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A Limit on Downsizing: Varity Corp. v. Howe

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I. INTRODUCTION

In the last fifteen years, over forty-three million jobs have been eliminated in the United States.[1] Companies affected by these job losses include AT&T, Tenneco, Sears, and Xerox.[2] While there have been millions of new jobs created, the trend to continue to downsize is becoming the "holy grail of corporate management."[3] Until recently, most of the employees terminated or laid off in these downsizings, also known as re-engineerings, reductions-in-force, or "voluntary retirements," were unsuccessful in maintaining their jobs or recovering their benefits.[4]

The recent decision in *Varity Corp. v. Howe*,[5] however, marked the first time that the United States Supreme Court empowered employees

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1. Louis Uchitelle & N.R. Kleinfeld, *The Downsizing of America*, N.Y. TIMES, Mar. 3, 1996, at A1, *available in* LEXIS, News Library, NYT File. The article was the first in a series focusing on the millions of employment casualties caused by severe cutbacks in the manufacturing industry, the health industry, and the legal profession. *Id.*; *see* N.R. Kleinfeld, *The Downsizing of America: In the Workplace Musical Chairs, the Company as Family, No More*, N.Y. TIMES, Mar. 4, 1996, at A1, *available in* LEXIS, News Library, NYT File.

2. Uchitelle & Kleinfeld, *supra* note 1, at A1. AT&T plans to cut 40,000 jobs, Tenneco has cut 11,000 jobs, Sears has cut 50,000 jobs, and Xerox plans to cut 10,000 jobs. *Id.*

3. Alex Markels & Matt Murray, *Call It Dumbsizing: Why Some Companies Regret Cost-Cutting*, WALL ST. J., May 14, 1996, at A1, *available in* 1996 WL-WSJ 3102858.

4. *See infra* notes 19-26 and accompanying text.

5. 116 S. Ct. 1065 (1996).

victimized by downsizing to successfully sue their plan administrators.[6] Prior to this decision, employees could not recover on their own behalf, but rather could only bring suit on behalf of the plan.[7] In *Varity*, the Court held that employers may incur fiduciary liability under the Employee Retirement Income Security Act of 1974 (ERISA)[8] through their conduct as plan administrators.[9] Most significantly, the Court held that employees could sue as individuals and seek equitable relief for a breach of this fiduciary obligation.[10] As a result of this ruling, legal experts have predicted a dramatic increase in litigation over changes in benefit plans and other consequences of downsizing.[11]

This Note first reviews the background of corporate downsizing,[12] the common law roots of ERISA,[13] Congress's actions in creating ERISA,[14] and the key cases leading up to *Varity*.[15] The majority and dissenting opinions in *Varity* are then discussed.[16] Next, this Note analyzes the decision in *Varity*, as well as the alternative logic the Court could have used, and proposes a "safe harbor" for employers who still need freedom to operate their organizations.[17] Finally, this Note predicts the impact that *Varity* will have on future litigation and on management decisions.[18]

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6. *Id.* at 1075-76.

7. *Id.*; *see infra* Part II.

8. 29 U.S.C. §§ 1001-1461 (1994).

9. *Varity*, 116 S. Ct. at 1074.

10. *Id.* at 1079. Before this, an individual could sue only as a representative of the plan. For example, an individual could seek to force a dishonest fiduciary to return funds he embezzled to the plan, but could not try to recover individually. *Id.* at 1075-76.

11. Jan Crawford Greenburg, *Corporate Cuts Spur Suits by Angry Workers; Employees Seek Protection for Benefit Pension Plans*, CHI. TRIB., Mar. 29, 1996, § 1, at 1, *available in* 1996 WL 2656910. Major law firms even predict the need to "beef up" their practice in response to the *Varity* ruling. *Id.*

12. *See infra* Part II.A.

13. *See infra* Part II.B.

14. *See infra* Part II.C.

15. *See infra* Part II.D.

16. *See infra* Part III, notes 174-211 and accompanying text. As part of the discussion, the lower court opinions will be examined, including the multiple rulings and published opinions at the appellate level. *See infra* Part III.B, notes 143-73 and accompanying text.

17. *See infra* Part IV.

18. *See infra* Part V.

II. BACKGROUND

A. *Corporate Downsizing*

In the past, employers typically terminated employees for many reasons, but large-scale downsizing was usually done solely because the company needed to survive short-term.[19] More recently, however, employers have downsized to increase earnings, to become more competitive, or to boost the price of the company's stock.[20]

Most litigation following downsizings initially focuses on employees who allege violations on grounds other than ERISA.[21] Litigants most often cite age discrimination[22] as the cause for their termination, claiming there are invariably younger, lower paid employees still at the company. The circuits have been split, however, on the requisite burden of proof when there is evidence of both age discrimination and large-scale downsizing.[23] Similar disputes arise when an employee claims his or her selection for termination violated other statutes.[24]

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19. These cases often wound up being adjudicated in the Federal Bankruptcy Courts. *See, e.g.*, *In re* America West Airlines, Inc., 171 B.R. 674 (Bankr. D. Ariz. 1994) (airline downsized under Chapter 11); *In re* Atron, Inc., 172 B.R. 541, 542 (Bankr. W.D. Mich. 1994) (under a reorganization plan, employer discharged employees as "part of a general downsizing of [the] . . . workforce").

20. Carrie R. Leana, *Why Downsizing Won't Work*, CHI. TRIB., Apr. 14, 1996, Sunday Magazine, at 15.

21. Employees often focus their first efforts at regaining their jobs. For a listing of cases brought by terminated employees, see *infra* note 24. ERISA is limited in its scope to certain types of benefit plans. *See infra* Part II.C (discussing the key provisions of ERISA).

22. The claimed violation is usually of the Age Discrimination in Employment Act of 1967, as amended. 29 U.S.C. §§ 621-634 (1994). If the employee claims the employer pressured the employee into volunteering for early retirement, a claim may be brought under the Older Workers Benefit Protection Act. 29 U.S.C. §§ 623, 626, 630 (1994).

23. The Seventh Circuit, for example, has stated that the plaintiff must prove that the termination would not have occurred "but for" the employer's motive to discriminate against the employee for the employee's age. Karazanos v. Navistar Int'l Transp. Corp., 948 F.2d 332, 335 (7th Cir. 1991). The Second Circuit looks only to whether the plaintiff proved that age made any difference in the decision. Montana v. First Fed. Savs. & Loan Ass'n, 869 F.2d 100, 105 (2d Cir. 1989).

24. *See* Frank C. Morris, *Litigation Challenges to Reductions in Force*, 108 A.L.I.-A.B.A. 181 (1995). *See, e.g.*, Mullins v. Pfizer, Inc., 23 F.3d 663 (2d Cir. 1994) (former employee alleged violations of ERISA, ADEA, and state law when the employer misled employee into taking early retirement); Fitzgerald v. Alleghany Corp., 904 F. Supp. 223 (S.D.N.Y. 1995) (disabled employee cited infirmity as reason selected to leave);

Even when the termination is inevitable, the loss of benefits perceived by employees as already earned has led to both group and individual litigation.[25] Before ERISA, employees had to rely primarily on common law to prevent their pension or benefit loss, regardless of whether the loss was a result of downsizing or the closing of a business.[26]

B. Common Law Roots of ERISA

The applicable common law of trusts, even when partially codified into some states' laws, dealt primarily with the protection of assets held by a trust.[27] Prior to 1974, whether or not to fund a plan at all was a decision left to each employer. The patchwork of state and common laws did not hold employers or plan administrators liable for inadequate funding or for the loss of anticipated benefits due to the lack of vesting provisions.[28]

Trustees of plan assets and plan administrators were considered fiduciaries of employer benefit and retirement plans.[29] At common law,

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Luongo v. Lawner, 1995 WL 96901 (D. Mass. 1995) (employee claimed she was chosen for discharge because she was pregnant); *see also* Purvey v. American Tel. & Tel. Co., No. 94-6102, 1995 WL 30918 (10th Cir. Jan. 27, 1995) (employee claimed race was the real reason for his firing); Taylor v. NCR Corp., No. 93-3538, 1994 WL 665549 (6th Cir. Nov. 28, 1994) (employee claimed sex discrimination was the actual reason for discharge).

25. There has been limited success litigating under state law contract theory. *See, e.g.*, Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988) (implied in fact promises are found in personnel practices, longevity of service, and employer communications). Federal statutes outside of ERISA focus on short-term aid—health plan benefits must be provided short-term under circumstances proscribed by part of the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA). 26 U.S.C. § 4980B (1994). Plant closings or mass layoffs also lead to litigation for violation of the Worker Adjustment and Retraining Notification Act (WARN), which requires either 60 days written notice to employees and to affected state and local governments, or the payment of 60 extra days of wages and benefits. 29 U.S.C. §§ 2101-2109 (1994).

26. *See infra* notes 33-36 and accompanying text. The Court in *Varity* looked to the common law to interpret certain ERISA provisions. *See infra* Part III.C.

27. *See, e.g.*, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 543, at 260 (rev. 2d ed. 1993). The common law was used to compel trustees of union welfare funds with conflicts of interest to restore fund assets. Blankenship v. Boyle, 329 F. Supp. 1089 (D.D.C. 1971).

28. *See* 29 U.S.C. § 1001(a) (1994) (congressional findings concerning state of the law prior to ERISA).

29. A plan administrator is a fiduciary when performing most functions. *See, e.g.*, *In re* Unisys Corp. Retiree Med. Benefit "ERISA" Litig., 57 F.3d 1255, 1261, n.10 (3d Cir. 1995) (holding when a plan administrator explains plan benefits to its employees, it acts in a fiduciary capacity), *cert. denied*, 116 S. Ct. 1316 (1996); *see also* Musto v. American Gen. Corp., 861 F.2d 897, 910 (6th Cir. 1988) (holding employers must satisfy fiduciary duties when administering benefit plans).

a fiduciary is a person who acts in the interest of another person.[30] Much litigation has surrounded the definition of the duties and responsibilities of the fiduciary or plan administrator when acting in their official capacities.[31] A fiduciary or plan administrator is held to a higher standard than that applied to normal working interrelationships.[32]

Under common law, the court of equity remedied a fiduciary duty violation.[33] The remedies included money damages against the trustee;[34] however, courts generally refused to grant punitive damages in equity cases.[35] Therefore, employees often looked to other causes of action for broader state-imposed remedies.[36]

Non-fiduciaries can also be liable for knowingly participating in a fiduciary's breach of duty.[37] This concept becomes important when an organization takes on multiple responsibilities as employer, plan administrator, and trustee.[38] Additionally, if a "trustee holds in trust a contract right against a third person and the trustee refuses to bring an action to enforce the contract, the beneficiaries can maintain a suit."[39]

30. 2A AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, LAW OF TRUSTS § 170, at 311-12 (4th ed. 1987). A duty of loyalty requires a trustee to deal fairly and honestly with beneficiaries. *Id.*

31. For a discussion of case law defining a fiduciary, see Robert N. Eccles, *Fiduciary Litigation Under ERISA: Substantive Aspects*, 23 A.L.I.-A.B.A. 125 (1996).

32. Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928). Chief Judge Cardozo wrote, "[m]any forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. . . . Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Id.*

33. Mertens v. Hewitt Assocs., 508 U.S. 248, 255-56 (1993) (citing Lessee of Smith v. McCann, 65 U.S. (24 How.) 398, 407 (1861)).

34. BOGERT & BOGERT, *supra* note 27, § 701, at 198; *see* United States v. Mitchell, 463 U.S. 206, 225-26 (1983).

35. *Mertens*, 508 U.S. at 257 n.7 (citing D. DOBBS, REMEDIES § 3.9, at 211 (1973)).

36. Pre-ERISA disputes regarding denial of benefits also looked to contract law for remedies. *See, e.g.*, Conner v. Phoenix Steel Corp., 249 A.2d 866, 868 (Del. 1969); Atlantic Steel Co. v. Kitchens, 187 S.E.2d 824, 827-28 (Ga. 1972).

37. Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942) (holding U.S. Department of Indian Affairs liable to native beneficiaries of a trust because officials knew trustees were misappropriating funds).

38. *See infra* notes 78-83 and accompanying text. The common law understanding of the term fiduciary administration was the exercise of powers conferred by (or performance of the duties imposed by) the trust documents. *See* RESTATEMENT (SECOND) OF TRUSTS § 164 (1957).

39. McMahon v. McDowell, 794 F.2d 100, 110 (3d Cir. 1986) (citing 4 A. SCOTT, LAW OF TRUSTS § 282.1, at 2339 (3d ed. 1967)).

Common law protections proved inadequate for many beneficiaries.[40] One notorious case was the 1963 closing of the Studebaker plant in South Bend, Indiana, which caused more than four thousand employees to lose all of their pensions.[41] Congress found too many pensions to be illusory and cited the Studebaker shutdown, with its loss of more than eighty-five percent of vested benefits, as one major example.[42]

C. *Key Provisions of ERISA*

Because of these and broader concerns[43] regarding the abuses of plan employers and sponsors, Congress enacted the Employee Retirement Income Security Act of 1974.[44] Congress based its decision to enact ERISA on a decade of studies suggesting that the nation's private pension plans were failing.[45] Congress found that employer pension plans were underfunded, and thus, millions of employees were deprived of their expected benefits.[46]

The purpose of ERISA is to protect "the interests of participants in employee benefit plans and their beneficiaries, . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanc-

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40. *See* JOHN LANGBEIN & BRUCE WOLK, PENSION AND EMPLOYEE BENEFIT LAW 64-65 (1st ed. 1990) (citing Michael S. Gordon, *Overview: Why Was ERISA Enacted?*, *reprinted in* Special Committee on Aging, The Employee Retirement Income Security Act of 1974: The First Decade, S. Prt. No. 221, 98th Cong. 2d Sess. 1, 10-11 (1983)).

41. Although a district court granted a preliminary injunction preventing Studebaker from terminating the plan, the employees eventually lost. *See* International Union, UAW v. Studebaker Corp., 50 Lab. Cas. (CCH) ¶ 19,307 (N.D. Ind. Oct. 30, 1964).

42. H.R. REP. NO. 93-2, at 1599 (1973). Other examples included instances of multiemployer plan participants who sold their operations, leaving insufficient assets to pay benefits to even vested participants. *Id.* at 1600. Studies by the Departments of Labor and Treasury showed over 19,000 workers lost vested benefits the prior year alone. Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 375 n.22 (1980).

43. Congressional investigations of pension plan employers showed rampant embezzlement, kickbacks, excessive cross-charges, and purchases of securities which were conflicts of interest. *See* LANGBEIN & WOLK, *supra* note 40, at 59.

44. Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 (1994)).

45. *Nachman*, 446 U.S. at 361-62. Congress wanted to prevent the "great personal tragedy" employees suffer when vested benefits are not paid because plans are terminated. *Id.* at 374.

46. *Id.* at 362; *see* ERISA § 2(a), 29 U.S.C. § 1001(a) (1994).

tions, and ready access to the Federal Courts."[47] Congress enacted the statute in the interests of employees and their beneficiaries.[48]

Congress intentionally invoked the common law of trusts in the statute to broaden the scope of the responsibility of fiduciaries such as trustees and plan administrators.[49] ERISA "abounds with the language and terminology of trust law."[50]

The relevant part of ERISA[51] that specifically translates the common law of fiduciary responsibilities is section 404, which requires that actions be taken for the benefit of plan participants and beneficiaries.[52] Section 404(a) directs plan fiduciaries, including plan administrators, to act "solely in the interest of the participants and beneficiaries" and to act with the "exclusive purpose" to provide plan benefits and to defray reasonable plan administration expenses.[53] Courts have generally treated the "solely in the interest" and "exclusive purpose" concepts interchangeably, as part of the codification of the common law of trusts' requisite duty of undivided loyalty.[54]

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47. 29 U.S.C. § 1001(b) (1994). To minimize the conflicts among states and limit the financial burden of complying with multiple jurisdictions, ERISA preempts all state laws regarding benefit plans. Ingersoll Rand Co. v. McClendon, 498 U.S. 133, 138-39 (1990); *see* ERISA § 514(a), 29 U.S.C. § 1144(a) (1994).

48. Shaw v. Delta Airlines, Inc., 463 U.S. 85, 90 (1983).

49. Central States, Southeast & Southwest Areas Pension Fund v. Central Transp., Inc., 472 U.S. 559, 570 (1985); *see* H.R. REP. NO. 93-533, at 11 (1973), *reprinted in* 1973 U.S.C.C.A.N. 4639, 4649. Pre-ERISA common law remedies for a breach of fiduciary duty are also applicable. Coar v. Kamizir, 990 F.2d 1413, 1422-24 (3d Cir. 1993).

50. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989).

51. A full discussion of ERISA is beyond the scope of this Note. It is important to note, however, that Congress also traded away already existing rights. Common law and state law causes of action for employees, such as misrepresentation or fraudulent inducement by their employers, were no longer allowed, as they were preempted by ERISA. ERISA § 514(a), 29 U.S.C. § 1144(a) (1994).

52. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A) (1994). A goal of the statute was to establish "'enforceable standards to insure honest, faithful, and competent management of pension and welfare funds.'" Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 141 n.8 (1985) (citing 120 CONG. REC. 29954 (1974) (statement of Sen. Williams)); H.R. CONF. REP. NO. 1280, 93d Cong. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4795. Congress intended this provision to codify the strict duty of loyalty that fiduciaries owe to beneficiaries. *Central States*, 472 U.S. at 570-71.

53. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) (1994); *see also* NLRB v. Amax Coal Co., 453 U.S. 322, 330-32 (1981) (discussing how a trustee with divided loyalties must try to prevent any injury to the beneficiary).

54. *See* Eccles, *supra* note 31, at 139. The courts have spent considerable effort trying to further define these terms under fact-specific litigation. *Id.* at 139-44.

A breach of these responsibilities permits relief under several sections of ERISA, including sections 409(a) and 502(a).[55] Under section 409(a), a fiduciary can be held personally liable for losses to the plan resulting from his or her breach and can be subject to other equitable relief.[56]

Section 502(a) provisions are intended to provide both participants and beneficiaries "with broad remedies for redressing or preventing violations" of ERISA.[57] The causes of action created in section

55. ERISA § 409(a), 29 U.S.C. § 1109(a) (1994); ERISA § 502(a), 29 U.S.C. § 1132(a) (1994). ERISA § 409 is referenced in § 502(a)(2); *see infra* note 56.

56. ERISA § 409(a), 29 U.S.C. § 1109(a). Congressional Committee Reports emphasize a fiduciary's personal liability for losses to the plan. *See* H.R. CONF. REP. NO. 93-1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 5038. Section 409(a) provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be 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 use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

ERISA § 409(a), 29 U.S.C. § 1109(a).

57. *See* S. REP. NO. 93-127 (1973), *reprinted in* 1974 U.S.C.C.A.N. at 4838, 1 Leg. Hist., at 621 (Senate version); H.R. REP. NO. 93-533, at 17 (1973), *reprinted in* 2 Leg. Hist., at 2364 (House version). Section 502(a) reads in its entirety:

> (a) Persons empowered to bring a civil action
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> A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;
>
> (4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of [section] 1025(c) of this title;
>
> (5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or
>
> (6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (*l*) of this section.

502(a)(2) allow the Secretary of Labor, participants, beneficiaries, and fiduciaries to obtain "appropriate relief"[58] under section 409 for violations of fiduciary responsibilities.[59] Section 502(a)(3) allows a participant, beneficiary, or fiduciary to obtain "any other appropriate relief"[60] to redress violations.[61]

Congress added other remedies when it passed Title IV[62] of ERISA, creating the Pension Benefit Guarantee Corporation (PBGC).[63] Congress established the PBGC, which is funded with insurance-like premiums paid by employers, to protect employees against the loss of nonforfeitable or vested benefits.[64] The PBGC ensures employees that they will receive a portion of their vested benefits.[65] If the plan fails and the PBGC steps in to pay employees, the PBGC has the right to sue the employer.[66]

ERISA § 502(a), 29 U.S.C. § 1132(a) (1994).

58. Defining "appropriate relief" is the subject of ongoing litigation. *See infra* notes 107-19 and accompanying text.

59. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2).

60. Defining "any other appropriate relief" is at the heart of *Varity. See infra* notes 174-211 and accompanying text.

61. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

62. Pub. L. No. 93-406, 88 Stat. 1003 (codified as amended at 29 U.S.C. §§ 1301-1311 (1994)).

63. ERISA §§ 4002(a), 29 U.S.C. § 1302(a) (1994). This section provides:

> There is established within the Department of Labor a body corporate to be known as the Pension Benefit Guaranty Corporation. In carrying out its functions under this subchapter, the corporation shall be administered by the chairman of the board of directors in accordance with policies established by the board. The purposes of this subchapter, which are to be carried out by the corporation, are—(1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants, (2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this title applies, and (3) to maintain premiums established by the corporation under section 4006 at the lowest level consistent with carrying out its obligations under this title.

Id.

64. ERISA § 4006, 29 U.S.C. § 1306 (1994).

65. *Id.*

66. ERISA § 4062(b), 29 U.S.C. § 1362(b) (1994). This section provides in part:

> Any employer to which this section applies shall be liable to the corporation, in an amount equal to the lesser of— (1) the excess of— (A) the current value of the plan's benefits guaranteed under this title on the date of termination over (B) the current value of the plan's assets allocable to such benefits on the date of termination, or (2) 30 percent of the net worth of the employer.

The ERISA statute attempted to define the activities that make a person a fiduciary with respect to a plan.[67] Under ERISA, a person is a fiduciary with respect to a plan to the "extent he has any discretionary authority or discretionary responsibility in the administration of such plan."[68] An employer is also allowed to act both as plan administrator and plan sponsor.[69]

D. *Judicial Interpretation of ERISA*

Since the passage of ERISA, federal courts have adjudicated thousands of cases to further define who is a fiduciary, what duties are imposed, what transactions are prohibited, and what remedies are appropriate for a breach of fiduciary duty.[70] In defining who is a fiduciary, courts have emphasized the broad sweep of the statutory definition as well as the limitations it creates.[71] The Court in *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*[72] created one limitation on liability when it recognized that someone is a fiduciary only to the extent he performs one of the described fiduciary duties, acting sometimes as a fiduciary and sometimes in his own interests.[73]

Id.

> In other words, the employer must reimburse the PBGC for payments made from PBGC funds to cover nonforfeitable benefits to the extent that the pension fund was unable to pay them, but in no event is the employer liable to the PBGC for more than 30% of its net worth.

Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 363 n.4 (1980).

67. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (1994).

68. ERISA § 3(21)(A)(iii), 29 U.S.C. § 1002(21)(A)(iii). A person is also a "fiduciary with respect to a plan" under ERISA

> to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, [or] (ii) he 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.

ERISA § 3(21)(A)(i)-(ii), 29 U.S.C. § 1002(21)(A)(i)-(ii). In *Varity*, the parties appeared to agree that Varity Corporation's status as a fiduciary turned on subsection (iii), relating to plan administration. *See infra* Part III.C.

69. ERISA § 408(C)(3), 29 U.S.C. § 1108(C)(3) (1994).

70. For a comprehensive review of relevant cases on each of these areas, broken into a number of subtopics, see Eccles, *supra* note 31.

71. *See, e.g.* Sladek v. Bell Sys. Management Pension Plan, 880 F.2d 972, 976 (7th Cir. 1989); Olson v. E. F. Hutton & Co., 957 F.2d 622, 625 (8th Cir. 1992). The relevant section of the ERISA statute is § 3(21)(A). *See supra* note 68 and accompanying text.

72. 510 U.S. 86 (1993).

73. *Id.* at 95-97; *see also* Davidowitz v. Delta Dental Plan, Inc., 946 F.2d 1476, 1481 (9th Cir. 1991) (stating that a person can act as a fiduciary at times, yet act in his

In *Central States, Southeast and Southwest Areas Pension Fund v. Central Transportation, Inc.* the Court stated that Congress did not enumerate all the duties of trustees.[74] Congress specifically invoked the common law of trusts to further define those duties,[75] and as the Court in *NLRB v. Amax Coal Co.* stated, unless Congress expresses an unequivocal intent to the contrary, the Court must infer that Congress intentionally imposed the traditional duties of a trustee.[76] A duty of loyalty is therefore owed to a beneficiary, and the interests of all other parties must be excluded.[77]

The very nature of the various roles employers play with regard to pension plans gives rise to potential conflicts among employers' duties as fiduciaries. These conflicts do not mean, however, that the employer automatically breaches its fiduciary responsibilities when it makes "business decisions." A company, for example, does not necessarily act in its fiduciary capacity when deciding to amend or terminate a welfare benefits plan.[78] In *Curtiss-Wright Corp. v. Schoonejongen*, the Court held that "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans."[79] The Court also noted that ERISA does not create entitlement to benefits.[80]

The courts have also struggled with many instances where employers have come close to or crossed the line between their right to make business decisions and their obligations as trustees or fiduciaries. This can be particularly troublesome for employees when an employer sells

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own interests at others); Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1158 (3d Cir. 1990) ("[F]iduciary duties under ERISA attach not just to particular persons, but to particular persons performing particular functions.").

74. 472 U.S. 559, 570 (1985).

75. *Id.*

76. 453 U.S. 322, 330 (1981).

77. *Id.* at 329.

78. *See* Adams v. Avondale Indus., Inc., 905 F.2d 943, 947 (6th Cir. 1990); *see also* Waller v. Blue Cross, 32 F.3d 1337 (9th Cir. 1994) (deciding to terminate an employee benefit plan is a business decision and does not invoke obligations as a fiduciary); Malia v. General Elec. Co., 23 F.3d 828 (3d Cir. 1994) (stating business decisions related to changes in a pension plan are those of a plan sponsor acting as an employer, not as a fiduciary).

79. 115 S. Ct. 1223, 1228 (1995). The company amended its health care benefit plan, providing that coverage terminates for retirees and their dependents when the business operations cease at the facility from which they retired. *Id.* at 1227.

80. *Id.* at 1228.

one of its facilities. In *Firestone Tire & Rubber Co. v. Bruch*,[81] the company sold its plastics division and neither paid benefits nor provided information to the employees who were rehired by the new owner of the plant.[82] The Court held that there was a duty to the former employees, and that information need only be provided to those reasonably expected to return to employment or to employees with a "colorable claim" to vested benefits.[83]

Other courts have looked at asset sales of troubled companies when the transactions affected employee benefits.[84] When International Harvester sold its Wisconsin Steel subsidiary to the small company Envirodyne, International Harvester loaned Envirodyne the money for the acquisition and transferred all pension obligations to it.[85] When Envirodyne subsequently filed bankruptcy, the PBGC tried to assess liability against the "selling" company under ERISA.[86] The court held that liability arises when a "principal purpose" of the business decision is to avoid pension liability and refused to dismiss PBGC's claim for predecessor liability.[87]

By contrast, the PBGC failed to attach fiduciary liability to Doskosil Company for Doskosil's sale of its Wilson Foods meat plants and subsequent bankruptcy.[88] The court denied proofs of claim totalling $53 million in unfunded pension benefits because Doskosil was no longer the employer.[89]

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81. 489 U.S. 101 (1989).

82. *Id.* at 105. Firestone denied the terminated employees severance benefits from an ERISA covered plan, contending that the sale of the business was not covered by the company's termination plan as a "reduction in work force." *Id.* at 106.

83. *Id.* at 110. The Court noted that the likelihood of imposition of $100 per day penalties under ERISA § 1132(c)(1)(B) would act as an incentive for the company to provide information to anyone who "may become eligible" as a participant. *Id.* at 118.

84. *See, e.g.*, *In re* Consolidated Litig. Concerning Int'l Harvester's Disposition of Wis. Steel, 681 F. Supp. 512 (N.D. Ill. 1988); *In re* Doskosil Co., Inc., 130 B.R. 858 (Bankr. D. Kan. 1991).

85. *International Harvester's*, 681 F. Supp. at 515.

86. *Id.* The bankruptcy of Envirodyne was triggered when International Harvester foreclosed on the acquisition loans. *Id.* at 516.

87. *Id.* at 526. The district court also considered whether the buyer objectively lacked a reasonable chance of meeting those obligations before concluding that PBGC's claims against International Harvester could not be dismissed. *Id.* at 525-27.

88. *Doskosil*, 130 B.R. at 860-61.

89. The bankruptcy court noted that ERISA § 1369, which attaches liability to anyone with the principal purpose of evasion of responsibility, became effective on January 1, 1986, two years after the Wilson transaction. *Id.* at 868. The court also noted, however, that the facts in this case were not as egregious as in *International Harvester*. *Id.* at 867.

Misrepresentations by employers have also been treated various ways by the courts, depending on the facts as much as the law.[90] In *Berlin v. Michigan Telephone Co.*,[91] employees who were told they only had the opportunity for reduced benefits upon early retirement, when the company actually had other intentions, could maintain a cause of action against their employer.[92] Similarly, in the Third Circuit, an employer who served as a plan fiduciary had a duty to not make affirmative misrepresentations dealing with prospective plan changes.[93] Another employer who did not disclose that the company was seriously contemplating significant downsizing, but who made general statements about the company's strong financial health, was not liable for breach of fiduciary duty.[94]

Some courts have not looked favorably on intentional lying by employers. The Second Circuit has affirmatively stated that "'when a [fiduciary] speaks, it must speak truthfully.'"[95] The Seventh Circuit has noted that "[l]ying is inconsistent with the duty of loyalty owed by all fiduciaries."[96] The Fifth Circuit has noted that even subjective good faith is not always a valid defense, stating that "a pure heart and an empty head are not enough."[97]

Sections 502(a)(2) and 502(a)(3) establish the principal causes of action available under ERISA for a breach of fiduciary duty.[98] As to section 502(a)(2), the Court in *Massachusetts Mutual Life Insurance Co. v. Russell*[99] held that Congress did not authorize any relief except

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90. *See infra* notes 91-94 and accompanying text.

91. 858 F.2d 1154 (6th Cir. 1988).

92. *Id.* at 1156. The plaintiffs accepted early retirement based on the initial statements of the employer, only to find out that better benefits would be available shortly for those who waited. *Id.* at 1163-64.

93. Kurz v. Philadelphia Elec. Co., 96 F.3d 1544, 1550 (3d Cir. 1996).

94. Vartanian v. Monsanto Co., 880 F. Supp. 63, 69-70 (D.C. Mass. 1995). The court decided that the misrepresentations concerned business plans, not benefit plans. *Id.* at 70.

95. Mullins v. Pfizer, Inc., 23 F.3d 663, 668-69 (2d Cir. 1994) (quoting Drennan v. General Motors Corp., 977 F.2d 246, 251 (6th Cir. 1992)).

96. Peoria Union Stock Yards Co. Retirement Plan v. Penn Mut. Life Ins. Co., 698 F.2d 320, 326 (7th Cir. 1983). The court also noted that Congress codified this concept in § 404(a) of ERISA. *Id.*

97. Donovan v. Cunningham, 716 F.2d 1455, 1467 (5th Cir. 1983).

98. For the text of § 502 and discussion of the causes of action it provides, see *supra* notes 57-61 and accompanying text.

99. 473 U.S. 134 (1985).

that sought for the plan itself.[100] In *Russell*, a beneficiary under an employee benefit plan administered by Massachusetts Mutual became disabled with a back ailment and the company terminated her benefits based on erroneous information.[101] While retroactive benefits were paid after an appeal,[102] the beneficiary sued for additional damages caused by the improper initial denial of her claim and what she had to do to get the benefits paid.[103] She based her claim on section 409,[104] disclaiming any reliance on section 502(a)(3),[105] and sought extra contractual damages for herself as an individual rather than on behalf of the plan itself.[106]

After reviewing the statute and interpreting the intent of Congress, the Court held that relief was authorized only for the benefit plan itself, and not for individual beneficiaries.[107] Since the ruling in *Russell*, all the circuits have disallowed section 502(a)(2) actions where individual beneficiaries requested recovery.[108] In his concurring opinion, Justice Brennan[109] stated "we save for another day" the question of the nature and extent of the appropriate equitable relief to redress violations under section 502(a)(3).[110]

In *Mertens v. Hewitt Associates*,[111] the Court ruled that section 502(a)(3) provided for traditional equitable relief only, and not for legal damages.[112] In *Mertens*, when Kaiser Steel phased out its steel-making

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100. *Id.* at 148.

101. *Id.* at 136.

102. *Id.*

103. *Id.* The plaintiff claimed that even though she received both her retroactive and future benefits, the willful conduct of high-level officials within the company caused her husband to cash in his retirement savings which aggravated her psychological and physical problems. *Id.* at 136-37.

104. *See supra* notes 55-56 and accompanying text.

105. *Russell*, 473 U.S. at 139 n.5.

106. *Id.* at 136.

107. *Id.* at 142. For a more comprehensive analysis of the decision in *Russell*, see Christopher F. Robertson, Note, *Closing the* Massachusetts v. Russell *Gap: Monetary Damage Awards Under ERISA Section 502(a)(3)*, 48 WASH. & LEE L. REV. 691 (1991).

108. *See, e.g.*, Adamson v. Armco, Inc., 44 F.3d 650, 654 (8th Cir. 1995), *cert. denied* 116 S. Ct. 85 (1995); Lee v. Burkhart, 991 F.2d 1004, 1007-08 (2d Cir. 1993); Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1169 (3d Cir. 1990); Bryant v. International Fruit Prod. Co., 886 F.2d 132, 135 (6th Cir. 1989); Drinkwater v. Metropolitan Life Ins. Co., 846 F.2d 821, 824 (1st Cir. 1988); Sokol v. Bernstein, 803 F.2d 532, 537-38 (9th Cir. 1986).

109. Justices White, Marshall, and Blackmun joined in the concurrence. *Russell*, 473 U.S. at 148 (Brennan, J., concurring).

110. *Id.* at 150 (Brennan, J., concurring).

111. 508 U.S. 248 (1993).

112. *Id.* at 256. The Court did not rule on the issue of whether individual causes of action were permissible under § 502(a)(3).

operation, prompting a large number of participants in its pension plan to take early retirement, the company did not change its funding to reflect the higher costs the plan was then incurring and failed to change its actuarial assumptions.[113] The plaintiffs sought monetary damages under section 502(a)(3), as equitable relief, from Kaiser's non-fiduciary actuarial company.[114]

The Court noted that it could not consider the term "equitable relief" in section 502(a)(3) to mean "all relief available for breach of trust at common law."[115] The use of section 502(a)(3) as a cause of action against a non-fiduciary was also incorrect according to the Court,[116] even though ERISA defines fiduciary in broad functional terms of control and authority over the plan.[117] The dissenting opinion did not agree that Congress stripped trust beneficiaries under ERISA of a remedy that they had under common law: a remedy against third parties and against trustees.[118] The dissent stated that the section 502(a)(3) usage of "appropriate equitable relief" referred to the normal remedy in equity for a breach, i.e., compensatory monetary damages.[119]

Although the Court in *Mertens* addressed the issue of specific non-fiduciary remedies under section 502(a)(3) of ERISA, the Court did not clarify how that section applied to a cause of action for breach of a fiduciary obligation. Specifically, it did not address whether section 502(a)(3) authorizes relief for individuals rather than only for the plan

113. *Id.* at 250. The defendant was the actuarial firm that allegedly breached its professional duty when it allowed the company to use erroneous actuarial assumptions and did not disclose the inadequate funding of the plan. *Id.*

114. *Id.* at 251.

115. *Id.* at 254-55. The Court concluded that this would require the term to be given different meaning than elsewhere in ERISA or it would otherwise void the congressionally drawn distinction between "equitable" and "remedial" relief in § 409(a). *Id.* The Court further noted that ERISA is "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs." *Id.* at 256.

116. *Id.* at 256-57.

117. *Id.* at 257. The Court looked to ERISA § 3(21)(A), 29 U.S.C. 1002(21)(A), to decide this issue. *Id.* For a more complete discussion of *Mertens*, see Elaine McClatchey Darroch, Note, Mertens v. Hewitt Associates: *The Supreme Court's Dismantling of Civil Enforcement Under ERISA*, 1994 DET. C.L. REV. 1089. Darroch recommends that Congress reverse *Mertens*. *Id.* at 1111.

118. *Mertens*, 508 U.S. at 258 (White, J., dissenting). Justice White was joined in the dissent by Chief Justice Rehnquist and Justices Stevens and O'Connor. *Id.* (White, J., dissenting).

119. *Id.* at 260 (White, J., dissenting).

itself, an issue upon which the courts of appeals were split. The Ninth[120] and Eleventh Circuits,[121] for example, held that this section only authorizes suits that seek relief for the plan itself. By contrast, the Third[122] and Seventh Circuits[123] joined the Eighth[124] in holding that section 502(a)(3) authorizes relief for individual beneficiaries. The Court granted certiorari in *Varity* to resolve this conflict among the circuits.

III. DISCUSSION

A. *Facts of* Varity

Varity Corporation is a diversified Canadian company which manufactures farm equipment and other products.[125] The company uses the name Massey-Ferguson for its American farm equipment operations.[126] In 1986, Varity underwent a restructuring and executed a series of agreements[127] by and among its own subsidiaries. The agreements transferred several of Varity's struggling operations, including Massey-Ferguson, into a new Canadian corporation owned by Varity, named Massey Combines Corporation (MCC).[128]

120. McLeod v. Oregon Lithoprint, Inc., 46 F.3d 956, 959 (9th Cir. 1995); *see also* Horan v. Kaiser Steel Retirement Plan, 947 F.2d 1412, 1417-18 (9th Cir. 1991) (holding that plaintiffs' claim should have been dismissed for failure to state a claim since they sought individual relief rather than relief on behalf of the plan).

121. Simmons v. Southern Bell Tel. & Tel. Co., 940 F.2d 614, 617 (11th Cir. 1991); *see also Horan*, 947 F.2d at 1417-18; Richards v. General Motors Corp., 850 F. Supp. 1325 (E.D. Mich. 1994) (holding employees could not seek individual relief under ERISA); Kaiser Permanente Employees Pension Plan v. Bertozzi, 849 F. Supp. 692, 700 (N.D. Cal. 1994) (stating section 502(a)(3) limits recovery to "relief that inures to the benefit of the plan as a whole").

122. Bixler v. Central Pa. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1298-99 (3d Cir. 1993).

123. Anweiler v. American Elec. Power Serv. Corp., 3 F.3d 986, 993 (7th Cir. 1993).

124. Howe v. Varity Corp., 36 F.3d 746, 748 (8th Cir. 1994), *aff'd*, 116 S. Ct. 1065 (1996); *see also* McCabe v. Trombley, 867 F. Supp. 120 (N.D.N.Y. 1994) (allowing individuals to seek equitable relief under ERISA); Iwans v. Aetna Life Ins. Corp., 855 F. Supp. 579 (D. Conn. 1994) (same).

125. Howe v. Varity Corp., 1989 WL 95595, at *2 (S.D. Iowa July 14, 1989) (*Howe I*). The district court's decision is discussed *infra* notes 143-61 and accompanying text.

126. *Howe I*, 1989 WL 95595, at *2.

127. *Id.* These agreements were known internally as "Project Sunshine." *Id.*

128. *Id.* The transferred businesses included the production, distribution, and marketing of combines, certain tractors, balers, and the retail farm equipment stores. *Id.*

The strategy "amounted to placing many of Varity's money-losing eggs in one financially rickety basket."[129] Because Varity transferred only its money-losing divisions and various other debts into the new subsidiary, any failure of the new MCC would not cause the bankruptcy of Varity.[130] The failure of MCC would, however, eliminate Varity's worst performing businesses and also eradicate debts that Varity's more profitable divisions would otherwise be obligated to pay.[131]

Most significantly, Varity also transferred about 1500 employees from Massey-Ferguson and other poorly performing units to MCC, along with almost 4000 retirees from various parts of Varity's corporate family.[132] Varity "hoped the reorganization would eliminate [obligations] . . . arising from the Massey-Ferguson benefit plan's promises to pay medical and other nonpension benefits to employees of Massey-Ferguson's money-losing divisions."[133] While Varity retained the right to terminate complete benefit plans of all employees, the restructuring allowed them to specifically terminate only the benefits of the employees of the poorly performing divisions and other MCC transferees.[134]

Varity encouraged its employees to accept the changes in their benefit plans through special meetings at which employees were told that their benefits could stay secure if they transferred to the MCC plan voluntarily.[135] About 1500 employees accepted.[136] Varity also unilaterally assigned the 4000 retirees' benefit obligations to the new company without informing the retirees of the completed transfer.[137]

MCC operated at an $88 million loss during its first year[138] and soon accumulated debt of almost $400 million.[139] Eventually, MCC failed and went into receivership, ceasing operations and terminating all benefits to the employees and retirees.[140] The employees and retirees filed

129. Varity Corp. v. Howe, 116 S. Ct. 1065, 1068 (1996).
130. *Id.*
131. *Id.* About $282 million in debt was transferred to MCC. *Howe I*, 1989 WL 95595, at *2.
132. *Howe I*, 1989 WL 95595, at *2. The plans were to be self-insured by MCC. *Id.* at *6.
133. *Varity*, 116 S. Ct. at 1068.
134. *Id.*
135. *Id.* at 1069.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Howe I*, 1989 WL 95595, at *2.
140. *Id.*

suit for reinstatement of benefits, including pensions and disability pay.[141] They sought the benefits to which they would have been entitled under the previous benefit plan had they not been transferred to the failed MCC.[142]

B. Lower Courts' Decisions

The district court first examined the background of the case[143] and made a number of critical findings of fact, the first being that the plaintiffs had a right to certain benefits.[144] The court determined that the employee handbook, which summarized the benefits due, indicated that the "benefits for the company employees continue in retirement."[145] Although Varity pointed out its ability to terminate the plan, the court instead looked to the handbook as promissory language.[146] The court also determined that the company's practices further supported the theory that there existed a right to the benefits,[147] inalterably earned by employees who were either eligible for retirement or disabled.[148] The court found that the writings and the practices of the company established that "the benefits to which retirees, survivors, eligible dependents and disabled employees became entitled upon their retirement or disablement were to continue undiminished for their lifetimes."[149]

Having found that the right to the benefits existed, the court proceeded to determine what entity, if any, could be held liable to pay them. Varity argued that neither it nor Massey-Ferguson could be held liable because, under ERISA, they were not employers or fiduciaries of MCC employees.[150] The court looked to ERISA section 1002(5) for definitional guidance on the term "employer."[151] Determining Varity

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141. *Id.*

142. Varity Corp. v. Howe, 116 S. Ct. 1065, 1069 (1996). The district court cited ERISA § 404(a) for the breach of fiduciary obligations and cited § 502(a)(3) as giving employees the right to "appropriate equitable relief." *See infra* Part III.B.

143. *See supra* Part III.A.

144. *Howe I*, 1989 WL 95595, at *2-3. The court separately looked to who could be held liable for the benefits. *Id.* at *5. If it were MCC, then there was nothing left from which the plaintiffs could collect any judgment. *Id.* at *9.

145. *Id.* at *3. These benefits included "basic health, major medical, dental health, vision care and hearing benefits." *Id.*

146. *Id.* at *2-4.

147. *Id.* The court again ignored the termination rights that the company reserved and examined letters sent by executives to employees and long-standing policies to maintain the provision of benefits to retirees. *Id.* at *3-4.

148. *Id.* The court looked at explicit vesting language in the plan documents, again ignoring Varity's separate right to terminate the plan. *Id.* at *4. Varity's right to terminate benefits for active employees was not in dispute. *Id.* at *5.

149. *Id.*

150. *Id.*

151. *Id.* The court also looked at the definition of "employer" contained in the Fair

met this definition,[152] the court also noted that Varity played a continuing role in the administration of the MCC benefits plan[153] and found that Varity was an employer under ERISA.[154]

To determine the issue of fiduciary roles, the court focused on the ERISA language and the intent of Congress,[155] and found both Varity and Massey-Ferguson to be fiduciaries under ERISA.[156] The court further found that they breached their fiduciary duties by making decisions not based on concerns for the beneficiaries[157] and by deliberately misleading the beneficiaries.[158] The court decided "that MCC's overriding purpose, from its conception to its demise, was to serve the interests of its creator, Varity[,] . . . [which included] the unlawful purpose of jettisoning its obligation to pay retirement and disability benefits."[159]

The district court ordered that Varity and Massey-Ferguson reinstate the retirement and disability plans as they existed before the failure of MCC.[160] That decision was immediately appealed.[161]

Labor Standards Act (FLSA). *Id.*; *see* 29 U.S.C. § 203(d) (1994). The FLSA definition was relevant because it is similar to the ERISA definition and because more FLSA case law exists to assist in the examination of the issue. *Howe I*, 1989 WL 95595, at *5. The court noted that courts have been loath to recognize this type of corporate-form defense when it would undermine Congress's intent under FLSA or ERISA. *Id.*

152. *Howe I*, 1989 WL 95595, at *6.

153. *Id.*

154. *Id.* The court also found Massey-Ferguson to be an employer under the statute. *Id.*

155. *Id.* If "a corporation exercises any discretionary authority or control . . . [over a] benefits plan or the management or disposition of the plan assets," it is a fiduciary under ERISA. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (1994). For a discussion on Congressional intent, see H.R. CONF. REP. NO. 93-1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 5038.

156. *Howe I*, 1989 WL 95595, at *7.

157. *Id.* at *13. These decisions included Varity's transfer of employees to MCC and the decision to terminate their benefits. *Id.*

158. *Id.* at *13 n.27 (citing Berlin v. Michigan Bell Tel. Co., 858 F.2d 1154, 1163 (6th Cir. 1988) (holding that a fiduciary may not materially mislead those who are owed a duty of loyalty)).

159. *Id.* at *8. The court used strong language to describe Varity's motives. *See id.*

160. *Id.* at *20. The order was entered as a preliminary injunction. *Id.*

161. *Id.*

In its first opinion,[162] the Eighth Circuit stated the issue merely as one of "contract interpretation."[163] According to the Eighth Circuit, plaintiffs carry the burden to prove they have vested welfare benefits.[164] The court interpreted the plan documents to read that employees only have the right to claim benefits for injuries or disabilities that occurred before the termination of the plan.[165] Therefore, the court held that only those employees who were injured or disabled prior to the 1988 termination of the welfare plans would remain subject to the injunction which restored their benefits.[166]

In its second opinion, the Eighth Circuit again rejected all claims for severance pay by employees who were still working when MCC terminated operations.[167] The court based its decision primarily on language in the company's personnel administration manuals which stated that such payment "does not constitute a contractual relationship with the employee."[168]

For the remaining plaintiffs, the court first determined that the employer had breached its fiduciary duty by making affirmative misrepresentations.[169] The court next examined whether the breach allowed

162. The Eighth Circuit initially reviewed the district court's preliminary injunction in *Howe v. Varity Corp.*, 896 F.2d 1107 (8th Cir. 1990) (*Howe II*). It then dealt with the case as a whole in *Howe v. Varity Corp.*, 36 F.3d 746 (8th Cir. 1994) (*Howe III*), *aff'd*, 116 S. Ct. 1065 (1996). See *infra* notes 167-73 and accompanying text for a discussion of *Howe III*. The court then clarified its opinion in *Howe v. Varity Corp.*, 41 F.3d 1263 (8th Cir. 1994).

163. *Howe II*, 896 F.2d at 1109.

164. *Id.* (citing Anderson v. Alpha Portland Indus., Inc., 836 F.2d 1512, 1517 (8th Cir. 1988)).

165. *Id.* at 1110. The court noted that plan documents do not establish retirement as the vesting point; moreover, the district court should not have relied on extrinsic evidence when the documents were "unambiguous on their face." *Id.*

166. *Id.* at 1111-12. The case was remanded to determine who was eligible for benefits under this revised standard. *Id.* at 1111. On remand, a jury trial was held, and the employees, including those who were terminated without previously retiring, were awarded approximately $10 million in actual damages and $36 million in punitive damages for breach of contract, fraud, and ERISA violations. *Howe III*, 36 F.3d at 751. The district court judge, however, granted judgment as a matter of law in Varity's favor as to the claims for severance pay by then-active employees who lost their jobs. *Id.* Furthermore, the trial court set aside all punitive awards. *Id.* The employees who had retired prior to MCC's termination were given several choices, including the jury award for actual damages or reinstatement into Massey-Ferguson's benefits plan. *Id.* The retirees chose the jury award. *Id.*

167. *Howe III*, 36 F.3d at 752.

168. *Id.* The written policy was the critical issue, even though both Massey-Ferguson and MCC had an established practice of paying these benefits previously. *Id.* The court also rejected fraudulent misrepresentation theories because of preemption by ERISA. *Id.* at 753 (citing Consolidated Beef Indus. v. New York Life Ins. Co., 949 F.2d 960, 964 (8th Cir. 1991)).

169. *Id.* at 753. The court noted that "'[a] fiduciary may not materially mislead

individual beneficiaries a right of action under ERISA section 502(a)(3).[170] The court interpreted this section to allow individual relief for the plan participants.[171] However, the court substantially limited that relief, relying on *Mertens* for its decision that restitution is the appropriate form of relief.[172] Accordingly, the court awarded the plaintiffs exactly what they would have received had they not been transferred to MCC.[173]

C. *The Majority Opinion of the Supreme Court*

On review, the United States Supreme Court affirmed the appellate court's opinion,[174] holding that ERISA authorizes individualized equitable relief for certain breaches of fiduciary obligations.[175] Justice Breyer wrote for the majority, first examining the question of Varity's fiduciary status.[176] Although Varity argued that it was acting solely as an employer, and not as a plan administrator,[177] the Court gave deference to the district court's factual findings.[178] The Court then applied these facts to the definition of a fiduciary contained in ERISA section 3(21)(A)[179] and concluded that Varity spoke as a plan administrator

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those to whom the duties of loyalty and prudence described in 29 U.S.C. § 1104 are owed.'" *Id.* (quoting Berlin v. Michigan Bell Tel. Co., 858 F.2d 1154, 1163 (6th Cir. 1988)).

170. *Id.* at 754. The court first dismissed the company's reliance on *Russell* because that case looked to § 502(a)(2), disclaiming reliance on 502(a)(3). *Id.*; *see supra* notes 98-110 and accompanying text.

171. *Howe III*, 36 F.3d at 755. The court cited Justice Brennan's concurring opinion in *Russell*. *Id.*; *see supra* notes 109-10 and accompanying text. The court also followed the reasoning of the Seventh Circuit. *Howe III*, 36 F.3d at 755 (citing Anweiler v. American Elec. Power Serv. Corp., 3 F.3d 986, 993 (7th Cir. 1993) ("An individual may seek equitable relief from a breach of fiduciary duty under section 1132(a)(3).")).

172. *Howe III*, 36 F.3d at 756. The court saw the $7.6 million in compensatory damages awarded to the retirees as legal relief, not equitable relief. *Id.* By contrast, restoring the retirees to their "rightful position" is restitution. *Id.* (citing Mertens v. Hewitt Assocs., 508 U.S. 248, 257-58 (1993) (allowing such equitable relief under § 502(a)(3))).

173. *Id.*

174. Varity Corp. v. Howe, 116 S. Ct. 1065, 1079 (1996).

175. *Id.*

176. *Id.* at 1071. Justice Breyer was joined by Chief Justice Rehnquist and Justices Stevens, Kennedy, Souter, and Ginsburg. *Id.* at 1067.

177. *Id.* at 1071. ERISA permits Varity to be both an employer and plan administrator at different times. *Id.*; ERISA § 408(c)(3), 29 U.S.C. § 1108(c)(3) (1994).

178. *Varity*, 116 S. Ct. at 1074; *see supra* Part III.A (discussing the facts of *Varity*).

179. *See supra* notes 67-69 and accompanying text.

when it informed employees that transferring to MCC would not undermine the security they had in their benefits.[180] The Court held that making representations about the future of plan benefits is an act of plan administration, and, therefore, the company acted as a fiduciary at the time it made such representations.[181]

The Court next addressed whether the company's actions violated ERISA-imposed fiduciary duties.[182] To this end, the Court looked to section 404(a),[183] which requires a fiduciary to "'discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries.'"[184] The majority found that because the company knowingly deceived the plan beneficiaries in order to save money, the company failed to meet the "solely in the interest" test and breached its fiduciary duty.[185]

The final question addressed by the Court concerned whether ERISA section 502(a)(3) authorized individual relief for the participants in the event of a breach.[186] Varity argued that, in light of *Russell*, it was clear that Congress excluded individual relief.[187] The majority, however, distinguished the plaintiff in *Russell*, who relied only on section 502(a)(2) and who also had section 502(a)(1) to remedy her injury.[188] The majority thus concluded that *Russell* did not control the issues in *Varity*.[189]

The Court then noted that the "catchall" language of section 502(a)(3),[190] along with congressional intent,[191] provided broad reme-

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180. *Varity*, 116 S. Ct. at 1072-73.

181. *Id.* at 1074. The Court again deferred to the district court as to the facts and inferences to be drawn from them. *Id.*

182. *Id.*

183. ERISA § 404(a), 29 U.S.C. § 1104(a)(1) (1994); *see supra* notes 52-53 and accompanying text.

184. *Varity*, 116 S. Ct. at 1079 (quoting ERISA § 404(a), 29 U.S.C. § 1104(a)(1)). The Court also looked to the common law duty of loyalty. *Id.* at 1075 (citing BOGERT & BOGERT, *supra* note 27, § 543, at 218-19).

185. *Id.* at 1074-75.

186. *Id.* at 1075-79. The plaintiffs could not proceed under § 502(a)(1) because they were "no longer members of the Massey-Ferguson plan, and, therefore, had no 'benefits due [them].'" *Id.* at 1079 (quoting ERISA § 502(a)(1)). Similarly, the Court had previously ruled that subsection (a)(2) provided no remedies for individuals. *Id.*; *see* Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140 (1985). For a discussion of *Russell*, see *supra* notes 99-110 and accompanying text.

187. *Varity*, 116 S. Ct. at 1076.

188. *Id.*; *see supra* notes 104-05 and accompanying text.

189. *Varity*, 116 S. Ct. at 1076.

190. *Id.* at 1077.

191. *Id.* at 1078 (citing S. REP. NO. 93-127, at 35 (1973) and H.R. REP. NO. 93-533, at 17 (1973) (stating that the Senate and House intended to "provide . . . participants and beneficiaries with broad remedies for redressing or preventing violations of

dies for stopping violations of ERISA.[192] The Court found that the common law of trusts required a plan administrator to be impartial.[193]

In summary, the majority found that granting individual remedies is consistent with the language of ERISA, congressional intent, and the common law of trusts.[194] Therefore, the Court affirmed the judgment of the court of appeals.[195]

D. *The Dissenting Opinion*

Writing for the dissent, Justice Thomas[196] rejected the majority opinion because it could not comport with the text or structure of ERISA.[197] Additionally, the dissent argued that the holding should not be distinguished from that in *Russell*.[198] Consequently, Varity could not be held to have breached any fiduciary obligation.[199] Further, the dissent asserted that even if a breach occurred, the individuals had no remedy.[200]

Justice Thomas noted that in creating ERISA, Congress had to balance many competing, powerful interests,[201] and as a result, the sections of ERISA which assigned fiduciary duties and responsibilities were crafted with particular care.[202] Therefore, he argued that section 502(a)(3) must be read in context with surrounding portions of the code and with the Court's precedent in *Russell*.[203] Because section

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[ERISA]")).

192. *Id.*

193. *Id.* at 1078-79; *see* RESTATEMENT (SECOND) OF TRUSTS § 183, 232 (1957) (discussing the duty of impartiality).

194. *Varity*, 116 S. Ct. at 1079.

195. *Id.*

196. Justices O'Connor and Scalia joined in the dissenting opinion. *Id.* (Thomas, J., dissenting).

197. *Id.* (Thomas, J., dissenting).

198. *Id.* at 1083 (Thomas, J., dissenting) (citing Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985)).

199. *Id.* (Thomas, J., dissenting).

200. *Id.* (Thomas, J., dissenting).

201. *Id.* at 1080 (Thomas, J., dissenting) (citing Mertens v. Hewitt Assocs., 508 U.S. 248 (1993)).

202. *Id.* (Thomas, J., dissenting). Specifically, Justice Thomas looked to § 409, that portion contained in Part 4 of the Act's regulatory provisions, entitled "Fiduciary Responsibility." *Id.* (Thomas, J., dissenting). This section of the code creates liability, but requires § 502(a)(2) to enforce it. *Id.* (Thomas, J., dissenting).

203. *Id.* (Thomas, J., dissenting) (citing *Russell*, 473 U.S. at 146).

502(a)(3) failed to mention fiduciary duty, Justice Thomas concluded that Congress intended section 502(a)(2) to "provide the exclusive mechanism for bringing claims for breach of fiduciary duty."[204] Thus, Justice Thomas argued that the reasoning of the Court in *Russell* applied, and individual relief should have been foreclosed.[205]

Justice Thomas concluded that even if ERISA authorized individual recovery for breach of fiduciary duty, Varity did nothing actionable as a breach of fiduciary responsibilities under ERISA.[206] He based this conclusion on the premise that section 3(21)(A)[207] considers an employer to be a fiduciary "only 'to the extent' that 'he has any discretionary authority or discretionary responsibility in the administration of [the] plan.'"[208] Justice Thomas reasoned that because Varity acted as an employer and not a plan administrator at the time the conduct occurred, Varity owed no fiduciary duty to the beneficiaries.[209] Further, Justice Thomas did not consider Varity's conduct a breach of any duty because the company warned its employees that employment conditions would be determined by the success of MCC, and plan documents clearly reserved Varity's right to terminate or alter the plans in any way.[210] Therefore, Justice Thomas concluded that "courts should not feel compelled to bind employers to the strict fiduciary standards of ERISA just because an ordinary business decision results in an adverse impact on the plan."[211]

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204. *Id.* at 1081 (Thomas, J., dissenting). Justice Thomas compared § 502(a)(2), which specifically incorporates § 409's fiduciary breach, with the more generally worded § 502(a)(3), concluding that the specific provision must govern the general. *Id.* (Thomas, J., dissenting) (citing Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992) (noting that in statutory construction, the specific governs the general)).

205. *Id.* at 1083 (Thomas, J., dissenting).

206. *Id.* at 1084 (Thomas, J., dissenting).

207. *See supra* note 68 and accompanying text.

208. *Varity*, 116 S. Ct. at 1085 (Thomas, J., dissenting) (quoting ERISA § 3(21)(A)(iii), 29 U.S.C. § 1002(21)(A)(iii) (1994)).

209. *Id.* at 1085-86 (Thomas, J., dissenting). To reach this conclusion, Justice Thomas noted that "'ERISA does not require that "day-to-day" corporate business transactions . . . be performed solely in the interest of plan participants.'" *Id.* at 1086 (Thomas, J., dissenting) (quoting Adams v. Avondale Indus., Inc., 905 F.2d 943, 947 (1990)). Further, the language of the statute, not the common law of trusts, must be the starting point in the analysis. *Id.* at 1085 (Thomas, J., dissenting) (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976)). Justice Thomas espoused that any communication by Varity with employees regarding the transfer, even if untrue, was in the role of employer under the limits in ERISA, and not under any broader common law. *Id.* at 1088 (Thomas, J., dissenting). Justice Thomas emphasized that "the determinative factor is not truthfulness but the capacity in which the statement is made." *Id.* (Thomas, J., dissenting).

210. *Id.* at 1090 (Thomas, J., dissenting).

211. *Id.* at 1091 (Thomas, J., dissenting).

IV. ANALYSIS

In the context of downsizing or even day-to-day decision-making, management often confronts the competing interests of shareholders, employees, and other stakeholders. Congress faced similar competing needs and demands when creating ERISA.[212] The Court in *Varity*, despite reacting to recent changes in the corporate environment,[213] still looked to congressional intent and the common law of trusts to correctly rule that ERISA allows individual relief for plan beneficiaries and participants.[214] The majority opinion, however, went too far when it limited the relief under section 502(a)(3) to restitution.[215] In addition, the majority made no attempt to define the critical term "misled."[216] The decision, however, was a clear change in direction away from the narrowing of plan participants' rights under the Court's prior opinions in *Russell* and *Mertens*.

A. *The Opinions in* Varity

In first determining that Varity was acting as a fiduciary when it took the actions it did, the majority looked to common law and ERISA, although the dissent stated that only ERISA should be relevant.[217] The Court had already addressed that concept a decade earlier, however, when it found that "rather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility."[218] Although the fiduciary concept was already broadly defined by the common law, Congress enacted ERISA because common law did not offer enough benefit plan protection.[219]

212. Mertens v. Hewitt Assocs., 508 U.S. 248, 261-62 (1993).

213. Such changes include the use of employee downsizing and benefit reduction as a general management tool. *See supra* notes 20, 25-26 and accompanying text (discussing reasons for corporate downsizing and the impact on employees before ERISA).

214. *See supra* notes 190-95 and accompanying text.

215. *Varity*, 116 S. Ct. at 1079.

216. See *infra* notes 283-87 for proposals to correct these shortcomings.

217. *Varity*, 116 S. Ct. at 1085 (Thomas, J., dissenting).

218. Central States, Southeast & Southwest Areas Pension Fund v. Central Transp. Inc., 472 U.S. 559, 578 (1985).

219. *See* H.R. REP. NO. 93-533, at 11 (1973); *see also* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 114 (1989) (reconciling the scope of a fiduciary's duties and authority).

The dissent cited *Mertens* to rationalize a narrow definition of "fiduciary."[220] Justice Thomas, however, conveniently dropped the phrase "thus expanding the universe of persons subject to fiduciary dut[ies]—and to damages"[221] from his discussion of *Mertens*.[222] The Court in *Mertens* was using the functional definition of a trustee to expand, not contract, the definition.[223]

When Varity intentionally communicated with employees about the security of their benefits, it engaged in an act of plan administration, and therefore became subject to fiduciary responsibility.[224] The dissent saw this communication as solely the act of an employer, but admitted that "[e]mployers who choose to administer their own plans assume responsibilities to both the company and the plan, and, accordingly, owe duties of loyalty and care to both entities."[225] If so, the corporation made it difficult to determine whether it even attempted any balance with the Chairman and Chief Executive Officer of Varity Corporation's statement that, by shifting thousands of retirees' pensions into MCC, he "unloaded his losers" and "delighted" in getting out from under the obligations.[226]

The communication by Varity executives to employees, which foreseeably affected employees' choices respecting plan benefits, may have had some business purposes.[227] A participant, asked only to decide whether to make decisions with regard to the plans, would have reasonably believed the employer was answering questions about the safety of the plans in its role as plan administrator.[228] When an em-

220. *Varity*, 116 S. Ct. at 1085 (Thomas, J., dissenting) (citing Mertens v. Hewitt Assocs., 508 U.S. 248, 261 (1993)).

221. *Mertens*, 508 U.S. at 262.

222. *Varity*, 116 S. Ct. at 1085 (Thomas, J., dissenting). In addition, the dissent looked to the same definition in § 3(21)(A) as the majority, but unilaterally inserted the word "only" into the wording of the statute to try to narrow its applicability. *Id.* at 1089 (Thomas, J., dissenting).

223. *Mertens*, 508 U.S. at 262.

224. *Varity*, 116 S. Ct. at 1074. This is the weakest link in the majority opinion, but plan administrators are required to give beneficiaries information regarding the plan. *See* ERISA §§ 102, 104, 105; 29 U.S.C. §§ 1022, 1024, 1025 (1994). Communicating in the manner and content chosen by Varity was a means of performing the duties imposed by the plan. *Varity*, 116 S. Ct. at 1074. When a person or entity performs these duties, fiduciary responsibility attaches. *Id. See generally* 2A SCOTT & FRATCHER, *supra* note 30, § 164, at 250-53 (explaining duties and powers of trustee). When information regarding the plan is compiled, a fiduciary duty arises. *Varity*, 116 S. Ct. at 1073.

225. *Varity*, 116 S. Ct. at 1084 (Thomas, J., dissenting).

226. Howe v. Varity Corp, 36 F.3d 746, 750 (8th Cir. 1994) (*Howe III*), *aff'd*, 116 S. Ct. 1065 (1996).

227. *Varity*, 116 S. Ct. at 1086 (Thomas, J., dissenting).

228. *Id.* at 1072.

ployer conflates its multiple roles in a single communication dealing with plan benefits, the employer bears a risk that it will be found to have spoken as a fiduciary.[229] There is "a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which [the company] knows the beneficiary does not know."[230]

"MCC was an empty vessel . . . with enormous debt, junk for hard assets and nearly three times as many retirees as employees."[231] Varity retained corporate-wide responsibility for less than 400 retirees, all of whom were former executives or employees from the head office.[232] The executive decisions that affected the plan, its participants, and its beneficiaries were not the by-product of normal management decisions. Rather, the decision to negatively affect the plans and participants was creatively *implemented* by the company acting as a plan administrator, and therefore subjected the company to fiduciary duties and responsibilities.[233] When an administrator explains plan benefits to employees, it acts in a fiduciary capacity.[234]

A duty of loyalty exists to administer a plan solely in the interest of the beneficiary.[235] This duty comes from the trust relationship rather

229. *See* Brief for the United States as Amicus Curiae at 9, Howe v. Varity, 36 F.3d 746 (8th Cir. 1994) (No. 94-1471), *aff'd*, 116 S. Ct. 1065 (1996).

230. RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. d (1959). An individual must know "exactly where he stands with respect to the plan." H.R. REP. NO. 93-533, at 11 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649.

231. Howe v. Varity Corp., 1989 WL 95595, at *8 (S.D. Iowa Jul. 14, 1989) (*Howe I*).

232. *Id.* at *8 n.16. The thousands of retirees who were "transferred" never knew about it until MCC failed and their benefits stopped. *Howe III*, 36 F.3d at 750.

233. The mere act of reorganizing parts of a company, even one in financial difficulty, should not automatically be construed as acting in a fiduciary capacity. When the primary motive, however, is to impact the plan and its beneficiaries, whether for positive or negative purposes, the company and its involved executives have undertaken a fiduciary role. The assumption of this role and the problems it causes prompted Congress to create ERISA. *See supra* notes 43-46 and accompanying text. Varity executives held seats on MCC's board of directors (including the chairman, who was also Varity's president) which explicitly retained authority over the benefit plans. *Howe I*, 1989 WL 95595, at *6.

234. *In re* Unisys Corp. Retiree Med. Benefit "ERISA" Litig., 57 F.3d 1255, 1261 (3d Cir. 1995) (holding that when a plan administrator explains plan benefits to its employees, it acts in a fiduciary capacity), *cert. denied*, 116 S. Ct. 1316 (1996); *see also* Adams v. Avondale Indus., Inc., 905 F.2d 943, 947 (6th Cir. 1990) (holding that a company was not acting as a fiduciary in deciding the fate of welfare benefits plan); Musto v. American Gen. Corp., 861 F.2d 897, 910 (6th Cir. 1988) (holding that employers must satisfy fiduciary duties when administering benefit plans).

235. RESTATEMENT (SECOND) OF TRUSTS § 170 (1959).

than from any trust instrument.[236] Selfish interests must be excluded,[237] and actions must be exclusively for the benefit of a plan's participants and beneficiaries.[238]

The majority found that the company knowingly breached its duty to deal fairly and honestly by its cognizant and significant deception of the beneficiaries in order to save money at the expense of the beneficiaries.[239] The company had the right to terminate the plans and could have done so for those who were not vested at the time, handling whatever employee morale issues that developed in a more forthright, professional manner. Lying is not consistent with the duty of a fiduciary.[240] The dissent, while agreeing that the company was intentionally untruthful,[241] saw the activity as a part of day-to-day corporate decisions which had a collateral effect on prospective employee benefits.[242] The dissent argued that "ordinary business decisions . . . may be made without fear of liability for breach of fiduciary duty under ERISA, even though they may turn out to have negative consequences for plan participants."[243] This concept is conceptually correct,[244] but failed in its implementation at Varity because the company's decisions were not "ordinary business decisions."[245] The facts of the case[246] dictate that the company knowingly took on multiple roles, which affected ERISA-protected plans, and then knowingly took actions to deceive plan beneficiaries and participants.[247]

236. CHARLES E. ROUNDS, JR. & ERIC P. HAYES, LORING: A TRUSTEE'S HANDBOOK § 6.1.3, at 112 (7th ed. 1994).

237. BOGERT & BOGERT, *supra* note 27, at § 543. There is a public policy behind this duty of loyalty, and conflicts must be avoided. *Id.*; *see* Woods v. City Nat'l Bank & Trust Co., 312 U.S. 262, 268-69 (1941) (stating a fiduciary cannot serve conflicting interests); NLRB v. Amax Coal Co., 453 U.S. 322, 330 (1981) (noting there is an established rule against divided loyalties).

238. H.R. CONF. REP. NO. 93-1280, at 309 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5039, 5089 (stating that dual loyalties must be avoided under ERISA). When Congress amended ERISA in 1980 (regarding multi-employer plans), it reaffirmed that trustees' actions must be solely in the best interest of the beneficiaries. *See* H.R. REP. NO. 96-869, pt. 1, at 67 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2918, 2935.

239. Varity Corp. v. Howe, 116 S. Ct. 1065, 1074-75 (1996).

240. Peoria Union Stock Yards Co. Retirement Plan v. Penn Mut. Life Ins., 698 F.2d 320, 326 (7th Cir. 1983).

241. *Varity*, 116 S. Ct. at 1088 (Thomas, J., dissenting). Justice Thomas did not see this as determinative because in his opinion the company was not acting as a fiduciary when the statement was made. *Id.* (Thomas, J., dissenting).

242. *Id.* at 1086 (Thomas, J., dissenting).

243. *Id.* (Thomas, J., dissenting).

244. Adams v. Avondale Indus., Inc., 905 F.2d 943, 947 (6th Cir. 1990).

245. *Varity*, 116 S. Ct. at 1074.

246. The majority considered the lower courts' transcripts and findings of egregiousness in reaching their decision. *Id.* at 1071-72.

247. *Id.* at 1072-74.

The dissent argued that the company could have achieved many of its objectives legitimately, via plan termination and employee termination,[248] but because Varity chose the deceptive path, the Court correctly held that the company violated the obligations imposed by ERISA.[249] "[I]t is Black-letter trust law that fiduciaries owe strict duties running directly to beneficiaries in the administration and payment of trust benefits."[250]

No matter how broadly worded the plan documents may be in conferring discretion, the plan administrator will "never be permitted to act dishonestly or in bad faith."[251] Courts have read section 404 as imposing an unwavering duty to make decisions prudently, "with single-minded devotion to a plan's participants and beneficiaries."[252] Varity's decisions, as plan administrator, were neither made nor implemented with this standard of devotion.[253] A plan administrator must speak truthfully whenever it speaks.[254] Making material, affirmative misrepresentations to plan participants constitutes a breach of fiduciary responsibility.[255]

In determining whether relief for these violations was available to individuals under section 502(a)(3), the majority looked to the text of the legislation and to the intent of Congress.[256] The Court reasoned that Congress would not textually immunize fiduciaries when their breaches cause harm to individuals.[257] The dissent interpreted the tex-

248. *Id.* at 1087 & n.10 (Thomas, J., dissenting).

249. *Id.* at 1074.

250. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 152-53 (1985) (Brennan, J., concurring); *see also* 2A SCOTT & FRATCHER, *supra* note 30, § 170, at 311.

251. 3 SCOTT & FRATCHER, *supra* note 30, § 187.4, at 44. When the actions are not in bad faith, a court will interfere if there is an improper motive. *Id.* § 187.5, at 46. In considering improper motives, the court may consider whether the fiduciary has a conflict of interest with that of the plan beneficiaries. *Id.* at 47.

252. Adams v. Avondale Indus., Inc., 905 F.2d 943, 946-47 (6th Cir. 1990) (citing Morse v. Stanley, 732 F.2d 1139, 1145 (2d Cir. 1984)); *see also* Berlin v. Michigan Tel. Co., 858 F.2d 1154, 1162 (6th Cir. 1988).

253. *Varity*, 116 S. Ct. at 1074.

254. Mullins v. Pfizer, Inc., 23 F.3d 663, 669 (2d Cir. 1994).

255. *Id.*; *see* ROUNDS & HAYES, *supra* note 236, § 6.1.5.1, at 136 (stating that a beneficiary must be provided with all the information needed to protect his interest); *see also* 3 SCOTT & FRATCHER, *supra* note 30, § 170.25, at 436 (revealing that a fiduciary must make full disclosure and take no advantage of its position).

256. *Varity*, 116 S. Ct. at 1078-79.

257. *Id.*

tual argument as plausible, but only if it is read without reference to the surrounding text, and concluded that Congress did not want to offer such relief.[258]

It is illogical, however, that Congress did not want to offer individual relief. If section 502(a)(3) did not permit lawsuits for individualized harm caused by a breach of the duty of loyalty owed to the individual, an anomalous gap would be created in what Congress intended to be a comprehensive enforcement scheme.[259] Violations of the strict duty of loyalty imposed by ERISA may cause injury to certain participants or beneficiaries, yet not affect the plan as a whole.[260] Allowing an employer to breach its fiduciary duty to an individual who would have no standing to state a claim under ERISA was not the intent of Congress.[261] That interpretation fits with the Court's determination that Congress crafted the remedial scheme in ERISA with deliberate care.[262]

Furthermore, the plain language of section 502(a)(3)[263] is consistent with the stated purpose of ERISA and its incorporated common law of trusts. The Court has acknowledged that Congress created ERISA "to promote the interests of employees and their beneficiaries in employee benefit plans."[264] The key to statutory construction is to give effect to the plain meaning of the words used by Congress.[265] The common law similarly supports this view.[266] It is therefore logical to find Justice Brennan's concurring opinion in *Russell*, that individual recovery is available under section 502(a)(3), persuasive.[267]

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258. *Id.* at 1080-86 (Thomas, J., dissenting).

259. *See* Brief for the United States as Amicus Curiae at 16, Howe v. Varity, 36 F.3d 746 (8th Cir. 1994) (No. 94-1471), *aff'd*, 116 S. Ct. 1065 (1996).

260. Bixler v. Central Pa. Teamsters Health & Welfare Fund, 12 F.3d 1282, 1298 (3d Cir. 1993).

261. Vartanian v. Monsanto Co., 14 F.3d 697, 702 (1st Cir. 1994); *see also* Mullins v. Pfizer, Inc., 23 F.3d 663, 667 (2d Cir. 1994).

262. *See supra* notes 44-48 and accompanying text.

263. See *supra* note 57 for the text of § 502(a).

264. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 112 (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983)).

265. Hubbard v. United States, 115 S. Ct. 1754, 1761 (1995). Even Justice Thomas agreed that the textual argument is plausible when read without reference to the surrounding text. *Varity*, 116 S. Ct. at 1080 (Thomas, J., dissenting).

266. *See, e.g.*, ROUNDS & HAYES, *supra* note 236, § 7.2, at 170 (stating that a fiduciary is liable to the beneficiary for breach of duty).

267. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 143 (1985) (Brennan, J., concurring). Joined by three other Justices, Justice Brennan argued that § 502(a)(3) provides individual relief while § 502(a)(2) combines with § 409 to provide the broader relief on behalf of the plan itself. *Id.* (Brennan, J., concurring); *see* Bixler v. Central Pa. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1298 (3d Cir. 1993) (finding Justice Brennan's analysis persuasive). For further discussion regarding

The dissent in *Varity* found *Russell* all but dispositive on the issue.[268] *Russell* is distinguishable, however, on several levels, the most important of which is the section of ERISA upon which the plaintiffs relied in pursuing their claims.[269] The Court in *Russell* noted that the plaintiff "expressly disclaims reliance on section 502(a)(3),"[270] the very section relied on in *Varity*.[271] Any dicta in *Russell* which infers broader application is not binding.[272] Each of the subsections of section 502(a) have specific purposes,[273] with section 502(a)(2) intentionally tied to plan relief pursuant to section 409. The Court in *Russell* took great pains to link section 502(a)(2) solely to section 409,[274] thus it is a tortured path for the *Varity* dissenters to trace the *Russell* majority's steps through these sections in order to limit section 502(a)(3). Congress logically added section 502(a)(3) as an independent remedial provision in ERISA[275] which does not exclude individual relief.

Once the Court affirmed the Eighth Circuit in *Howe III*, it also affirmed that court's view that *Mertens* controls what actual relief is available to the individuals who were harmed by the breach.[276] The Court in *Mertens*, however, based its decision on an old distinction between the courts of equity and the courts of law.[277] The dissent in

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the ability of § 502(a)(3) to stand on its own language, see MICHAEL J. CANAN, QUALIFIED RETIREMENT AND OTHER EMPLOYEE BENEFIT PLANS 1035-38 (1996).

268. *Varity*, 116 S. Ct. at 1084 (Thomas, J., dissenting). Justice Thomas argued that *Russell* protected all plan participants via a "single remedy on behalf of the plan" under § 502(a)(2), that this holding was consistent with Congress's intent to prevent individual relief for beneficiaries, and therefore, that it should be extended to § 502(a)(3). *Id.* (Thomas, J., dissenting).

269. *Russell* is distinguishable from *Varity* on the facts, which may have influenced the outcome. In *Russell*, the plaintiff previously received restitution of disallowed benefits for her back injury by simply seeking a reevaluation by the plan administrator and was now seeking punitive damages. *Russell*, 473 U.S. at 136-38. In contrast, *Varity* involved thousands of employees who had been intentionally deceived out of their basic benefits. *Varity*, 116 S. Ct. at 1074.

270. *Russell*, 473 U.S. at 139 n.5.

271. The majority in *Varity* noted that *Russell* did not provide for individual relief under § 502(a)(2), and that the plaintiffs in *Varity* relied upon § 502(a)(3) for individual relief. *Varity*, 116 S. Ct. at 1079.

272. *Russell*, 473 U.S. at 150-51 (Brennan, J., concurring).

273. *See supra* notes 57-61 and accompanying text.

274. *Russell*, 473 U.S. at 139-42.

275. For further discussion as to how § 502(a)(3) operates independently, see CANAN, *supra* note 267, § 21.2, at 1031-37.

276. Howe v. Varity Corp., 36 F.3d 746, 756 (8th Cir. 1994) (*Howe III*), *aff'd*, 116 S. Ct. 1065 (1996).

277. Mertens v. Hewitt Assocs., 508 U.S. 248, 255 (1993). For a discussion of the

Mertens noted that the decision would strip beneficiaries of a remedy they enjoyed in the equity courts under common law.[278] The Court in *Varity*, therefore, should have overruled *Mertens*[279] explicitly or at least distinguished it.[280] It is reasonable that Congress provided remedies for breaches in a "catchall" fashion[281] because the intent was to provide "'participants and beneficiaries with broad remedies for redressing or preventing violations of [ERISA].'"[282] The Court in *Varity* did not provide that broad remedy when it affirmed the Eighth Circuit.

B. Unanswered Question and Proposals

The Court's decision made no attempt to define the critical term "misled."[283] This adjudication, of course, will always be fact-specific in nature, but further guidance is needed.

To help guide employers and plan administrators, Congress should add an ERISA regulation defining when employees are "misled" and what constitutes a "deceitful" practice where organizations make major downsizing moves.[284] At least one safe harbor provision should be

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strained analysis Justice Scalia used to reach the majority decision in *Mertens*, see *Supreme Court's Decision in* Mertens *Limits Equitable Relief Available Under ERISA*, 2 LITIG. REP. 3 (1993). The courts of equity did not have the power to award punitive damages. Some courts have recently awarded them only where the breach of fiduciary duty involves fraud or malice. *See* ROUNDS & HAYES, *supra* note 236, § 7.2.3.3, at 175.

278. *Mertens*, 508 U.S. at 263-64 (White, J., dissenting). Justice White was joined in the dissent by Chief Justice Rehnquist and Justices Stevens and O'Connor. *Id.* at 263 (White, J., dissenting).

279. A complete analysis of *Mertens* is beyond the scope of this Note. For a discussion outlining the reasons why it should be reversed, see Darroch, *supra* note 117.

280. The facts in *Mertens* are distinguishable from those in *Varity* because in *Mertens* a non-fiduciary was being sued. *Mertens*, 508 U.S. at 253. It was therefore logical to enforce lesser penalties because lesser duties attach to a non-fiduciary.

281. Varity Corp. v. Howe, 116 S. Ct. 1065, 1077-78 (1996). Under the law of trusts, a breach of trust may lead to a remedy of monetary damages. Warren v. Society Nat'l Bank, 905 F.2d 975, 982 (6th Cir. 1990); *see* Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 154 n.10 (1985) (Brennan, J., concurring) (arguing that trust law remedies provide money damages); *see also* BOGERT & BOGERT, *supra* note 27, § 862 (discussing the payment of damages by a trustee for breach of trust).

282. *Varity*, 116 S. Ct. at 1078 (quoting S. REP. NO. 93-127, at 35 (1973) and H.R. REP. NO. 93-533, at 17 (1974)).

283. Throughout *Varity* and its corresponding lower court opinions, the courts used terms such as "misled," "deceiving," and "intentional misrepresentation" to describe the company's actions. *Id.* at 1066-67; Howe v. Varity, 36 F.3d 746, 750, 753-54 (8th Cir. 1994) (*Howe III*), *aff'd*, 116 S. Ct. 1065 (1996).

284. An objective guideline would be helpful because, as Justice Thomas noted, management must make day-to-day decisions which have a corollary or even unintended impact on the plans and their beneficiaries. *Varity*, 116 S. Ct. at 1086 (Thomas, J., dissenting).

time-related; when management chooses to restructure certain units and the restructured units survive twenty-four months or more, a rebuttable presumption should arise that the employees were not misled into taking an unnecessary risk in transferring to the new division.

If a company fails to meet the safe harbor element, the next test level should parallel the inquiries courts have made in age discrimination cases.[285] The most employer-friendly approach would assimilate the "but for" test used by the Seventh Circuit.[286] Under this approach, a deceptive practice occurs if the employer would not have restructured but for the opportunity to escape benefit obligations.[287] The regulation should not, however, remove an employer's documented rights to terminate a plan in a forthright manner.

Congress must also address remedies for the intentional deception situation. Currently, an executive pressured to save cash or cut losses for a company would wisely imitate Varity Corporation,[288] primarily because the Supreme Court's decisions have limited the cost of violation to restitution.[289] The worst that could happen, therefore, would be that the company would have to pay only what it would have paid out despite the deception. Thus, if the company can steer through the litigation, it can realize significant material savings. Therefore, clear incentives exist to make the same fundamental decision made by Varity Corporation.

To dissuade executives from being attracted to this "no lose" situation, Congress should add certain punitive damage remedies for both the plans and the individuals. However, because punitive damages are anathema to the public and to many present legislators, such damages should be capped. One capping method would be the treble damage approach used in other areas of federal law.[290] An even more useful method would channel the majority of these punitive damages into the PBGC fund. This approach is appropriate because ERISA and the PBGC

285. Courts make these inquiries into violations of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1994).

286. *See supra* note 23.

287. To lower the number of preemptory lawsuits, thresholds must first be cleared, including an actual, substantial decrease in the ability to provide vested benefits.

288. See *infra* Part V for further discussion as to how this could occur even after the decision in *Varity*.

289. *See supra* notes 172-73, 215 and accompanying text.

290. *See, e.g.*, Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c) (1994); Clayton Act, 15 U.S.C. § 15(a) (1994) (antitrust violations).

were created to protect against egregious actions by employers and fiduciaries. Furthermore, this damage structure would permit reduced insurance payments into the fund by the many employers who act within the rules and spirit of ERISA.

V. IMPACT

While the Court correctly decided most of the elements of *Varity*, the ruling opened the door to increased litigation.[291] One area in particular will probably be affected: the decision created an effective route around the shield that ERISA provides from certain common law and state law causes of action.[292] In light of *Varity*, courts are already reexamining cases that would otherwise be disposed of by ERISA's preemption of these matters.[293]

The decision in *Varity* may encourage some employers to attempt what Varity Corporation tried to accomplish. Because the Court looked to *how* the company tried to do it rather than *what* it tried to do, corporate executives may have a legitimate temptation to restructure failing entities into new units.[294] After *Varity*, however, the employers will have to be frank with the employees as to the risks, even while reminding the employees that the plans may otherwise be terminated at will.

The Court noted that the U.S. Chamber of Commerce feared that one impact of the decision in *Varity* would be fiduciaries fearfully paying out every cent they could.[295] The Court, however, correctly perceived this to be a non-issue because fiduciaries are similarly charged with preserving assets in order to take impartial account of all beneficia-

291. Attorneys are already predicting a substantial increase in litigation over benefit plans altered by downsizing. *See* Greenburg, *supra* note 11, § 1, at 1.

292. The preemption is created by § 514(a), 29 U.S.C. 1144(a) (1994).

293. *See, e.g.*, Degnan v. Publicker Indus., 83 F.3d 27 (1st Cir. 1996). The district court in *Degnan* had rejected the common law claim of an employee who showed that his employer had first misrepresented an inducement to take early retirement, and then stopped paying. *Id.* at 28-29. The court rejected this claim because of ERISA's preemption clause in § 514(a). *Id.* The First Circuit agreed that ordinarily no relief existed, but mindful of *Varity*, gave leave to the plaintiff to file an amended complaint charging an ERISA violation. *Id.* at 29-30; *see also* Smith v. Texas Children's Hosp., 84 F.3d 152 (5th Cir. 1996) (remanding plaintiff's claim for individual relief as to benefits cut off when she contracted multiple sclerosis, because of the Court's recent decision in *Varity*).

294. This is partly due to the lack of any downside risk, since the maximum loss is restitution.

295. Varity Corp. v. Howe, 116 S. Ct. 1065, 1078 (1996) (citing Brief for Chamber of Commerce as Amicus Curiae at 11, Howe v. Varity Corp., 36 F.3d 746 (8th Cir. 1994) (No. 94-1471), *aff'd*, 116 S. Ct. 1065 (1996).

ries.[296] Thus, little change appears likely in this area. Most of the activity will likely center on the areas of individual litigation and corporate downsizing.

VI. CONCLUSION

The Supreme Court's decision in *Varity* clearly reversed a trend that was narrowing the protection offered under ERISA. The Court correctly held that an individual has the right to relief under ERISA, which is an important consideration because the statute locks out employees and retirees from more traditional venues of relief in state courts.

As a result of broader employee protection, companies will now have to reexamine the risks versus the rewards of further downsizing decisions affecting benefit plans. Although a flurry of individual suits may be expected in the near future, this increase in litigation will ultimately slow as the courts define the extent of this important decision.

296. *Varity*, 116 S. Ct. at 1078; *see also* 3 SCOTT & FRATCHER, *supra* note 30, § 214.