STICKS AND STONES

A Legal Analysis of Employer Liability for Communications to Employees About Benefit Plans

Hugh O'Reilly and Katrina Wyman

Reprinted with the permission of the Estates, Trusts and Pension Journal. This paper will be published in Volume 19 of the Journal.

I INTRODUCTION[1]

It would seem that by their very nature pensions and benefits are difficult to understand. Pension plans are subject to regulation and complex legislative schemes. Non-pension benefits contain numerous exclusions, conditions and other limitations on coverage. Simply administering employee pension and non-pension benefit plans requires the deployment of a small army of human resource professionals, insurance company employees, actuaries, consultants and lawyers.

As a result of this complexity, employees and other plan beneficiaries often find the terms of their pension and non-pension benefit coverages difficult to assess. In concrete terms, this means that employees are frequently unaware of the specific terms of their pension and benefit plans and that employees may receive less from their plans than they should. In addition, employees may lack sufficient information to make the best choices in times of need or at particularly important decision points (e.g. when taking early retirement).

From the point of view of employees, the need for information about pensions and non-pension benefits is only growing because benefit plans increasingly shift responsibility to participants to determine the amount of their retirement income and to select the types of non-pension benefit coverage that they and their families will receive. For example, defined contribution pension plans and group registered retirement savings plans place the responsibility for selecting investments on plan participants. Under these plans, participants ultimately determine the amount of their retirement income through the investments they select. Similarly, flexible benefit plans require plan participants to select their non-pension benefits on the basis of a fixed menu of benefit options and a certain number of dollars to be used for purchasing benefit options. In many cases, any dollars not used for benefits are returned to employees in the form of cash. While these plans often have group life and long-term disability default options, employees assume the ultimate responsibility for making the best benefit choices.

[1] This paper was initially prepared for an October 1998 Centrum conference. The paper has benefitted greatly from comments made by Dona Campbell.

Employers are aware of the need of employees for information about pensions and benefits. Consequently, employers work to provide it by communicating with employees and plan beneficiaries. However, communications may create legal liability for employers.

In the United States, for example, there is considerable case law arising from the failure of employers to accurately communicate about pensions and other benefits as required under the *Employee Retirement Income Security Act*.[2] American courts have held that a booklet summarizing a benefit plan prevails over the terms of the plan documents in the event of a conflict.[3] Moreover, the United States Supreme Court recently found in *Varity Corp.* v. *Howe* for a group of employees whose former employer had deliberately misled them about the security of their benefits in order to induce them to transfer to a new division.[4] Of course, American courts have not ignored the arguments of employers and employers have recently achieved victories in several notable cases.[5]

---

[2] 29 U.S.C.A., s. 1001-1461 [hereinafter *ERISA*]. See generally D. M. Muir, "Truth or Consequences: *Varity* v. *Howe* and Beyond" (1998) 13 The Labor Law. 411; R. P. Barry, "*ERISA's* Purpose: The Conveyance of Information from Trustee to Beneficiary" (1999) 31 Conn. L. Rev. 735 [hereinafter "*ERISA's* Purpose"]; H. H. Rossbacher, J. S. Cahill & L. L. Griffis, "*ERISA's* Dark Side: Retiree Health Care Benefits, False Employer Promises and The Protective Judiciary" (1997) 9 DePaul Bus. L .J. 305 [hereinafter "*ERISA's* Dark Side"]; "*'Accuracy Is Not A Lot To Ask*:' Applying *Contra Proferentum* To Employer Disclaimers, Summary Plan Descriptions & *ERISA*" (1996) 47 Labor Law Journal 283 [hereinafter "*'Accuracy Is Not A Lot To Ask*'"]; and W.H.Boies, N.G. Ross & C. Mathews, "Communicating With Employees About Benefits -- A Central Issue in *ERISA* Litigation" in Practising Law Institute Litigation and Administrative Practice Course Handbook Series, Litigation PLI Order No. H0-001N (October, November, 1998) (27th Annual Institute on Employment Law), online: WL (TP-ALL) [hereinafter "Communicating With Employees About Benefits"].

[3] *McKnight* v. *Southern Life and Health Insurance Company,* 758 F.2d 1566 at 1570 (11th Cir. 1985) ("It is of no effect to publish and distribute a plan summary booklet designed to simplify and explain a voluminous and complex document, and then proclaim that any inconsistencies will be governed by the plan. Unfairness will flow to the employee for reasonably relying on the summary booklet.")]. See also *Edwards* v. *State Farm Mut. Auto. Ins. Co.,* 851 F.2d 134 at 136 (6th Cir. 1988). See generally "*ERISA's* Dark Side", *supra* note 2 at 314.

The backdrop to American decisions giving legal weight to summary plan documents is the requirement under *ERISA* to provide a summary plan description to benefit plan participants that meets prescribed standards: *ERISA*, *supra* note 2, s.1022(a) and s. 1024.

[4] *Varity Corp.* v. *Howe et al.*, 516 U.S. 489 (1996) [hereinafter *Varity*]. See also *In Re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.,* 57 F.3d 1255 (3rd Cir. 1995), *cert. denied*, 116 S.Ct. 1316 [hereinafter *Unisys*] (affirming lower court ruling that retirees may maintain a claim for breach of fiduciary duty under *ERISA* for the termination of their medical benefits). But see *In Re Unisys Corp. Retiree Med. Benefit "ERISA" Litig*., 957 F.Supp. 628 (E.D. Pa. 1997).

[5] See *Sprague* v. *General Motors Corp.,* 133 F.3d 388 (6th Cir. 1998), *cert. denied*, 118 S. Ct. 2312 [hereinafter *Sprague*] (General Motors allowed to reduce health care benefits for retirees even though there was considerable evidence they had been promised fully paid up lifetime health care benefits); and *Frahm* v. *Equitable Life Assur. Soc. Of U.S.*, 137 F.3d 955 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 55 [hereinafter *Frahm*] (Equitable Life Assurance allowed to reduce health benefits for retired agents). See generally "*ERISA's* Dark Side", *supra* note 2.

Although there has been considerably less litigation in Canada arising from communications about pensions and benefits, Canadian courts have also held that communication materials, and not the terms of the particular pension or benefit plan, should govern in certain circumstances. For example, in *Deraps* v. *Labourers' Pension Fund of Central and Eastern Canada*, the Ontario Court of Appeal recently found for a widow who was not told prior to signing a spousal waiver that signing it would mean that she could not collect a spousal pension after her husband's death.[6] The defendants in *Deraps* were the trustees of the pension plan and a pension plan advisor but employers have been held accountable in other cases for misleading communications about pensions and other benefits. As a result of this case law, employers must be careful about how they communicate at all points in the employment cycle: during the interview process, during the active period of employment, and at the time that employees resign, retire or are dismissed.

The purpose of this paper is to help employers communicate with their employees in a way that will be mindful of the legal risks associated with such communication. This paper will set out the following:

(i) the legal framework that applies to employee communications in Canada; and

(ii) practical approaches for avoiding liability.

This article focuses on employer liability for communications about pension and non-pension benefit plans in Canada by reviewing applicable Canadian case law. In addition, American cases are mentioned to illustrate directions that Canadian courts may take in the future.

[6] [1999] O.J. No. 3281 (C.A.), online: QL (OJ) [hereinafter *Deraps*].

II THE LEGAL FRAMEWORK

The first and most important consideration to note is that Canadian courts view the employment relationship as a special relationship. In *Wallace* v. *United Grain Growers Ltd.* the Supreme Court of Canada (the "SCC") stated that this special relationship has two significant features.[7] First, unlike an ordinary commercial relationship that is evidenced by a contract, in the employment context there is no presumption of equal bargaining power. Instead, the SCC recognized that the employment relationship is characterized by a power imbalance in which the employer has the upper hand not just in the negotiation of the terms of a particular employment contract, but in all aspects of the employment relationship.[8] Second, the SCC observed that work is a defining feature in a person's life and any changes in the work place will have far reaching repercussions on the employee in all aspects of the employee's life.[9]

These statements in *Wallace* suggest that Canadian courts will be mindful of the power imbalance in any dispute between an employee and an employer which arises as a result of any ambiguity in communications made to the employee. Moreover, as a result of this view of the employment relationship, a court may well conclude that employers are bound by statements that were made in communication materials that were not intended to have a legal effect. Courts have already suggested that employers may be legally bound by statements made

---

[7](1997), 152 D.L.R. (4th) 1 (S.C.C.) [hereinafter *Wallace*]. There were two sets of reasons in *Wallace*. Justice Iacobucci wrote for the majority, describing the employment relationship in the terms discussed above. Justice McLachlin authored a separate opinion, concurring and dissenting in part. However, Justice McLachlin implicitly endorsed Iacobucci J.'s view of the employment relationship at 45 ("As Iacobucci J. points out, employment contracts have characteristics quite distinct from other types of contracts as a result of the often unequal bargaining power typically involved in the relationship.")

[8] *Wallace, supra* note 7 at 33, per Iacobucci J.

[9] *Wallace, supra* note 7 at 34, per Iacobucci J.

in brochures,[10] pension estimates,[11] the employer's annual report,[12] other documents[13] and oral statements.[14]

In any case involving communications to employees, the facts of each case will play an important role in a court's determination of liability. As a result, it is difficult to articulate a set of fixed procedures or principles that will allow an employer to avoid liability for communications in all cases.

However, a review of the relevant case law suggests that there are two principal legal bases for holding employers liable for pension and benefit communications: the tort of negligent misrepresentation and contract law, in particular the principle of estoppel. These two possible bases of legal recovery are discussed separately below. Tort imposes a general duty on employers provided certain conditions are met while contractual principles can form the basis of recovery only if the relationship between the plaintiff and the defendant is governed by contract,

---

[10] *Baillie* v. *Crown Life Insurance Co.* (1998) 217 A.R. 253 at 261 and 263 (Q.B.). See also *Harris* v. *Robert Simpson Company Ltd.,* [1985] 1 W.W.R. 319 at 327 (Alta. Q.B.) [hereinafter *Harris*].

[11] See *Manuge* v. *Prudential Assurance Co. Ltd.* (1977), 81 D.L.R. (3d) 360 [hereinafter *Manuge*]. In *Manuge*, a third party carrier, not the plaintiff's former employer, was held liable for providing an erroneous pension estimate.

[12] *Stelco Inc.* v. *Ontario (Superintendent of Pensions)* (7 July 1993), PCO Bulletin Vol. 4, Issue 1 (August 1993) 40, aff'd 4 C.C.P.B. 108 (Div. Ct.), varied on other grounds (1995), 126 D.L.R. (4th) 767 (C.A.), varied on other grounds, leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 481, online: QL (SCCA).

[13] *Bathgate* v. *National Hockey League Pension Society* (1992), 11 O.R. (3d) 449 (Gen. Div.), varied (1994), 16 O.R. (3d) 761 (C.A.), leave to appeal to S.C.C. refused [1994] S.C.C.A. No. 170, online: QL (SCCA) [hereinafter *Bathgate*]. The Court of Appeal slightly varied the original judgement of Adams J. in light of a submission made by an intervenor.

[14] See for example *Queen* v. *Cognos* (1993) 99 D.L.R. (4th) 626 (S.C.C.) [hereinafter *Cognos*]; *Ford* v. *Laidlaw Carriers Inc.* (1993), 1 C.C.P.B. 97 (Gen. Div.), aff'd in part (1994), 12 C.C.P.B. 179 (Ont. C.A.), leave to appeal to S.C.C. refused (1995), 191 N.R. 400 [hereinafter *Ford*]; *Campbell* v. *Board of Administrators of Teachers' Retirement Fund* (1993), 110 D.L.R. (4th) 400 at 403-405 (Alta. Q.B.) (pension plan administrator liable for information provided in response to telephone inquiry and repeated several years later in writing).

In the United States, the case law tends to emphasize that *ERISA* exhibits a "strong policy preference for the primacy of the written word over conflicting oral representations": *Radley* v. *Eastman Kodak Cl.*, 19 F.Supp.2d 89 at 102 (W.D.N.Y. 1998). See also *Curtiss-Wright Corp.* v. *Schoonejongen et al.*, 514 U.S. 73 at 83 (1995) ("ERISA … has an elaborate scheme in place for enabling beneficiaries to learn their rights and obligations at any time, a scheme that is built around reliance on the face of written plan documents"); *Sprague, supra* note 5 at 402-403, per Nelson J.; and *Frahm, supra* note 5 at 958 and 960. But see *Curcio* v. *John Hancock Mut. Life Ins. Co.*, 33 F3d 226 (3rd Cir. 1994) (employer liable for misrepresentations in oral and written communications although Court emphasizing at 236, note 17 that employer distributed written material in addition to making oral representations); and *Unisys, supra* note 4. Cases emphasizing the primacy of written documentation about benefits appear to do so based on the disclosure requirements in *ERISA* and a belief that certainty advances the interests of employers and employees.

as it generally will be in a case where an employee is seeking redress from his or her employer. Given that tort is regarded as imposing a general duty, parties whose relationship is governed by contract are able to sue "in either or both, except where the contract indicates that the parties intended to limit or negative the right to sue in tort."[15]

This article will address the elements of the tort of negligent misrepresentation and then turn to an analysis of the applicable contractual principles.

1. Negligent Misrepresentation

As a result of the SCC's decision in *Cognos* and subsequent case law, it is clear that an employer can be found liable on the basis of negligent misrepresentation for mistakes in communications about pensions and benefits.

An employer would be liable for a misrepresentation if it was demonstrated that:

1. the employer owed the plaintiff a duty of care based on a special relationship;

2. the misrepresentation made by the employer was "untrue, inaccurate or misleading;"

3. the employer was negligent in making the misrepresentation;

4. the negligent representation was relied on by the plaintiff in a reasonable manner on; and

5. the plaintiff suffered damages as a result of relying on the representations made by the employer.[16]

---

[15] *BG Checo International Ltd.* v. *British Columbia Hydro and Power Authority* (1993), 99 D.L.R. (4th) 577 at 584, per La Forest and McLachlin JJ. (S.C.C.) [hereinafter *BG Checo*]. "The most common means by which" parties indicate their intention that tort liability not bind them "is the inclusion of a clause of exemption or exclusion of liability in the contract": *ibid.* at 585.

[16] These five requirements are identified in *Cognos, supra* note 14 at 643, per Iacobucci J.

(a) Duty of Care Based on a Special Relationship

To recover under the legal rubric of negligent misrepresentation, a plaintiff must establish that he or she was owed a duty of care by the defendant. Based on *Hercules Managements Ltd.* v. *Ernst & Young*,[17] a plaintiff is owed a duty of care for negligent misrepresentation if the plaintiff can establish two principal elements. First, the plaintiff must establish that he or she is owed a *prima facie* duty of care because (1) the defendant ought reasonably to have foreseen that the plaintiff would rely on the defendant's representation, and (2) it was reasonable for the plaintiff to rely on the defendant's representation in the circumstances. Second, assuming that there is a *prima facie* duty of care, there must be no policy considerations militating in favour of limiting or eliminating this duty. In negligent misrepresentation cases, a key policy consideration is the potential for indeterminate liability. The courts are unlikely to impose liability if the defendant did not know the identity of the plaintiff (or the class of plaintiff) or if the defendant's statements were not used for the specific purpose for which they were made.[18]

The legal principles set out in *Hercules Managements* are applicable to employee communications.[19] This is the case because it is eminently foreseeable that employees will use the information in communication materials about pensions and benefits to make choices since the materials are intended to explain how benefit plans work. Moreover, since the communication materials are almost certainly going to be the only information that an employee receives about pension and benefit plans, relying on the materials is likely to be reasonable in the circumstances. Finally, imposing a duty on an employer in respect of pension and benefit communications is unlikely to create indeterminate liability. Employees are known to employers either individually or as a class, and employees will generally use employer communications about pensions and benefits for the purpose for which they were prepared -- to make choices about benefits or employment status.

---

[17] [1997] 2 S.C.R. 165 [hereinafter *Hercules Managements*].

[18] See *Hercules Managements, supra* note 17 at 198.

[19] For examples of cases pre-dating *Hercules Managements* in which employers were found to owe employees a duty of care for negligent misrepresentations about pensions or other benefits see *Spinks* v. *Canada*, [1996] 2 F.C. 563 (F.C.A.) at 580 [hereinafter *Spinks*]; *Lehune* v. *Kelowna (City)*, [1993] B.C.J. No. 2451 (S.C.), online: QL (BCJ), aff'd in part (1994), 98 B.C.L.R. (2d) 135 (C.A.) [hereinafter *Lehune*]; *Ford*, *supra* note 14.

It is also possible that employers will be considered to owe a duty of care to the spouses of employees and other beneficiaries of employees.[20] For example, in *Deraps*, the Ontario Court of Appeals held that a duty of care was owed to the wife of a member of a pension plan, as well as to the member.[21] However, it must be emphasized that the wife was known to the defendants in *Deraps* at the time that information about benefits was provided. Furthermore, the wife participated in the benefits selection process, at least to the extent of signing a waiver that eliminated her right to receive a spousal pension. Accordingly, the extent to which an employer will be found to owe a duty of care to beneficiaries of employees will depend upon the facts of each case.

(b) To be a "Misrepresentation" a Statement Must be Untrue, Inaccurate or Misleading

The second requirement set out in *Cognos* for an action based on negligent misrepresentation is that the statement at issue "must be untrue, inaccurate or misleading."[22] In elaborating on this requirement, the SCC stated that it preferred "a flexible approach" for determining when statements give rise to liability and refused to hold that "express or direct representations"[23] were required. In order to better illustrate what is meant by a misrepresentation it is necessary to set out the ways in which a misrepresentation may be found to be "untrue, inaccurate or misleading" by a court.

Straight Untruths

A representation will be considered to be a straight untruth if it is simply untrue. For example, a pension statement that sets out an erroneous estimate of the value of an employee's pension will be an untrue misrepresentation.[24]

---

[20] See for example *Lehune*, *supra* note 19 at para. 3 (implying that an employee and his spouse were owed a duty of care). See also *Watson Estate* v. *Canada Mortgage & Housing Corp*. (1995), 7 C.C.P.B. 87 at 94 (Alta. Q.B.) (Florence Watson failed on the fourth *Hedley Byrne* test of reliance in a reasonable manner) [hereinafter *Watson*].

[21] See *Deraps, supra* note 6 at para. 53.

[22] *Cognos, supra* note 14 at 643, per Iacobucci J.

[23] *Cognos, supra* note 14 at 659, per Iacobucci J.

[24] See for example *Manuge, supra* note 11.

Implied Misrepresentations

Implied misrepresentations may lead to a finding of liability against the employer. For example, in *Cognos*, statements made to a prospective employee in the course of an interview were found to be actionable because they amounted to implied misrepresentations that funding for the project for which the employee was being hired was secure. Since the funding was not secure and the plaintiff left a previous job on the basis that the funding would be secure, the employer was found to have misrepresented the situation.

Omissions

A statement that is technically correct but misleading because it leaves out certain information may also constitute a representation. In *Deraps*, for example, the pension counsellor's "failure to advise Monique Deraps ... that she would receive nothing when her husband died if she signed the [spousal] waiver" was held to be a misrepresentation.[25] Similarly, in *Lehune*, it was held to be a misrepresentation to have stated that a retiring employee's group life insurance benefit could not be carried on after his retirement and that it would be very costly to carry on the policy if it could be maintained. The statements were misleading because the group life policy could have been converted to a single life policy and the comment as to cost was not supported with additional information.[26] Again in *Spinks*, a misrepresentation was found to have occurred because an employee was not informed that he could buy-back his previous years of pensionable service with the Australian government.[27]

The decisions in *Lehune* and *Spinks* suggest that an omission in the context of an employment relationship may also indicate a legal obligation on employers to seek out information about an employee in order to ensure that appropriate pension and benefit information is provided to the employee. Indeed in *Lehune* the trial judge specifically considered whether the employer representative who gave misleading information about the

---

[25] *Deraps, supra* note 6 at para. 54.

[26] *Lehune, supra* note 19 at paras. 4-8.

[27] See also *Bratkowski* v. *Ontario Teachers' Pension Plan Board* (1997), 16 C.C.P.B. 182 at 201 (Gen. Div.) [hereinafter *Bratkowski*] and *Mandavia* v. *Central West Health Care Institutions Board* (1997), 490 A.P.R. 121 at 128-130 (Nfld. S.C. (T.D.)).

possibility of converting a retiring employee's group life insurance benefit to an individual life insurance policy should have consulted other departments that had information that the employee had lung cancer, and had missed work and taken treatment. While the Court refused to hold that the failure to take such steps constituted negligence, in holding that there had been negligence on the basis that the employer had not adequately responded to questions about whether the group life benefit could be converted to an individual life policy, the Court did take account of the employee's specific circumstances and the knowledge that other employer representatives had of the employee's illness.

Cases such as *Lehune* and *Spinks* suggest that employers (or third party carriers) providing pension and benefit information are in a difficult position. On the one hand, there does not appear to be an obligation on them to undertake an onerous investigation to seek out information about an employee. However, there is duty on a representative providing pension and benefit information to use all existing knowledge that an employer has about an employee and to ask pertinent questions of the employee ("to explore the factual background"[28]). Applying this existing knowledge and the employee's responses, the employer must then take reasonable care to provide any pension and benefit information that could be considered relevant. Accordingly, the nature and extent of the pertinent information (as well as the inquiries that the employer needs to make) will vary in the circumstances depending on the particular employee and the applicable benefit.

[28] *Lehune, supra* note 19 at para. 9.

Existing Facts as Opposed to Future Occurrences

In *Cognos*, Iacobucci J. recognized that some authorities draw a distinction between representations about existing facts and representations about future occurrences, suggesting that representations about existing facts are actionable whereas representations about future prospects are not actionable.[29] However, as *Cognos* itself illustrates, it may be difficult in some circumstances to distinguish statements about existing facts from statements about future prospects since representations about the future may be based on existing facts.[30] Accordingly, it is perhaps not surprising that the SCC refused to decide in *Cognos* if the view that there is no liability for misrepresentations about future occurrences is correct as a matter of law.[31]

In the employment context, representations about existing facts could include statements about existing benefit eligibility rules. Representations about future occurrences might include statements about whether an employer will be making changes to benefits in the future. In addition, omitting to inform employees about possible changes to benefit plans could also amount to a misrepresentation and would be consistent with the definition of misrepresentations as encompassing omissions.

One situation where it might be relevant to determine if a possible change in benefits is an existing fact or a future prospect is where an employee retires before the announcement of an early retirement program. In such circumstances, the employer is likely to argue that the early retirement program was a future occurrence as of the date of the employee's retirement. On this basis the employer could argue that it had no obligation to disclose the impending announcement of the program. If, however, the program is announced shortly after the employee retires, the employee is likely to argue that the program was a fact at the time of his or her retirement in the sense that planning had proceeded to the point where the implementation of the program was a virtual certainty. Hence, the employee may maintain that the employer was negligent in not disclosing the impending announcement of the program at the time of his or her retirement.

---

[29] *Cognos, supra* note 14 at 657, per Iacobucci J.

[30] See *Granitile Inc.* v. *Canada*, [1998] O.J. No. 5028 at para. 126 (Ont. Gen. Div.), online: QL (OJ) ("representations as to future conduct may, when examined closely, contain within them implied statements of fact"). See also *Cognos, supra* note 14 at 656-658, per Iacobucci J.

[31] *Cognos, supra* note 14 at 657, per Iacobucci J.

In the United States, there is considerable case law on the right of employees who retire just before the announcement of an early retirement program to obtain the enhanced benefit available under the program. Some courts of appeal have held that employers, when acting as fiduciaries under *ERISA,* must "provide truthful information to employees who ask about possible" future changes to benefits, "particularly when the change[s]" are "under 'serious consideration.'"[32] Moreover, it has been suggested that employers may be under a duty to advise employees of "benefit changes pending before senior management" regardless of whether "an employee raises the question."[33]

In *Fischer I,*[34] the Third Circuit Court of Appeals held that an employer could be liable under *ERISA* for breach of fiduciary duty to employees who retired after asking whether an early retirement program was in the offing and being told that no such program was under consideration. The Court ruled that liability would exist if the employer was giving serious

---

[32] "Communicating With Employees About Benefits," *supra* note 2 at *901.

See for example *Fischer* v. *Philadelphia Elec. Co.*, 994 F.2d 130 (3rd Cir. 1993), *cert. denied*, 114 S.Ct. 622 (1993) [hereinafter *Fischer I*]; *Fischer* v. *Philadelphia Elec. Co.*, 96 F.3d 1533 (3rd Cir. 1996), *cert. denied*, 117 S.Ct. 1247 [hereinafter *Fischer II*]; *Kurz* v. *Philadelphia Elec. Co.*, 994 F.2d 136 (3rd Cir. 1993), *cert. denied*, 114 S.Ct. 622 (1993); *Kurz* v. *Philadelphia Elec. Co.*, 96 F.3d 1544 (3rd Cir. 1996), *cert. denied*, 118 S.Ct. 297 (1997); *Vartanian* v. *Monsanto Co.*, 131 F.3d 264 (1st Cir. 1997) [hereinafter *Vartanian*]; *Muse* v. *I.B.M.*, 103 F.3d 490 (6th Cir. 1996), *cert. denied*, 117 S.Ct. 1844; *Wilson* v. *Southwestern Bell Telephone Co.,* 55 F.3d 399 (8th Cir. 1995), *rehearing, en banc, denied,* 1995 U.S. App. LEXIS 11784 (8th Cir. 1995); and *Hockett* v. *Sun Co., Inc.*, 109 F.3d 1515 (10th Cir. 1997).

See also *Ballone et al.* v. *Eastman Kodak Co.*, 109 F.3d 117 (2d Cir. 1997) (multi-factor test for assessing liability rather than serious consideration standard) [hereinafter *Ballone*]; and *Radley* v. *Eastman Kodak Col.*, 19 F.Supp.2d 89 (W.D.N.Y. 1998) (applying *Ballone* and commenting that it is difficult to reconcile with precedents in other circuits adopting a serious consideration standard).

But see *Sprague, supra* note 5 at 406, per Nelson J. (no fiduciary duty to disclose the *possibility* of a future change in benefits).

[33] "Communicating With Employees About Benefits," *supra* note 2 at *901.

See *Vartanian, supra* note 32 at 268, note 4 ("some courts of appeal have recognized the possibility of an affirmative duty to advise a beneficiary of potential plan changes, regardless of the existence of employee inquiry. *Anweiler* v. *American Elec. Power Serv. Corp.*, 3 F.3d 986, 991 (7th Cir. 1993); *Eddy* v. *Colonial Life Ins. Co.*, 919 F.2d 747, 750 (D.C. Cir. 1990); but see *Pocchia* v. *NYNEX*, 81 F.3d 275, 278 (2d. Cir.), *cert. denied*, -- U.S. -- 117 S.Ct. 302").

See generally "*ERISA's Purpose*", *supra* note 2.

[34] *Fischer I, supra* note 32.

consideration to a benefit change when the denials were made.[35] Furthermore, the Court held that an employer could not insulate itself from liability by not informing the benefits counsellors dealing with employees that changes are under consideration.[36] Subsequently, in *Fischer II,*[37] the Court offered a definition of when an employer would be viewed as giving serious consideration to a change in benefits. The Court stated:

> 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.[38]

As is illustrated by the result in *Fisher II*, this articulation of the serious consideration standard significantly narrows the circumstances under which employees may recover from employers. Specifically, the Court held on the facts in *Fisher II* that the employer began giving serious consideration to an early retirement program only shortly before it was publicly announced, thereby denying recovery to the plaintiffs.

The American cases illustrate that three competing policies are at issue in determining if employers should be liable for not disclosing the possibility of a future change in benefits, such as the possibility of an early retirement program. First, there is the "employee's right to information"[39] about changes that may affect his or her employment choices. On the other hand, there is a countervailing concern with preserving the "employer's right to operate on a day-to-day basis"[40] and not being forced to divulge preliminary discussions that may not be of

---

[35] See *Fischer I, supra* note 32 at 135 ("when a plan administrator speaks, it must speak truthfully").

[36] *Fischer I, supra* note 32 at 135.

[37] *Fischer II, supra* note 32.

[38] *Fischer II, supra* note 32 at 1539. For a discussion of the serious consideration standard, see D. M. Nimtz, "Tenth Circuit Survey: *ERISA* Plan Changes" (1998) 75 Denv. V.L. Rev. 891 at *895-*902; and see also M. S. Rotenberg, "Issues in the Third Circuit: Casebrief: *ERISA - Fischer* v. *Philadelphia Electric Co.*: The Third Circuit 'Seriously Considers' The Fiduciary Duty to Disclose Potential Changes To An Employee Benefit Plan Under *ERISA*" (1997) 42 Vill. L. Rev. 1915.

[39] *Fischer II, supra* note 32 at 1539.

[40] *Fischer II, supra* note 32 at 1539.

consequence. Third, there is the concern with not imposing a level of disclosure on employers that will discourage them from improving benefits.

In Canada there has not been a significant amount of litigation on these issues. In *Nuxoll* v. *Inco Ltd.,* an employee who retired prior to the date that an early retirement program was instituted was unsuccessful in obtaining the benefit of the program even though he had apparently asked whether a program was forthcoming before retiring.[41] However, it should be noted that in *Nuxoll*, the Court did not hold categorically that an employer could never be liable for not disclosing that it was contemplating an early retirement package to an employee who retired before it was announced. Indeed, the plaintiff could be viewed as having lost in *Nuxoll* primarily because the Court was not convinced that his former employer had made a decision to offer an early retirement package at the time he retired.[42] Although none of the American case law on the duty of employers to disclose possible changes in benefits is discussed in the reasons in *Nuxoll*, the extensive American jurisprudence on the point at which employers must disclose such changes should not be ignored. Given that courts in Canada have yet to fully engage in a debate about how to reconcile the rights of employers and employees when changes in benefits are under consideration, a prudent employer should be careful in statements made about both existing facts and future occurrences, such as the possibility of an early retirement program.

---

[41](1997) 33 C.C.E.L. (2d) 97 (Ont. Gen. Div.) [hereinafter *Nuxoll*]. See also *Locke and Vanderlinden* v. *Irving Oil Ltd.* (1994), 153 N.B.R. (2d) 170 (Q.B.) [hereinafter *Locke and Vanderlinden*] (employees unsuccessfully sued to take advantage of early retirement incentive announced after they had retired; Higgins J.'s reasons discuss the case primarily under contract law principles although he implies at 176 that negligent misrepresentation was argued).

[42] *Nuxoll, supra* note 41 at 112.

(c) Negligence Must Be Established

Liability will exist for a negligent misrepresentation only if it is established that the employer acted negligently in making the representation. The standard of care for determining whether negligence exists in an employment situation is the same standard that exists in other negligence actions. In order to avoid a finding of negligence, the person making

the representation must exercise such reasonable care as the circumstances require to ensure that representations made are accurate and not misleading.[43]

Cognos underscores that it will not be enough for an employer to assert that it was being truthful at the time the statements at issue were made and that the employer genuinely believed that the statements were accurate.[44] An employer must be more than honest -- employers must take reasonable care to ensure that statements are accurate. In other words, an employer will be held liable for making an honest mistake if it can be demonstrated that the employer failed to take steps to ensure that the statements it made were accurate.

Moreover, in certain circumstances employers may have a positive duty of disclosure. Although employers do not appear have a duty of full disclosure, employers seem to be required to provide "highly relevant information,"[45] even if this information is not requested. Thus in *Spinks*, Linden J.A. emphasized that it was not necessary for an employer "to divulge every bit of irrelevant and arcane information."[46] Instead, Linden J.A. indicated that there is a duty "of reasonable disclosure,"[47] with reasonableness being determined based on the circumstances of each case. The reasons in *Spink*s suggest that there will be a positive duty on the employer to provide information even if the information has not been specifically requested in the following circumstances:

- where the employee has a unique need for specialized information and the employee cannot be expected to formulate questions to elicit this information;[48]

---

[43] *Cognos, supra* note 14 at 651, per Iacobucci J.

[44] *Cognos, supra* note 14 at 653-654, per Iacobucci J.

[45] *Cognos, supra* note 14 at 644, per Iacobucci J.

[46] *Spinks, supra* note 19 at 586.

[47] *Spinks, supra* note 19 at 586..

[48] *Spinks, supra* note 19 at 585 and 588. See also *Luo* v. *Canada (Attorney-General)* (1997), 145 D.L.R. (4th) 457 at 471 (Ont. Div. Ct.) (citing *Spinks*) [hereinafter *Luo*]. In *Luo*, a recipient of unemployment insurance recovered benefits lost due to negligent misrepresentation by Crown employees.

- where the employer knows of the employee's need for information or where it should be obvious to the employer that the employee needs the information;[49]

- "where an advising person possesses or can easily obtain important and relevant information;"[50] and

- where the failure to divulge the information can be reasonably expected to lead to economic loss.[51]

In *Spinks*, the Federal Court of Appeal held that the employer had acted negligently in not informing the employee of his right to buy-back pensionable service on the basis that the employer recruited the employee from abroad, knew of the employee's previous work in Australia, the information was easily accessible to the employer and the failure to provide the information could be expected to cause economic loss.

---

[49] *Spinks, supra* note 19 at 585-586. See also *Deraps, supra* note 6 at para. 56 (the pension counsellor "should have been aware that there were serious implications for Monique Deraps in signing the waiver, ... and implications [the pension counsellor] ... knew or ought to have known, would be of particular interest to Monique Deraps as the surviving spouse"); and *Bixler* v. *Cent. Pas. Teamsters Health-Welfare Fund*, 12 F.3d 1292 at 1300 (3rd Cir. 1993) (the "duty to inform … entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful").

[50] *Spinks, supra* note 19 at 586. See also *Rothwell* v. *R.* (1985), 10 C.C.E.L. 276 at 282 (F.C.T.D.) [hereinafter *Rothwell*]; *Bratkowski, supra* note 27 at 200-201 (citing *Spinks*); and *Luo, supra* note 48 at 471.

[51] *Spinks, supra* note 19 at 586.

Duty to Disclose Change in Circumstances

Related to the positive duty on employers to reveal highly relevant information in some circumstances is a positive duty on employers to reveal a material change in a representation in certain circumstances. This duty would seem to amount to a requirement that an employer inform an employee of a material change in a representation upon which the employer knows the employee is relying. For example, in *De Groot* v. *St. Boniface General Hospital*,[52] the employer was held to have acted negligently because it did not inform a prospective doctor-employee of the reconsideration of an earlier recommendation about the scope of the hospital privileges the doctor would have if hired. As a result of the reconsideration, the doctor was recommended for more limited privileges than had been previously represented to him by the employer.

It should be emphasized, however, that the case law does not suggest that there is an open-ended duty on employers to search out and update a truthful answer after it is given. For example, in *Beaudry* v. *B.C. Hydro and Power Authority*,[53] the plaintiff's action was dismissed on the basis that there was no duty on his employer to seek him out in order to update answers he received at a retirement seminar he attended along with sixteen other people. The facts in *Beaudry* were that, prior to retiring, Beaudry had asked at a seminar whether the company would be offering an early retirement package. Consistent with the facts as they were known at the time, Beaudry was told that the company would not be providing such a package. After the seminar, but prior to Beaudry's retirement, the company began to consider offering an early retirement program. A program was subsequently implemented after Beaudry retired. In the action, Beaudry unsuccessfully argued that there was a continuing duty on his employer to update the truthful answers he had received at the seminar and that, had he been made aware of the contemplated program, he would have waited until after the program was implemented before he retired. What may distinguish the result in *Beaudry* from *De Groot* is that in *Beaudry*

[52] (1994) 22 C.C.L.T. (2d) 163 (Man. C.A.) [hereinafter *De Groot*].

[53] [1992] B.C.J. No. 67 (S.C.), online: QL (BCJ) [hereinafter *Beaudry*].

there seemed to be a lack of substantive evidence that Beaudry had either relied on the statement at the seminar in making his decision about when to retire, or that the employer had knowledge of any such reliance by Beaudry on the statements made at the seminar.

(d) Reasonable Reliance

The fourth requirement for the tort of negligent misrepresentation is that the plaintiff must have relied, in a reasonable manner, on the misrepresentation at issue. This requirement has two components.[54] First, the aggrieved party must establish that he or she actually relied in fact on the statement at issue. In *Marulanda* v. *Ottawa (City),*[55] for example, the plaintiff's action was dismissed on the basis that he did not rely on an erroneous pension estimate provided by his employer in taking early retirement. Another lower pension estimate had been provided to him in the period leading up to his decision to take early retirement and the erroneous estimate was provided after Marulanda had signed the final documents for his retirement.

Second, reliance must be demonstrated to be reasonable in the circumstances. The reasonableness of the employee's reliance on a misrepresentation concerning pension and benefit information is not a major issue in many cases and often seems to be assumed by the courts. For example, in *Spinks* the Court stated that it was reasonable for a new employee to rely on his employer for information about pension rights and that there was no onus on the employee to ask if he could buy back his pensionable service from previous employment in Australia.[56] Similarly, in *Lehune*, the trial judge held that it was reasonable for a retiring employee and his spouse to have acted on the (erroneous) advice that they received that the employee's life insurance could not be carried over into his retirement. Nevertheless, an employee's reliance on a misrepresentation might be considered unreasonable if there was

---

[54] A.M. Linden, *Canadian Tort Law* 3d ed. (Toronto and Vancouver: Butterworths, 1997) at 429-430 [hereinafter *Canadian Tort Law*].

[55] (1997) 45 C.C.P.B. 260 (Ont. Gen. Div.) [hereinafter *Marulanda*].

[56] See also *Manuge, supra* note 11 at 369 (plaintiff entitled to rely on a pension calculation provided by the defendant third party carrier since the calculation of the pension entitlement "required a specialized knowledge").

evidence that the employee had relevant knowledge to the contrary, or that the statement was made in a casual way, or if the misrepresentation was accompanied by a disclaimer.[57] However, it should be noted that disclaimers should be clearly displayed to be given legal effect.[58]

(e) Reliance Results in Loss

The fifth and final requirement for the tort of negligent misrepresentation is that the person must have relied on the representation to his or her detriment. Examples of detrimental reliance include an employee losing opportunities to increase his pension because of an incorrect pension calculation,[59] a retiring employee losing the opportunity to convert his life insurance benefit because of misleading advice,[60] and a plaintiff losing his right to receive "money in hand ... rather than in the form of a right to small future payments over a long period of time."[61]

---

[57] See *Watson, supra* note 20 at 94; and *Canadian Tort Law, supra* note 54 at 448.

But see "'*Accuracy Is Not A Lot To Ask*,'" *supra* note 2 at 294-295 (noting that some federal courts have rejected the validity of disclaimers on the basis that giving effect to them would undercut the requirement under *ERISA* to provide accurate and comprehensive summaries). See for example *Hansen* v. *Continental Ins. Co*., 940 F.2d 971 at 982 (5th Cir. 1991) [hereinafter *Hansen*] ("drafters of a summary plan description may not disclaim its binding nature"); and *Aiken* v. *Policy Management Sys. Corp*., 13 F.3d 138, (4th Cir. 1993).

[58] See *Watson, supra* note 20 at 93-94; and *Cognos, supra* note 14 at 662-666, per Iacobucci J.

[59] *Manuge, supra* note 11.

[60] *Lehune, supra* note 19.

[61] *Rothwell*, *supra* note 50 at 283.

It is interesting to note that the Court held in *Greenley* v. *Xerox Canada Ltd.*[62] that the plaintiff did not suffer a loss when he resigned after receiving an incorrect estimate of the value of his pension. The Court held that Greenley's employment would have been terminated in any event on the date he resigned. According to the Court, the erroneous pension estimate resulted in no loss to Greenley since Greenley's employer had already communicated its intention to terminate his employment if he did not resign.

2. Contract law

There would appear to be three principal doctrines of contract law that employees can use to hold employers liable for pension and benefit communications: (1) the principles of contract formation and contractual terms, (2) unilateral contract, and (3) the principle of estoppel.

(a) Principles of Contract Formation and Contractual Terms

Principles of contract formation

One argument that an employee might advance for holding an employer liable for an erroneous communication about pensions and benefits is that the communication constituted a contractual offer by the employer to the employee. In assessing this argument, a court would proceed on an objective basis since "the test of whether a promise is made, or of whether assent is manifested to a bargain" depends "on how the promisor's conduct would strike a reasonable person in the position of the promisee."[63]

The objective theory of contract formation was relied on in *Hendee* v. *Telesat Canada.*[64] In that case, the Ontario Court (General Division) rejected an employee's claim that his employer had offered him an early retirement package and that he had accepted it at the first meeting that he had with an employer representative to discuss the company's new early retirement program. The employee was seeking to give

[62] *Greenley* v. *Xerox Canada Ltd.* (1997), 199 A.R. 248 at 306 (Q.B.) [hereinafter *Greenley*].

[63] S.M. Waddams, *The Law of Contracts*, 4th ed. (Toronto: Canada Law Book, 1999) at para. 141.

[64](1997), 14 C.C.P.B. 248 (Ont. Gen. Div.) [hereinafter *Hendee*].

contractual effect to the package he was offered at the first meeting because the benefit he was promised at that meeting was for a higher amount than the benefit he ultimately received. However, Bell J. rejected Hendee's argument on the basis that, "from the point of view of an objective reasonable bystander," the employer "did not make an offer of early retirement to [the employee at the initial meeting] … which was open for acceptance by him."[65]

Similarly in *Locke and Vanderlinden*, Higgins J. rejected the plaintiffs' argument that an early retirement program announced by Irving Oil shortly after they began receiving their pensions should apply to them, concluding that:

> neither the plaintiffs nor the defendant had any *reasonable expectation* that a legally binding contractual offer and acceptance was being created nor … would a *reasonable person* in the position of the parties have thought that an offer was being extended to the plaintiffs which the plaintiffs were entitled to accept.[66]

Contractual term as opposed to mere representation

A variation on the argument that an erroneous communication represented a contractual offer would be that the communication constitutes a contractual term as opposed to a mere representation. Indeed, in *Ford* and *Greenley*, courts considered whether specific representations made to employees constituted contractual terms.[67] In *Ford*, the key issue was whether statements made initially by the president of the employer and subsequently repeated by other company officials constituted terms of the contract governing the early

[65] *Hendee, supra* note 64 at 261.

[66] *Locke and Vanderlinden, supra* note 41 at 192-193. Emphasis added.

[67] *Ford, supra* note 14; and *Greenley, supra* note 62.

retirement of the employees. Similarly in *Greenley* the Court considered whether the inflated pension estimate that the employer provided to Greenley before he formally agreed to resign was a term of the contract under which he subsequently resigned.

(b) Unilateral contract

A unilateral contract begins with the making of a promise in exchange for the performance of an act. Performance of the act constitutes the acceptance of the offer embodied in the promise and the consideration for that promise.

Unilateral contract theory could provide a basis for employees to recover from an employer where the employer had promised a benefit to its existing employees and subsequently withdrawn the benefit. For example, in *Sloan* v. *Union Oil Company of Canada Ltd.*[68] the defendant had introduced a termination allowance in the course of the plaintiff-employee's employment. Employees were informed of the fringe benefit through pamphlets, booklets and circulars. The defendant retained the right under the text of the policy setting out the allowance to modify or terminate the allowance and did indeed alter the allowance over the years. When the defendant sold its assets to another company, it terminated the employment of employees and imposed restrictions on the collection of the allowance which eliminated the plaintiff's entitlement.[69] The plaintiff sued for and obtained entitlement to the termination allowance from the defendant based on the policy that existed immediately prior to the sale of the assets.

Unilateral contract theory was the basis of the decision in *Sloan.* The Court held that Union Oil had made a promise of a termination allowance in a series of communications in exchange for the performance of an act. In the view of the Court, the act should be regarded as acceptance of, and consideration for, the original promise.[70] Even though the employee was

---

[68] (1955), 4 D.L.R. 664 (B.C.S.C.) [hereinafter *Sloan*].

[69] *Sloan, supra* note 68 at 671-672.

[70] *Sloan, supra* note 68 at 672-673 and 684.

already bound to serve the defendant as an employee, the Court held that the employee's continued service to the employer amounted to acceptance of the offer and consideration for it.[71]

(c) Estoppel

Estoppel is another legal device that employees may use to hold employers liable for statements contained in employer pension and benefit communications. To rely on estoppel, a plaintiff must establish that a representation was made in words or conduct, with the intention to create legal relations, and that the plaintiff relied on this representation to his or her detriment. Where a representation is made in these circumstances, the representor is estopped as against the representee from going back on the statement.[72]

In *Schmidt* v. *Air Products of Canada Ltd.*[73] the SCC considered the application of estoppel to pension communications. In that case, a group of employees argued that an eight page employer brochure explaining the pension plan estopped the defendant company from claiming entitlement to the pension plan surplus. Justice Cory stated:

> Documents not normally considered to have legal effect may none the less from part of the legal matrix within which the rights of employers and employees participating in a pension plan must be determined.[74]

---

[71] *Sloan, supra* note 68 at 673 and 684. See also *Bathgate, supra* note 13 at 498 and 505 (citing *Sloan* for the proposition that pension rights can be earned independent of the law of trusts under contract or employment law through work).

[72] See *Maracle* v. *Travellers Indemnity Co. of Canada* (1991), 80 D.L.R. (4th) 652 at 656 (S.C.C.).

[73] (1994), 115 D.L.R. (4th) 631 (S.C.C.) [hereinafter *Schmidt*].

[74] *Schmidt, supra* note 73 at 676, per Cory J.

However, the Court went on to state that whether such documents will be given legal effect depends on three factors: "the wording of the documents, the circumstances in which they were produced, and the effect which they had on the parties, particularly the employees."[75] These three factors amount to a restatement of the three elements generally required to found an estoppel, i.e. a representation intended to create legal relations that leads the representee to act to his or her detriment.

The first two factors relevant to determining if an employer has been estopped by a pension brochure -- the words of the document and the circumstances under which the document was provided to employees -- focus on whether the brochure amounts to a representation made with an intention to create legal relations. In *Schmidt*, the SCC seemed to be of the view that the brochure provisions which related to the surplus did not "amount to a promise intended to affect the legal relationship between the parties"[76] because:

- the brochure did not purport to have any contractual effect;
- the brochure stated that it was a transcript of policies and benefits that could be amended by the company; and
- the brochure was worded in a way that was declarative of employee rights under the pension plan.[77]

Presumably, the inclusion of a visible disclaimer stating that the text of the plan documents prevailed over the text of the summary booklet would also eliminate employer liability based on

[75] *Schmidt, supra* note 73 at 676, per Cory J.

[76] *Schmidt, supra* note 73 at 677, per Cory J.

[77] *Schmidt, supra* note 73 at 676, per Cory J.

estoppel for errors in the brochure.[78] However, as noted above, disclaimers have not always permitted employers to avoid liability in the United States.[79]

The third criterion for estoppel based on a pension brochure (that the brochure have an effect) represents a requirement that there be evidence that employees relied on the brochure to their detriment. Indeed in *Schmidt*, Cory J. specifically commented on the absence of evidence that the brochure induced Schmidt to join the company, or that Schmidt had read the brochure, or that the brochure affected the position of employees in general or collective bargaining.[80] However, Cory J.'s emphasis on the need for evidence of reliance notwithstanding, the threshold for establishing reliance would appear to be low. This is implied by two suggestions in Cory J.'s reasons. First there is his reference to the lack of evidence that the employee had read the brochure, which can be taken as implying that evidence that the brochure was read at the time it was distributed may help to establish reliance. Second there is Cory J.'s reference to reliance having existed in *Collins et al.* v. *Pension Commission of Ontario*[81] because the employees believed they were entitled to the pension plan surplus based on a booklet and the terms of the plan.[82] If evidence that a booklet induced a belief is sufficient to establish reliance then it may not be difficult to prove reliance.[83]

A notable aspect of Cory J.'s reasons in *Schmidt* is his suggestion that the age of a brochure can affect the ability to use it to found an estoppel argument. This might suggest that the age of the brochure is an independent variable in addition to the other three factors for determining whether a document will be given legal effect, with older brochures being of less use than newer ones. However, the reference to the age of the document in *Schmidt* may simply

---

[78] See *Watson, supra* note 20 at 94. See also *Re TIE/Communications Canada Inc. Pension Plan* (1994), 7 C.C.P.B. 120 at 127 (Ont. Pension Commission), aff'd (1996), 13 C.C.P.B. 91 (Div. Ct.) (employees not entitled to pension plan surplus based on statement in original pension plan booklet because the booklet contained a disclaimer, and the original booklet was amended and there was no evidence of reliance on the original booklet).

[79] See *supra* note 57.

[80] *Schmidt, supra* note 73 at 676-677, per Cory J.

[81] (1986) 56 O.R. (2d) 274 (Div. Ct.) [hereinafter *Collins*].

[82] *Schmidt, supra* note 73 at 677, per Cory J.

[83] See also "*'Accuracy Is Not A Lot To Ask*,'" *supra* note 2 at 293 (discussing the threshold for reliance in litigation under *ERISA*).

have been intended to suggest that producing a single brochure distributed many years before the events giving rise to a dispute does not satisfy the third requirement that there must be reliance by the person asserting the estoppel argument. This may be the case especially if, as in *Schmidt*, there is no evidence that the brochure was read by the employee at the time it was distributed or that the representations in the brochure were subsequently repeated by the employer.

Indeed, *Collins* offers an interesting contrast with *Schmidt* on the potential to found an estoppel argument based on a brochure distributed by the employer many years earlier.[84] In *Collins*, as in *Schmidt*, the employees made an estoppel argument based in part on a brochure distributed in 1972. This was thirteen years before the employer claimed the surplus in the pension plan in *Collins* and sixteen years before the surplus was claimed in *Schmidt*. However, in indicating approval of *Collins* in *Schmidt,* Cory J. did not suggest that the age of the brochure in *Collins* undercut its relevance to the estoppel argument of the employees.[85] It is possible that Cory J. did not regard the age of the brochure as significant in *Collins* because there appear to have been other "representations made over the years by" the employer to the employees in *Collins* consistent with the brochure.[86] In addition, reliance may have been generated on the employer's statements in the brochure and other representations because the pension plan was subject to collective bargaining between the employer and the union.

III PRACTICAL TIPS FOR AVOIDING LIABILITY

In *Hansen*, the Fifth Circuit Court of Appeals observed that "[a]ccuracy is not a lot to ask for" in communications about benefits.[87] Of course, accuracy is essential from the point of employees given the difficulty of understanding formal plan documents, and from the perspective of employers wanting to avoid legal liability. Listed below are several practical

---

[84] We are grateful to Dona Campbell for bringing this contrast to our attention.

[85] See *supra* note 82.

[86] *Collins, supra* note 81 at 276.

[87] *Hansen, supra* note 57 at 982. This statement is incorporated into the title of C.A. Kin's article: "*'Accuracy Is Not A Lot To Ask For*,'" *supra* note 2 at 283, note *.

ways that employers can attempt to ensure accuracy in their communications about pensions and non-pension benefits and thereby minimize the likelihood of liability.

1. First, employers should be aware of the legal liability that attaches to communications about pensions and benefits. In particular, employers should understand that communications may be the only source of information that the employee receives about his/her pension or benefit plan.

2. Employers should make sure that information in communication materials is accurate.

3. If the communication is not intended to be legally binding, specific disclaimers should be placed on the communication materials. The disclaimer should be specific, clearly worded and placed beside the statement to which the disclaimer applies. Too often disclaimers fail to fulfill their intended purpose because they appear in fine print at the end of the benefit plan summary.

4. Employers should consider the audience and the context for the communication.

5. If the plan text governs over the terms of the summary, make sure that there is a plan text and that employees are allowed to review the plan text.

6. All information about employees should be shared with the human resources department.

7. Employer representatives providing pension and benefit information should be trained and knowledgeable,[88] and understand the scope of their responsibilities. Employers are unlikely to avoid liability based on good intentions.[89]

8. Statements made at the time an employee is terminated should include all information that pertains to the benefit plans. Information about when benefit

[88] See *Frahm, supra* note 5 at 960 (plan administrator complies with duty of care under *ERISA* by taking precautions such as training benefits staff even if precautions sometimes prove insufficient).

[89] See *Deraps, supra* note 6. In *Deraps*, the defendants were found liable even though the senior administrator of the pension plan gave evidence that representatives of the pension plan were "required to explain" that signing the waiver signed by the plaintiff would cause a loss of future benefits: para. 20.

coverage ceases and the ability of the employee to convert a group benefit to an individual benefit should be included in the termination letter.