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ERISA MISREPRESENTATION AND NONDISCLOSURE CLAIMS: SECURITIES LITIGATION UNDER THE GUISE OF ERISA?

Clovis Trevino Bravo*

ABSTRACT

In the wake of recent corporate scandals and dramatic market downturns, many employees whose defined contribution plans were heavily invested in employer stock have experienced substantial losses in their anticipated retirement savings. To recover for their losses, plan participants have filed a number of lawsuits under the Employee Retirement Income Security Act of 1974 (“ERISA”) alleging that plan fiduciaries made misrepresentations or failed to disclose material information about the suitability of investing in the company stock. These controversial suits are usually derivative or companion cases to securities class actions based on the same allegations of misrepresentations or nondisclosures. Even though there is a significant overlap between the ERISA and the securities suit, the procedural, remedial, and substantive rules governing the two actions are quite different. By juxtaposing these rules, this Article examines whether ERISA fiduciary misrepresentation and nondisclosure claims amount to securities litigation in disguise; and if so, whether these claims should be allowed to proceed in the absence of the procedural safeguards imposed by the Private Securities Litigation Reform Act (“PSLRA”).

INTRODUCTION

In the wake of recent corporate scandals and dramatic market downturns, many employees whose company-sponsored retirement saving plans were heavily invested in the stock of their employers have seen their account balances substantially depleted.¹ To recover for their losses, some plan participants have filed lawsuits under the Employee Retirement Income Security Act (“ERISA”)² alleging that plan fiduciaries made misrepresentations or

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¹ See generally Susan J. Stabile, Enron, Global Crossing and Beyond: Implications for Workers, 76 ST. JOHN’S L. REV. 815 (2002).

failed to disclose information about the suitability of investing in the company stock. These controversial suits are generally derivative or companion cases to securities fraud class actions arising out of the same alleged misrepresentations and nondisclosures. Even though the securities and ERISA lawsuits are based on the same underlying facts, the procedural and substantive rules governing the two actions are substantially different. The question arises: are these lawsuits securities litigation under the guise of ERISA? If so, should they be allowed to proceed in the absence of the procedural safeguards imposed by the Private Securities Litigation Reform Act ("PSLRA")?

Thus far commentators have addressed this overlap only partially or incidentally; hence the need to address in this Article the procedural, remedial and substantive differences between the ERISA and the Securities action side by side. Following this introduction, Part I of this Article presents a brief overview of ERISA fiduciary duties. Part II identifies the most significant procedural and remedial differences between the ERISA lawsuit and the securities class action. Part III discusses disclosure duties under ERISA and the Securities laws, and Part

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3 This article does not address the issue of whether ERISA fiduciaries are liable for imprudence in allowing continued investment in employer stock. See generally Craig C. Martin, Matthew J. Renaud and Omar R. Akbar, What's up on Stock-Drops? Moench Revisited, 39 J. MARSHALL L. REV. 605 (2006) (discussing imprudent investment claims).


5 See Shelby D. Green, To Disclose or Not to Disclose? That Is the Question for the Corporate Fiduciary Who Is Also a Pension Plan Fiduciary Under ERISA: Resolving the Conflict of Duty, 9 U. PA. J. LAB. & EMP. L. 831 (2007) (arguing that the ERISA fiduciary duty to disclose could be read to require fiduciaries with insider obligations to advise employees that further investment in the company would not be wise, but without stating why, if that would reveal non-public corporate information); Mark Casciari and Ian Morrison, Should the Securities Exchange Act be the Sole Federal Remedy For An ERISA Fiduciary Misrepresentation of the Value Of Public Employer Stock? 39 J. MARSHALL L. REV. 637 (2006) (“ERISA does not provide an additional remedy” for misrepresentations or nondisclosures.”); Craig C. Martin and Elizabeth L. Fine, ERISA Stock Drop Cases: an Evolving Standard, 38 J. MARSHALL L. REV. 889, 912 (2005) (briefly discussing some significant procedural differences between ERISA and securities law liability); Susan J. Stabile, I Believed My Employer and Didn’t Sell My Company Stock: Is There an ERISA (or ‘34 Act) Remedy for Me?, 34 CONN. L. REV. 385, 423-24 (2004) (arguing that recognizing an ERISA claim for misrepresentations and nondisclosures that would not constitute a securities law violation does not do violence on Congress' securities law goals, but questioning whether ERISA should provide a remedy when such behavior is arguably both a violation of ERISA and of the securities laws).
IV examines whether securities and ERISA misrepresentation and nondisclosure claims overlap, complement, or are in conflict with each other. This Article concludes that the substantial overlap and potential conflict between the two actions warrants substantive clarification and procedural harmonization to clarify fiduciary duties and employee rights and to prevent plaintiffs’ lawyers from using ERISA to evade the protections that the federal securities laws provide against abusive litigation.

I. **ERISA Fiduciary Duties**

The *Employee Retirement Income Security Act* of 1974 (ERISA) was enacted to “assure the equitable character” and financial soundness of retirement and other benefit plans.⁶ ERISA imposes on plan fiduciaries the highest standard of conduct known to the law.⁷ These duties include the duty to act prudently, to follow directives from plan participants, to monitor, to diversify investments, and to act loyally. ERISA fiduciary duties are not limited by the statute’s express provisions: the legislative history of ERISA suggests that Congress intended to incorporate into ERISA the core principles of trust law to define the general scope of fiduciary authority and responsibility.⁸

ERISA contemplates two basic types of pension arrangements: defined benefit and defined contribution plans.⁹ When ERISA was enacted, the predominant pension structure offered by United States publicly traded companies was the defined benefit plan, under which employers guarantee a pension benefit determined by using a formula that adjusts benefits

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⁶ *Id.* § 1001(a).

⁷ *See*, *e.g.*, Flanigan v. General Elec. Co., 242 F.3d 78, 86 (2d Cir. 2001); Kuper v. Iovenko, 66 F.3d 1447, 1453 (6th Cir 1988).


based on variables such as age, length of service, and final salary.\textsuperscript{10} Now the predominant structure of retirement coverage in the United States is the defined contribution plan,\textsuperscript{11} which provides benefits derived from the contributions made by or on behalf of an employee to an account during his or her employment.\textsuperscript{12}

The increase in the number of defined contribution plans is almost wholly attributable to the availability of the 401(k) plan.\textsuperscript{13} These plans give participants the opportunity to manage their retirement savings by directing contributions among numerous investment alternatives.\textsuperscript{14} In almost \([\_\%]\) of 401(k) plans offered by U.S. public companies, the sponsoring company’s stock is one of many investment options, but plan participants tend to invest overwhelmingly in the stock of their employer.\textsuperscript{15} As a result of special tax preferences for heavy investment in company stock,\textsuperscript{16} many 401(k) plans have designated the employer stock fund as an Employee Stock Ownership Plan (ESOP)—a defined contribution plan designed to be primarily invested

\begin{footnotesize}
\begin{enumerate}
\item See generally Susan J. Stabile, \textit{Another Look at 401(k) Plan Investments in Employer Securities}, 35 J. MARSHALL L. REV 539 (2002) (Symposium) (offering several explanations for such heavy plan investments in employer securities, including context dependence, optimistic bias, loyalty, and pressure).
\item See Economic Growth & Tax Relief Reconciliation Act of 2001 (EGTRRA), PUB. L. NO. 107-16 §662(a), amending I.R.C. §404(k)(2)(a) (allowing employers to deduct dividends paid on ESOP shares when those dividends are, at election of participants, paid to ESOP and then reinvested in employer stock).
\end{enumerate}
\end{footnotesize}
in employer stock.\textsuperscript{17}

Even though ERISA does not require employers to offer such plans, employers who choose to do so must abide by ERISA’s strict standards of fiduciary conduct.\textsuperscript{18} First, ERISA stipulates that a fiduciary must discharge all duties in accordance with the documents and instruments governing the plan.\textsuperscript{19} Second, fiduciaries are required to act “solely in the interest of plan participants and beneficiaries,” for the “exclusive purpose” of providing benefits to them.\textsuperscript{20} Third, ERISA fiduciaries must discharge their duties “with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use […]”\textsuperscript{21}

In addition to the duties of loyalty and prudence, fiduciaries are bound by the duty of diversification “so as to minimize the risk of large losses.”\textsuperscript{22} ERISA’s diversification requirement, however, does not apply to the acquisition or holding of employer stock once a plan or portion of a plan is designated as a participant-directed eligible individual account plan (EIAP), including ESOPS and 401(k) plans.\textsuperscript{23} A conflict arises out of heavy employee investment in company stock: ERISA fiduciaries, who are often corporate insiders, have a duty to operate the plan exclusively for employees’ benefit\textsuperscript{24} but may also wear a corporate hat and “have financial interests that are adverse to the interests of the beneficiaries but in the best

\textsuperscript{17} 29 U.S.C. § 1107(d)(6)(A).

\textsuperscript{18} See, e.g., \textit{In re WorldCom, Inc. ERISA Litig.}, 263 F. Supp. 2d 745, 757 (2003).

\textsuperscript{19} Id. § 1107(a)(3)(A).

\textsuperscript{20} Id. § 1104(a)(1)(A)(i) (2000).

\textsuperscript{21} Id. § 1104(a)(1)(B).

\textsuperscript{22} Id. §1104(a)(1)(C).

\textsuperscript{23} Id. §1107(b)(2)(B). An EIAP is a profit sharing, stock bonus, thrift or savings plan, employee stock ownership plan (“ESOP”) that explicitly provides for acquisition and holding of stock issued by the plan sponsor.

\textsuperscript{24} 29 U.S.C. § 1001.
interest of the company.”

I. **ERISA & SECURITIES LITIGATION**

There are several procedural and remedial differences between the ERISA fiduciary breach claim and the securities class action based on the same allegations of misrepresentations or nondisclosures. First, some ERISA plaintiffs would not have standing to sue under the securities laws as a result of the purchase or sale requirement of rule 10b-5. Second, the set of defendants intersects only incidentally because only named and functional fiduciaries may be held responsible under ERISA. Third, ERISA plaintiffs have to meet a less stringent pleading standard for fault than the pleading requirements for scienter in securities litigation. Fourth, ERISA plaintiffs need only plead that their loss could be linked to a fiduciary wrongdoing, whereas the securities plaintiffs must allege loss causation. Fifth, an ERISA lawsuit is not subject to the discovery safeguards of the PSLRA. Finally, plaintiffs in a securities fraud action generally can only recover actual damages, whereas “§502(a)(2) [of ERISA] encompasses appropriate claims for ‘lost profits.’” Even thought ERISA plaintiffs must first establish the fiduciary status of the defendants, this section discusses the most significant procedural and remedial differences that make an ERISA cause of action more likely to survive a motion to dismiss, and thus more likely to settle at a high value or to get to the merits than a securities action based on the same allegations of misrepresentations or nondisclosures.

A. **Procedural Differences**

i. **Bringing an ERISA lawsuit may provide a remedy to plaintiffs who could not otherwise recover as a result of the ‘purchase or sale’ requirement of 10b-5**

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Rule 10b-5 prohibits fraud in connection with the purchase or sale of a security.\textsuperscript{27} In \textit{Blue Chip Stamps v. Manor Drug Stores}, the U.S. Supreme Court held that standing to sue in private actions under rule 10b-5 is limited to actual purchasers or sellers of securities.\textsuperscript{28} Writing for the majority, Justice Rehnquist reasoned that the language of section 10(b) compelled such result\textsuperscript{29} and that public policy demanded curtailment of the right of action to avoid “the danger of vexatious litigation.”\textsuperscript{30} Thus, a plaintiff claiming not to have sold or not to have purchased a security has no standing to sue under 10b-5.

ERISA on the other hand, requires only that a civil action be brought by a plan participant, a beneficiary, or a plan fiduciary.\textsuperscript{31} Thus, ERISA plaintiffs who claim to have remained invested in company stock because they relied on material fiduciary misrepresentations or nondisclosures would have standing to sue under ERISA but not under 10b-5. Even those participants who rely on misrepresentations or nondisclosures and decide to invest more heavily in company stock would have questionable standing under the securities laws because the purchaser for 10(b) purposes may be deemed to be the plan, and the plan may only transfer stock from different participant accounts and not actually purchase nor sale a security.\textsuperscript{32} Thus, bringing an ERISA lawsuit may provide a remedy to those plaintiffs who could not otherwise recover under the securities laws.

\hspace{1em} ii. Only named and functional fiduciaries may be liable under ERISA

\textsuperscript{27} See 17 C.F.R. § 240.10b-5.
\textsuperscript{28} 421 U.S. § 723, 730 (1975).
\textsuperscript{29} \textit{Id.} at 736 (“the principal express nonderivative private civil remedies, created by Congress contemporaneously with the passage of § 10b […] are by their terms expressly limited to purchasers or sellers of securities.”).
\textsuperscript{30} \textit{Id.} at 740.
\textsuperscript{31} 29 U.S.C. § 1132(a).
Any defrauding party may be held liable under 10b-5. The 1934 Act also creates ‘control person’ liability for "every person who, directly or indirectly, controls any person liable." In addition, the PSLRA gives the Securities and Exchange Commission (S.E.C.) authority to prosecute individuals who aid and abet violators of the 1934 Act. Whereas any individual who violates 10b-5 can be held liable for fraud, the first issue addressed by a court considering an ERISA fiduciary breach claim is whether each defendant is a fiduciary with respect to the plan.

Whether a particular individual or entity is a fiduciary with respect to a plan is a highly fact intensive inquiry. Every employee benefits plan covered by ERISA must have at least one named fiduciary but others may be deemed functional fiduciaries based on the substantive authority and particular function exercised vis-à-vis a plan. Although ERISA plaintiffs must plead factual allegations establishing each defendant’s fiduciary status, courts have adopted a liberal view of who qualifies as a fiduciary, a concept “to be construed liberally, consistent

35 Id. § 78t(e) (An aider or abettor is "any person that knowingly provides substantial assistance to another person in violation of a provision of this title, or of any rule or regulation issued under this title.").
37 See Lockheed Corp. v. Spink, 517 U.S. 882, 890 (1996) (noting that fiduciary status under ERISA exists when one is fulfilling certain statutorily defined functions).
39 See e.g., Crowley v. Corning, Inc., 234 F. Supp. 2d 222, 228 (W.D.N.Y. 2002) (ERISA fiduciary claims against plan sponsor dismissed on Rule 12(b)(6) motion because complaint “contains no factual allegations which support a claim that [plan sponsor] had de facto control over the Committee members.”); In re Providian Financial Corp. ERISA Litig., No. C01-05027 (N.D. Cal. Nov. 14, 2002) (dismissing complaint because “plaintiffs have lumped the various classes of defendants into an undifferentiated mass and allege that all of them violated all of the asserted fiduciary duties.”).
with ERISA’s policies and objectives."^{40} This expansive concept may apply to the plan administrator, the plan sponsor, or to any director, to the extent that it exercises or retains any of the functions listed in the statutory definition of ‘fiduciary’:

A person is a fiduciary to the extent that he: (i) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of the assets, (ii) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) has any discretionary authority or discretionary responsibility in the administration of such plan.\footnote{See 29 U.S.C. § 1002(21)(A).}^{41}

An ERISA fiduciary can also be held liable for a breach committed by a co-fiduciary if he knowingly participated in, tried to conceal an act or omission by another fiduciary, or enabled another fiduciary to commit the breach.\footnote{Id. § 1105(a).}^{42} Although the concept of fiduciary is expansive, a misrepresentation actionable through the securities laws may not be actionable under ERISA unless the particular individual or entity making the statement is a fiduciary with respect to the plan. Thus, the fact that “the set of potentially responsible parties [may] intersect” is only incidental.\footnote{Rogers v. Baxter Int’l, Inc., 521 F.3d 702, 705 (7th Cir. 2008).}^{43}

iii. ERISA’s pleading standard for fault is less stringent than the pleading requirement for scienter in securities litigation


\footnote{In re Elec. Data Sys. Corp. ERISA Litig., 305 F.Supp. 2d 658, 665 (E.D. Tex. 2004).}^{40}
as a “cogent and compelling” inference of an intent to deceive or defraud. 46 Thus, a complaint will survive a motion to dismiss “only if reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged.” 47

Most courts agree that ERISA does not have heightened pleading requirements, 48 but is subject to the notice pleading standard of Rule 8(a), 49 or to the heightened pleading standard of Rule 9(b) if allegations of fiduciary breach involve fraud. 50 However, the Supreme Court has recently held in Bell Atlantic Corporation v. Twombly 51 (an antitrust case), that a plaintiff must allege at the pleading stage facts sufficient to “raise a right to relief above the speculative level.” 52 Thus far, several federal courts and circuits have applied Twombly outside the antitrust context, 53 including to claims of ERISA fiduciary breach. 54 Their application of Twombly,

47 Id.
48 See In re Enron Corp. Sec., Derivative & ERISA Litig., 284 F. Supp. 2d 511, 652 (S.D. Tex. 2003) (“ERISA does not even have heightened pleading requirements, but is subject to the notice pleading standard.”) (citations omitted).
49 Fed. R. Civ. P. 8(a) (requires a “short and plain statement” of the relevant elements showing that the plaintiffs are entitled to relief). See e.g., In re Dynegy Inc. ERISA Litig., 309 F. Supp. 2d 861, 867 (S.D. Tex. 2004) (“ERISA does not have heightened pleading requirements.”).
50 Fed. R. Civ. P. 9(b) (“[I]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity”). See, e.g., Concha v. London, 62 F.3d 1493, 1503 (9th Cir. 1995); Hill v. Bellsouth Corp., 313 F. Supp. 2d, 1366 (N.D. Ga. 2004). But see Rankin v. Rots, 278 F. Supp. 2d 853, 866 (E.D. Mich. 2003) (“While some of the allegations in support of [plaintiffs’] claim are similar to fraud allegations, i.e. that [defendants] provided false and misleading information, the gravamen of [plaintiffs’] claim is grounded in ERISA. The heightened pleading requirement under Rule 9(b) will not be imposed where the claim is for a breach of fiduciary duty under ERISA.”).
52 Id. at 1966.
53 See e.g., Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007) (noting that at the very least, Twombly ought to apply in cases “where massive discovery is likely to create unacceptable settlement pressures.”); Victaulic Co. v. Tieman, 499 F.3d 227 (3d Cir. 2007); Lindsay v. Yates, 498 F.3d 434 (6th Cir. 2007).
however, has been uneven because the Court did not specify whether this standard applies to all civil actions or the level of factual detail that it requires. Nonetheless, even if Twombly raises the level of scrutiny at the pleading stage, satisfying its “plausibility” standard is significantly less burdensome than the stringent pleading requirements of the PSLRA.

iv. Securities plaintiffs must allege loss causation, whereas ERISA plaintiffs need only have suffered losses that could be linked to a fiduciary breach.

The PSLRA also makes clear that a plaintiff in a Rule 10b-5 case "shall have the burden of proving that the act or omission of the defendant [...] caused the loss for which the plaintiff seeks to recover damages." In Dura Pharmaceuticals, Inc. v. Broudo, the Supreme Court held that a plaintiff must allege in his complaint loss causation—that the defendant's misrepresentation (or other fraudulent conduct) proximately caused the plaintiff's economic loss.”

A mere allegation that the plaintiff "paid artificially inflated prices” as a result of the misrepresentations is not sufficient because the loss occurs only when the truth is disclosed and the stock price falls as a result.

In contrast, in order to survive a motion to dismiss, ERISA plaintiffs need only satisfy the more flexible pleading requirements of Federal Rule of Civil Procedure 8(a)—a pleading

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54 See Pugh v. Tribune Co., 521 F.3d 686 (7th Cir. 2008)(“Factual allegations must be enough to raise a right to relief above the speculative level[.]”); see also Bishop v. Lucent Techs., Inc., 520 F.3d 516 (2008) (“a complaint containing a statement of facts that merely creates a suspicion of a legally cognizable right of action is insufficient”); Eckert v. Titan Tire Corp., 514 F.3d 801 (8th Cir. 2008) (“While a complaint [...] does not need detailed factual allegations, a plaintiff’s obligations to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions.” (citing Twombly, 127 S. Ct. at 167)); Wilson v. Kimberly-Clark Corp.

55 Id. at 1998 (Stevens J. dissenting) (noting that whether the new pleading standard will apply in civil cases is “a question that the future will answer.”).


59 Id. at 347.
must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”\footnote{Fed. R. Civ. P. 8(a).} Thus, ERISA plaintiffs need only show that they suffered losses that “\textit{could be linked}” to nondisclosures or misrepresentation by a fiduciary acting in a fiduciary capacity.\footnote{Graden v. Conexant Systems, Inc., No. 05-695 (SRC) (D.N.J. Aug. 27 2008) (unpublished 8/27/08).} Some courts, however, have dismissed claims that earlier disclosure of nonpublic information would have prevented or minimized losses because, under the efficient market hypothesis, had the company publicly released the information earlier, the market would have adjusted immediately and the plan would have sustained the same loss it incurred following the announcement.\footnote{See Edgar v. Avaya, 503 F.3d 340, 350 (2007) (internal citations omitted).}

For instance, the district court in \textit{Graden v Conexant Systems, Inc.}, dismissed claims that the defendants violated ERISA fiduciary duties by failing to disclose to plan participants that the company was in a precarious financial condition following a merger.\footnote{See Jo-el Meyer, \textit{Court Finds Nondisclosure of Merger Snags Wasn't a Breach; Other ERISA Claims Survive}, 8 PENS. & BEN. DAILY (BNA) 168 (Aug. 29, 2008).} The court rejected the claim for failure to plead loss causation: “due to the almost immediate market internalization of any announcement by [the defendant], no loss to Plaintiff could be linked to the alleged wrongdoing.”\footnote{Id. at 42.} In contrast, the court in \textit{In re Honeywell International ERISA Litigation} rejected this argument,\footnote{\textit{In re Honeywell Int'l ERISA Litig}, 2004 U.S. Dist. LEXIS 21585, 41-42 (2004).} reasoning that, while full disclosure may not have prevented the losses incurred by the plan on stock already held, disclosure would have prevented the plan from acquiring additional company stock at an inflated price.\footnote{Id. at 42.}
v. The ERISA lawsuit is not only subject to less stringent discovery rules but may also allow securities plaintiffs to bypass the discovery safeguards of the Private Securities Litigation Reform Act

Upon the filing of a motion to dismiss by a defendant in a securities action, the PSLRA provides that there will be an automatic stay in discovery, unless the plaintiff will suffer improper or unfair detriment or a loss of evidence might result.67 Without the ability to engage in discovery, plaintiffs face a higher cost in identifying specific misleading statements and omissions and in determining their materiality. Plaintiffs’ lawyers, unable to increase the amount of information against defendants or to pursue an aggressive discovery strategy, are less likely to obtain a large settlement or to reach the merits of the case.

In contrast, ERISA civil actions are subject to the full set of discovery rules established in Federal Rule Civil Procedure 26(b): ERISA allows parties to “obtain discovery regarding any matter not privileged, which is relevant to the claim or defense of any party.”68 Moreover, some courts have been willing to lift the discovery stay in companion securities actions where defendants have already produced documents to plaintiffs in parallel ERISA or derivative suits.69 In In re WorldCom, Inc. Securities Master File Litigation, the court held that the intended purpose of the discovery stay—minimizing frivolous class action filings and preventing “fishing expeditions”—should not prevent the securities plaintiffs from having access to documents already made available to the U.S. Attorney, the S.E.C., and plaintiffs in a separate ERISA action.70 Strategically, filing an ERISA lawsuit in addition to the securities


70 234 F. Supp. 2d 301, 305 (S.D.N.Y. 2002); see also In re Royal Ahold N.V. Sec., & ERISA Litig., 2004 U.S. Dist. LEXIS 4048, (Mar. 12, 2004) (lifting stay where documents had been produced to government agencies and were going to be produced to the ERISA plaintiffs).
action may allow plaintiffs to circumvent the discovery safeguards of the PSLRA and deploy the tools of discovery to uncover wrongdoing or exert settlement pressures.

B. Scope of Remedies

Defrauded investors who satisfy the elements of 10b-5 may recover out-of-pocket monetary “actual damages.” However, because the rule 10b-5 cause of action is implied, neither Section 10(b) nor Section 10(b)(5) establishes specific measurements for damages. The Supreme Court in Affiliated Citizens of Utah v. United States, outlined the traditional “out-of-pocket” theory for damages in 10b-5 claims: damages would be measured by the difference between the value of what the seller received for the shares and the fair market value of the shares at the time of the sale. When the defendant received more than the seller's actual loss, damages are the amount of the defendant's profit. Even though Section 28(a) of the Securities Exchange Act and 21D(e) of the PSLRA provide definitions regarding damages, the law remains open ended in regard to recovery. For instance, the Second Circuit has allowed ‘benefit of the bargain’ damages under Rule 10b-5 but only "where misrepresentation is made in [...] tender offer and proxy solicitation materials as to the consideration to be forthcoming


74 Id.


76 PUB. L. 104-67 (adding Sec. Ex. Act section 21D(e)(1)).
upon an intended merger.”\textsuperscript{77} Otherwise, a plaintiff’s lost profits are not recoverable in Rule 10b-5 actions.\textsuperscript{78}

Whereas recovery under the securities law is limited to actual damages, the scope of remedies under ERISA is broader than under 10b-5. ERISA provides two main avenues for relief for a breach of fiduciary duty. First, under ERISA 502(a)(2), the Secretary of Labor, a participant, beneficiary, or fiduciary may sue to seek relief for a breach of fiduciary duty authorized by Section 409 of ERISA.\textsuperscript{79} Section 409(a) makes a fiduciary who breaches his fiduciary responsibilities personally liable “to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through the use of assets of the plan.”\textsuperscript{80} Second, ERISA Section 502(a)(3) authorizes suits by participants, beneficiaries or fiduciaries to recover “appropriate equitable relief.”\textsuperscript{81}

Until recently, Supreme Court precedent had been applied to bar recovery for breach of fiduciary duty under section 502(a)(2) if the remedy inured to an individual or an individual account and not to “the plan as a whole”.\textsuperscript{82} The Supreme Court revisited this interpretation of section 502(a)(2) in \textit{LaRue v. DeWolff, Boberg & Associates Inc.}, holding that section

\textsuperscript{77} Ososky v. Zipf, 645 F.2d 107, 114 (2d Cir.1981).


\textsuperscript{79} 29 U.S.C. § 1132(a)(2).

\textsuperscript{80} Id. § 1109(a).

\textsuperscript{81} Id. §1132(a)(3)(B).

\textsuperscript{82} Mass. Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 144 (1985) (recovery under section 502(a)(2) must “inure[…] to the benefit of the plan as a whole.”).
502(a)(2) "authorizes recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account." ⁸³

Relying on LaRue, Judge Easterbrook of the Seventh Circuit recently held in Rogers v. Baxter International Inc., that the beneficiary of a defined-contribution account who suffered a loss attributable to a pension plan fiduciary's alleged imprudent investment may obtain relief even though other participants are uninjured.⁸⁴ Therefore, post-LaRue, claims filed under Section 502(a)(2) by plan participants whose individual retirement plans have been depleted or depreciated by fiduciary breach arising out of misrepresentations or nondisclosures will not be dismissed on the ground that there was no loss to the entire plan.⁸⁵

Also important to misrepresentation and nondisclosure claims is footnote 4 of the opinion, where Justice Stevens notes that “§502(a)(2) encompasses appropriate claims for ‘lost profits.’”⁸⁶ Therefore, even if the scale of a case is insufficient to give rise to plan wide litigation, if only one participant suffers a significant loss due to a fiduciary breach, he may bring a lawsuit to recover lost profits—that is, “whatever would have been [in his individual account] had the plan honored the employee’s entitlement, which includes an entitlement to prudent management.”⁸⁷ The Court’s conclusion that “the legal issue under Section 502(a)(2) is

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⁸³ 128 S. Ct. at 1026. LaRue was a participant in DeWolff's 401(k) plan who instructed the administrator and a fiduciary of the plan to make certain changes to his 401(k) plan. His instructions were not followed and, as a result, LaRue’s individual account plan was depleted by approximately $150,000.00. See LaRue v. Dewolff, Boberg & Assoc., 450 F.3d 570, 572 (2006) (vacated, LaRue, 128 S. Ct. 1020).

⁸⁴ Rogers, 521 F.3d at 705. Baxter concerned a single participant alleging that plan fiduciaries breached the duty of prudence by allowing participants to invest in company stock “despite knowing that the stock was overpriced in the market and hence a bad deal.” Id. at 704.

⁸⁵ Jo-el J. Mayer, Litigation 'Floodgates' Will Not Be Opened By Court's LaRue Decision, 8 PENS. & BEN. REP. (BNA) 68 (April 9, 2008) (quoting statement by panelist Bob Eccles of O'Melveny & Myers, Washington, D.C.).

⁸⁶ LaRue, 128 S. Ct. at 1024 (fn. 4).

⁸⁷ Harzewski v. Guidant Corp., 489 F.3d 799, 804-805 (7th Cir. 2007).
the same whether [the participant’s] account includes 1% or 99% of the total assets of the plan,”88 expands the scope of ERISA remedies available to ERISA plaintiffs.

II. **THE QUESTION OF DUTY**

   A. **ERISA Duty of Disclosure**

   Courts have increasingly been required to consider the extent, if any, to which ERISA's fiduciary standards encompass a fiduciary duty to disclose information to participants beyond ERISA's express reporting and disclosure requirements.89 There is a considerable amount of confusion and inconsistencies in the case law on whether such duty exists and if so, under what circumstances it applies. Over the years, some issues have settled. The Supreme Court has made clear that when a fiduciary speaks in a fiduciary capacity, it has a duty to speak truthfully and completely even if those communications are not required by ERISA.90 Courts, however, have struggled to determine whether a communication made or adopted by an ERISA fiduciary has a sufficient nexus to the plan or benefits thereunder to be deemed fiduciary in nature.

   A more difficult duty question arises when the fiduciary remains silent about a material fact that a reasonable plan participant would need to know to protect his interest in the plan. The question of whether ERISA’s fiduciary standards encompass a duty to disclose is “area of developing and controversial law.”91 A great number of ERISA plaintiffs have argued that plan fiduciaries had a duty to disclose to them material nonpublic information necessary to appreciate the true risk of investing their retirement savings in company stock.

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88 *LaRue*, 128 S. Ct. at 1024.


90 *Varity* 516 U.S. at 506 ("[L]ying is inconsistent with the duty of loyalty owed by all fiduciaries.").

Although some courts have refused to create affirmative disclosure duties beyond ERISA’s explicit requirements, 92 other courts relying on fiduciary principles and the law of trusts, have found that ERISA’s fiduciary duties encompass an affirmative duty to disclose material information when the fiduciary is on notice that silence might be harmful. 93 These courts, however, have also struggled to determine under which circumstances, if any, the fiduciary is on notice that silence may be harmful so as to trigger disclosure obligations. 94 Thus far, most of these cases have settled in the million dollars 95 partly because the case law on ERISA disclosure duties "is complex, rapidly developing, and uncertain." 96

The Secretary of Labor has taken the view that: “ERISA’s duties of prudence and loyalty not only forbid fiduciaries from misleading plan participants, but may, under some circumstances, also require fiduciaries to disclose information that participants need to protect their interests, even if the disclosure is not specifically requested or otherwise mandated in ERISA’s reporting and disclosure provisions." 97 The Secretary has recently intervened as

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92 See, e.g., Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 84 (1995) (Congress did not intend to supplement ERISA's reporting and disclosure scheme “by a far away provision in another part of [ERISA].”); Varity, 516 U.S. at 489 (ERISA does not require employers “to keep plan participants abreast of the plan sponsor's financial security.”); Ames v. Am. Nat'l Can Co., 170 F.3d 751, 759 (7th Cir. 1999) (“[T]he affirmative obligation to disclose materials under ERISA […] extends only to a defined set of documents”).

93 See, e.g, Harzewski v. Guidant Corp., 489 F.3d 799 (7th Cir. 2007); Glaziers & Glassworkers, 93 F.3d 1171, 1180 (3d Cir. 1995) (the duty of ERISA fiduciaries to inform is "not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful." Id.).

94 See Palen v. Kmart Corp., 215 F.3d 1327 (6th Cir. 2000) (ERISA fiduciary on notice that “silence might be harmful” when it provided only health insurance information in response to plaintiff's request that defendant continue all of decedent's benefits, even though plaintiff did not specifically mention life insurance).

95 See, e.g., In re Delphi Corp. Sec., Derivative & "ERISA" Litig. (ERISA claim settled for $47 million); In re ADC ERISA Litig., ($3.25 million, Sept. 2006); In re Allegheny Sec., Litig., $4 million (Dec. 2006); In re AOL Time Warner Inc. ERISA Litig., ($100 million, Sept. 2006); In re Broadwing ERISA Litig., ($11 million, Oct. 2006); In re CMS Energy ERISA Litig., ($28 million, June 2006).

96 See GM, Employees Reach $37.5M Settlement To End ERISA Fiduciary Breach Claims, PENS. & BEN. DAILY (BNA) (Jan. 18, 2008) (quoting motion for approval of the settlement).
amicus curiae in support of plaintiffs appealing to the Seventh Circuit the lower court’s dismissal of allegations that defendants breached their fiduciary duties by failing to disclose to plan participants the fees paid by the plan and revenue sharing payments. Although not explicitly disagreeing with this holding, the Secretary strongly rejected the district court’s reasoning that “[w]here as here Congress has by statute and related regulation, created detailed rules governing disclosure requirements, it would be inappropriate to ignore and augment them using the general power to define fiduciary obligations.” Thus, to the extent that the law is unclear, a plan fiduciary cannot “rely on the regulatory requirements to satisfy its disclosure obligations” even if it has not otherwise misled participants.

i. Mandatory Disclosure Obligations

Part I of ERISA establishes a comprehensive set of reporting and disclosure requirements. The first requirement is that the terms of each employee benefit plan be set forth in a written plan document. The plan administrator must communicate these terms in the form of a ‘Summary Plan Description’ (SPD) to plan participants within 90 days of becoming covered. The SPD must be comprehensive in describing a participant’s and beneficiary’s rights and obligations under the plan—which includes information such as the plan’s sources of financing and the names and addresses of the people who exercise authority

97 Amended Brief of the Secretary of Labor, Elaine L. Chao, As Amicus Curiae In Support of Plaintiffs-Appellants, No. 07-3605, 08-1224, p.10, Hecker v. Deere, No. 06-C-719-S (W.D. Wis. Oct. 22, 2007) [hereinafter “Amended Brief”].


99 Id. at 974.

100 Amended Brief, supra note 96, at 10.


102 Id. § 1102(a)(1)).

103 Id. § 1024(b)(1)).
over the plan. In addition, the SDP must be "written in a manner calculated to be understood by
the average plan participant" and must contain information concerning the plan's governance
"sufficiently accurate and comprehensive to reasonably appraise such participants and
beneficiaries of their rights and obligations under the plan."\(^{104}\)

In addition to the Summary Plan Description, the plan administrator must give
participants a Summary Annual Report (SAR) within seven months of the close of each plan
year that summarizes the plan's financial operations for the year.\(^{105}\) In the case of a defined
benefit pension plan, the SAR must also include a statement regarding the plan's compliance
with ERISA's minimum funding standards.\(^{106}\) Upon request, a participant is entitled to receive
a copy of the full annual report that the plan administrator must file each year with the Internal
Revenue Service and the Department of Labor.\(^{107}\) The full annual report must contain detailed
information concerning the plan's financial status.\(^{108}\)

Satisfying ERISA's explicit disclosure obligations, however, does not shield an ERISA
fiduciary from liability. The Secretary of Labor has noted that "[n]othing in the text of the Act
or the regulations governing annual reports (Forms 5500) and summary plan descriptions
indicates that those requirements were intended to be the exclusive disclosure obligations of
prudence and loyalty."\(^{109}\)

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\(^{105}\) 29 U.S.C. § 1024(b)(3).

\(^{106}\) See 29 C.F.R. § 2520.104(b)-10(d). ERISA's minimum funding standards apply to defined benefit pension

\(^{107}\) 29 U.S.C. § 1024(b)(4). All three filing requirements are satisfied by filing a Form 5500 (Annual Report) with
the IRS, which forwards copies to the DOL and the PBGC. See IRS Publication 1048; 29 U.S.C. § 1024(a)(1)(A);
29 C.F.R. § 2520.104a-5(a)(2).


\(^{109}\) \textit{Amended Brief, supra} note 96, at 20.
When an ERISA fiduciary communicates with plan participants in a fiduciary capacity, it has a duty to speak truthfully and completely even if those communications are not required by ERISA.\textsuperscript{110} The seminal Supreme Court case spurring causes of action for fiduciary misrepresentations is \textit{Varity Corp. v. Howe}.\textsuperscript{111} In \textit{Varity}, the company had spun off a number of its non-profitable divisions to a separately incorporated company and intentionally misled its employees to think that their benefits would remain secured if they transferred to the new company.\textsuperscript{112}

The Supreme Court held that Varity was acting in its fiduciary capacity because “a reasonable employee could have thought that Varity was communicating with them both in its capacity as employer and its capacity as plan administrator,”\textsuperscript{113} and that it breached its fiduciary duties by knowingly misrepresenting the security of the transferred employees’ future benefits.\textsuperscript{114} The Supreme Court made clear, however, that a company does not act as a fiduciary “simply because it made statements about its expected financial condition” or because “an ordinary business decision turn[ed] out to have an adverse impact on the plan.”\textsuperscript{115} Instead, the Court found a fiduciary breach because the company knowingly connected materially misleading statements about the subsidiary’s financial health to statements it made about future benefits “so that its intended communication about the security of benefits was rendered materially misleading.”\textsuperscript{116}

\textsuperscript{110} \textit{Varity}, 516 U.S. at 506.
\textsuperscript{111} 516 U.S. 489 (1996).
\textsuperscript{112} \textit{Id}
\textsuperscript{113} \textit{Id.} at 502.
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Id.} at 505.
Under the Court’s reasoning in *Varity*, communications by the company in S.E.C. filings or corporate communications about the health of the company or its stock would not be actionable unless given in connection with (implicit or explicit) advice to plan participants about the suitability of investing in company stock. To give rise to liability under *Varity*, there must be a link between the false or misleading information about the company and a fiduciary discretionary decision to disseminate such information in a manner reasonably calculated to influence plan participants’ benefits decisions.

For instance, in *In re Sprint Erisa Litigation*, the court denied a motion to dismiss claims that defendants had made false material representations to plan participants where an employee newsletter contained highly optimistic statements on company growth that were intended to address the soundness of investing in company stock. The court noted that the misleading statements in question were contained in an employee newsletter that was disseminated with the intent to recommend plan participants to invest more heavily in the company stock. Thus, having disseminated false or misleading material information sufficiently relevant to plan benefits decisions—a fiduciary discretionary decision—the company was on notice that silence could be harmful and had a duty to disclose to the extent necessary to correct or make the previous statements not misleading.

116 *Id.*


118 *Id.* at 1226.

Courts, however, have disagreed as to whether false or misleading statements in S.E.C. filings are *per se* fiduciary by reason of incorporation into the SPD, or whether dissemination is required to give rise to fiduciary liability. Absent additional facts, most courts have found that such act of incorporation as required by ERISA section 404(c)\(^{120}\) does not involve any fiduciary discretion and therefore, does not give rise to fiduciary liability.\(^{121}\) Some courts have allowed a theory of incorporation by reference to survive the motion to dismiss level, reasoning that anything incorporated into the Summary Plan Description (SPD) may be deemed a fiduciary communication.\(^{122}\)

Other courts have reasoned that false or misleading statements in S.E.C. filings are actionable only if the fiduciary decides to speak by disseminating the statements to plan participants in a manner reasonably calculated to influence a benefits decision. For instance, the court in *In re Dynergy Inc ERISA Litigation* held that misrepresentations in S.E.C. filings that had been incorporated into the SPD became actionable only when the company encouraged plan participants to review the filings carefully.\(^{123}\) The court reasoned, consistent with *Varity*, that such communication was sufficiently related to benefits decisions to be deemed fiduciary and to trigger a duty to speak truthfully and thus to investigate before speaking.\(^{124}\) The court noted, however, that had the fiduciaries not disseminated the

\(^{120}\) 29 U.S.C. § §1106, §1107.

\(^{121}\) *See In re Tyco Int’l, Ltd. Multidistrict Litig.*, 2004 WL 2903889, *6 (D.N.H. 2004) (noting that “[a]lthough plaintiffs plainly had a right to expect that Tyco International would refrain from making material misstatements in its SEC filings, that expectation must be enforced under the securities laws rather than ERISA”).

\(^{122}\) *See In re WorldCom, Inc. ERISA Litig.*, 263 F. Supp. 2d 745, 766 (S.D.N.Y. 2003) (“ERISA fiduciaries, however, cannot in violation of their fiduciary obligations disseminate false information to plan participants, including false information contained in SEC filings.” *Id.*); *see also* Rankin v. Rots, 278 F. Supp. 2d 853, 876-877 (E.D. Mich. 2003) (“Defendants had a duty under securities laws not to make any material misrepresentations; they also had a duty to disseminate truthful information to plan participants, including the information contained in SEC filings. [T]heir duties under ERISA and securities law co-exist.” *Id.*).


\(^{124}\) *Id.*
information, they would not have assumed an independent duty to investigate and correct statements about the stock made by non-fiduciaries via securities filings.125

iii. Duty to Correct

The duty to speak truthfully and completely also encompasses a duty to correct mistakes in previous fiduciary communications when information later reveals that the communication was false when made. The difficult issue arises when an ERISA fiduciary adopts or disseminates to plan participants a non-fiduciary statement that, unbeknown to the fiduciary, is false or misleading when made. As previously noted, courts disagree as to whether false or misleading statements in S.E.C. filings are per se fiduciary communications or whether dissemination is required to give rise to fiduciary liability.

Even though “ERISA does not impose affirmative disclosure obligations to correct the misstatements of others made to the market,”126 some courts have stated that if a fiduciary makes or disseminates a statement sufficiently related to a benefits decisions, he is under a duty to investigate before speaking, to speak truthfully, and to correct statements made by non-fiduciaries, even if those statements are made in securities filings.127 For instance, In re Honeywell Int’l ERISA Litigation, the court accepted plaintiff’s theory that plan fiduciaries that distributed the SPD thereby adopted the misleading statement in S.E.C. filings and had an affirmative duty to correct subsequent S.E.C. disclosures to the extent they knew that the subsequent filings contained material misrepresentations.128

125 Id.
126 Id. at 884.
127 Id. at 890; see also Shirk v. Fifth Third Bancorp, Slip Copy, 2007 WL 1100429 (S.D. Ohio 2007).
The case law suggests that a duty to correct can only arise if (i) the person who made or disseminated the particular statement was a fiduciary to the plan; (ii) the false or misleading statement was sufficiently related to the plan or benefits thereunder to be deemed fiduciary under *Varity*; (iii) the fiduciary knows or should know (through reasonable investigation) that the communication was false or misleading when made, and (iv) a reasonable plan participant would rely on the statements in making benefits-related decisions.

iv. Duty to Update and/or to Warn

*Varity* involved a company knowingly connecting materially misleading statements about the financial health of its subsidiary to statements it made about future benefits. The Supreme Court, however, specifically reserved the question of “whether ERISA fiduciaries have any fiduciary duty to disclose truthful information on their own initiative, or in response to employee inquiries.” Thus, a more controversial issue is whether a fiduciary has a duty to warn participants or update them about financial and business developments if circumstances have changed to an extent that participants are acting upon information or representations about the company that are no longer accurate.

The requirement that fiduciaries speak truthfully means that their statements must be true when made. Thus, courts have generally found that the duty not to mislead is not breached if subsequent developments make an earlier communication or representation false or materially misleading. Whereas the duty to correct may be derived from the general duty not to mislead or misrepresent, the duty to update must be analyzed solely as a subset of the more controversial duty to speak when the fiduciary is on notice that silence might be harmful.

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129 *Varity*, 516 U.S. at 506.

130 See, e.g., Swiney v. GMC, 46 F.3d 512, 520 (6th Cir. 1995) ("An employer is not liable for breach of fiduciary duty under [ERISA] if the statements were made in good faith and the statements indicated the employer's actual intent at the time.").
Several courts applying ERISA fiduciary standards have found a duty to update written statements if the fiduciary knows or should know that the communications have become misleading because a change in course is under serious consideration. Other courts have imposed an affirmative duty to inform or warn participants where a fiduciary has reason to know of a particular beneficiary’s need for information and thus is on notice that silence would be harmful. Such limited duty only arises “if there was some particular reason that the fiduciary should have known that his failure to convey information would be harmful.”

Other courts have found such duty to exist only if the fiduciary has promised to update the participants on certain matters. This affirmative disclosure duty, however, has generally been found in cases concerning plan terms and requirements, matters of plan administration, or tax or other legal issues affecting participant plan elections.

The question arises whether fiduciaries would have a duty to update participants of material non-public business or financial developments that render investment in the company stock imprudent where the fiduciary is on notice that the participants need such information to protect their assets. On the one hand, courts have made clear that “plan administrators are not required to inform all plan participants and beneficiaries of every corporate event, especially

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131 McAuley v. IBM Corp. Inc., 165 F.3d 1038 (6th Cir. 1999) (holding that SPDs should remain accurate and non-misleading throughout the availability of the plan, thus finding a duty to correct any misleading information and to update any information that has become misleading).

132 Stabile, supra note 5 (quoting Harte v. Bethlehem Steel Corp., 214 F.3d 446, 452 (3d Cir. 2000); Barker v. Am. Mobil Power Corp., 64 F.3d 1397, 1403 (9th Cir. 1995); Hamilton v. Allen-Bradley Corp., 244 F.3d 819, 826-827 (11th Cir. 2001).

133 Watson v. Deaconess Waltham Hosp., 298 F.3d 102, 114-115 (1st Cir. 2002).


135 Stabile, supra note 5, citing In re Unysis Corp., 242 F.3d 497, 501 (3d Cir. 2001) (discussing possible affirmative duty to correct plaintiffs’ mistaken belief that they were entitled to lifetime health plans); Krohn v. Huron Men’l Hosp., 173 F.3d 542, 548 (6th Cir. 1999) (finding an affirmative duty to disclose where plaintiff’s husband made specific inquiry regarding disability benefits).
contingent events, that might impact the value of the company’s common stock.”\textsuperscript{136} On the other extreme, “when fraudulent acts threaten to impair and diminish the value of the plan's investment,”\textsuperscript{137} a breach of duty may lie where the fiduciary fails to take steps to protect the assets of the plan.\textsuperscript{138}

B. Disclosure Duties under the Securities Laws

Disclosure is at heart of the federal securities laws.\textsuperscript{139} However, the securities disclosure architecture stands on the foundational stone that the materiality of a piece of information is a necessary but not a sufficient condition to require its disclosure.\textsuperscript{140} Some information may be material—that is, likely to be important to the reasonable investor,\textsuperscript{141} but an issuer may have no duty to disclose it unless it has: (i) a duty to disclose the information as required by the S.E.C., (ii) a duty to speak truthfully and completely, (iii) a duty to correct, (iv) a limited duty to update (in some circuits), (v) a duty to disclose or abstain, or (vi) a duty to disclose publicly information selective disclosed (Reg FD). Even though material misrepresentations by the issuer are always actionable under 10b-5, the difficult duty question arises when the company chooses to speak in a way that is not a clear misrepresentation of the truth or when the company chooses to remain silent.\textsuperscript{142}

i. Duty to Disclose Information Required by the S.E.C.


\textsuperscript{138} Id.

\textsuperscript{139} Donald Langevoort, The Muddled Duty to Disclose under Rule 10b-5, 57 VAND. L REV. 1639, 1640 (2004).

\textsuperscript{140} Id., (citing e.g., Baron v. Smith, 285 F. Supp. 2d 96, 103 (D. Mass. 2003)).

\textsuperscript{141} See generally James Cox et al., SECURITIES REGULATION, Ch.. 11 (4th ed. 2004).

\textsuperscript{142} Langevoort, supra note 139, at 1640.
It is well established that a material misrepresentation in a document filed with the S.E.C. leads to liability under Section 18 of the Exchange Act and to 10b-5 exposure.\textsuperscript{143} The difficult question is whether investors are entitled to rely on the completeness of required disclosure items. Courts have generally refused to find a duty to disclose arising out line-item disclosure requirements so that silence is not actionable under Rule 10b-5 for remaining silent when disclosure was required.\textsuperscript{144}

1. Management Discussion and Analysis

Item 303(a) of regulation S-K requires issuers to disclose known trends and uncertainties (except for merger negotiations) that are reasonably likely to occur, unless management determines that, even if the uncertainty comes to fruition, it will not have a material effect—favorable or unfavorable—on the registrant’s financial condition or operations.\textsuperscript{145} Even though the S.E.C. has explicitly required such disclosure, courts have generally refused to find that there is a fraud-based duty to disclose “known trends and uncertainties” under item 303(a), possibly because of its forward-looking nature or its heightened materiality standard.\textsuperscript{146}

For instance, in \textit{Oran v. Stafford}, the Third Circuit held that a private right of action for alleged violations of Item 303(a) of Regulation S-K does not exist.\textsuperscript{147} The court reasoned that a violation of Item 303 is not the equivalent of a Section 10(b) violation as a matter of law

\begin{footnotes}
\begin{enumerate}
\item Id. at 1653.
\item See, e.g., Donald Langevoort, \textit{Insider Trading and the Fiduciary Principle: A Post-Chiarella Restatement}, 70 \textit{CAL. L. REV.} 1, 4-7 (1982).
\item Langevoort, \textit{supra} note 139, at 1653.
\item 226 F.3d 275, 287 (3d Cir. 2000) (“Item 303 [does not] create an independent cause of action for private plaintiffs.”); \textit{see also} In re Pac. Gateway Exch., Inc. Sec. Litig., (N.D. Cal. 2002) (holding that “no private right of action exists under Section 10(b) for violations of Regulation S-K”).
\end{enumerate}
\end{footnotes}
because the materiality tests under SK-303 differs greatly from the materiality tests for securities fraud.\textsuperscript{148} However, at least one district court has held that allegations claiming a violation of Item 303 could support valid claims under Rule 10b-5.\textsuperscript{149}

2. \textit{Form 8-K}

In response to the recent corporate scandals and the adoption of the Sarbanes Oxley Act,\textsuperscript{150} there may be a trend towards requiring more real-time disclosure of corporate events. Section 409 of SOX authorizes the S.E.C. to require public companies to disclose material changes in the financial or operational condition of the issuer on a rapid and current basis.\textsuperscript{151} Even though section 409 is “intended to provide investors with better and faster disclosure of important corporate events,”\textsuperscript{152} the S.E.C. has interpreted this invitation narrowly by incorporating new categories of events that trigger 8-K filings and shortening the disclosure deadline, but generally confining these events to extraordinary and out-of-the-course of business developments.\textsuperscript{153}

The S.E.C. also adopted a limited safe harbor from public and private claims under Exchange Act Section 10(b) and Rule 10b-5 for a failure to timely file a Form 8-K for seven items.\textsuperscript{154} Material misstatements or omissions in a Form 8-K, however, remain subject to

\textsuperscript{148} O\textit{ran}, 226 F.3d at 288.

\textsuperscript{149} \textit{See In re} Campbell Soup Co. Sec. Litig., 145 F. Supp. 2d 574 (D.N.J. 2001) (holding that “A publisher's failure to disclose trends in declining sales and increasing returns, as required by Item 303 of Regulation S-K, adequately alleged a securities law violation.” \textit{Id.} at 591).

\textsuperscript{150} \textit{PUB. L. NO. 107-204, 116 Stat. 745.}

\textsuperscript{151} \textit{Id.} \textsection{} 409.

\textsuperscript{152} Final Rule: Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, Securities And Exchange Commission, 17 C.F.R. PARTS 228, 229, 230, 239, 240 and 249, [RELEASE NOS. 33-8400; 34-49424; File No. S7-22-02].

\textsuperscript{153} \textit{Id.}

\textsuperscript{154} \textit{Id.}
Section 10(b) and Rule 10b-5 liability.\textsuperscript{155} In addition, the safe harbor extends only until the due
date of the company's next periodic report.\textsuperscript{156} Failure to make such disclosure in the periodic
report will subject a company to potential liability under Section 10(b) and Rule 10b-5, in
addition to potential liability under Exchange Act Section 13(a) or 15(d).\textsuperscript{157}

ii. Duty to Speak Truthfully and Completely

Even if not required, when a corporation chooses to speak in a manner calculated to
influence investors—whether in public statements or S.E.C. mandatory disclosure items, there
is a duty to speak truthfully and completely.\textsuperscript{158} Courts agree that materially misleading public
statements or misrepresentations in forms 10-K or 10-Q and other mandatory disclosure items
give rise to 10b-5 exposure.\textsuperscript{159} Thus, if private information makes public statements materially
misleading, courts generally have found a contemporaneous duty to disclose to the extent
necessary to make the statements, in the light of the circumstances under which they are made,
not misleading.\textsuperscript{160} This duty, however, is limited because courts are very reluctant to find that

\textsuperscript{155} Id.

\textsuperscript{156} Id.

\textsuperscript{157} Id.

\textsuperscript{158} Langevoort, supra note 139, at 1640 (citing Roeder v. Alpha Indus., Inc., 814 F.2d 22 (1st Cir. 1987); In re
Fed. Sec. L. Rep. (CCH) ¶ 83,239 (1982) (savings and loan press release reporting substantial losses was
misleading because it failed to disclose significant adverse effect on bank's net worth); Basic Inc. v. Levinson, 485
U.S. 224, 229 (1988) (implicitly finding that there was no general duty to disclose merger talks, but concluding
that liability existed where a corporation chose to speak untruthfully).

\textsuperscript{159} Langevoort, supra note 139, at 1648.

\textsuperscript{160} See Backman v. Polaroid Corp., 910 F.2d 10 (1st Cir. 1990); Eisenstadt v. Centel Corp., 113 F.3d 738, 746 (7th
Cir. 1997).
a disclosed statement is misleading even if not qualified or accompanied by an appraisal, a prediction, or an estimate that is materially inconsistent with the disclosed statement. 161

Statements of opinion may also be actionable under the antifraud provisions if they are objectively false. In Virginia Bankshares, Inc. v. Sandberg,162 the Supreme Court held that directors’ recommendation to shareholders to approve a going-private transaction because the offer was a “fair price” and a “high value,” was objectively false because the directors had objective evidence before them that was inconsistent with their professed opinion.163 Under this reasoning, a statement of opinion may be actionable under 10b-5 but only if the opinion is deceptive—it is objectively wrong and the speaker knows it. Such feigned opinions are properly deemed untrue statements of fact.

iii. Duty to Correct

A corollary of the duty not to mislead or misrepresent is the duty to correct mistakes in previous disclosure documents or statements. The duty to correct applies when a company makes a material statement that, at the time made, it believed to be true, but as revealed by subsequently discovered information actually was not. For instance, in In re Healthcare Compare Corp. Securities Litigation,164 the court held that a company would have a duty to correct upon discovering information regarding patient enrollments when the information was

161 See Panter v. Marshall Filed & Co., 646 F.2d 271 (7th Cir.), cert. denied, 454 U.S. 1092 (1981) (finding that it was not a material omission for the management of a target company to report in a letter to stockholders higher nine-month earnings and not also to disclose an internal projections for a year-end decline in earnings); see also Starkman v. Marathn Oil Co., 772 F.2d 231, 238 (6th Cir. 1985), cert. denied, 475 U.S. 1015 (1986) (holding that there is a duty to disclose “projections and asset appraisals […] only if the predictions underlying [them] are substantially certain to hold”).


164 75 F.3d 276 (7th Cir. 1996).
in existence when the misstatements was made but was unknown to management.\textsuperscript{165} As to erroneous statements made by third parties, courts generally hold that there is no duty to correct statements by others unless the company has “placed its imprimatur, expressly or impliedly, on the [third party’s statements].”\textsuperscript{166}

iv. Duty to Update

Courts disagree as to whether there is a duty to update previously disclosed information if new developments make it untrue or materially misleading. Whereas most circuits have rejected a duty to update,\textsuperscript{167} a few circuit courts have recognized such duty in limited circumstances where the nature of the statement is such that it explicitly or implicitly invites future reliance and operates as a continuing representation of its accuracy.\textsuperscript{168} For instance, in \textit{In re Time Warner Securities Litigation},\textsuperscript{169} the Second Circuit recognized the possibility of liability for failure to update when Time Warner hyped strategic alliances as a source of debt financing but also began to consider an equity offering as an alternative source of financing.\textsuperscript{170} The court held that when a company announces a goal as well as the intended approach for

\textsuperscript{165} \textit{Id.}

\textsuperscript{166} Elkind v. Liggett & Myers Inc., 635 F.2d 156, 163 (2d Cir. 1980).

\textsuperscript{167} See, e.g., Gallagher v. Abbott Laboratories, 269 F.3d 806, 808-809 (7th Cir. 2001) (stating that “[w]e do not have a system of continuous disclosure. [...] Rule 10b-5 condemns only fraud, and a corporation does not commit fraud by standing on its rights under a periodic-disclosure system”); see also Stransky v. Cummins Engine Co., Inc., 51 F.3d 1329, 1332 (7th Cir. 1995), as amended, (Apr. 7, 1995) (if a company makes a historical statement that was accurate when made, it has no duty to update it based upon subsequent events).

\textsuperscript{168} See \textit{In re Time Warner Inc. Sec. Litig.}, 9 F.3d 259, 267 (2d Cir. 1993); see also Weiner v. Quaker Oats Co., 129 F.3d 310 (3d Cir. 1997).

\textsuperscript{169} \textit{In re Time Warner Inc. Sec. Litig.}, 9 F.3d 259, 267 (2d Cir. 1993); see also Shaw v. Digital Equipment Corp., 82 F.3d 1194, 1219 (1st Cir. 1996) (holding that there is no duty to update "cautiously optimistic comments that would not be actionable in the first instance.").

\textsuperscript{170} \textit{Time Warner}, 9 F.3d at 262.
reaching it, the corporation might come under an obligation to disclose other approaches to reaching the goal when those approaches are under active and serious consideration.\footnote{171 Id. at 268.}

Similarly, in \textit{Weiner v. Quaker Oats Co.}, the Third Circuit found a duty to update about merger negotiations that would cause the company to exceed the amount of debt allowed under its previously announced policy of an appropriate debt-equity ratio.\footnote{172 129 F.3d 310 (3d Cir. 1997).} However, even the courts accepting a duty to update have been careful to distinguish forward-looking statements about company policy—financing strategy as in \textit{Time Warner} or capitalization policy as in \textit{Weiner}—from forward-looking statements about ordinary course of business matters, such as pricing strategies,\footnote{173 See San Leandro Emergency Medical Group v. Phillip Morris Cos., 75 F.3d 801 (2d Cir. 1996) (refusing to impose a duty to update with respect to a sudden change in a company’s cigarette pricing strategy).} that need not be ‘updated’.

In contrast, other courts have emphatically rejected a duty to update. In \textit{Gallagher v. Abbott Laboratories}, Judge Easterbrook stated the creation of a duty to update was the province of the S.E.C. or Congress and not the courts.\footnote{174 269 F.3d 806, 810 (7th Cir. 2001) (“a corporation does not commit fraud by standing on its rights under a periodic-disclosure system”).} He reasoned that imposing such duty would effectively mandate continuous reporting and that “judges have no authority to scoop political branches and adopt continuous disclosure under the banner of 10b-5”\footnote{175 Id.} when the S.E.C. had made the judgment that “firms are entitled to keep silent (about good news as well as bad news) unless positive law creates a duty.”\footnote{176 Id. at 808 (internal citations omitted).} However, even if the circuit recognizes a duty to update, it would be very narrow in scope because most corporate statements speak to

\begin{itemize}
\item \textit{Weiner v. Quaker Oats Co.}, 129 F.3d 310 (3d Cir. 1997).
\item \textit{San Leandro Emergency Medical Group v. Phillip Morris Cos.}, 75 F.3d 801 (2d Cir. 1996).
\item \textit{Gallagher v. Abbott Laboratories}, 269 F.3d 806, 810 (7th Cir. 2001).
\end{itemize}
current state of the company and do not operate as a continuing representation.\textsuperscript{177} In addition, an issuer should be able to defeat any duty to update claim by disclaiming in plain and clear language any intention to take on a responsibility to update a statement.

v. Duty to Disclose or Abstain

Rule 10b-5 prohibits corporate insiders from trading company stock on the basis of material nonpublic information known to one party of the trade but not the other.\textsuperscript{178} Trading on such information qualifies as a “deceptive device” under § 10(b), because "a relationship of trust and confidence [exists] between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation [and that] relationship [gives] rise to a duty to disclose or to abstain from trading because of the 'necessity of preventing a corporate insider from [...] taking unfair advantage of [...] uninformed [...] stockholders.'"\textsuperscript{179}

The insider-trading prohibition applies to sales of an employer's stock by ERISA fiduciaries and plans that acquire material nonpublic information.\textsuperscript{180} In order to avoid insider-trading liability, a fiduciary who has access to non-public information must either disclose such information to the public or abstain from trading.\textsuperscript{181} Thus, neither the ERISA plan nor the ERISA fiduciary can sell the employer stock that the plan already holds based upon

\textsuperscript{177} See Langevoort supra note 139, 1668 (citing In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1431 (3d Cir. 1997)).

\textsuperscript{178} See U.S. v. O'Hagan, 521 U.S. 642, 651-52 (1997) ("classical" insider trading occurs when company insiders buy or sell their company's stock while in possession of material, nonpublic information).

\textsuperscript{179} Id. at 652 (1980) (citing Chiarella v. United States, 445 U.S. 222, 228-229 (1980)).


\textsuperscript{181} See In re Cady, Roberts & Co., 40 SEC 907, 911 (1961) (adopting the ‘disclose or abstain’ principle).
confidential non-public information because such a ‘purchase or sale’ would violate insider-trading laws. 182

A plan sponsor could also be subject to liability for insider trading as a tipper if it provided material nonpublic information to the Plan or its participants. Such liability would attach only if the plan sponsor passed the information for the purpose of obtaining, directly or indirectly, some personal or economic benefit. 183 Although the necessary type of benefit has not been precisely defined, the S.E.C. takes the position that intangible benefits, such as a desire to enhance one's reputation, are sufficient. 184 Accordingly, a desire to confer a benefit on employees or avoid a breach of fiduciary duty claim may also be sufficient to establish tipping liability. Thus, neither fiduciaries nor participants can trade while in possession of material, nonpublic information. 185

vi. Duty to Disclose Publicly Information Selectively Disclosed

Regulation FD (“Fair Disclosure”) prohibits selective disclosure of inside information concerning company stock to any “holder of the issuer's securities, under circumstances in which it is reasonably foreseeable that the person will purchase or sell the issuer's securities on the basis of the information.” 186 Thus, if a selective disclosure is made to a party who will be trading on the information, such as a 401(k) plan participant, full public disclosure is required simultaneously, if disclosure was made on purpose; or subsequently, if disclosure was

182 See U.S.C. §§ 78u-1(a)(1)(B), 78u-1(b)(1)(A) (providing civil penalty on a person who directly or indirectly controls a person who engages in insider trading where the controlling person knew or recklessly disregarded the likelihood that the person would engage in insider trading and failed to take appropriate steps to prevent it).


186 17 C.F.R. § 243.100(b)(1)(iv).
accidental. A Reg FD violation does not require scienter or breach of fiduciary duty, but it is enforceable only by the S.E.C. and does not give rise to 10b-5 liability. Thus, if a corporate insider who is also an ERISA fiduciary communicates information about the possibility of accounting fraud or other material information about the company solely to employees who will be trading on the information, the fiduciary may be subject to a cease-and-desist order, judicial enforcement action, or a civil penalty.

III. OVERLAPPING, CONTRADICTORY OR COMPLIMENTARY DISCLOSURE CLAIMS?

The ERISA and the securities lawsuit arising out of a common nucleus of operative facts may be combined and brought before a judge for coordinated or consolidated proceedings. However, the general consensus is that the numerous distinctions between the ERISA and the securities fraud cases warrant both separate consolidation and separate trial. For instance, the U.S. District Court for the Southern District of Ohio recently declined to transfer a proposed ERISA fiduciary breach class action against Macy’s to a New York federal court where two securities lawsuits were pending based on the same misrepresentations and nondisclosures. The court reasoned that, even though similar, “[the] ERISA matter and the securities action in New York are not identical [to] necessarily require transfer” even though such transfer would promote judicial economy.

187 Id. § 243.100.
188 17 C.F.R. § 243.102 (“No effect on antifraud liability.”).
190 Robert Rachal, Howard Shapiro, and Nicole Eichberger, Fiduciary Duties Regarding 401(k) and ESOP Investments in Employer Stock, in ERISA LITIGATION (Jayne E. Zanglein and Susan J. Stabile, eds., 2005).
191 Id. at 624.
193 Id.
Whereas this reasoning may hold true for misrepresentation and failure to correct claims, the inevitable intersection between the ERISA and securities nondisclosure claims makes it difficult, if not impossible, to determine the disclosure duties of ERISA fiduciaries, if any, without a clear reference to whether there was a duty to disclose the information under the securities laws.

A. Misrepresentation and Failure to Correct Claims

ERISA fiduciary misrepresentation and securities fraud are distinct causes of action that intersect incidentally: only fiduciary communications are actionable under ERISA, the standard of materiality may be different, and a fiduciary breach need not constitute fraud or be committed with scienter as required by a 10b-5 action. Thus, a showing of ERISA fiduciary breach based on a misrepresentation need not be grounded on a securities law violation. Conversely, a misrepresentation that is actionable under the securities laws need not give rise to ERISA liability if it is not fiduciary in nature.

i. A false or misleading statement is actionable under ERISA only if it is a fiduciary communication

Both ERISA and the securities laws impose a duty not to mislead or misrepresent. Whereas there is no fiduciary requirement under the securities laws, actionability of a false or misleading statement under ERISA depends on whether the fiduciary makes, adopts or disseminates the false or misleading statement in a fiduciary capacity—that is, the statement is sufficiently related to the plan or benefits thereunder to satisfy the Varity standard.194 As the Varity decision noted, a company does not act as an ERISA fiduciary “simply because it made statements about its expected financial condition.”195 Those statements must be linked to

194 See discussion supra Part II.A(ii).
195 Varity, 516 U.S at 505.
statements about plan benefits in order to be actionable under ERISA. In this sense, the standard of actionability is more stringent than the securities law standard.

There is one potential gray area blurring the distinction between corporate communications and fiduciary communications—whether statements in S.E.C. filings that have been incorporated in the SPD or public statements of the company that have been disseminated by plan fiduciaries would be deemed fiduciary communications for purposes of ERISA. The judicial consensus seems to be that mere incorporation of S.E.C. filings into the SPD is not a fiduciary act. Liability would require that the information be made or disseminated by an ERISA fiduciary in a manner reasonably calculated to influence plan participants’ benefits decisions; and that the fiduciary knows or should know that the information was false or misleading when made.

ii. The ERISA standard of materiality may be lower than the Securities standard

A statement is material in the ERISA benefits-related context “if there was a substantial likelihood that it would have misled a reasonable participant in making an adequately informed decision about whether to place or maintain monies in a particular fund.” Under the securities law, information is material if there is "a substantial likelihood that [its] disclosure would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.” Whereas some communications may be deemed immaterial under the securities law, an immaterial misrepresentation may invite greater reliance by plan participants if the statement is made, endorsed or disseminated by a plan fiduciary.

196 See discussion supra Part III.A (ii).

197 Edgar, 503 F.3d at 350 (quoting Unisys, 74 F.3d at 442).

For instance, a statement may be deemed ‘puffery’ for purposes of securities litigation because a reasonable investor would find it unimportant to the total mix of information available to the market. However, if the same statement is endorsed or disseminated by a plan fiduciary, it may be taken more seriously by plan participants who—because of lack of sophistication or a greater belief in the competence of plan fiduciaries, rely more heavily on their recommendations. Thus, a false or misleading statement may not be deemed material enough to establish the type of fraud that is actionable under 10b-5. But the fiduciary who knew or should have known that a corporate communication was false or misleading but still endorsed, adopted, or disseminated it should be liable for his breach of duty.

iii. A fiduciary breach need not constitute fraud or be committed with scienter as required by a 10b-5 action

The standard for liability in an ERISA lawsuit is significantly lower than the burden to show scienter required to prevail in a securities 10b-5 action. Scienter is generally defined as “a mental state embracing intent to deceive, manipulate, or defraud,”199 or at least severe recklessness.200 In contrast, a lack of intent to deceive does not insulate a fiduciary from liability: “a fiduciary breaches its duties by materially misleading plan participants, regardless of whether the fiduciary's statements or omissions were made negligently or intentionally.”201 A finding of fiduciary breach turns on whether the fiduciary knew or should have known (through reasonable investigation) that the communication was false or misleading when made. Thus, defendants sued for the same actions under both statutes may not be liable under 10b-5 if they lacked the required intent to manipulate, deceive or defraud, but may be liable under

200 See, e.g., Alpern v. UtiliCorp United Inc., 84 F.3d 1525, 1534 (8th Cir. 1996) (explaining that the Eight Circuit follows the majority rule that recklessness satisfies the scienter requirement).
201 Adams v. Brinks's Co., 2008 U.S. App. LEXIS 536 (4th Cir. 2008); see also James v. Pirelli Armstrong Tire Corp., 305 F.3d 438, 448-49 (6th Cir. 2002) (a fiduciary may breach his duty to plan participants by providing materially misleading information, even if he does not do so negligently or intentionally).
ERISA if a reasonably prudent fiduciary would have acted otherwise. ERISA’s duty of prudence may be breached by mere inaction.

iv. Both ERISA and the Securities Laws impose a Duty to Correct but ERISA’s duty to Correct is Limited to Fiduciary Communications

The securities laws impose a duty to correct material misstatements that at the time made, the company believed to be true, but as revealed by subsequently discovered information actually was not. As to statements made by third parties such as analysts, courts generally hold that there is no duty to correct under the securities laws unless the company has “placed its imprimatur, expressly or impliedly, on the [third party’s statements].”202 Under ERISA, fiduciaries must correct mistakes in previous fiduciary communications when information later reveals that the communication was false when made.

ERISA, however, “does not impose affirmative disclosure obligations to correct the misstatements of others made to the market.”203 The case law suggests that a duty to correct arises under ERISA when and only if: (i) the person who made or disseminated the particular statement was a fiduciary to the plan; (ii) the false or misleading statement was sufficiently related to the plan or benefits thereunder to be deemed fiduciary under Varity; (iii) the fiduciary discovers or should have discovered (through prudent investigation) that the communication was false or misleading when made, and (iv) a reasonable plan participant would rely on the statements in making benefits-related decisions.

If a material false or misleading statement is both a corporate and a fiduciary communication, correction would be mandated by the securities laws and by ERISA. For instance, in WorldCom, plan participants alleged that WorldCom’s S.E.C. filings contained material misrepresentations regarding WorldCom’s financial condition. The court held that

202 Elkind v. Liggett & Myers Inc., 635 F.2d 156, 163 (2d Cir. 1980).

“WorldCom had a duty to correct any prior material misrepresentations when it became aware of its falsity”\textsuperscript{204} and that such correction would have been consistent with ERISA.\textsuperscript{205} However, ERISA fiduciaries would have no duty to correct corporate communications that are not made in a fiduciary capacity, even though from a plan participant’s perspective, fiduciary statements may be indistinguishable from non-fiduciary communications.

\textbf{B. Failure to Disclose Claims}

The most difficult and interesting issues arise when ERISA plaintiffs claim an entitlement to non-public company information regarding financial and business operations that the company has not revealed to the public at large but that the fiduciary has acquired in its corporate capacity. The difficulty of defining the contours of an ERISA disclosure fiduciary duty is further aggravated because the question of duty under the securities laws is muddled with complexities that may be resolved differently from court to court.\textsuperscript{206}

Although the ‘duty to disclose’ question under the securities laws is not clear-cut, in theory the company either has a duty to disclose or has the right to remain silent. Several fiduciary duty question arise out of these two scenarios: (i) whether the fiduciary would violate his fiduciary duties by failing to disclose information that is required to be disclosed under the securities laws, (ii) whether the fiduciary would breach his duties by failing to disclose material information about the company that does not give rise to 10b-5 liability, and if so, (iii) whether the fiduciary would be required to selectively disclose the information to plan participants.

The confusion in the case law arises mainly because these three distinct questions have generally been framed or analyzed as one—whether plan participants have a superior right to

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\begin{itemize}
\item \textsuperscript{204} See \textit{In re WorldCom, Inc. ERISA Litig.}, 263 F. Supp. 2d 745, 767 (S.D.N.Y. 2003).
\item \textsuperscript{205} \textit{Id.}
\item \textsuperscript{206} See generally Langevoort \textit{supra} note 139.
\end{itemize}
}
information than other shareholders of the company. It is clear that neither the courts, the Department of Labor, nor the S.E.C. would allow plan fiduciaries to trade or to cause to trade while in the possession of material, non-public information. As the Enron court noted: “[l]ike any other investor, plan participants have no lawful right, before anyone else is informed of Enron’s negative financial picture, to profit from fraudulently inflated stock prices or to avoid financial loss by selling early before public disclosure.” Selective disclosure would not “protect any lawful financial interests of the plan participants and beneficiaries.”

The two other questions are more difficult to answer and, at the motion to dismiss level, probably a practical impossibility. Although courts are not explicitly articulating it, analytically the initial inquiry seems to be whether plan participants are entitled (or likely to be entitled) to the information under the securities laws as shareholders of the company. If the answer is ‘definitely yes’, then the issue is whether fiduciaries on notice of the securities violation have a heightened duty to provide that information to plan participants even if it would force its public disclosure. If the answer to whether the company is required to disclose the information is ‘no’, the question would be whether plan participants, even if not entitled to the information as a matter of securities laws, are nonetheless in a relationship of trust such that fiduciaries on notice that silence might be harmful have a duty to make disclosures to plan participants and to the investing public to the extent necessary to protect the assets of the plan.

Not surprisingly, courts faced with the intersections and ambiguities of two complex bodies of federal law have reached inconsistent results. At the motion to dismiss level, some


208 284 F. Supp. 2d at 565.

209 Id.
courts have found a duty of disclosure to the extent necessary for plan participants to appreciate the risks of investing in company stock and make informed decisions vis-à-vis their investments.\textsuperscript{210} Other courts have limited such duty only to special circumstances where the information would have an “extreme impact” on plan beneficiaries.\textsuperscript{211} These courts have generally faced factual allegations against fiduciaries who were on notice that the company was not disclosing material information (arguably or likely) in violation of the securities laws. However, when ERISA plaintiffs have argued that they were entitled to company information beyond the requirements of the securities laws, courts have been reluctant to impose through the backdoor a new set of disclosure obligations under the guise of ERISA fiduciary duties.

i. An affirmative duty to disclose non-public information beyond the requirements of ERISA and the securities laws would put ERISA fiduciaries in the untenable position of determining what information to disclose to reconcile their duties towards shareholders and plan participants

Courts have generally dismissed claims that plan fiduciaries failed to disclose adverse non-public information of business and financial material events affecting the value of company stock when the securities laws would not require such disclosure. For instance, in \textit{Hull v. Policy Management Sys. Corp}, the court dismissed a claim against a 401(k) plan’s administrative committee members who were sued for failing to disclose adverse non-public information regarding the company’s value and failing to divest the plan of company stock in light of such information.\textsuperscript{212} The court reasoned that the plaintiffs sought to impose a higher standard of care on ERISA fiduciaries with respect to plan investment in company stock as opposed to other securities, and that this standard of care would be illegal and unreasonable:

\textsuperscript{210} See Harzewski v. Guidant Corp., 489 F.3d 799 (7th Cir. 2007).


In many respects, this standard would put the committee in the untenable situation of choosing one of three unacceptable (and in some cases illegal) courses of action: (1) obtain ‘inside’ information and the make stock purchase and retention decisions based on this ‘inside’ information; (2) make the disclosures of ‘inside’ information itself before acting on the discovered information, overstepping its role and, in any case, likely causing the stock price to drop; or (3) breach its fiduciary duty by not obtaining and acting on ‘inside’ information.213

Similarly, the district court in *Cokenour v. Household International Inc.* declined to grant a motion to dismiss, but noted that defendants have no duty to continuously gather and disclose nonpublic information bearing some relation to the plan sponsor’s financial condition,” especially when disclosures “would simply have accelerated the demise of the household stock held by the fund. Their duties as fiduciaries were to prevent such loss.”214 This reasoning, however, may be adequate for failure to disclose financial and business information not required to be disclosed by the securities laws but fiduciaries cannot have a duty to prevent losses to a plan by concealing a securities law violation or delaying compliance with the securities laws.

ii. A heightened disclosure duty on ERISA fiduciaries on notice of fraudulent concealment of information would only force compliance with the securities laws

Courts faced with allegations of nondisclosures that amount or could amount to securities fraud have decided motions to dismiss in favor of the ERISA plaintiffs. For instance, in *Shirk v. Fifth Third Bancorp*, plan participants alleged that plan sponsors breached their fiduciary duties, *inter alia*, by failing to disclose complete and accurate information regarding Fifth Third Stock when the company was allegedly concealing its financial problems.215 The court concluded that “[a] claim is actionable for allegedly not disclosing negative information concerning investment in Fifth Third Stock, such that the Plan’s participants could not

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213 *Id.* at 26-27.


appreciate the true risks presented by investments in Fifth Third Stock and could not make informed decisions regarding investments in the Plan.”\textsuperscript{216} The court further added that “a duty to disclose exists under ERISA and Plaintiffs have stated a claim for a breach of that duty.”\textsuperscript{217}

Even though the holding was stated in very general terms—whether the participants were provided information about the true risks of investing in company stock so that they could make an informed decision,\textsuperscript{218} the court was faced with allegations that the company was concealing its financial problems likely in violation of the securities laws. Holding that fiduciaries can stand still while on notice that the company is engaging in misbehavior that could amount to securities fraud would be akin to holding that fiduciaries have no duty to act when on notice that plan assets are being misappropriated. The result would not be consistent with ERISA’s stated mission of establishing high standards of fiduciary conduct.

Similarly, a heightened duty of disclosure on ERISA fiduciaries when the information would probably give rise to 10b-5 liability would resolve 10b-5 ambiguities on the duty to disclose question in favor of ERISA plaintiffs. Because the fiduciary’s conduct must be judged pre-ante, imposing a duty to disclose material information that could arguably be required disclosure under 10b-5 would be consistent with ERISA’s high fiduciary standards and with the disclosure goals of the securities laws. As previously noted, there is an open question around the circuits as to whether failure to comply with mandatory disclosure items gives rise to 10b-5 fraud-based liability and if so, under what circumstances.\textsuperscript{219} Imposing a duty on ERISA fiduciaries to disclose such information may resolve these questions in favor of ERISA

\begin{footnotes}
\item[216] Id. at 14.
\item[217] Id.
\item[218] Id.
\item[219] See discussion supra Part II.B (i).
\end{footnotes}
plaintiffs who would (arguably) be entitled to the information regardless of whether its concealment actually gives rise to fraud-based duties.

iii. Fiduciaries have a heightened duty of disclosure when on notice of a (likely) securities law violation that threatens the assets of the plan but have no duty to disclose financial and business information where the securities laws would not require such disclosure

Even though a clear standard has not been articulated yet, a careful examination of the case law suggest that when the securities laws do not require disclosure of adverse business and financial information, courts are generally unwilling to impose independent disclosure requirements on ERISA fiduciaries. In contrast, courts are willing to entertain claims that ERISA fiduciaries have a heightened duty of disclosure when on notice that the company is engaging in corporate fraud or is otherwise violating the securities laws. The question underlying the legal analysis seems to be: who should bear the risk of loss when the value of the company stock plummets, plan participants or plan sponsors and fiduciaries? Whereas employees, like other investors, have assumed the risk of a normal downswing of the business cycle, they have not assumed the risk that plan sponsors or fiduciaries with experience, expertise, and inside access, will conceal information in violation of the securities laws.

This implicit analysis provides the appropriate standard: ERISA fiduciaries have no duty to disclose financial and business information beyond statutory obligations, unless on notice that the assets of the plan are being threatened by corporate misconduct, including violations of the securities laws. Such duty, however, is better analyzed as a subset of the general fiduciary duty to act when on notice that plan assets are at risk of being misappropriated, depleted, or diminished by corporate misconduct, and not as an independent disclosure duty under ERISA’s fiduciary provisions.
CONCLUSION

This Article provided an overview of the procedural, remedial, and substantive differences between the ERISA and the securities misrepresentation and nondisclosure claims. Procedurally, ERISA may allow plaintiffs to proceed with claims that would not otherwise support a securities class action because of the PSLRA’s heightened pleading requirements. ERISA also allows plaintiffs to proceed with discovery even if discovery has been stayed in the companion securities case. Thus, ERISA plaintiffs are more likely to avoid an early stage dismissal of their case, proceed to discovery, and obtain a favorable settlement.

ERISA also affords significant substantive advantages over traditional securities suits. First, the securities laws offer protection only to actual purchasers or sellers, whereas ERISA may offer redress to plan participants who were defrauded or misled into holding their securities. As to misrepresentation claims, once the ERISA plaintiffs have established the fiduciary nature of a communication, a showing of ERISA fiduciary breach is less burdensome than satisfying the elements of fraud under 10b-5. More complex issues arise when ERISA plaintiffs allege that misrepresentations in corporate communications or S.E.C. filings are fiduciary in nature. Such claims may be resolved under Varity’s requirement that there be a link between the false or misleading statement and a fiduciary decision to disseminate the information in a manner calculated to influence plan participants’ benefits decisions.

Nondisclosure allegations raise more interesting intersections with the securities laws. This Article distinguished between claims that fiduciaries have a duty to speak when on notice that the company is engaging in corporate fraud or is otherwise violating the securities laws, and allegations that fiduciaries have a duty to disclose non-public information that the company is entitled to keep silent. A careful examination of the cases reveals an emerging standard: absent a securities law violation, an ERISA fiduciary cannot breach his duties by
standing on the company’s right to remain silent under a periodic disclosure system. Nonetheless, to the extent that the law remains unclear, ERISA fiduciaries cannot rely on satisfying statutory disclosure requirements to avoid the risks of litigation.

By exploiting the legal uncertainty surrounding the question of duty and the procedural advantages provided by ERISA, plaintiffs’ lawyers have exerted (sometimes) unwarranted settlement pressures on defendants fearing potentially massive discovery and litigations costs. There is a pressing need to clarify the legal standards and to effect procedural harmonization at the pleading stage to expose groundless claims at the point of minimum expenditure of time and money. A failure to effect procedural harmonization may have unintended consequences if actual or perceived risk of fiduciary liability deters capable persons from serving as ERISA fiduciaries. The cost of these suits may ultimately be borne by employees themselves if, as a result of greater plan expenses and higher insurance premiums, plan sponsors curtail or stop providing their employees with retirement benefits instead of mitigating risk by exercising more caution.

The stakes are high: the resolution of these issues implicates the financial security of a large part of the country’s aging population, the financial and legal stability of plan sponsors and fiduciaries facing litigation on two fronts, and the scarce judicial resources of the federal courts confronted with the difficult task of reconciling two different lines of duty. While no comprehensive resolution of these issues seems imminent in the federal courts, the pressing need for clarity and predictability invites legislative action, or joint action by the Securities and Exchange Commission and the Department of Labor.  

220 See Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans, 73 Fed. Reg. 142 (proposed July 23, 2008); 2005 Form 5500 Data, U.S. Department of Labor (noting that over 60 million employees have almost $2.3 trillion invested into participant-directed retirement plans governed by ERISA).

221 See Id., Labor Department Proposed Rule on Investment Advice For Participants and Beneficiaries of Certain Retirement Arrangements, Department of Labor Employee Benefits Security Administration, 29 C.F.R. Part 2550.