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ASSUMPTION-OF-THE-RISK
RETIREMENT?:

A SURVEY OF RECENT “SERIOUS CONSIDERATION” CASE LAW

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In July 2003, the law became unsettled as to when an employer, in its role as a plan fiduciary, must truthfully inform employees of prospective retirement incentive plans.\(^1\) In Martinez v. Schlumberger,\(^2\) the Fifth Circuit rejected the prevailing doctrine of “serious consideration,” a bright-line test requiring that plan fiduciaries refrain from making material misrepresentations regarding seriously considered plan changes. This duty of truthfulness remains a major point of contention within ERISA fiduciary law, generating a lengthy line of case law in the circuit courts of appeals. While the outcomes of these cases have increasingly tended to disfavor plaintiff-employees,\(^3\) employers—particularly those with operations in various states—must be cognizant of the sometimes subtle variations in this body of law. This is particularly true now that the Fifth Circuit has joined the Second Circuit in rejecting the serious consideration rule.

In the typical serious consideration fact pattern, the employer

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1. Prior to Martinez v. Schlumberger, 338 F.3d 407 (5th Cir. 2003), the law was “settled” in the sense that all other circuit courts of appeals to address the issue, save one, had adopted the “serious consideration” standard. As commentators have noted, however, the various permutations of “serious consideration” make compliance with this doctrine a circuit-by-circuit endeavor. See, Daniel M. Nimtz, ERISA Plan Changes, 75 DENV. U.L. REV. 891, 902 (1998) (stating “While relatively settled on the serious consideration approach, the circuits still vary widely in their application of the test. As a result, corporations must consult their district court’s decisions to determine what types of disclosure the particular jurisdiction requires.”).

2. 338 F.3d 407 (5th Cir. 2003).

offers an early retirement incentive package to employees, often as part of a reduction in force. The employees, who are told a more generous package will not be offered in the near future, retire under the initial plan. A short time after departing, they learn that the employer is offering a more advantageous retirement package to induce the retirement of additional employees. The retirees then sue the employer on the grounds that the plan's fiduciaries failed to provide truthful responses to the retirees' questions as to the possibility of future benefit enhancements. The retirees assert that the fiduciaries with whom they communicated must surely have known that the second incentive plan was under consideration as of the initial inquiries.

This article surveys serious consideration case law from each of the circuits to have addressed the issue in the last three years—including the Fifth Circuit's recent Martinez v. Schlumberger opinion. Though the cases are by nature fact-specific, and the courts' analyses splintered when viewed head-to-head, a few overriding principles will emerge in the course of the review. These principles may suggest a more cohesive approach to the problem of serious consideration.

I. THE ERISA FIDUCIARY DUTIES

The Employee Retirement and Income Security Act of 1974 ("ERISA"), imposes a number of fiduciary duties upon plan fiduciaries. Drawn from principles of trust law, the ERISA duty of loyalty requires that the fiduciary discharge his/her plan duties "solely in the interest of the participants and beneficiaries and [for] the exclusive purpose of... providing benefits to participants and their beneficiaries." This responsibility, which incorporates a duty of impartiality, is typically the basis for a plaintiff's serious consideration action. In short, it is alleged that the fiduciary-defendant did not respond truthfully to a participant's inquiries regarding early retirement window incentive programs being considered by management. The Supreme Court addressed the scope of the ERISA fiduciary duty of loyalty in Varity v. Howe, holding that the act of communicating to plan participants with respect to future plan benefits, through authorized corporate officials, could constitute fiduciary conduct.

Second, the ERISA "prudent man" standard of plan

4 Martinez, 338 F.3d 407.
6 Id. § 1104 (2000). Issues of loyalty are also addressed through the statute's prohibited transaction rules. Id. § 1106 et seq.
8 See generally Jay Conison, Employee Benefit Plans, 234 (1998) (noting the Supreme Court's admonition that such findings of fiduciary violation are necessarily fact-driven).
administration requires that the fiduciary exercise "the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character with like aims." Third, the duty to diversify plan investments requires the type of prudent investing suggested by modern portfolio theory. Fourth, ERISA Section 404(a)(1)(D) compels fiduciaries to act in accordance with plan documents and governing instruments—but only to the extent such instruments are consistent with ERISA Titles I ("Protection of Employee Benefit Rights") and IV ("Plan Termination Insurance"). Finally, ERISA Section 409(a) renders the fiduciary who breaches one or more of the above responsibilities "personally liable to make good to [the] plan any losses."

To establish a claim for breach of fiduciary stemming from alleged misrepresentations regarding coverage under an employee benefit plan, a plaintiff must demonstrate that: 1) a defendant was acting in a fiduciary capacity when it made the challenged representations; 2) these constituted material misrepresentations; and 3) the plaintiff relied on those misrepresentations to his/her detriment.

II. EARLY INROADS: DEVELOPMENT OF THE "SERIOUS CONSIDERATION" STANDARDS

In a line of post-Varity cases, courts have considered issues involving employer use of subsidized early retirement incentive programs ("ERIP"), which are typically implemented as part of a reduction in the workforce.

A. The Source of "Serious Consideration": Berlin

In Berlin v. Michigan Bell Telephone Co., the seminal "serious consideration" decision, a class of former Michigan Bell employees claimed they were wrongfully denied retirement benefits in violation of ERISA. The plaintiffs were not provided severance

10. Id. § 1104(a)(1)(C).
11. Id. § 1104(a)(1)(D).
12. Id. § 1104.
13. See James v. Pirelli Armstrong Tire Corp., 305 F.3d 439, 449 (2002); Ballone v. Eastman Kodak Co., 109 F.3d 117, 122, 126 (2d Cir. 1997) (holding that "serious consideration" of plan changes is not the sine qua non of the materiality of alleged misrepresentations regarding such changes).
14. 858 F.2d 1154 (6th Cir. 1988). See generally Pamela Perdue, The Evolving Area of ERISA Disclosure, SG073 ALI-ABA 927, 932 (noting that Berlin involved the implementation of a prospective or contingent plan, as opposed to the amendment of an existing plan). In Drennan v. General Motors Corp., 977 F.2d 246 (6th Cir. 1992), the Sixth Circuit extended its holding in Berlin to anticipated changes of an existing plan.
benefits under Michigan Bell's Management Income Protection Plan ("MIPP") upon their retirement. In response to financial difficulty from late 1980 until mid-year 1982, Michigan Bell had implemented MIPP in an effort to downsize its management staff. The MIPP was an incentive package designed to encourage voluntary terminations and early retirement. The first MIPP "window period" lasted from October 1, 1980 to December 1, 1980; a second MIPP period began on June 1, 1982 and lasted until July 31, 1982. Employees eligible for MIPP benefits received—in addition to their existing pension and other unrelated benefits—a separation pay allowance of five percent annual salary and five percent for each completed year of service occurring after one year of credited service.

The initial MIPP offering spurred great interest among remaining Michigan Bell managers as to the likelihood of subsequent MIPP offerings. Fearing that managers contemplating retirement would postpone their decision until a second MIPP period occurred, Michigan Bell officials advanced a series of representations to employees concerning the potential for a new MIPP. In one such published communication, circulated during the first MIPP period but after the application deadline for managers to retire under the incentive plan, a Michigan Bell Vice President stated:

I'm sure the general awareness that MIPP was being offered even on a very limited basis may have caused some managers to delay their plans to retire. If any of them are still waiting in anticipation of receiving such an offer, there's no reason for them to delay any longer.

Subsequent communications, both written and oral, reiterated Michigan Bell's position that no new MIPP periods would be offered in the foreseeable future. However, a second MIPP period was then approved in June 1982 and made available to managers who retired between June 1 and July 31, 1982. The Berlin plaintiffs, who had retired prior to the second MIPP offering, claimed Michigan Bell violated its ERISA fiduciary duties by making material misrepresentations as to the future

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16. Id. at 1157.
17. Id.
18. Id.
19. Id. A maximum of 100 percent of annual salary was imposed, and MIPP benefits were to be paid over a one-year period beginning at retirement. In addition, MIPP provided additional medical insurance coverage. Id.
20. Id. at 1158.
22. Id.
23. Id. at 1154.
24. Id. at 1159.
availability of MIPP benefits, thereby encouraging managers to retire voluntarily in the interim. 20

In reviewing the several duties imposed by ERISA upon plan fiduciaries, the court noted that the pure business decisions of an employer are not subject to the statute's fiduciary requirements. 21 Contrary to the view of the district court, however, the Sixth Circuit maintained that communications or representations by an employer prior to a business decision would not be exempt from the ERISA fiduciary standards simply because the business decision itself was a non-fiduciary activity. 22 The court held that when serious consideration was given by [Michigan Bell] to implementing MIPP by making a second offering . . . , then [Michigan Bell] as the plan administrator and/or its [vice president], the plan fiduciary, had a fiduciary duty not to make misrepresentations, either negligently or intentionally, to potential plan participants concerning the second offering. 23

As a result, misrepresentations made to potential plan participants after Michigan Bell afforded serious consideration to the second MIPP offering could constitute a breach of a fiduciary duty. 24 Finding genuine issues of material fact as to when serious consideration of the second MIPP offering occurred, and whether material misrepresentations were made to participants as to that offering, the court reversed the district's court grant of summary judgment. 25

The task of stating a more definitive standard for serious consideration would pass to the Third Circuit, which first addressed the issue in 1993.

B. The Third Circuit's Fischer Decisions

Now considered the leading cases in defining serious consideration, the Third Circuit's Fischer decisions articulate a "rule of truthfulness" for employer responses to employee inquiries regarding the likelihood of enhanced retirement incentive offerings.

25. Id. at 1160.
26. Id. at 1163 (citing Hickman v. Tosco Corp., 840 F.2d 564, 566 (8th Cir. 1988)).
27. Id. at 1163-64.
28. Berlin, 858 F.2d at 1163-64.
29. Id. at 1164.
30. Id. Rejecting defendants' argument that its holding imposed a "duty of clairvoyance" i.e., to predict accurately the future availability of MIPP benefits upon plan fiduciaries, the court explained that liability would lie only if the plaintiffs demonstrated material misrepresentations in violation of the ERISA Section 404 ("Fiduciary Duties").
1. Fischer I

In Fischer v. Philadelphia Elec. Co. ("Fischer I"), the Third Circuit reversed a district court's grant of summary judgment to defendant-employer Philadelphia Electric Co. ("PECo"), holding that genuine issues of material fact existed as to whether the employer had violated its fiduciary duty as plan administrator in making certain alleged representations to plan participants. Appealing on behalf of a class of former PECo employees, Herbert Fischer claimed the company breached its ERISA fiduciary duties to him and other retirees by failing to provide truthful answers to the plaintiffs' inquiries. Specifically, the former employees—contemplating retirement in late 1989—had asked whether the company was planning to implement an early retirement incentive program. The answers they received were in fact inconsistent with certain transitional measures in the works at PECo.

The company had requested a $549 million dollar rate increase from the Public Utility Commission during 1989, the status of which remained uncertain at year's end. Facing a potential budget shortfall, PECo had formed an internal task force and contacted an outside actuarial firm in February 1990 to identify cost reduction methods. The actuarial firm suggested that an early retirement program would assist in reducing the number of PECo employees. In April 1990, the company's CEO presented the early retirement concept to PECo's Board of Directors as a way to reduce costs. On April 19, 1990, the company learned it would receive less than half of the requested rate increase from the PUC. That same day, PECo's CEO wrote a letter to employees describing the impact of the PUC decision and informing them that he would recommend board approval for an early retirement program to cut payroll. On May 25, the board approved an early retirement plan benefiting employees who elected to retire between July 15 and September 15. Prior to April 19, however, PECo benefits counselors had informed participants considering retirement, such as Herbert Fischer, that an early retirement program was not being considered by senior management.

32. Id. at 135.
33. Id. at 131.
34. Id. at 132.
35. Id.
36. Id. at 131.
37. Id.
38. Fischer I, 994 F.2d at 132.
40. Id. at 131-32.
41. Id. at 132.
42. Id.
Assumption-of-the-Risk Retirement management. Employees unable to partake in the program, because they had already retired from the company on January 1, February 1, March 1, and April 1, 1990, sued PECo for breach of fiduciary duty.

Assessing the scope of this fiduciary duty, the Third Circuit observed that ERISA permits employers to wear two hats—those of employer and plan administrator. Only activities falling within the latter of these roles would be subject to the ERISA fiduciary duties, one of which was to act “solely in the interests of the participants and beneficiaries.” While the parties agreed that PECo, acting as employer, could offer enhanced pension benefits at its discretion, the retirees charged that ERISA required a forthright reply to participant inquiries as to whether such decisions were being considered. For this proposition, they cited Berlin, in which the Sixth Circuit had held that once an employer gave serious consideration to providing additional benefits, it possessed “a fiduciary duty not to make misrepresentations, either negligently or intentionally, to potential plan participants concerning the [benefits].” Emphasizing the dichotomy of employer/plan administrator duties, the Third Circuit contrasted Berlin with its own holding in Pavonk v. HMW Industries, Inc., that “an employer’s lawful [plan] termination decision, absent affirmative misrepresentations designed to mislead plan participants, is not governed by ERISA’s standards of fiduciary duties.” The court found great similarity, however, between statements made by Berlin executives and those of the PECo counselors. In both cases, company fiduciaries, when asked to discuss the likelihood of upcoming early retirement programs, had

43. Id.
44. The retirees would have been otherwise eligible for the PECo early retirement program, had they not retired from the company prior to the plan’s announcement. Id. at 132. The program featured such inducements as a five year time-in-service credit, a five-year age credit, and severance pay. Fischer v. Philadelphia Electric Co., 96 F.3d 1533, 1536 (3d Cir. 1996) [hereinafter Fischer II].
45. Fischer I, 994 F.2d. 130, 133 (citing Amato v. Western Union Int’l, Inc., 773 F.2d 1402, 1416 (2d Cir. 1985)).
46. Id.
47. Or, to use the plaintiffs’ more colorful depiction, that a “conspiracy of silence among senior management aimed at keeping confidential the considerable efforts being taken to implement an early retirement incentive program.” Fischer I, 994 F.2d at 133.
48. 858 F.2d 1154, 1163-64 (6th Cir. 1988) (holding that while an employer’s decision to encourage voluntary terminations through the creation of a severance plan was a settlor-type function, the employer, nevertheless, maintained a fiduciary obligation to accurately inform employees potentially affected by the plan of the employer’s future intentions respecting the plan).
49. 883 F.2d 221, 229 (3d Cir. 1989).
50. Fischer I, 994 F.2d at 134.
responded that no such programs were in the offing.51

Moreover, the court rejected PECO's assertion that because its benefits counselors were truly unaware that management was contemplating a new early retirement program, there was no affirmative misrepresentation to participants.52 The company, it concluded, could not escape its ERISA fiduciary duties by "building a 'Chinese wall' around those employees on whom plan participants reasonably rely for important information and guidance about retirement."53 The court further noted that ERISA does not impose a "duty of clairvoyance" on fiduciaries to offer precise predictions as to future plan changes.54 Instead, it prohibits plan administrators from making "affirmative material misrepresentations" to participants regarding changes to their plans.55 Coining the oft-repeated slogan of the serious consideration doctrine, the court observed that "[w]hen a plan administrator speaks, it must speak truthfully."56

The court enunciated in Fischer I was premised on the materiality of the plan administrator's affirmative representations, which the court characterized as a mixed question of law and fact.57 Ultimately, the question would depend on whether "there is a substantial likelihood that [the misrepresentation] would mislead a reasonable employee in making an adequately informed decision about if and when to retire."58 The court added that:

51. A Berlin company vice president had assured lower-level managers "that there were no current plans to offer [an early retirement plan]." Similarly, a primary PECO benefits counselor, when asked by a participant considering retirement if there would be a new early retirement plan, stated "absolutely not for at least the next five years." Id.

52. Id. at 135.

53. Id. Moreover, an employee's inquiry as to potential plan changes need not be directed only to those possessing actual knowledge of such a change. Where an employee inquiry is made after a potential change reaches serious consideration, "it would not be a defense that supervisors [of whom inquiry was made] were unaware of the status and thus responded ignorantly but truthfully to the employee's inquiry." Bins v. Exxon Co., 220 F.3d 1042, 1049 n.6 (9th Cir. 2000) (en banc).

54. Fischer I, 994 F.2d at 135. That is, the fiduciary does not have to predict future changes. Other circuits have similarly rejected the "duty of clairvoyance." Swinney v. Gen. Motors Corp., 46 F.3d 512, 520 (6th Cir. 1995); Drennan v. Gen. Motors Corp., 977 F.2d 246, 251 (6th Cir. 1992); Barnes v. Luci, 927 F.2d 539, 544 (11th Cir. 1991).

55. Fischer I, 994 F.2d at 135.

56. Id. This language is frequently cited by other appellate courts considering the serious consideration standard. See Wilber H. Boies & Nancy G. Ross, Communicating with Employees About Benefits: A Central Issue in ERISA Administration and Litigation, 664 PLI/Lit 487, 522 (2001) (discussing tests and standards developed by the appellate courts).

57. Fischer I, 994 F.2d at 135.

58. Id.
[Included within the overall materiality inquiry will be an inquiry into the seriousness with which a particular change to an employee pension plan is being considered at the time the misrepresentation is made. All else equal, the more seriously a plan change is being considered, the more likely a misrepresentation, e.g., that no change is under consideration, will pass the threshold of materiality.59] 

On the record before the court, it was unclear how seriously PECo had considered the early retirement program when the participants made their inquiries. The court concluded that summary judgment was inappropriate, and remanded the case for trial.

2. Fischer II

Three years after Fischer I, the Third Circuit revisited the "serious consideration" issue in Fischer v. Philadelphia Electric Co., ("Fischer II").60 On the remand of Fischer I, the district court determined that PECo had been in serious consideration of its early retirement program as of March 12, 1990, the date its benefits manager contacted an outside actuarial firm regarding the company's need to reduce costs quickly.61 The court held that employees who sought information regarding the early retirement program from March 12 until official announcement of the program on April 19, and who were told that no change was being considered, had received material misinformation.

Reversing the district court judgment, the Third Court acknowledged that the serious consideration test it announced in Fischer I had not been carefully defined.62 The court noted that the test balanced an employee's interest in material information of plan changes for use in making employment decisions, against that of an employer's need to conduct ongoing review of its benefits packages without having to disclose every aspect of such activities.63 Given these competing considerations, the court held that serious consideration of a change in plan benefits exists "when (1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change."64 The court of appeals added that the

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59. Id.
60. 96 F.3d 1533 (3d Cir. 1996).
61. Id. at 1537.
62. "Although the test we set out in Fischer I ultimately turned on 'serious consideration,' we paid little attention to the details of that term. We offered nothing in the way of a definition, standard, or even factors to consider... We commend [the district court judge's] efforts to apply this amorphous concept." Id. at 1539.
63. Id.
64. Id. at 1540 (citing the district court opinions of Judge Weiner in Fischer, and Judge Katz in Zschunke v. Bell Atlantic Corp., 872 F. Supp. 1395, 1401 (E.D. Pa. 1995)), aff'd, 70 F.3d 1259 (3d Cir. 1995)).
serious consideration assessment would not hinge upon any one of the three factors, but that the three would "interact and coalesce to form a composite picture." 66

Unpacking the three elements of its test, the Third Circuit explained that the requirement of a specific proposal was intended to differentiate preliminary information-gathering and option analyses from a "specific proposal that is sufficiently concrete to support consideration by senior management for the purpose of implementation." 66 The "discussion for implementation" component allowed senior management to partake in preliminary strategy development without triggering a serious consideration disclosure. 67 Such initial efforts might include the commissioning of a comparative study or a report of benefits options. Serious consideration would apply when the "subject turn[ed] to the practicalities of implementation." 68 The third factor pertained especially to those companies large enough to employ full-time benefits review personnel. 69 Suggestions submitted by such employees to high-level management would not in and of themselves constitute serious consideration of a proposal. 70 The court did not, however, view senior management as coextensive with a corporation's board of directors. 71 Thus, for example, the third prong of the test would be satisfied where a plan was considered by benefits-area senior management, and such individuals ultimately made recommendations to the board as to benefits. 72 Describing the balance of interests achieved by its test, the court emphasized that the imposition of liability at an earlier stage of consideration would subject employees to a deluge of meaningless disclosures and discourage employers from entertaining early retirement plan proposals at all. 73

Applying its newly-fashioned test, the Third Circuit determined that serious consideration by PECo occurred not on March 12, but on April 7, 1990, the date that senior PECo management met with its outside actuarial consultant to discuss

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65. Fischer II, 96 F.3d at 1539. Nor did the factors establish a "bright-line" rule; in Kurz v. Philadelphia Electric Co., 994 F.2d 136, 139 (3d Cir. 1993), cert. denied, 510 U.S. 1020 (1993), the Third Circuit rejected the idea that serious consideration could derive from a single event.

66. Fischer II, 96 F.3d at 1540. The "specific proposal" need not be a description of the plan in its final form. Id.

67. Id.

68. Id. Such preliminary work would thus allow for interaction between senior management, company personnel, and external consultants. Id.

69. Id.

70. Id.

71. Fischer II, 96 F.3d at 1154.

72. Id. at 1541.

73. Id.
the consultant's report on staff reduction options. Notes from that meeting indicated that PECO's CEO had disclosed his intention to announce multi-million dollar cost cuts on that date. These events cumulatively suggested that an early retirement plan was discussed by senior PECO management for implementation at the April 7 meeting. Prior to that date, serious consideration had not occurred. The March 12 telephone call by a PECO benefits manager to the actuarial firm was insufficient because it was preliminary in nature as to the topic of early retirement programs, was not conducted by a member of senior management, and was merely an exercise in information gathering. Since all members of the plaintiffs' class had already retired as of the designated April 7 serious consideration date, the court entered judgment for PECO.

C. The Second Circuit Approach: Ballone

Rejecting the serious consideration test as formulated in Fischer II, the Second Circuit adopted a more expansive view of materiality that generally affords less deference to employers. In Ballone v. Eastman Kodak Co., retirees of Eastman Kodak asserted that the employer made affirmative misrepresentations to them that no enhanced pension plan would be offered in the months following their retirement. An augmented pension plan was implemented shortly thereafter; it provided severance pay, a bridge payment and a retraining allowance not available to employees who had retired under a previous plan. Retirees under the original plan sued Kodak for breach of its ERISA fiduciary duty, claiming the employer had falsely assured them that the plan under which they retired would not be enhanced. The district court granted judgment for Kodak, holding that the

74. Id. The court viewed the consultant report as an exemplar of the type of "specific proposal" envisioned under the first prong of its test.  
75. Id. at 1542.  
76. Id.  
77. Id. at 1542.  
78. Fischer II, 96 F.3d at 1543. The court also rejected plaintiffs' common law equitable estoppel argument. Id.  
80. 109 F.3d 117, 117 (2d Cir. 1997).  
81. Id. at 120.  
82. Id. at 121.  
83. Id. at 120. In 1990, the company revised its Kodak Retirement Income Plan ("KRIP") to eliminate a minimum age requirement for retirement and to provide employees partial, or in some cases, complete pension benefits. One effect of this change was to spur employee retirement, thereby assisting Kodak's efforts to downsize. Id. During 1991, the company formed a "downsizing task force" to explore further options to streamline operations in light of diminished earnings. Id.
company had not "seriously considered" changes to its retirement plan prior to the plaintiffs' retirement, so that the company's alleged misstatements prior to the effective date of the enhanced plan were immaterial. 84

The district court had relied upon prior precedent for the proposition that "at a minimum, pension plan changes must be under 'serious consideration'" before a plan fiduciary could be liable for making material misrepresentations to participants. 86 On appeal, the Second Circuit objected to the district court's use of serious consideration as the talisman for assessing the materiality of Kodak's misrepresentations. 87 It reasoned that serious consideration should be but one factor in the materiality analysis. 88 "The ultimate inquiry," the court instructed, "[w]hether there is a 'substantial likelihood' that the affirmative misrepresentation 'would mislead a reasonable employee in making an adequately informed decision about if and when to retire." 89 To assist in determining the materiality of false assurances, the court set forth the following five factors:

(1) how significantly the statement misrepresents the present status of internal deliberations regarding future plan changes; (2) the special relationship of trust and confidence between the plan fiduciary and beneficiary; (3) whether the employee was aware of other information or statements from the company tending to minimize the importance of the misrepresentation or should have been so aware, taking into consideration the broad trust responsibilities owed by the plan administrator to the employee; (4) the employee's reliance on the plan administrator for truthful information; and (5) the specificity of the assurance. 90

While mere "mispredictions" would not be actionable, the court added that false statements as to future benefits could be material if "couched as a guarantee," particularly if such guarantee was supported by specific statements of fact. 91 The court vacated the district court judgment dismissing plaintiffs'

84. Id. at 121.
85. Mullins v. Pfizer, 23 F.3d 663, 669 (2d Cir. 1994) (holding that a plan administrator may not offer affirmative material misrepresentations regarding proposed future changes to an employee benefit plan).
86. Ballone, 109 F.3d 117 at 122. "The district court erred in attributing talismanic significance to its finding that Kodak's future retirement plan... was not under serious consideration at the time Kodak allegedly misled [p]laintiffs." Id.
87. Id. at 123.
88. Id.
89. Id. at 122-23.
91. Ballone, 109 F.3d 117 at 125 (citing Malone v. Microdyne Corp., 26 F.3d 471, 479 (4th Cir. 1994)). The guarantee must, of course, be realistic.
fiduciary claim and remanded the case for consideration of the alleged Kodak misrepresentations in light of the above five factors. Given that Kodak had assured the plaintiffs it would not implement a new retirement program in the immediate future, the court of appeals stated that such a decision on the part of Kodak could constitute a material misrepresentation in that plaintiffs maintained they would have delayed their decision to retire but for such assurances from the employer.

D. The Progeny of Fischer II

1. The First Circuit

Applying a narrow reading of what constitutes an ERISA plan, the First Circuit has derailed recent serious consideration claims.

In Rodowicz v. Massachusetts Mutual Life Insurance Co., ("Rodowicz I") the First Circuit reversed a district court's use of the serious consideration test as a basis for dismissing state law misrepresentation claims. The Rodowicz I plaintiffs, who retired from MassMutual under an offering less generous than an ensuing program, sued the employer for breach of its ERISA fiduciary duty. The court began its analysis by noting Vartanian v. Monsanto Co., in which the First Circuit, adopting Fischer II, had held that employers have a fiduciary duty under ERISA to disclose changes in retirement benefits at the point they come under serious consideration. Next, it rejected the district court's use of the serious consideration test regarding the plaintiffs' state common law claims. Distinguishing serious consideration from the common law materiality standard, the court stated that the latter required a lower showing of proof with regard to materiality than did the three-pronged ERISA test. "In our view," stated the court, "a reasonable employee could 'attach importance' to and be influenced by misstatements that fail to meet the strict requirements of the 'serious consideration' test." The court held

92. Id. at 126.
93. Id.
94. 192 F.3d 162, 174 (1st Cir. 1999) (citing Hockett v. Sun Co., 109 F.3d 1515, 1524 (10th Cir. 1997)).
95. Id. at 174-75 (citing Hockett, 109 F.3d at 1524).
96. Id. at 166.
97. Vartanian v. Monsanto Co., 131 F.3d 264 (1st Cir. 1997).
98. Rodowicz, 192 F.3d at 172.
99. Id. at 174.
100. Id.
101. Id.
that it was error for the district court to apply serious consideration to the state law claims.\textsuperscript{102}

At trial after remand, a jury awarded $334,777.33 to the plaintiffs.\textsuperscript{103} Appealing this outcome, MassMutual argued it was entitled to judgment as a matter of law because there was not a plan under serious consideration at the time of the misrepresentations.\textsuperscript{104} In \textit{Rodowicz v. Massachusetts Mutual Life Insurance Co.}, ("Rodowicz II"),\textsuperscript{105} the First Circuit vacated the jury verdict, concluding that there was no evidence in the trial testimony that MassMutual "had any intention, as of the date the statements were made, of proposing or implementing an enhanced benefit package of any sort."\textsuperscript{106}

In \textit{O'Connor v. Commonwealth Gas Co.},\textsuperscript{107} the First Circuit extended \textit{Rodowicz I} to hold that a contested early retirement incentive plan ("ERIP") did not fall within the coverage of ERISA.\textsuperscript{108} The employees' claim stemmed from the merger of Commonwealth Electric with Commonwealth Gas Company ("CGC"), which were both subsidiaries of Commonwealth Energy Systems ("CES").\textsuperscript{109} At a February 6, 1997 meeting, employees were informed of both the merger and company plans to eliminate fifteen percent of its workforce.\textsuperscript{110} A personnel reduction program ("PRP"), finalized on May 13, offered retiring employees the following benefits: 1) a severance bonus; 2) pension credit up to 78 months' credit for time in service; 3) COBRA premium payments for a year; 4) educational services valued at $5,000; and 5) outplacement assistance.\textsuperscript{111} Plaintiffs, who had retired on January 1 and February 1, 1997, were denied benefits under the program.\textsuperscript{112} They sued CGC, claiming its agents made material misrepresentations that induced them to retire before the PRP became effective.\textsuperscript{113} The district court had held that the "composite" of the severance bonus, in addition to the other PRP elements, rendered it an ERISA-covered plan.\textsuperscript{114}

\textsuperscript{102} \textit{Id.} at 175.
\textsuperscript{104} \textit{Id.}
\textsuperscript{105} 279 F.3d 36 (1st Cir. 2002).
\textsuperscript{106} \textit{Id.} at 49.
\textsuperscript{107} 251 F.3d 262 (1st Cir. 2001) (directing readers to the more thorough recitation of case facts contained in the district court's opinion at 85 F. Supp. 2d 49 (D. Mass. 2000)).
\textsuperscript{108} \textit{Id.} at 264.
\textsuperscript{109} \textit{Id.} at 265.
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{Id.} at 265, 270.
\textsuperscript{112} \textit{Id.} at 265.
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{O'Connor}, 251 F.3d at 266.
Citing the Supreme Court's *Fort Halifax*, the First Circuit stated that the severance bonus offered under the PRP was but a one-time, lump-sum payment. The payment was derived from an employee's years of service and rate of pay, which the court regarded as a "limited, non-discretionary" calculation. The court was not concerned that the PRP reserved to CGC the discretion to make individual determinations as to eligible employees; such a decision, it noted, would be based on a mechanical comparison of employees' years of service. Also, discounting the PRP's provision of COBRA premium payments and other benefits as mere afterthoughts, the court maintained they would not likely affect an employee's retirement decision. In sum, the non-severance related benefits were "minor perks" incapable of transforming the CGC severance bonus into an ERISA-covered plan.

2. *The Second Circuit*

Two recent cases from the Second Circuit have addressed the duty of Pfizer, Inc. to its retiring employees with respect to an early retirement plan it announced in the late 1980s. *Mullins v. Pfizer, Inc.*, involved the claim of a Pfizer employee who took early retirement six weeks before the announcement of an enhanced early retirement package. James Mullins, a 34-year employee of Pfizer, retired from the company on April 1, 1990 under an early retirement program providing benefits discounted by ten percent of his normal retirement benefit. On May 16, Pfizer announced a Voluntary Separation Option ("VSO") under which Mullins, had he delayed retirement, would have received a significantly more generous set of benefits. In late 1989, the

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115. Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) (holding that a one-time, lump-sum severance benefit plan did not constitute an ERISA plan).
117. Id. at 268.
118. Id. at 269. The making of COBRA premium payments apparently being little more than a year-long exercise in check-writing.
119. Id. at 270-71. The non-severance benefits did not involve "the kind of ongoing discretionary judgments that would sufficiently tax an employer's administrative integrity to warrant ERISA's prophylaxis." Id. at 270.
120. Id. at 270. "The VSO provided a lump sum severance payment tied to years of service, a "long service" bonus, "a lump sum... full payment of 1990 vacation entitlement... retirement benefits for retirement-eligible employees... continuation of medical, dental and basic life insurance benefits for" non-retirement eligible employees until they could procure coverage from a new employer, educational assistance payments, new employment assistance, and employee assistance plan services. Id. at 97-98. The VSO constituted a new ERISA plan, as opposed to an amendment of an existing retirement plan. Id.
plant manager of Pfizer's Groton, Connecticut facility, where Mullins was employed, requested that a demographic analysis of the plant be conducted. The study concluded that the Groton facility would become overstaffed due to the shutdown of a particular plant operation, and that a separation incentive program should be implemented to address the resulting "excess personnel" problem. This recommendation was discussed by the plant's manager and its assistant plan manager, who reported the idea to Pfizer division management in New York on February 9, 1990. Following a complex review and adoption process, the proposal was announced to Pfizer employees on May 16, 1990.

The court determined that serious consideration of the VSO occurred on February 9, the date a Pfizer assistant plan manager recommended to a Pfizer group vice president the implementation of an enhanced retirement incentive program. In doing so, the court adopted the notion that consideration of retirement incentives by a corporate division's senior management alone, as opposed to its top executives, was sufficient to invoke serious consideration. With regard to the third prong of Fischer II ("authority to implement"), the court recognized that approval for the VSO could come only from a corporate management committee composed of division heads, the Pfizer chairman and president, and other advisory members. However, the court rejected Pfizer's argument that the third prong required actual submission of the proposal to the CPC for approval. It noted that all the managers with expert knowledge of the Groton plant had agreed as to the need for a retirement incentive as of February 9.

124. Id. at 99.
125. Id. at 99-100. Company culture militated against the laying off of individuals. Mullins, 147 F. Supp. 2d at 100.
126. Id.
127. Id. at 100-02.
128. Id. at 103.
129. Id. at 112. The court noted, however, the Second Circuit rule that serious consideration is but one aspect of an alleged material misrepresentation. See Ballone v. Eastman Kodak Co., 109 F.3d 117, 125-26 (2d Cir. 1997).
130. Mullins, 147 F. Supp. 2d at 112.
131. See Bins v. Exxon Co., 220 F.3d 1042, 1051-52 (9th Cir. 2000) (suggesting that principal senior executives usually provide the company's management services).
132. Hockett, 109 F.3d at 1523.
134. Id. at 113.
135. Id.
136. Id. at 112.
This, in its view, was sufficient. The court further concluded that Pfizer breached its fiduciary duties by failing to inform its “front-line benefits representatives of the VSO discussions after the point at which its consideration of the proposal became serious. In Caputo v. Pfizer, the Second Circuit held that retirees lacked “actual knowledge” of a breach of fiduciary duty, as of the date they learned of the announcement of an early retirement program, sufficient to trigger the three-year ERISA statute of limitations. As in Mullins, the case involved the VSO announced by Pfizer to employees of its Groton, Connecticut facility on May 16, 1990. Outlining the VSO approval process, the court noted management discussions beginning in January 1990 of the program’s benefits and drawbacks, and the projection of company “manning levels.” Central to the company’s ten-year “Groton 2000” downsizing plan was the shutdown of a first Groton division in 1990, and a second in 1992. Recognizing that the announcement of the May 1990 VSO would lead some employees to anticipate, and postpone retirement in lieu of a subsequent “golden handshake,” the company instructed its benefits counselors to say they knew of no plans for additional VSOs. From August 1990 to March 1991, the plaintiffs—who had worked for Pfizer an average of thirty-five years—asked plant supervisors, human resources representatives, and benefits counselors about the potential for additional VSOs. Told in all instances there were no such plans, the four plaintiffs retired on successive dates between January 1 and June 1, 1991. One plaintiff was informed by a Groton plant manager that he “would never live long enough to see a golden handshake.” A second VSO, part of the company’s “Groton 2000” downsizing campaign, was announced November 11, 1991. The plaintiffs would have been eligible for this new VSO, but could not demonstrate that any individual had lied to them. Learning of Mullins after its 1995
The plaintiffs retained Mr. Mullin’s attorney in October 1996 and asserted that Pfizer had fraudulently induced them to retire. The district court held that their claim was barred by ERISA’s three-year statute of limitations in that they possessed “actual knowledge” of the breach upon learning of the second VSO in November 1991. Further, it held their claim for actions involving “fraud or concealment,” a six-year statute of limitations under ERISA, had not been pled with sufficient particularity.

Applying ERISA’s six-year “fraud or concealment” exception, the Second Circuit held that the exception should not be limited to cases involving the federal fraudulent concealment doctrine (which would require an affirmative act of concealment in addition to the breach of fiduciary duty). Departing from First, Third, Seventh, Ninth and D.C. Circuit decisions on the issue, the court held the six-year statute of limitations applies when a fiduciary breaches its duty by making a knowing misrepresentation or omission of material fact that induces an employee to act to his detriment, or when the fiduciary engages in acts to prevent the discovery of such a fiduciary duty.

As to the particularity claim, the court agreed that the complaint was insufficient as a matter of materiality. It held, however, that plaintiffs should have been granted leave to replead. The representations made to plaintiffs, it reasoned, were arguably material in that no reasonable, long-service employee would have retired had he known he could wait a few months and leave with a VSO “golden handshake.”

149. Id. at 186-87. The 1995 verdict for Mullins was vacated under Sullivans v. LTV Aerospace & Defense Co., 82 F.3d 1251 (2d Cir. 1996), which held there is no right to a jury trial for the recovery of ERISA benefits. The case was later retried to the district court on the breach of fiduciary duty issue. Id. at 97.
150. Caputo, 267 F.3d at 187.
151. Id.
152. Id.
153. Id. at 188-89.
154. Id. at 190.
155. Id. at 191. With regard to Pfizer’s purported breach of fiduciary duty, the plaintiff had alleged that:

   by making affirmative material representations that caused the plaintiff to believe that no enhancement of employee benefits would be offered to employees or was being seriously considered by the defendant . . . by giving incomplete and untruthful responses to the plaintiff’s inquiries about employee options and benefits in that, in response to the plaintiff’s inquiries the defendant failed to disclose that it had decided to offer enhanced benefits to employees or was seriously considering making such an offer.

   Id.

156. Caputo, 267 F.3d at 191.
157. Id. at 192.
particular, the court cited the plant manager’s “never live long enough” comment. In addition, it noted evidence suggesting Pfizer knew of the need for a second VSO in early 1990, and that it had already slated certain jobs for elimination. The court ruled that plaintiffs’ claims were timely-brought under ERISA’s Section 413 “fraud or concealment” provision—that is, within six years of Pfizer’s November 1991 announcement of the VSO.

Reaching the district court’s imposition of the three year statute of limitation, the Second Circuit held that a plaintiff possesses “actual knowledge of the breach or violation’ within the meaning of ERISA § 413(2)... when he has knowledge of all material facts necessary to understand that an ERISA fiduciary has breached his or her duty or otherwise violated the Act.” Applying this standard, the court concluded that Pfizer’s offering of the 1991 VSO was not inherently suspect so as to trigger the statute of limitations. Pfizer would only have breached its duty if its responses to the plaintiffs’ questions were untruthful when made, or if it had withheld material information known to the company as of the date the plaintiffs inquired as to future benefits. The court thus rejected the district court’s use of a “constructive knowledge” standard, which would have required plaintiffs to bring their action when they “should have known that Pfizer may have breached its fiduciary duty.”

3. The Third Circuit

In Chichelo v. Hoffman-LaRouche Inc., the district court entered summary judgment against an employee who failed to demonstrate that his employer was investigating and formulating a voluntary early retirement program contemporaneous to the employee’s pre-retirement inquiries. Chichelo, a 27-year employee of the defendant-employer, alleged that the company breached its ERISA fiduciary duty by failing to advise him, prior to retirement, of its plans to implement a voluntary early retirement program (“VERP”). Chichelo attempted to confirm rumors that the company might implement a VERP by contacting the Hoffman-LaRouche Director of Human Resources, its Vice President of Promotion, and a member of the benefits

158. Id.
159. Id.
160. Id.
161. Id. at 193.
162. Id.
163. Caputo, 267 F.3d at 194.
164. Id.
166. Id. at *22.
167. Id. at *3-5.
department—all of whom replied that they had no knowledge of a potential VERP. On May 23, 1994, Chichelo tendered a resignation letter to his supervisor stating that “[i]f LaRouche should prefer to elect that I retire early, perhaps there could be some compensatory program.” Making no additional inquiries as to proposed plan changes, Chichelo retired on July 1. On October 17, 1994, three-and-a-half months after plaintiff’s retirement, the employer announced a VERP, implemented in conjunction with its acquisition of a new company.

The district court concluded that if no reasonable jury could find that the employer had a VERP under “serious consideration” on or before May 23, 1994, the date of Chichelo’s resignation letter, then it must grant summary judgment for the employer. It found that a reasonable jury could have concluded that a specific proposal was under serious consideration as of July 21, 1994. On that date, a memo from a LaRouche vice president and general counsel to the company’s president and CEO stated that “I believe we should seriously consider implementing an Early Retirement Program for the LaRouche organization.”

The court found no evidence, however, that a specific proposal existed or was discussed for purposes of implementation either on or prior to May 23, 1994. While the court found it likely that LaRouche’s CEO took steps to develop a voluntary reduction in force contemporaneously with its May 1, 1994 merger agreement, it determined that such steps consisted of data gathering and plan formulation, not implementation. Concluding that Chichelo failed to present any evidence—circumstantial or otherwise—of the existence of a specific plan on or before May 23, 1994, the court entered summary judgment for LaRouche.

By contrast, the second offering in Adams v. Sun Co., Inc., (unpublished), occurred in much closer proximity to the original provision of a lump sum payment option. When the plaintiff-employees of Whitaker Coal were laid off from the corporation in

168. Id. That is, Chichelo does not claim he was ever “told that a VERP was not under consideration.” Id. at *4.
169. Id.
170. Id. at *3.
171. Chicelo, 2001 U.S. Dist. LEXIS at *4. The employer had been in the process of acquiring the company prior to Chicelo’s retirement; the employee was aware of the possible merger at the time he made his initial inquiries. Id. at *3.
172. Id. at *15.
173. Id. at *16-17.
174. Id. at *16. The memo pertained to LaRouche’s planned acquisition. Id.
175. Id. at *17.
177. Id. at *21-22.
1995, their defined benefit pension plan contained no lump sum payment option; it prohibited the distribution of retirement benefits until participants reached age 55. A letter from the plan's actuary dated September 25, 1995, recommended the company amend its plan to allow lump sum distributions to the laid off workers and vested terminees. In November 1995, employees were notified of the "one-time" opportunity to elect—a lump sum distribution on or before December 31, 1995. Whitaker merged with Sunoco in 1996, which became the plan sponsor and announced that remaining participants would be granted a second opportunity to receive lump sum distributions. This second lump sum window opened in mid-November, 1996. Due to a change in interest rates, the latter distributees received significantly larger payments than the plaintiff-employees. In district court, plaintiffs claimed Sunoco and Whitaker violated their fiduciary duties by making a misleading "one-time" opportunity representation to the initial retirees.

Applying Fischer II, the court of appeals saw no evidence of a sufficient "specific proposal." It concluded that plaintiffs' argument was little more than an inference of Sunoco's intent to use the second lump sum option to finalize its liabilities as to the plan. The court viewed the letter from Whitaker's plan actuary as an act of information gathering. Moreover, the plaintiffs failed to demonstrate the employer's consideration of the "practicalities of administration." Affirming the district court, the court granted summary judgment for the employer.

The Third Circuit applied its Fischer II holding in the context of a multiemployer plan in Mushalla v. Teamsters Local No. 863 Pension Fund. In Mushalla, the plaintiffs maintained that their multiemployer pension fund should be held to a higher duty to

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179. Id. at 625.
180. Id. at 625-26.
181. Id. at 626. The plan had been amended prior to the announcement to provide for such a distribution.
182. Id.
183. Id.
184. Id.
186. Id. at 628.
187. Id.
188. Id.
189. Id. For example, "how a second lump sum window would be communicated, to whom it would available [sic], under what terms, or when and for how long." Id.
190. Id.
disclose proposed changes than single employer funds.\footnote{192} Plaintiffs, participants in the Teamsters Local No. 863 multiemployer pension fund, each retired in late December 1997 and January 1998 after thirty years of service with their employer.\footnote{193} At the time of plaintiffs' retirement, the Fund imposed a thirty-years-of-service cap for purposes of calculating pension benefits.\footnote{194} In April 1998, however, the Fund announced it would calculate years of service using a thirty-five year cap.\footnote{195} In April 1997, the Fund had retained a legal consultant to redraft the plan's terms.\footnote{196} In November of that year, a Fund trustee suggested that the years of service cap be raised to slow the loss of senior union members; actuarial calculations were performed that month to assess the funding feasibility of using a forty-two year cap.\footnote{197} Although the consultant's plan restatement, completed on December 4, 1997, contained no cap increase, the trustee expressed his interest in having a new cap included in the revised plan.\footnote{198}

At a December 7 meeting with general members, the trustee reported that an increased cap was being discussed, but plaintiff Mushalla mistakenly believed such a cap would not apply to his employer.\footnote{199} A day later, the Funds' trustees jointly approved a draft of the plan containing the thirty-five year cap, contingent upon confirmation of the actuarial soundness of such an increase.\footnote{200} Plaintiff Mushalla, who inquired as to proposed cap increases as late as December 20, was told by union business agents that no such increases were under consideration.\footnote{201} One month later, the trustees were assured of the new cap's actuarial feasibility and began discussing how notice to participants of such a change would be provided.\footnote{202} Participants received notice on February 1, 1998 of the new cap, which was formally approved by the trustees on April 1.\footnote{203} A district court, finding that serious consideration did not occur until January 20, dismissed the retirees' complaint.\footnote{204}

\begin{footnotes}
192. Id. at 393.
193. Id. The fund was managed by five union-appointed and five participant-selected trustees.
194. Id.
195. Id.
196. Id.
197. Id. at 393-94. This cap of forty-two years of service was ultimately determined to be too expensive.
198. Mushalla, 300 F.3d at 394.
199. Id.
200. Id.
201. Id. at 394-95.
202. Id. at 395.
203. Id.
204. Id.
\end{footnotes}
On appeal, the employees urged that the court apply a narrower version of serious consideration tailored to participants of multi-employer plans. Because multi-employer plan decisions are less driven by a "corporate profit motive," they argued, the business operations rationale that served as a counterweight to employees' interests in Fischer II was not present in the multi-employer context. Rejecting this contention, the Third Circuit affirmed the district court conclusion that "the trustees of a multiemployer pension fund have the same need to be able to freely consider changes to the pension plan [as individual employers]." Applying Fischer II, the Fund conceded the test's third factor, in that the trustees possessed authority to implement change. With regard to the first factor, the court of appeals affirmed the district court conclusion that no specific proposal existed prior to January 20, 1998—the date the trustees received actuarial confirmation of the financial viability of the cap increase. The plaintiffs also failed on the second factor, since the court found no suggestion that the trustees discussed the proposed cap increase for purposes of implementation at their December 9 meeting. The Third Circuit affirmed the district court's grant of summary judgment for the Fund.

Nydes v. Equitable Resources (unpublished), involved a plan change permitting lump sum payments. Nydes had apparently inquired as to the possibility of receiving his plan benefits in lump sum form. He was informed that such a distribution form was not available, despite the fact that management was reviewing a proposal to adopt a lump-sum option. Nydes was terminated effective November 1, 1996; the plan was amended to permit lump sum payouts for employees employed as of January 1, 1997. Assuming this change was under serious consideration when Nydes made his inquiries, the court held that his employer had no fiduciary duty to disclose such information to him.

205. Mushalla, 300 F.3d at 395.
206. Id. at 396-97 (citing Mushalla v. Teamsters Local No. 863 Pension Fund, 152 F. Supp. 2d 613, 628 (D.N.J. 2001)).
207. Id. at 397.
208. Mushalla, 300 F.3d at 399. The court rejected plaintiff's argument, borrowed from Hockett, 109 F.3d at 1515, that "cost analysis or actuarial work is not a necessary prerequisite to serious consideration." Distinguishing Hockett, the court stated that the trustees' approval of the cap increase was contingent upon the actuarial determinations, such that the plan was not "sufficiently concrete" until the actuaries had spoken.
209. Id. at 399-400.
210. Id. at 400.
212. Id. at *4.
213. Id. at *4-5.
214. Id. at *5.
The court's analysis focused on the materiality of the misrepresentation. A material misrepresentation, it stated, occurs "if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision about if and when to retire." Here, it held, the change was not material to Nydes' decision to retire because the employee was in fact terminated from his position effective—at the latest—November 1, 1996. This separation date was not negotiable, such that "[t]he decision if and when to leave [the employer] was simply never plaintiff's to make." The court affirmed the grant of summary judgment in Equitable's favor.

The court in Higgins v. Exxon Co., USA imposed ERISA's three year statute of limitations to bar the claim of a serious consideration participant. The plaintiff-employee claimed that because his employer misrepresented the likelihood of enhanced retirement incentive benefits, the employee retired too early to partake in such benefits. The court did not reach the merits of the claim, but instead dismissed it under the three-year statute of limitations because the plaintiff knew of the program approximately three months after he retired, yet waited nearly five years to file his lawsuit.

4. The Fourth Circuit

The Fourth Circuit adopted the serious consideration doctrine in Elmore v. Cone Mills Corp.

5. The Fifth Circuit

Prior to 2003's Martinez v. Schlumberger, the Fifth Circuit had not directly addressed the serious consideration doctrine. The district court in McCall v. Burlington Northern/Santa Fe Co. held that an employer did not breach its fiduciary duty in stating that future severance packages would not offer better

215. Id. at *4.
216. Id. at *6.
217. Id. at *7 (quoting the district court opinion).
220. ERISA § 413 requires that a claim for fiduciary breach be commenced within six years, or if the plaintiff has actual knowledge of the breach or violation, within three years.
222. Id.
223. 23 F.3d 855 (4th Cir. 1994) (reversing judgment of district court that employer's "representations are enforceable under ERISA").
benefits to retiring employees. However, because the subject plan was not conceived until many years after the plaintiffs' decision to retire, the *McCall* court neither accepted nor rejected the serious consideration test. The plaintiffs in *McCall* retired pursuant to the terms of a 1991 voluntary separation plan, for which an employer-provided summary plan description provided the following question and answer:

Q. Will there be another opportunity to participate in a separation pay plan after this one?
A. The company is offering this plan in an effort to reduce its expenses due to business conditions. At this time, the company's management has not yet decided if there will be any additional voluntary separation plans. However, management has decided that if there are any additional plans, the benefits would not be as good as those contained in this plan.

Four years later, the employer offered a second voluntary separation pay plan. Asserting a claim for breach of fiduciary duty under ERISA, plaintiffs argued that had they not retired under the original plan, they would have been eligible for a larger severance payment under the 1995 Plan.

Because neither party contended that the employer's management was seriously considering the 1995 Plan at the time of the 1991 offering, the court noted that the employer would be entitled to summary judgment under a strict application of the serious consideration standard. Citing *Ballone*, however, the plaintiffs urged that the court determine whether the employer had made "guarantees regarding future benefits that misrepresent present facts," and, if so, whether such representations were sufficiently material to induce a reasonable person to rely upon them. Plaintiffs argued that the employer's statement was a material misrepresentation because management had not determined collaboratively that if subsequent separation pay plans were in fact offered, the benefits under them would not be as good as those under the 1991 plan. Testimony indicated that a senior vice president of human resources had been solely responsible for deciding the employer would not offer a future plan with better benefits.

225. Id. at 511.
227. Id. at 565-66.
228. Id.
229. Id. While plaintiffs characterized the 1991 Q&A as an unequivocal promise made with specific intent to induce their reliance, the court addressed the issue as framed by defendants—that is, "when a fiduciary has a legal obligation to truthfully inform employees about possible future employee benefits plans." Id. at 567.
230. Id. at 568.
231. Id.
benefits than the 1991 Plan.\textsuperscript{233} Rejecting this argument as a misinterpretation of the applicable test, the district court stated that a plan need only "be considered by 'those members of senior management with responsibility for the benefits area of the business, and who will ultimately make recommendations to the board regarding benefits operation."	extsuperscript{234} The human resources official met this description, and the court granted the employer judgment as a matter of law as to the plaintiffs' breach of fiduciary duty claim.\textsuperscript{235}

Subsequent to \textit{McCall}, the serious consideration issue was more directly presented in \textit{Martinez v. Schlumberger Ltd.}\textsuperscript{236} After canvassing the current law of serious consideration, the district court turned to the Voluntary Early Retirement Plan ("VERP") at issue.\textsuperscript{237} Prior to retiring on July 1, 1998, the plaintiffs had asked personnel at Schlumberger whether a new, enhanced retirement program would be implemented.\textsuperscript{238} Although the personnel replied that they had no knowledge of such a plan, a new VERP was announced on July 27, 1998.\textsuperscript{239} Having retired, plaintiffs were ineligible for the new plan, which provided an additional year of salary not included in a prior VERP.\textsuperscript{240} Plaintiffs had retired on June 30, 1998. Defendant-employer claimed the VERP had received only a preliminary discussion when the three plaintiff-employers inquired as to its status in May and June of 1998.\textsuperscript{241} Given that the Fifth Circuit had not yet expressly adopted the standard serious consideration test, defendants urged a rule requiring employers "to notify employees about a retirement incentive only after such a package has been irrevocably implemented."\textsuperscript{242}

Rejecting both the defendants' employer-friendly proposal and the Second Circuit's employee-friendly \textit{Ballone} analysis, the court assumed the Fifth Circuit would adopt some version of the standard serious consideration test.\textsuperscript{243} Thus, it found the employer's VERP to be under serious consideration as of July 14, 1998.\textsuperscript{244} Prior to that date, the company's lower management was exploring a variety of options—none of which had been

\begin{footnotesize}
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\item \textsuperscript{233} \textit{Id.}
\item \textsuperscript{234} \textit{Id.} at 570 (citing \textit{Fischer II}, 96 F.3d at 1540).
\item \textsuperscript{235} \textit{Id.}
\item \textsuperscript{236} 191 F. Supp. 2d 837, 840-43 (S.D. Tex. 2001).
\item \textsuperscript{237} \textit{Id.} at 843.
\item \textsuperscript{238} \textit{Id.}
\item \textsuperscript{239} \textit{Id.}
\item \textsuperscript{240} \textit{Id.} at 838.
\item \textsuperscript{241} \textit{Id.} at 843.
\item \textsuperscript{242} \textit{Martinez}, 191 F. Supp. 2d at 846.
\item \textsuperscript{243} \textit{Id.} at 851.
\item \textsuperscript{244} \textit{Id.}
\end{itemize}
\end{footnotesize}
demonstrably selected for purposes of implementation. The court added, however, that the company could not avoid its ERISA fiduciary liability by failing to inform members of its lower management—to whom employees would turn for retirement options—of possible future changes. Although the court found the timing of the plan's adoption "troubling," it noted the plaintiffs' argument for serious consideration as of that date was premised upon pure speculation. As a result, the proximity of the retirement and offering dates was insufficient to preclude summary judgment for the employer.

The district court, however, was incorrect in assuming the Fifth Circuit would adopt the serious consideration test or some variation of it. In July 2003, the Fifth Circuit rejected serious consideration in lieu of a "fact specific approach" resembling that of the Second Circuit. The court affirmed the district court's conclusion that the employer did not breach its fiduciary duty by failing to disclose the new VERP, but not on the same reasoning. The court first held, in accord with the other circuit courts of appeals, that "an employer, if it chooses to communicate about the future of a participant's plan benefits, has a fiduciary duty to refrain from misrepresentations." But on the issue of when an employer's misrepresentation would be actionable, the Fifth Circuit found no basis for concluding that the duty of truth arose only after the employer gave serious consideration to a plan. Analogizing to a Supreme Court opinion involving employer misrepresentations in the context of a potential merger, the Fifth Circuit concluded that the materiality of such misrepresentations should not be determined using a bright-line rule. On this basis, the court rejected the Fischer II serious consideration test.

In place of serious consideration, the Fifth Circuit adopted a fact-specific approach with the overarching question being whether "there is a substantial likelihood that a reasonable person in the plaintiffs' position would have considered the information an employer-administrator allegedly misrepresented important in making a decision to retire." Citing to the Second Circuit's Ballone, relevant factors would include: 1) how significantly the

245. Id.
246. Id. at 851-52.
247. Id. at 852.
248. Id.
250. Id. at 424.
251. Id.
253. Id. at 224-25.
254. Martinez, 338 F.3d at 428.
statements misrepresented the present status of internal deliberations regarding future plan changes; 2) whether the employee knew or should have been aware of other information tending to minimize the misrepresentation; and 3) the specificity of the assurance. In addition, the court recognized that the more seriously a plan is being considered, the more likely a representation about the plan is material. The court thus held that the lack of serious consideration “does not equate to a free zone for lying.”

The Martinez court also held that an employer has no fiduciary duty to affirmatively disclose whether it is considering amending a plan. Here, the Fifth Circuit noted that ERISA does not require employer-administrators to disclose that they are considering amending a plan. Applying these dual rules, the court concluded that summary judgment was proper as to the plaintiffs’ claim that Schlumberger violated its duty to disclose its consideration of the early retirement offering; no such duty existed. Regarding the employer’s alleged affirmative misrepresentations that no new plan would be forthcoming, the court concluded that the employers’ responses did not materially misrepresent the potential for change. Addressing the statement made to one of the plaintiffs by a personnel employee that “Schlumberger was doing too good right now and they would not be offering any packages because they’d lose too many good people,” the court applied its factors test to conclude that any reasonable listener would have understood that the statement to the plaintiff was “no more than the unsupported speculation of a fellow employee.”

6. The Sixth Circuit

Decided less than three months after Fischer II, the Sixth Circuit’s Muse v. IBM Corp., offered a “special events”-driven notion of serious consideration. The Muse plaintiffs retired from IBM under a two-part voluntary early retirement program offered by the company from September 1989 to March 1990. The first part of this Voluntary Transition Payment (“VTP”) program provided employees terminating prior to December 29 one week of

255. Id. at 428 (quoting Ballone v. Eastman Kodak Co., 109 F.3d 117, 125 (2d Cir. 1997).
256. Id.
257. Id.
258. Id.
259. Id. at 429.
260. Martinez, 338 F.3d at 432.
261. Id. at 407.
262. Id. at 432.
263. 103 F.3d 490, 494 (6th Cir. 1996), cert. denied, 520 U.S. 1240 (1997).
264. Id. at 492.
salary for every six months of service, with a cap of fifty-two weeks of salary.\footnote{265} The second part provided the same benefits as the first, but covered employees who retired from December 31, 1989 to March 31, 1990.\footnote{266} A variation on the VTP that incorporated a leave of absence feature (the “VTP/LOA”),\footnote{267} was offered by IBM on January 22, 1990.\footnote{268} It consisted of a five-year pre-retirement leave of absence for use by employees who were within five years of retirement eligibility and otherwise qualified for the original VTP.\footnote{269} Retirees who received leave status under VTP/LOA received the same benefits as the VTP employees.\footnote{270}

In August 1990, IBM introduced a third such program—the Lexington Transition Payment Program (“LTPP”)—under which employees who retired from September 28 to December 31, 1990, received two weeks’ salary for each six months of service, capped at 104 weeks, in addition to a $25,000 payment.\footnote{271} The LTPP was offered only to employees of IBM’s Lexington plan, and subsequent to the company’s decision to sell that plan.\footnote{272} LTPP-level benefits had been offered by IBM in the past, however, and prior to accepting VTP or VTP/LOA-level benefits, the plaintiff-employees had asked their supervisors whether an LTPP-type plan would be offered in the future.\footnote{273} They were told it would not be.\footnote{274} As retirees, they sued IBM claiming the company breached its fiduciary duty by failing to inform them that the LTPP offer was under serious consideration.\footnote{275} IBM claimed serious consideration did not occur prior to June 19, 1990.\footnote{276} The district court adopted the recommendation of a designated magistrate judge that summary judgment be granted for IBM.\footnote{277} The magistrate found that serious consideration occurred on April 19, 1990.\footnote{278}

Appealing the summary judgment order, plaintiffs argued that certain studies conducted by IBM prior to November 1989 suggested serious consideration of the LTPP.\footnote{279} The Sixth Circuit, however, emphasized that IBM did not offer the enhanced LTPP until after its decision to sell the Lexington plant.\footnote{280} “The

\begin{itemize}
  \item 265. Id.
  \item 266. Id.
  \item 267. Id.
  \item 268. Id.
  \item 269. Id.
  \item 270. Muse, 103 F.3d at 492.
  \item 271. Id.
  \item 272. Id. at 492-93.
  \item 273. Id. at 492.
  \item 274. Id.
  \item 275. Id. at 493.
  \item 276. Id.
  \item 277. Muse, 103 F.3d at 493.
  \item 278. Id.
  \item 279. Id. at 494.
  \item 280. Id.
\end{itemize}
exception of serious consideration," it held, "does not apply until a company focuses on a particular plan for a particular purpose."281 The court added that it was not serious consideration for an employer to study plan changes to gain a general appreciation of its options.282 Here, IBM's decision to sell the Lexington plant supplied the unique impetus for the LTPP, a plan that had not been under serious consideration prior to that time.283 An alternative conclusion, the court stated, would contravene the ERISA policies of encouraging employers to provide welfare benefit plans, and of reducing the financial and administrative burdens imposed on employers.284

The Sixth Circuit returned to the fact setting in Muse, this time with the benefit of Fischer II, in 1999's McAuley v. IBM Corp., Inc.285 Though involving the same VTP, VTP/LOA, and LTPP plans at issue in Muse, McAuley arose from a redesign of IBM's retirement plans announced by the company in early 1991.286 The 1991 redesign eliminated certain early retirement penalties and provided greater retirement benefits to employees retiring in 1991.287 The plaintiffs, who retired under the VTP program, accused IBM of intentionally withholding information from them respecting the retirement plan changes (which were allegedly pending) at the time they retired.288 In particular, they claimed the company induced them to retire outright in 1990 rather than utilizing a leave-of-absence feature that would have permitted them to be eligible for the 1991 enhancements.289

Plaintiffs contended that preparation for the 1991 enhancements had already reached the implementation stage as of the date they retired, thereby constituting serious consideration.290

281. Id.
282. Id.
283. Id. at 493-94. Citing Drennan v. General Motors Corp., 977 F.2d 246, 251 (6th Cir. 1992), cert. denied, 508 U.S. 940 (1993), the court stated that it was a well-settled proposition that an employer bears a fiduciary duty not to make misrepresentations to potential plan participants once it gives "serious consideration to implementing a second offering of severance plan benefits ..." Id. at 493. It noted, however, that the law was less certain with respect to "whether fiduciaries must disclose plan changes that have been proposed or considered but not yet adopted." Id. See also McGrath v. Lockheed Martin Corp., 48 Fed. Appx. 543, 556 (6th Cir. 2002) (unpublished) (quoting Muse v. International Business Machine Corp., 103 F.3d at 493).
284. Muse, 103 F.3d at 494.
285. 165 F.3d 1038, 1043 (6th Cir. 1999).
286. Id. at 1041. The Sixth Circuit further explained that the LTPP at issue contained a pre-retirement leave of absence feature that operated in the same manner as the VTP/LOA.
287. Id.
288. Id.
289. Id.
290. Id. at 1043-44.
The Sixth Circuit applied a two-part analysis to the serious consideration question. After first asking, under Muse, whether the employer was “focusing on a particular plan for a particular purpose,” the court applied the three Fischer II factors. Applying Muse, the court reiterated that serious consideration does not occur until a company “focuses on a particular plan for a particular purpose.” It concluded that IBM had in mind the particular purpose of making retirement more desirable to long-term employees (to promote its downsizing efforts) during its retirement redesign process. The court construed the “particular plan” aspect of this standard as not requiring a “finalized plan in its ultimate incarnation.” The fact that IBM, as of October 4, had determined to remove early retirement penalties was sufficient to constitute a particular plan as of that date. The court next applied Fischer II, through which it also arrived at October 4 as the date of serious consideration.

The district court in Harrison v. UAW applied McAuley in effectively denying the serious consideration contentions of retired GM employees. The GM plaintiffs, members of UAW L599 and L659, retired from GM on successive dates between October 1, 1999 to February 1, 2000. The retirees sued both GM (as plan administrator) and the two unions for making misrepresentations and failing to inform them of upcoming incentive plans. The

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291. Muse, 103 F.3d at 1043-45. See also Bradney v. E.I. DuPont de Nemours & Co., 229 F.3d 1150 (6th Cir. 2000), cert. denied, 531 U.S. 1133 (2001) (unpublished) (approving a district court's application of the two-part serious consideration analysis set forth in McAuley, and the test, though "somewhat vague," intends to "distinguish proposals that are being 'seriously considered' from those that are merely being analyzed, discussed or reflected upon in a preliminary manner").

292. McAuley, 165 F.3d at 1043.

293. Id. at 1044-45.

294. Id. at 1044.

295. Id. at 1044-45.

296. Id. Analogizing the first factor of Fischer II (a specific proposal) to the Muse particularity standard, the court determined that a sufficiently specific proposal existed on October 4. Similarly, it concluded that “discussion for purposes of implementation” (the second prong of Fischer II) occurred on October 4, the date employees working on the plan were instructed to finalize its design strategy. The third factor, consideration by senior management, occurred on October 4 as well. Though the IBM Management Committee, which possessed authority to make implement changes, did not review a finalized proposal on October 4, the court reasoned that the proposal it did view was “sufficiently concrete” to have been presented to management for implementation purposes. The court noted a meeting outline that suggested implementation strategies was in fact discussed on October 4, which was therefore the date of serious consideration under Fischer II. Id.


298. Id. at 554 n.1.

299. Id. at 556.
retirees argued they would have been eligible for a GM enhanced retirement plan announced after their retirement, and that they retired in reliance upon company representations that such a plan would not be offered. GM had recently closed the plants at which the plaintiffs worked. Instead of being laid off, however, the employees entered the GM JOBS Bank, a program enabling them to collect full pay if they reported each day to a GM facility and were available for work. At some point during this period, GM began considering the use of a Special Attrition Plan ("SAP"), which provided a choice of three bonus options to employees who retired. The company had used SAPs to reduce its workforce in the past. GM claimed it did not seriously consider this particular SAP until February 15, 2000, the day after it received a concession from the employees' union relaxing an attritional replacement requirement.

Juxtaposing the two-part McAuley analysis, the district court found that the earliest time that a material fact existed as to serious consideration—under either test—was January 2000. In particular, the court determined that GM first approached the union with a new SAP proposal on January 9. It deemed GM's preparation of monthly, SAP-related cost/benefits analyses prior to this date as too preliminary to trigger serious consideration. Similarly, the company's focus on a "particular plan for a particular purpose" did not arise until January 2000, with the result that plaintiffs retiring before that date were dismissed from the lawsuit. Further whittling the list of plaintiffs, the district court found that certain retirees would not have been eligible for the SAP due to seniority qualifications, that some had failed to inquire as to potential offers, and that still others had spoken only with the foreman and were not therefore misled by GM representatives "in the know." In the end, no plaintiffs were left standing, and the court entered summary judgment for GM and the unions.

300. Id.
301. Id. at 555.
302. Id. In late 1999, the press reported on the substandard conditions existing at the JOBS Bank worksites to which the employees reported.
303. Id. at n.6.
305. Id. at 556. This requirement had stipulated that GM replace employees who retired. Id. at n.7.
306. Id. at 560.
307. Id.
308. Id.
309. Id. at 556.
311. Id. at 561-63.
312. Id. at 565.
7. The Seventh Circuit

In Flanagan v. Allstate Insurance Co., former employees claimed that Allstate violated ERISA by failing to disclose that the company was considering a severance plan as part of its efforts to convert employees to independent contractors. The company provided severance payments through its newly-established Agent Transition Severance Plan ("ATSP") to employees who left Allstate as of December 1, 1999. The effective date was later amended to include employees who left or retired after June 1, 1999. Employee-agents who had left or converted to independent contractor status prior to the amended date sued Allstate under ERISA for failing to inform them of the new, beneficial severance plan at the time they met with benefits personnel to discuss their departures from Allstate.

The court noted that other courts in its district had already considered the serious consideration question. The district court stated its belief that the Seventh Circuit would recognize a cause of action for breach of fiduciary duty under the serious consideration doctrine. Allstate argued that the doctrine is applicable only to amendments to existing plans, not newly-created ones. Acknowledging that the misrepresentation concerned the creation of a new plan, the court accepted plaintiffs' contention that Allstate already had an existing fiduciary relationship with them under an established ERISA plan. Accordingly, the court found that if the new plan was under serious consideration when the employees made their inquiries to which answers were not given, then there was an

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313. 213 F. Supp. 2d 862, 865 (N.D. Ill. 2001).
314. Id.
315. Id.
316. Id.
317. Id. at 865-66.
318. Id. at 867 (citing Adamczyk v. Lever Brothers Company, 1999 WL 162801, *1, (N.D. Ill. Mar. 15, 1999) ("[W]hen an employee inquires about retirement, an employer or plan administrator has a duty to disclose information about a retirement incentive that is under serious consideration, even if not specifically questioned about the existence of such incentives"); Malone v. Commonwealth Edison Co., 1999 WL 965488, *8, *25 (N.D. Ill. Sep. 30, 1999) ("Although a plan administrator and/or a plan fiduciary . . . is under no duty to say anything at all or to communicate with potential plan participants about the future availability of a VSP, if the administrator or fiduciary does communicate with potentially eligible employees ‘after serious consideration has been given concerning a future implementation or offering under the plan, then any material misrepresentations may constitute a breach of their fiduciary duties.").
319. Id. at 867.
321. Id.
adequate claim for breach of fiduciary duty under ERISA.\textsuperscript{322}

In \textit{Beach v. Commonwealth Edison Co.},\textsuperscript{323} a former employee alleged his employer breached its ERISA fiduciary duty by making misrepresentations to him concerning the possibility of a retirement incentive plan.\textsuperscript{324} Contemplating retirement in the spring of 1997, Beach had questioned his ComEd supervisor and human resource personnel on various occasions to learn whether a retirement incentive program was being planned.\textsuperscript{325} He was repeatedly assured that such a program was not being considered and that even if it was, his department would not be covered.\textsuperscript{326} Beach asked to be kept informed of any new developments.\textsuperscript{327} Six weeks after his June 20, 1997 retirement, ComEd announced a new voluntary severance plan for employees in Beach's former department.\textsuperscript{328}

ComEd urged the court to apply \textit{Fischer I} for the conclusion that no serious consideration of the disputed plan occurred prior to Beach's retirement.\textsuperscript{329} Arguing \textit{Ballone}, Beach suggested a more liberal interpretation of materiality.\textsuperscript{330} The district court, observing that the Seventh Circuit had not committed to either test, applied a \textit{Ballone} materiality analysis.\textsuperscript{331} First, it found serious consideration to have occurred on a range of dates subsequent to Beach's retirement.\textsuperscript{332} As to the second and fifth factors under \textit{Ballone} (how significant the statements misrepresented the present status of the company's internal and the specificity of the statements), the court looked to evidence suggesting ComEd knew, prior to Beach's retirement, of a reorganization that would result in job eliminations and the need for a severance plan.\textsuperscript{333} The court concluded that statements by ComEd human resource representatives that a severance plan would not affect Beach's department could be sufficiently specific for a trier of fact to determine that Beach was misled in making an adequately informed retirement decision.\textsuperscript{334} The court also found that Beach satisfied the "special trust and relationship between

\begin{footnotes}
\textsuperscript{322} \textit{Id.}
\textsuperscript{323} \textit{Id.} at *1.
\textsuperscript{324} \textit{Id.} at *1-2.
\textsuperscript{325} \textit{Id.} at n.4.
\textsuperscript{326} \textit{Id.} at *2.
\textsuperscript{327} \textit{Id.} at *2. The plan included the following: "severance pay, extended health care benefits, life insurance, and education and out-placement assistance." \textit{Id.}
\textsuperscript{330} \textit{Id.} at *4.
\textsuperscript{331} \textit{Id.}
\textsuperscript{332} \textit{Id.} at *5.
\textsuperscript{333} \textit{Id.} at *5-6.
\textsuperscript{334} \textit{Id.} at *6.
\end{footnotes}
Assumption-of-the-Risk Retirement

fiduciary and beneficiary” factor since his trust in his supervisor and human resources representative to provide truthful information was not unreasonable. Finally, the court stated that a reasonable trier of fact could conclude there was no reason why Beach was, or should have been, aware of other information from ComEd tending to diminish the importance of the misrepresentations. In sum, the district court concluded that Beach had gathered sufficient evidence to raise a genuine issue of material fact on the breach of fiduciary duty question.

8. The Eighth Circuit

In a pre-Fischer II decision, the Eighth Circuit held in Wilson v. Southwestern Bell Tel. Co., that “a statement to employees that future incentive programs are not planned can be a misrepresentation if serious consideration has been given to implementing a future program.” On October 19, 1990, Southwestern had announced a cash-based incentive program that provided employees as much as one year’s salary as an incentive to retire early. A written summary of the program distributed to employees a week later stated that the company planned no additional programs “in the foreseeable future.” Southwestern’s vice president for human resources also distributed a letter confirming that the company “absolutely will not enrich the plan, nor will we extend it past year end.” On September 30, 1991, the company unveiled a pension enhancement severance plan that added five years to an employee’s age and service years, and raised pension benefits by fifteen percent for five years. Plaintiffs, who accepted the first severance plan, sued Southwestern for breach of its ERISA duties. They claimed that but for the company’s representations that no additional incentive programs would be offered in the foreseeable future, they would not have retired.

On the issue of serious consideration, the Eighth Circuit maintained that the plaintiffs’ “mere suspicion about what may have been in the back of [the company’s and its officials’] minds” was not enough to withstand summary judgment for Southwestern. The former employees simply failed to assert a question of material fact as to when serious consideration

335. Id.
337. Id.
338. 55 F.3d 399, 405 (8th Cir. 1995).
339. Id. at 404.
340. Id.
341. Id.
342. Id.
343. Id.
344. Id.
345. Wilson, 55 F.3d at 405.
occurred. Moreover, the company's written summary of the incentive program had suggested the need for future incentive plans would be a function of future financial performance.

9. The Ninth Circuit: Bins and Wayne

In *Bins v. Exxon Co.*, the Ninth Circuit expressly adopted and applied the *Fischer II* serious consideration test, and interpreted the standard in the context of a corporate subdivision. Plaintiff Bins, planning to retire in early 1996, sought to confirm rumors circulating during the fall of 1995 that his employer might offer a lump-sum retirement incentive in addition to its regular retirement benefits. To this end, he questioned his supervisors, benefits counselor, a human resources advisor, and his supervisor's supervisor—none of whom could confirm knowledge of such an offering. Bins made no further inquiries as to the possibility of a change in benefits subsequent to December 27, 1995. From December 27 until his retirement on February 1, 1996, he used up accrued vacation and scheduled off-duty days and did not report to the workplace.

During the fall of 1995, Bins' employer was in fact honing several proposals to reorganize Bins' division. This restructuring was to create a 200-employee surplus, for which an accompanying severance allowance program would encourage early retirement. On November 29, 1995, multiple proposals were collectively submitted for review to a manager authorized to implement such an offering. The proposals were reviewed by division officers in early December, and by an Exxon senior vice president on January 11, 1996. The proposals were formally approved by a second Exxon senior vice president on January 26, and announced publicly on February 13, 1996—less than two weeks after Bins' retirement. Granting summary judgment for Bins' employer, the district court rejected the employee's breach of fiduciary duty

346. *Id.*

347. *Id.* at 406. The summary, drafted in question and answer format, stated that future management force reductions would only be necessary if the company failed to grow its business. *Id.* at 404.

348. 220 F.3d 1042, 1049-50 (9th Cir. 2000). The case represented a matter of first impression in the Ninth Circuit. *Id.* at 1051.

349. *Id.* at 1045-46.

350. *Id.* at 1046.

351. *Id.*

352. *Id.*

353. *Id.*

354. *Bins*, 220 F.3d at 1046.

355. *Id.* The manager needed only receive final approval from Exxon to implement such an offering. *Id.*

356. *Id.*

357. *Id.* at 1046-47.
action because he had failed to renew his inquiry as to incentive retirement benefits after January 26, the date upon which EXXON was found to be in serious consideration of an incentive retirement plan. The district court ruled Bins' employer had no affirmative duty under the circumstances to inform him that it was considering a new proposal.

After surveying the various circuits' holdings with respect to employer communications of plan changes in the works, the Ninth Circuit endorsed a modified version of the Fischer II test. The court noted the need for flexibility in applying the test to fact situations that suggested an employer had tailored its activities to evade one of the three test factors. Though the court noted an incomplete record on this point, it suggested that a "specific proposal" may have existed in late November 1995, upon the completion of the multiple reorganization and retirement incentive proposals. As to the second factor, the Ninth Circuit instructed the district court on remand to focus on the scope of the reviews by senior management to determine when the "practicalities of implementation" were first considered. Third, in determining who qualified as "senior management with authority to implement the change," the district court was directed to assess the relationship of the particular division in which Bins was employed to the overall Exxon corporate structure. If the division was found to be a "highly autonomous entity," then the third prong of Fischer II could be met when senior management of that particular division began considering the early retirement proposal.

The Ninth Circuit also addressed the situation in which an employer reaches the serious consideration stage subsequent to (truthfully) informing an inquiring employee that no serious consideration had occurred. Here, the court held that an employer-fiduciary would not incur a duty to "follow-up" with an employee regarding proposed changes unless it agreed to do so. An employer would have a fiduciary duty to so notify the employee only upon providing assurances that it would keep an employee

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358. Id. at 1047.
359. Id.
360. Bins, 220 F.3d at 1048-49.
361. Id. at 1049. The court rejected a "formalistic" application of the test that would give the benefit of the doubt to employer-fiduciaries who complied with the words of the test—if not its spirit. Id. at 1049-1050.
362. Id. at 1050.
363. Id. at 1051.
364. Id. at 1052.
365. Id. This inquiry would focus on the extent to which the division was self-managed. Bins, 220 F.3d at 1052.
366. Id. at 1053.
informed of potential changes. Absent such assurances, the fact that an employer eventually arrived at the serious consideration stage subsequent to the employee’s inquiry would not "independently give rise to a fiduciary obligation to volunteer information." 

In a case falling "squarely under" the authority of Bins v. Exxon, the district court found no serious consideration to have occurred prior to the plaintiff's retirement in Reimering v. Retirement Pension Plan of the California State Automobile Association. Reimering alleged the defendants failed to disclose to him an enhanced retirement incentive ("ERI") plan under serious consideration at the time of his retirement. Reimering retired on October 31, 1997. Offered in April 1998, the ERI provided a 75% increase in benefits—but was not available to employees retiring prior to November 18, 1997. Defendants argued that a specific proposal was not under serious consideration prior to November 18, 1997, the date a human resources vice president pitched a proposed downsizing strategy to company executives. The district court agreed that a specific proposal presenting options "in sufficient detail to permit management to discuss the practicalities of implementation" did not exist until the November 18 meeting. In addition, the court found that Reimering had failed to officially inquire regarding a change in benefits packages. The court rejected his assertion that by announcing his retirement and completing certain retirement forms, he had effectively asked for information as to potential policy changes. For want of an explicit inquiry, the court granted defendants' motion for summary judgment.

367. Id. at 1054. An employer's duty to "follow up" as promised was premised on the notion that the employer anticipate that an employee might rely to his or her detriment upon the employer's silence, which would implicitly convey the message that no serious consideration exists. Id. (citing Varity, 516 U.S. at 505). See generally Krohn v. Huron Memorial Hosp., 173 F.3d 542 (6th Cir. 1999) (holding that the duty to inform participants encompasses both a negative duty not to misinform and an affirmative duty to inform when a trustee knows that silence could be harmful).

368. Bins, 220 F.3d at 1054.
370. Id. at *1.
371. Id. The November 18 date was, in fact, a retroactive reachback.
372. Id. at *3.
373. Id. at *4.
374. Id.
375. Id.
376. Reimering, 2001 WL 114442 at *6. The court discounted Reimering's claim that the company's General Counsel had stated to him, during a cafeteria lunch room conversation on plaintiff's last day of work, that nothing was going to happen that would make plaintiff's pension check bigger. Id. at *4.
The Ninth Circuit found serious consideration to have occurred prior to the plaintiff-employees' retirement in Wayne v. Pacific Bell.\textsuperscript{377} In Wayne, plaintiffs claimed that Pacific Bell failed to inform them it was seriously considering a proposal to implement a more favorable early retirement program.\textsuperscript{378} Pacific Bell announced its initial early retirement incentive program on June 1, 1995.\textsuperscript{379} At this meeting, management representatives replied to employee inquiries as to the likelihood of future such plans by stating that no funds would be available for subsequent early retirement offers.\textsuperscript{380} The plaintiffs had been required to accept the initial plan during a one-month window period from June 1 to June 30. On June 19, however, Pacific unveiled a new, enhanced early retirement program as part of a collective bargaining process with the plaintiffs' union.\textsuperscript{381}

Applying Fischer II as modified by Bins, the Ninth Circuit concluded that serious consideration had begun prior to the June 19 meeting.\textsuperscript{382} By this date, the new program had been reviewed by a high-level steering committee and offered to the union.\textsuperscript{383} Pacific Bell argued that no serious consideration occurred by June 19 because the union had not yet accepted.\textsuperscript{384} Rejecting this argument, the court held that whether the union had ultimately accepted Pacific Bell's new enhanced proposal was not determinative of whether the company had given serious consideration under Bins.\textsuperscript{385} The court also held, per Ballone, that an employer fiduciary "may not actively misinform its plan beneficiaries about the availability of future retirement benefits to induce them to retire earlier than they otherwise would, regardless of whether or not it is seriously considering future plan changes."\textsuperscript{386} The district court was instructed on remand to assess serious consideration without regard to the pendency of collective bargaining.\textsuperscript{387}

Mathews v. Chevron Corp.\textsuperscript{388} involved several former Chevron employees who claimed they would have received greater benefits

\textsuperscript{377} 238 F.3d 1048, 1054 (9th Cir. 1999), cert. denied, 543 U.S. 814 (2001).
\textsuperscript{378} Id. at 1050.
\textsuperscript{379} Id. at 1051.
\textsuperscript{380} Id. In truth, the company's actuarial services group had determined the pension fund, if left to grow, would be overfunded by $1.6 billion by the year 2000. Id. at 1052.
\textsuperscript{381} Id. at 1053.
\textsuperscript{382} Id. at 1054.
\textsuperscript{383} Wayne, 238 F.3d at 1054.
\textsuperscript{384} Id.
\textsuperscript{385} Id.
\textsuperscript{386} Id. at 1050-51 (citing Ballone v. Eastman Kodak Co., 109 F.3d 117, 124 (2d Cir. 1997).
\textsuperscript{387} Id. at 1055-56.
\textsuperscript{388} No. C 00-04824 WHA, 2002 WL 826804 (N.D. Cal., Apr. 23, 2002).
had they postponed their respective retirements and participated instead in the company workforce reduction incentive plan. The plaintiff-employees, who claimed they received misinformation as to the potential availability of the incentive plan, sued their employer for breach of its ERISA fiduciary duty. At issue in Mathews was a workforce reduction “benefit” known as the Special Involuntary Termination Enhancement (“SITE”). Participants involuntarily terminated without cause during SITE window periods received enhanced benefits. A feature called the SITE solicitation letter allowed employees to “nominate” themselves for involuntarily termination and eligibility for SITE benefits.

The general manager at the plaintiffs’ refinery was committed to reducing the plant workforce through attrition only, and had repeatedly rejected the SITE program. Responding to employee inquiries as to the future availability of involuntary termination benefits, he consistently maintained that employees would not be terminated except for cause. His views were posted on the company website, where he confirmed that “we are not planning to have a severance package here [voluntarily or involuntarily] in the foreseeable future.” In a website comment posted in early March 1999, the manager described his promise not to involuntarily terminate employees. He conceded that a corporate severance policy was under development, but stated there was no need for such a policy at plaintiffs’ refinery. Relying on these representations to varying degrees, the plaintiff-employees retired from Chevron over a period spanning February to July, 1999. Throughout the spring of that year, the manager had been consulting with his supervisor and the five other Chevron refinery general managers regarding the need for SITE benefits. In May 1999, the manager recanted his attrition-only views, permitting employees at his refinery to submit SITE solicitation letters. Since all but one of the plaintiff-employees had already retired by this point, they could not partake in SITE benefits.

389. Id. at *1.
390. Id.
391. Id.
392. Id.
393. Id. Known as the “self tap” feature. Id.
395. Id. at *2.
396. Id. at *3. The manager also voiced his marked opposition at town-hall style meetings held at the refinery where plaintiffs’ worked. Id. at *4.
397. Id. at *3.
398. Id. at *3-4.
399. Id. at *4.
401. Id. at *4.
402. Id.
The district court concluded that *Fischer II* serious consideration occurred in mid-April, when the general managers collectively determined that SITE solicitation letters should be sent to human resource personnel at each of the Chevron refineries. As to the plaintiffs, all of whom were rank-and-file employees, the court determined that a specific proposal existed—at the very earliest—in May 1999.

10. The Tenth Circuit

The Tenth Circuit adopted the *Fischer II* serious consideration test in *Hockett v. Sun Co., Inc. (R&M)*, where it established that there was "no intersection of the three *Fischer II* factors" prior to the time that all employee benefits department heads, and both the presidents of the subject parent and subsidiary corporations, met to discuss a specific voluntary termination proposal. More recently, in *Winkel v. Kennecott Holdings Corporation*, the court addressed whether an employer was bound as an ERISA fiduciary to provide employees contemplating retirement information about severance plans. Less than one month after Winkel's retirement, Kennecott publicly announced an involuntary severance plan through which Winkel could have earned a greater benefit. The retiree sued his former employer for breach of ERISA fiduciary duty on the ground that Kennecott failed to disclose to him that it was considering adoption of the ERISA-covered severance plan. Ruling that the severance plan was not under serious consideration, the court did not reach Kennecott's argument that *Fischer II* should not apply to

403. *Id.* at *9*. Throughout the various refineries, the human resource staff in particular was in need of reduction. *Id.*
404. *Id.* at *10*.
405. *Id.*. *Hockett*, 109 F.3d 1515, 1522-24 (10th Cir. 1997) ("[W]e believe the *Fischer II* standard protects employees' access to material information without discouraging employers from improving their ERISA plans in the first place."). The court observed that:

[as a practical matter, an employer's "consideration" of an ERISA plan can fall anywhere along a continuum, beginning with the most casual mention of a possible plan change and ending, perhaps, with a formal vote by the Board of Directors. Between these two extremes are many stages of research, analysis, and debate, which only some proposals will survive. "Serious consideration" marks the point on the continuum at which imposing fiduciary-related duties will best serve the competing congressional purposes.

*Id.* at 1522. *See also* Maez v. Mountain States Tel., 54 F.3d 1488, 1500 (10th Cir. 1995); Mullins v. Pfizer, 147 F. Supp. 2d 95, 109 (D.Conn. 2001).
407. *Id.* at 700-01. Instead of being a retiree, Winkel would have been terminated in order to partake in the more generous severance benefits. *Id.*
408. *Id.* at 699.
involuntary severance plans.\textsuperscript{409} The district court granted summary judgment for Kennecott on this point.\textsuperscript{410} Applying \textit{Fischer II}, the Tenth Circuit concluded that serious consideration did not occur prior to Winkel's last day of work, as opposed to the effective date of his retirement more than one month later.\textsuperscript{411} As of his last day of work, the court reasoned, Winkel's retirement decision was irrevocable; he had cleaned out his desk: turned in his keys, had no intention of returning to work, and his replacement had already been hired.\textsuperscript{412} Viewing the facts as of Winkel's "last day," the court concluded that the employer had not yet given serious consideration to its severance plan.\textsuperscript{413}

11. The Eleventh Circuit:

In 1991's \textit{Barnes v. Lacy}, \textsuperscript{414} a case pre-dating \textit{Fischer II}, the Eleventh Circuit held that an employer did not mislead its employees with respect to its intention to introduce subsequent early retirement plans.\textsuperscript{415} In late 1985, the company had announced its Voluntary Early Retirement Opportunity plan ("VERO"), available to those employees eligible for early retirement as of January 1, 1986.\textsuperscript{416} Nine of the more than forty employees who retired under the plan subsequently sued the company, alleging they had been induced to leave by misleading or ambiguous company representations regarding the VERO.\textsuperscript{417} The claim arose when the company announced a new retirement plan two years after VERO, which offered greater benefits than the first plan.\textsuperscript{418} The plaintiffs alleged that VERO had been presented to them as a "one-time offer" such that they would have no opportunity for a better retirement package than the one currently being offered.\textsuperscript{419} At trial, the company established that it had not in fact intended to offer a subsequent early retirement plan at the time the first was announced.\textsuperscript{420} The trial court held that the company misled the plaintiffs by not disclosing the reservation of its right to make such benefits available in the future.\textsuperscript{421}

Emphasizing the district court's findings that the company

\textsuperscript{409} Id. at 702-03. In a footnote, the court suggests the \textit{Fischer II} test should indeed apply to involuntary severance plans.
\textsuperscript{410} Id. at 708.
\textsuperscript{411} Id. at 703.
\textsuperscript{412} Winkel, 3 Fed. Appx. at 704.
\textsuperscript{413} Id. at 703-05.
\textsuperscript{415} Id. at 544.
\textsuperscript{416} Id. at 541.
\textsuperscript{417} Id.
\textsuperscript{418} Id.
\textsuperscript{419} Id.
\textsuperscript{420} Id.
\textsuperscript{421} \textit{Barnes}, 927 F.2d at 542.
had no intention to mislead its employees, and that it had not contemplated further retirement offers, the Eleventh Circuit stated that the company's "one-time offer" comments regarding VERO were not misleading.\textsuperscript{422} It further noted that the summary plan description upon which the incentive retirement plans were added expressly stated the company's power to amend its plans.\textsuperscript{423} The fact that its representations were susceptible to misinterpretation was not a ground for liability where the company had made no untrue statements. In the Eleventh Circuit's view, the district court had placed "an unreasonable burden upon [the company] to predict future, unintended events."\textsuperscript{424} Citing Berlin, the court concluded that the company could only be liable if a predictive statement on its part had constituted a material misrepresentation—such as if it had stated a second plan was not under serious consideration when in fact it was.\textsuperscript{425} On the record before it, the court held that the company had not made a material misrepresentation.\textsuperscript{426}

Six years later, in Moore v. Florida Progress Corporation,\textsuperscript{427} the Eleventh Circuit formally adopted the Third Circuit's Fischer \textit{II} formulation of serious consideration over the Second Circuit's analysis in Ballone. Plaintiffs, retired employees of Florida Power Corporation, asserted that their employer misled them as to the implementation of a more favorable retirement plan after their departure from the company.\textsuperscript{428} The employees had retired on December 31, 1992, to escape changes to Florida Progress' post-retirement health insurance—effective for 1993—that added a new medical coverage co-payment and Medicare carve-out.\textsuperscript{429} Prior to retiring, the plaintiffs had been assured by senior company representatives that no "early out" retirement plans were under examination.\textsuperscript{430} In November and early December 1992, the company had worked with Buck Consultants, which had gathered cost data for several early retirement window options.\textsuperscript{431} By year's end, however, Florida Power's CEO had deemed the cost-saving alternatives to be unfeasible.\textsuperscript{432} In May 1993, company representatives brought back Buck for further cost analyses; by November, Florida Power's Compensation Committee had

\begin{enumerate}
\item Id. at 543.
\item Id.
\item Id. at 544.
\item Id.
\item Id. at 544.
\item Id.
\item Id.
\item Id. at *1.
\item Id. at *6.
\item Id.
\item Id. at *6.
\item Id. at *8.
\item Id.
\end{enumerate}
approved an enhanced retirement income plan to be effective January 1, 1994.433

Plaintiffs claimed that senior company representatives must have known of the new incentive plan as of late 1992, and thereby breached their ERISA obligations by stating they knew of no such plans.434 Adopting Fischer II, the Eleventh Circuit emphasized that the company had temporarily abandoned its exploration of early retirement options as of the end of 1992.435 Serious consideration, it concluded, did not occur until May 1993, when Florida Power renewed its discussions with Buck Consultants.436 Further, senior management did not consider the changes until that August.437 Finally, the senior officials were the plaintiffs' longstanding colleagues, and there was no credible evidence that they had lied to the plaintiffs.438 The court ordered that judgment be entered in favor of Florida Power.439

III. SILENCE AT A PRICE: THE SAFE HARBOR LOOK-BACK

Inevitably, as the case law demonstrates, a certain subset of employees will retire just prior to an employer's announcement of a new early retirement incentive program. The case law further reveals that while a fiduciary has no duty to volunteer its knowledge of such an incentive program, the fiduciary must speak truthfully when asked if a program is being planned—and in particular when such program has received "serious consideration" by those individuals with the authority to bring it about. Despite the widespread acceptance of the standard, enunciated in Fischer II, that a purported misrepresentation is not material unless a proposed program is under "serious consideration," the application of this test remains problematic.440 It must also be noted that not all jurisdictions follow Fischer II as the standard for the "materiality" in this context. As discussed above, the Second Circuit continues to adhere to a more expansive test in which serious consideration is "but one aspect" of the materiality of an alleged misrepresentation.441 In addition, the Fifth Circuit has recently rejected "serious consideration" in favor of a fact specific approach. The potential for other alternatives of course exists, as illustrated by the "irrevocably implemented" standard advocated

433. Id. at *9.
435. Id. at *14.
436. Id. at *15.
437. Id.
438. Id. at *15-16.
439. Id. at *16.
440. Fischer II, 96 F.3d at 1539.
by the defendants in *Martinez v. Schlumberger*.

Even in the circuits that do apply "serious consideration" or a variation of that standard, the courts have continued to struggle with issues such as who is sufficiently "senior"—as between upper echelon management and department division heads—to be deemed authorized to make decisions of "serious consideration" significance. Similar questions surround the issues of proposal specificity and the level of review that constitutes "consideration."

Given the uncertainty in what would appear to be a straightforward standard, an alternative, bright-line standard may be helpful. One such alternative would be to amend ERISA to exempt employers and fiduciaries from the duty to address participant inquiries regarding incentive programs under development or consideration until they are formally announced.

In exchange, the employer would be required to offer the newly-announced incentive program to any employee who retired within a specified look-back period (e.g., three months or six months) preceding the announcement date. Employees retiring prior to the look-back would not receive the benefit of the enhanced program—effectively assuming the risk of their decision to retire.

The proposed pre-announcement safe harbor would not be a license for employers to affirmatively misrepresent the status of planned programs. To the extent any fiduciary volunteered information regarding such a program, or addressed participant inquiries on the subject, the individual could breach his/her fiduciary duty by materially misrepresenting such proposals. However, should the fiduciary opt not to discuss such programs pre-announcement, there would be no resulting fiduciary violation. As with any bright-line standard, the "safe harbor look-back" would result in arbitrary outcomes for certain retirees. Depending on the length of look-back, however, the proposal could be drafted so as to be generous to recent retirees—thereby extracting a significant price for pre-announcement silence. Should the courts continue to narrow their interpretation of the *Fischer II* elements, such a proposal could offer a welcome alternative to serious consideration.

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443. *Martinez*, 191 F. Supp. 2d at 852. This is already the law in the Fifth Circuit, which held in *Martinez* that an employer has no fiduciary duty to affirmatively disclose whether it is considering changes to a benefits plan.