL AFFAIRS, INC. ISSN