Equitable Estoppel in ERISA: Reviving a Dead Remedy

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Introduction

Equitable remedies are supposed to provide adequate relief when ordinary damages cannot.[1] They are just another means of achieving justice. One type of equitable remedy is equitable estoppel, which allows a plaintiff to recover benefits lost due to a defendant's misrepresentations.[2] In the employee benefits context, those lost benefits could be money, enrollment in a plan, increased coverage amounts, or an award of actual plan benefits—whatever the employee would have gained if the misrepresentations had actually been true. In section 1132(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA),[3] Congress authorized civil actions for "appropriate equitable relief."[4] Theoretically, section 1132(a)(3) authorized courts to use equitable estoppel to help employees harmed by misrepresenta-

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1. Traditionally, equitable relief was available when "the Courts of Law [could not] clearly afford any relief, or adequate relief." JOSIAH W. SMITH, A MANUAL OF EQUITY JURISPRUDENCE § 1, at 2–3 (5th ed. 1856), https://archive.org/stream/manualofequityj00smit#page/2/mode/2up. "In the most general sense Equity is synonymous with natural justice." *Id.* § 1, at 3. "Its very central principles, its foundation upon the eternal verities of right and justice, its resting upon the truths of morality rather than upon arbitrary customs and rigid dogmas, necessarily gave it this character of flexibility, and permitted its doctrines to be enlarged so as to embrace new cases. . . ." 1 JOHN NORTON POMEROY, POMEROY'S EQUITY JURISPRUDENCE AND EQUITABLE REMEDIES § 59, at 61 (3d ed. 1905), https://archive.org/details/pomeroysequityj02pomegoog.

2. 2 JOHN NORTON POMEROY, POMEROY'S EQUITY JURISPRUDENCE AND EQUITABLE REMEDIES § 802, at 1416–17 (3d ed. 1905), https://archive.org/details/pomeroysequityj03pomegoog.

3. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. §§ 1001–1461 (2012)).

4. 29 U.S.C. § 1132(a)(3) (2012).

> A civil action may be brought . . . by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain *other appropriate equitable relief* (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

Id. (emphasis added).

tions.[5] However, federal courts have imposed limitations on ERISA equitable estoppel that have rendered the remedy almost entirely unavailable.

Part I of this Article discusses ERISA equitable estoppel generally and the four questionable limitations imposed by federal courts. Part II demonstrates that, before courts of law and equity merged, courts of equity did not impose these limitations. Part III argues that ERISA's text and express purpose do not support these limitations. Rather, courts have inappropriately relied upon pension benefit decisions interpreting the Labor Management Relations Act (LMRA),[6] a statute much more restrictive than ERISA.[7]

These restrictions on equitable estoppel will not likely withstand Supreme Court scrutiny. If the Court strikes down these limitations, plan fiduciaries—as well as employees—could be held liable under equitable estoppel for their misrepresentations, even if the misrepresentations contradict written plan terms. Attorneys representing plan fiduciaries should prepare their clients for this potential large change in the law, which could come in the very near future.

I. Limitations on ERISA Equitable Estoppel

ERISA equitable estoppel has had a difficult life in federal court. Most circuit courts did not acknowledge its availability until the late 1990s, and some still refuse to do so.[8] Additionally, federal courts created four barriers to relief: (1) representations cannot contradict unambiguous written plan terms, (2) representations cannot be oral, (3) representations cannot be based on silence or omissions, and (4) there must be "extraordinary circumstances."[9]

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5. Plan fiduciaries must discharge their duties

> solely in the interest of the participants and beneficiaries and: (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; . . . (B) with the care, skill, prudence, and diligence [of a prudent person] under the circumstances then prevailing; . . . and (D) in accordance with the documents and instruments governing the plan.

29 U.S.C. § 1104(a)(1) (2012). Fiduciaries also must deal fairly and honestly with plan members, not mislead members, and disclose material information affecting member interests. *See, e.g.*, Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 598 (8th Cir. 2009).

6. 29 U.S.C. §§ 401–531 (2012).

7. *See* discussion *infra* Part III(A) (discussing differences between the statutes).

8. *See* Michael T. Graham, *View from McDermott: Estoppel Claims Under ERISA—Confusion in Need of Clarification*, BLOOMBERG BNA: PENSION & BENEFITS DAILY (July 25, 2013), at 2, http://www.mwe.com/files/Publication/5ee5ad7a-cbe4-4e4f-958c-98f560a0c3b9/Presentation/PublicationAttachment/7a5752da-0036-4c84-adf6-9a736072d3da/Graham.Insight.pdf.

9. *See, e.g.*, *id.* at 2–4 (discussing limitations); Livick v. Gillette Co., 524 F.3d 24, 31 (1st Cir. 2008) ("[A]n informal [oral] statement in conflict with it is in effect purporting to *modify* the plan term, rendering any reliance on it inherently unreasonable."); Fink v. Union Cent. Life Ins. Co., 94 F.3d 489, 492 (8th Cir. 1996) ("Courts may apply the doctrine of estoppel in ERISA cases only to interpret ambiguous plan terms. . . ."); Curcio

With these limitations, few, if any, ERISA plaintiffs qualify for relief, even though they could have qualified under traditional equitable estoppel principles. For example, in *Mello v. Sara Lee Corp.*,[10] Sara Lee's vice president repeatedly told an employee the company would calculate his pension benefits based on a 1984 start date.[11] The employee received *six* annual benefit statements estimating his benefits at approximately $6500 per month based on the 1984 start date.[12] Then, Sara Lee substantially reduced his benefits to just $950 per month based on a 1994 transfer date.[13] The Fifth Circuit held Sara Lee was not estopped from refusing to calculate benefits from the 1984 start date since that would contradict the written plan terms.[14] The court determined that any reliance on "informal benefit statements and oral representations was unreasonable."[15] Many other decisions like *Mello* deny plaintiffs' estoppel claims. These cases are unreasonably harsh, often leaving ERISA claimants without a remedy for their significant losses.[16]

Although these limitations on equitable estoppel have long protected employers, insurers, and other plan fiduciaries, a 2011 Supreme Court case could erode these protections. In *CIGNA Corp. v. Amara*,[17]

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v. John Hancock Mut. Life Ins. Co., 33 F.3d 226, 235 (3d Cir. 1994) ("To succeed under [equitable estoppel], an ERISA plaintiff must establish . . . extraordinary circumstances."); Glass v. United of Omaha Life Ins. Co., 33 F.3d 1341, 1347 (11th Cir. 1994) (equitable estoppel claims exist only "when (1) the provisions of the plan at issue are ambiguous, and (2) representations are made which constitute an oral interpretation of the ambiguity. However, estoppel is not available either for oral modifications . . . or when the written plan is unambiguous.") (citations omitted); Kendall v. Twin Cities Iron Workers Pension Plan, 893 F. Supp. 2d 988, 999 (D. Minn. 2012) ("Common-law estoppel principles cannot be used to obtain benefits that are not payable under the terms of the ERISA plan. . . ."); Hutcherson v. Krispy Kreme Doughnut Corp., No. 1:09-cv-757-RLY-DKL, 2012 WL 287458, at *2 (S.D. Ind. Jan. 31, 2012) ("Plaintiff's estoppel claim is based on [Supervisor's] alleged 'material omission' of failing to provide Plaintiff with an enrollment form, and [Defendant's] lack of procedures for monitoring whether employees receive such forms. Accordingly, Plaintiff fails to allege that he relied on a written misrepresentation.").

10. 431 F.3d 440 (5th Cir. 2005).

11. *Id.* at 442.

12. *Id.* at 442–43.

13. *Id.*

14. *Id.* at 445–48.

15. *Id.* at 448.

16. *See, e.g.*, Rowello v. Healthcare Benefits, Inc., No. 12-4326 (RBK/JS), 2013 WL 6510475, at *9 (D.N.J. Dec. 13, 2013) ("As sympathetic as the Court may be to Plaintiff's plight, the factual background of this case clearly does not support the invocation of equitable estoppel."); Gearlds v. Entergy Servs., 871 F. Supp. 2d 552, 556–57 (S.D. Miss. 2012) (no equitable estoppel for plaintiff who mistakenly believed healthcare coverage was for life and could no longer receive coverage elsewhere due to preexisting conditions); Lawler v. Unum Provident Corp., No. 05-CV-71408, 2006 WL 2385043, at *1–3 (E.D. Mich. Aug. 17, 2006) ("As sympathetic as the Court is to Plaintiff's plight, case law does not support his argument" that fiduciary should be estopped from denying benefits after fiduciary accepted plaintiff's premium payments for years).

17. 131 S. Ct. 1866 (2011).

the Court defined "appropriate equitable relief" as relief traditionally available in courts of equity before the merger of law and equity.[18] In *CIGNA*, the trial court held the plan fiduciary to its representations, forcing it to provide benefits that contradicted the plan's written terms.[19] The Supreme Court found that the trial court's remedy could be justified under any of three traditional forms of equitable relief: (1) reformation allows courts to amend plan documents consistent with fiduciaries' representations, (2) surcharge allows courts to award plaintiffs make-whole damages for harm caused by a breach of fiduciary duty, and (3) equitable estoppel "operates to place the person entitled to its benefit in the same position he would have been in had the representations been true."[20] Thus, had there been any lingering doubt, the Court made clear that estoppel qualifies as "appropriate equitable relief" under ERISA.[21]

Although the Court did not specifically address the validity of lower courts' limitations on equitable estoppel, it did provide a framework for evaluating them. The Court stated that limitations on equitable remedies under ERISA "must come from the law of equity" itself or from the "relevant substantive provisions of ERISA."[22] Ultimately, it is a matter of congressional intent. On one hand, Congress clearly intended for courts to apply the traditional remedies,[23] but those traditional remedies may sometimes be inconsistent with the text

18. *Id.* at 1878–80.

19. *Id.* at 1875–76.

20. *Id.* ("Equitable estoppel 'forms a very essential element in . . . fair dealing, and rebuke of all fraudulent misrepresentation, which it is the boast of courts of equity constantly to promote.'") (citations omitted); *see also* Heckler v. Cmty. Health Servs., 467 U.S. 51, 59 (1984) (traditional equitable estoppel).

21. Some courts labeled *CIGNA*'s discussion of equitable relief as dicta and refused to follow it. *See, e.g.*, Parsons v. Bd. of Trs. of the Nev. Resort Ass'n-I.A.T.S.E. Local 702 Ret. Plan, No. 2:12-cv-00299-LDG (VCF), 2013 WL 5324946, at *10 (D. Nev. Sept. 20, 2013) ("[T]he discussion of equitable estoppel and surcharge in *CIGNA* has been considered dicta by the Ninth Circuit and is not binding on this Court."). That may technically be true. But six out of eight justices (Chief Justice Roberts and Justices Breyer, Ginsburg, Alito, Kagan, and Kennedy) joined in that portion of *CIGNA*. Only Justices Scalia and Thomas dissented. Justice Sotomayor did not take part. *See CIGNA*, 131 S. Ct. at 1870. Also, *CIGNA*'s discussion of equitable estoppel should be controlling in jurisdictions like the Eighth Circuit, which hold that "federal courts 'are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when . . . [dicta] is of recent vintage and not enfeebled by any [later] statement.'" Jones v. St. Paul Cos., 495 F.3d 888, 893 (8th Cir. 2007) (quoting City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554, 557 (8th Cir. 1993)).

22. *CIGNA*, 131 S. Ct. at 1880–82 ("To the extent any [detrimental reliance] requirement arises, it is because the specific remedy being contemplated imposes such a requirement."); *see also* US Airways, Inc. v. McCutchen, 133 S. Ct. 1537 (2013) (courts must evaluate how traditional courts of equity would have applied a remedy to determine its requirements or limitations).

23. 29 U.S.C. § 1132(a)(3) (2012).

and purpose of the statute itself.[24] Thus, if pre-*CIGNA* estoppel restrictions are still valid, it must be because either: (1) courts of equity imposed the same limitations on traditional equitable estoppel, or (2) ERISA nonetheless requires them.

Post-*CIGNA*, however, most courts have continued to enforce the extra limitations on estoppel, typically without even discussing *CIGNA*'s impact or traditional equitable principles.[25] Only a few courts have done so. In *Martin v. Aetna Life Insurance Co.*,[26] the district court refused to dismiss an equitable estoppel claim, observing that, under pre-*CIGNA* limitations, estoppel could not ever be applied to unambiguous ERISA plans. It noted *CIGNA* "seemingly approved the use of estoppel to modify the terms of a plan."[27] *Martin* added: "The fact that Martin's claim involves an omission rather than a direct representation (as in *CIGNA*) does not deprive Martin of a remedy, as equitable estoppel traditionally has been used to correct omissions."[28] Likewise, in *Strickland v. AT & T Umbrella Benefit Plan No. 1*,[29] another district court held that two of the limitations—that equitable

24. *See* Pasquantino v. United States, 544 U.S. 349, 359 (2005) ("[S]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.").

25. *See, e.g.*, Gabriel v. Ala. Elec. Pension Fund, 755 F.3d 647, 661–63 (9th Cir. 2014) (no equitable estoppel because representations did not concern ambiguous plan provision); Engers v. AT & T, Inc., 466 Fed. App'x 75, 81 n.9 (3d Cir. 2011) (*CIGNA* has no bearing on extra limitations, and there is "no reason to depart from our long-standing rule that an equitable estoppel claim . . . cannot be based merely on 'simple ERISA reporting errors or disclosure violations, such as a variation between a plan summary and the plan itself, or an omission in the disclosure documents,' without a showing of extraordinary circumstances") (citations omitted); *see also* Paul v. Detroit Edison Co., 94 F. Supp. 3d 880, 887–92 (E.D. Mich. 2015) (estoppel restrictions applied), *appeal filed*, No. 15-1493 (6th Cir.); Hendrian v. Astrazeneca Pharm. LP, No. 3:13-CV-00775, 2015 WL 404533, at *12–13 (M.D. Pa. Jan. 29, 2015) (extraordinary circumstances required); Crawford v. PACE Indus. Union-Mgmt. Pension Fund, No. 3:10-cv-628, 2014 WL 509475, at *7 (M.D. Tenn. Feb. 7, 2014) (same); Horan v. Reliance Std. Life Ins. Co., No. 12-7802 (JAP), 2014 WL 346615, at *14 (D.N.J. Jan. 30, 2014) (same); Malbrough v. Kanawha Ins. Co., 943 F. Supp. 2d 684, 694–96 (W.D. La. 2013) (same; also reliance on informal statements contrary to written plan is unreasonable); Parsons v. Bd. of Trs. of the Nev. Resort Ass'n-I.A.T.S.E. Local 702 Ret. Plan, No. 2:12-cv-00299-LDG (VCF), 2013 WL 5324946, at *10 (D. Nev. Sept. 20, 2013) ("However, the discussion of equitable estoppel and surcharge in *CIGNA* has been considered dicta by the Ninth Circuit and is not binding on this Court."); Pencil v. Ohio Masonic Home Pension Plan, No. 3:12-cv-377, 2013 WL 753863, at *3–6 (S.D. Ohio Feb. 27, 2013) (pre-*CIGNA* restrictions); Gamble v. Boeing Co. Emp. Ret. Plan, No. C10-1618 RSL, 2012 WL 1463378, at *4–6 (W.D. Wash. Apr. 27, 2012) (same).

26. No. 4:13CV1108 JCH, 2014 WL 2009079 (E.D. Mo. May 16, 2014).

27. *Id.* at *7 (citing *CIGNA*, 131 S. Ct. at 1880) ("Here, Martin seeks to be placed in the position he would have been, had [Anheuser Busch] and Aetna not failed to inform him of his rights under the Plan. Martin's claim for equitable estoppel thus survives, and this portion of Defendants' Motion to Dismiss will be denied.").

28. *Id.* at *7 n.13.

29. No. 3:10-cv-268-RJC-DSC, 2012 WL 4511367 (W.D.N.C. Oct. 1, 2012).

estoppel cannot contradict unambiguous written plan terms or be based on oral misrepresentations—were "dead in the water after [*CIGNA*]."[30]

With these few exceptions, federal courts oddly have not assessed the continuing validity of ERISA equitable estoppel restrictions after *CIGNA*.[31] The analysis below demonstrates that the Supreme Court will likely invalidate these limitations, expanding the availability of equitable estoppel. Attorneys should advise plan fiduciaries of this possibility and how to adjust behavior to avoid liability.

II. Equitable Estoppel in Traditional Courts of Equity

This first prong of *CIGNA*'s analysis is easy: just use Pomeroy's *Equity Jurisprudence* and Merwin's *Principles of Equity and Equity Pleading*—the same sources cited by the Supreme Court in *CIGNA*—to determine the traditional remedy's limitations.[32] To this point, no lower court has done so. If they had, they would have discovered that the pre-*CIGNA* estoppel limitations are inconsistent with the traditional remedy. For example, Pomeroy states:

> Equitable estoppel in the modern sense arises from *the conduct of a party*, using that word in its broadest meaning as including his *spoken or written words*, his positive acts, and his *silence or negative omission to do anything*.[33]
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> . . . .
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> Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, *of contract*, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, *of contract*, or of remedy.[34]
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30. *Id.* at *7 ("In light of [*CIGNA*], . . . [t]he Court finds that Plaintiff is not precluded from recovery, as a matter of law, based on the written terms of the plan."). Although *Strickland* concerned surcharge, not estoppel, its reasoning applies to any claim based on a breach of fiduciary duty. *Id.*

31. One such exception is *Guenther v. Lockheed Martin Corp.*, No. 5:11-CV-00380-EDJ, 2014 WL 31497, at *6 (N.D. Cal. Jan. 3, 2014) ("[C]ases involving equitable relief under § 502(a)(3) *might* be more appropriately analyzed under the Supreme Court's recent holding in *CIGNA*. . . . Under the [*CIGNA*] holding, the rigid requirement . . . that plan terms must be ambiguous *may not* be required for a plaintiff to prevail on an equitable estoppel theory.") (emphasis added) (citations omitted).

32. POMEROY, *supra* note 2; ELIAS MERWIN, PRINCIPLES OF EQUITY AND EQUITY PLEADING (H.C. Merwin ed., 1895), https://archive.org/stream/cu31924084264187#page/n5/mode/2up.

33. POMEROY, *supra* note 2, § 802, at 1416 (emphasis added).

34. *Id.* § 804, at 1421–22 (emphasis added).

> [T]he following are the essential elements which must enter into and form a part of an equitable estoppel in all of its phases and applications. . . . 1. There must be conduct—*acts, language, or silence*—amounting to a representation *or a concealment* of material facts. 2. These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. 3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, and at the time it was acted upon by him. 4. The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon. . . . 5. The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. 6. He must in fact act upon it in such a manner as to change his position for the worse. . . .[35]
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> . . . .
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> The treatment of the subject by courts of equity has generally been simple, uniform, and consistent. The conduct creating the estoppel must be something which amounts to either *a representation or a concealment* of the existence of facts; and these facts must be material to the rights or interests of the party affected by the representation or concealment, and who claims the benefit of the estoppel. The conduct may consist of external acts, of *language written or spoken*, or of *silence*.[36]
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> Acquiescence consisting of *mere silence* may also operate as a true estoppel in equity to preclude a party from asserting . . . *rights of contract*. . . . A fraudulent intention to deceive or mislead is not essential. All instances of this class, in equity, rest upon the principle: If one maintains silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent.[37]

Merwin, also cited by the Supreme Court, explained:

> Equitable estoppels are sometimes called estoppels *in pais*, because they are created entirely by the conduct or declarations of the party, in distinction from estoppels created by records, deeds, or other written instruments. . . .
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> These estoppels may be created by the acts of a party, by his express declaration, and in many cases by his silence,—by his not speaking when he had a duty to speak. "If a man was silent when he ought to have spoken, he shall not speak when he ought to be silent."[38]

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35. *Id.* § 805, at 1423 (emphasis added).
36. *Id.* § 808, at 1435 (emphasis added).
37. *Id.* § 818, at 1451 (emphasis added).
38. MERWIN, *supra* note 32, § 910, at 515.

Thus, the pre-*CIGNA* lower courts' four estoppel limitations are not consistent with traditional equitable estoppel. Courts of equity did not require contractual ambiguity or "extraordinary circumstances," and oral representations, silence, omissions, and concealment could all give rise to estoppel. This history strongly suggests that Congress intended courts to broadly construe "appropriate equitable relief" under section 1132(a)(3), consistent with the traditional remedy. But these historic standards may nonetheless be inconsistent with other provisions of ERISA, requiring the imposition of extra limitations. As shown below, however, that does not appear to be the case.

III. The ERISA Provisions

Other than authorizing "appropriate equitable relief," ERISA does not expressly address equitable remedies. If ERISA imposes extra limitations, it does so only by implication. This Part demonstrates, however, that courts inappropriately borrowed the limitations from the LMRA, and they have no support in ERISA.

A. From the LMRA to ERISA

In 1947, Congress passed the LMRA, also known as the Taft-Hartley Act, which governs employer-union relations.[39] The purpose of the LMRA is to prevent corruption between employers and unions.[40] With that goal in mind, the LMRA imposes criminal liability on employers that give "any money or other thing of value" to (1) employee representatives, (2) labor organizations (i.e., unions), or (3) any employee or union representative with the intention of influencing the

39. Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 401–531 (2012)).

40. *See* Moglia v. Geoghegan, 403 F.2d 110, 115–16 (2d Cir. 1968).

> The . . . purpose was to curb the abuses, discovered by Congress after extensive investigation, which seemed to be inherent in funds created and maintained by contributions exacted from employers but which were administered by union officials without any obligation to account to the contributors or to the union membership. . . . A reading of the legislative history of Section [186] shows that Congress intended to prohibit the establishment of any union funds by means of employer payments unless the funds conformed in all respects with the specific dictates of Section [186](c). . . . The reason for the rigid structure of Section [186] is to insure that employer contributions are only for a proper purpose and to insure that the benefits from the established fund reach only the proper parties. . . . Any erosion of the strict requirements of this section could provide an unintended loophole for the unscrupulous, and could result in a diversion of funds away from the proper parties as had occurred before Section [186] was enacted.

Id.; *see also* United States v. Ryan, 350 U.S. 299, 304–06 (1956) (discussing in detail the legislative history of the LMRA and Congress's goal of preventing union corruption).

activities of labor organizations.[41] It is also illegal to accept such payments.[42] The LMRA contains express exceptions to these broad prohibitions. One exception is for payments to union trust funds established to pay welfare or pension benefits.[43] This exception applies only if "the detailed basis on which such payments are to be made is *specified in a written agreement with the employer*."[44] In other words, it is a *federal crime* under the LMRA for employers to provide benefits outside the scope of written union agreements. ERISA does contain a similar "written instrument" provision, but it is not a crime to violate that requirement.[45] Further, unlike ERISA, the LMRA does not expressly authorize equitable relief, nor does it create a fiduciary relationship between the employer (or its agents) and the unionized employees.[46]

Consistent with a strict reading of the LMRA, federal courts held that estoppel was unavailable to contradict the written terms of a union pension plan. The first court to so hold was *Moglia v. Geoghegan*.[47] In *Moglia*, the First Circuit analyzed the LMRA's text and legislative history and held, for pension benefits supported by a union trust fund, "the equitable estoppel argument cannot supply the essential element of the written agreement Congress required by subsection [186](c)(5)(B)."[48] The court was sympathetic to the plaintiff, but nevertheless denied relief.[49] This result was appropriate in light of

41. *See* 29 U.S.C. § 186(a) (2012); *see also id.* § 186(d)(2) ("[A]ny person who willfully violates any of the provisions of this section shall, upon conviction thereof, . . . be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.").

42. *Id.* § 186(b)(1).

43. *Id.* § 186(c)(5).

44. *Id.* § 186(c)(5)(B) (emphasis added).

45. *Id.* § 1102(a)(1) (part 4 of ERISA states, "Every employee benefit plan shall be established and maintained pursuant to a written instrument."); *id.* § 1131 (criminal penalties apply only to part 1); *see also infra* Part III.B.

46. *See id.* § 187(b) ("Whoever shall be injured in his business or property by reason o[f] any violation of subsection (a) of this section may sue therefor in any district court of the United States . . . and shall recover the damages by him sustained and the cost of the suit."); *id.* § 1104 (fiduciary duties); *id.* § 1132(a)(3) (appropriate equitable relief).

47. Moglia v. Geoghegan, 403 F.2d 110, 115–19 (2d Cir. 1968).

48. *Id.* at 117. The court reasoned,

> The statutory requirement of a written agreement is not a minor technicality which may be dispensed with when, there being no written agreement, the acts of one party may be said to estop him from defending on that ground. A written agreement is necessary before payments may be made under the section. As compelling and as appealing as appellant's case is, the structure of the section and the Congressional intent underlying the section preclude any judicial inroads into its rigid, specific requirements.

Id.

49. *Id.* at 119 ("[T]he proper remedy for such a regrettable situation is not the enforcement of a claimant's rights under the trust because that would allow evasion of a carefully drafted statute. The congressional scheme, if properly enforced by government attorneys, is designed to prevent this unfortunate situation from ever arising.").

the LMRA's narrow legislative scheme and Congress's apparent intent to prevent LMRA distributions not authorized by a written agreement. Subsequent courts adopted the holding and reasoning of *Moglia* almost without fail.[50]

As *Moglia* spread, the "extraordinary circumstances" requirement was born. In 1976, the Eighth Circuit explained in *Phillips v. Kennedy*[51] that "[t]he actuarial soundness of pension funds is, absent extraordinary circumstances, too important to permit trustees to obligate the fund to pay pensions to persons not entitled to them under the express terms of the pension plan."[52] Courts today still apply the "extraordinary circumstances" requirement to equitable claims for pension benefits. Of course, the desire to protect the actuarial soundness of self-funded pension plans is inapplicable to claims involving ERISA *welfare* benefits, such as life, health, accident, or disability benefits. One circuit recognized this in *Black v. TIC Investment Corp.*[53]:

> In cases such as these where there is no danger that others associated with the Plan can be hurt, there is no good reason to breach the general rule that misrepresentations can give rise to an estoppel. There is no reason for the employee who reasonably relied to his detriment on his employer's false representations to suffer. There is no reason for the employer who misled its employee to be allowed to

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50. *See, e.g.*, Cleary v. Graphic Commc'ns Int'l Union Supplemental Ret. & Disability Fund, 841 F.2d 444, 447–48 (1st Cir. 1988) ("Representations made by a union official, clearly contrary to the written fund rules, cannot be binding on the Fund."); Nachwalter v. Christie, 805 F.2d 956, 959–61 (11th Cir. 1986) ("The written agreement requirement for pensions under the LMRA is similar to the written agreement requirement of ERISA."); Aitken v. IP & GCU-Emp'r Ret. Fund, 604 F.2d 1261, 1266–69 (9th Cir. 1979) (ineligible union fund participant could not use estoppel claim to obtain pension benefits absent extraordinary circumstances, even though estoppel claim presented little danger of corruption and no threat to fund's actuarial soundness); Thurber v. W. Conference of Teamsters Pension Plan, 542 F.2d 1106, 1108–09 (9th Cir. 1976) (receipt of pension payments, absent a written agreement providing for such payments, is a crime under LMRA); New York State Teamsters Conf. Pension & Ret. Fund v. M & M Trucking Co., 1985 U.S. Dist. LEXIS 13765, at *19 (N.D.N.Y. Nov. 19, 1985) ("To the extent that defendant is trying to assert the doctrine of estoppel, this defense must also be rejected. Courts are reluctant to apply estoppel in ERISA actions, absent extraordinary circumstances, where the corpus of the fund would be impaired."); Chambless v. Masters, Mates & Pilots Pension Plan, 571 F. Supp. 1430, 1453 (S.D.N.Y. 1983) ("While it is recognized that such rules may have a harsh effect on some unsophisticated, unsuspecting pension plan participants, it is clearly wise policy to reject invocations of the estoppel doctrine, except in extraordinary circumstances." (citations omitted)).

51. 542 F.2d 52 (8th Cir. 1976).

52. *Id.* at 55 n.8 ("We do emphasize, however, that it is the duty of the trustees to verify on a regular basis the eligibility of those for whom contributions are being made. The breach of that duty might well expose the trustees to personal liability in an appropriate case."); *see also* Haeberle v. Bd. of Trs. of Buffalo Carpenters Health-Care, Dental, Pension, and Supplemental Funds, 624 F.2d 1132, 1139–40 (2d Cir. 1980) ("Courts have been reluctant to apply the estoppel doctrine to require the payment of pension funds." (citing *Phillips*, 542 F.2d at 55 n.8, and Moglia v. Geoghegan, 403 F.2d 110 (2d Cir. 1968))).

53. 900 F.2d 112 (7th Cir. 1990).

> profit from the misrepresentation. We hold, therefore, that estoppel principles are applicable to claims for benefits under unfunded single-employer welfare benefit plans under ERISA.[54]

Black was the exception, however, not the rule.

Some courts were able to distinguish *Moglia*. For example, even though courts could not use equitable estoppel to force *plans* to pay benefits, some courts required *unions* to pay benefits because no criminal violation attached to unions' payments to members.[55] Other courts simply disagreed with *Moglia*. One held: "Estoppel may arise by silence or omission where one is under a duty to speak or act."[56] In *Rosen v. Hotel & Restaurant Employees & Bartenders Union of Philadelphia*,[57] the court estopped the pension plan from denying the plaintiff eligibility because plan representatives told the plaintiff that he was eligible to continue receiving benefits.[58] Like *Black*, *Rosen* rejected the actuarial soundness justification for the extraordinary circumstances requirement.[59] Finally, in *Scheuer v. Central States Pension Fund*,[60] the court found that "estoppel may be a basis

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54. *Id.* at 115.

55. For example, in *Novembre v. Local 584 Pension Trust Fund & Welfare Trust Fund*, the District of New Jersey originally held "the doctrine of estoppel cannot be applied as against the pension funds." No. 77-474, 1981 WL 138042, at *8 (D.N.J. Feb. 17, 1981). The court, however, awarded plaintiffs the employer's contributions to the fund, holding "it would not be appropriate for the funds to benefit from the wrong doing of the representatives." *Id.* On reconsideration, the District of New Jersey amended its decision, imposing liability directly on the trust fund:

> The extraordinary circumstances [requirement is] necessary where the actuarial soundness of the fund may be affected, but where the actuarial soundness will not be affected there is no reason why the Doctrine of Estoppel should not be applied to pension funds in the same manner as it is applied to all other persons or entities.
>
> . . . .
>
> [T]he prior decision of this Court is hereby amended to impose liability on the pension funds for the full amount of the pension benefits to which plaintiffs otherwise would have been entitled.

1981 WL 138043, at *2 (D.N.J. May 7, 1981) *aff'd mem.*, 691 F.2d 491 (3d Cir. 1982).

56. Carlsen v. Masters, Mates & Pilots Pension Plan Tr., 403 A.2d 880, 882–84 (N.J. 1979) ("It is clear that plaintiff was not fully apprised of his pension rights by either defendant. . . . The defendants' significant omissions in the information disclosed caused plaintiff to change his position for the worse. The doctrine of equitable estoppel is available to rectify this kind of injustice.").

57. 637 F.2d 592 (3d Cir. 1981).

58. *Id.* at 597–98.

59. *Id.* at 598 n.9.

> We perceive no substantial danger to the actuarial soundness of the defendant fund if they are required to pay retirement benefits. . . . Plaintiff may end up receiving more in benefits from the Fund than the Fund has received as a result of his contributions, or he may receive less; this is the expected actuarial risk which the Pension Fund takes with all participants."

Id. (citing Aitken v. IP & GCU-Emp'r Ret. Fund, 604 F.2d 1261, 1268 (9th Cir. 1979)).

60. 358 F. Supp. 1332 (E.D. Wis. 1973).

for relief in actions by employees to receive pension benefits."[61] Again, these cases were the exception; most courts adopted and followed *Moglia*.

Yet *Moglia* interpreted the LMRA before ERISA even existed. For many years after ERISA's enactment, *Moglia* was still applied only to pension benefits cases. Eventually, however, courts extended *Moglia*'s limitations to ERISA welfare benefit claims. In 1990, the Third Circuit in *Hozier v. Midwest Fasteners, Inc.*[62] held that, absent extraordinary circumstances, estoppel was not available in an ERISA case involving the termination of *severance* benefits:

> [A]n employer's post-formation promises to increase benefits, whether explicit and oral or implicit through custom, cannot alter the scope of entitlements created by a plan that must, under governing law, be "established and maintained" pursuant to a written instrument. . . . Any argument to the contrary . . . depends on the presupposition that the availability of estoppel in ERISA cases "is not so much a question of statutory interpretation as a question of public policy," . . . which we reject.[63]

One year later, the Third Circuit decided *Gridley v. Cleveland Pneumatic Co.*[64] and extended the extraordinary circumstances limitation to a claim for *life insurance* benefits.[65] Courts continued to extend LMRA estoppel limitations to more and more types of welfare benefits.

Ultimately, however, the LMRA is so different from ERISA that it can no longer be used to justify the estoppel limitations post-*CIGNA*. Unlike the LMRA, Congress created ERISA to protect employees, not to prevent corruption. ERISA does not criminalize the provision of benefits to participants in violation of plan terms.[66] ERISA creates a fiduciary relationship between plan administrators and plan partic-

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61. *Id.* at 1137–40.

> The sui generis nature of the pension agreement . . . should not immunize it from the equitable principles that govern similar agreements. The rising ethical standards in business relations which the estoppel doctrine is designed to enforce are no less needed in the administration of pension funds. . . . If anything, estoppel is more appropriate here. The complexity of the typical fund agreement and the trustees' freedom to decide as they wish make it unlikely that workers will disregard promises made to them. The hardship inflicted on those who rely upon promises is often severe.

Id. (citations omitted).

62. 908 F.2d 1155 (3d Cir. 1990).

63. *Id.* at 1165 n.10 (citations omitted).

64. 924 F.2d 1310 (3d Cir. 1991).

65. *Id.* at 1318–21 ("Mrs. Gridley cannot recover under the theory of equitable estoppel. Our precedents indicate that an ERISA reporting or disclosure violation, such as the distribution of an inaccurate summary plan description, cannot provide a basis for equitable estoppel, at least in the absence of 'extraordinary circumstances.'").

66. *See* 29 U.S.C. § 1102 (2012). ERISA's "written instrument" requirement is in Part 4 of ERISA concerning fiduciary duties. ERISA criminalizes only violations of Part 1. *See id.* § 1131(a) (2012).

ipants and beneficiaries. And, most importantly, ERISA specifically authorizes appropriate equitable relief for ERISA violations, including breaches of fiduciary duties. Thus, none of the unique circumstances under the LMRA warranting imposition of restrictions on equitable relief exist under ERISA.

B. Estoppel Can Contradict Unambiguous Written Plans

The requirement that courts may not grant equitable relief that contradicts unambiguous plan terms is the most significant limitation and the source of all other limitations. If this requirement is invalid, the other requirements likely fail as well. Precedent suggests this limitation will soon be invalidated. Numerous federal courts—including the Supreme Court on multiple occasions—have ordered "appropriate equitable relief" contrary to unambiguous plan terms to redress ERISA violations.[67] In particular, *CIGNA* held equitable estoppel was an available remedy even though benefits were not available under the plan's written terms.[68]

ERISA does state, however, somewhat similarly to the LMRA, that plans must be "established and maintained pursuant to a written instrument,"[69] and ERISA authorizes many types of relief "under the terms of the plan," including recovery of benefits, enforcement and clarification of participant rights, injunctive relief, and "appropriate equitable relief."[70] But even when relief is *not* available "under the terms of the plan," ERISA expressly authorizes participants and beneficiaries to seek injunctive and equitable relief for other ERISA violations.[71] As the Supreme Court held in *Varity Corp. v. Howe*[72]:

> The plaintiffs in this case could not proceed under the first subsection because they were no longer members of the [] plan and, therefore, had no "benefits due [them] under the terms of [the] plan."[73] They

67. *See, e.g.*, CIGNA Corp. v. Amara, 131 S. Ct. 1866, 1885 (2011) (equitable estoppel, reformation of the plan, and surcharge the available remedies); Varity Corp. v. Howe, 516 U.S. 489, 515 (1996) (appropriate equitable relief under section 1132(a)(3)); Strom v. Goldman, Sachs & Co., 202 F.3d 138, 149 (2d Cir. 1999) ("Plaintiff cannot sue under Section 502(a)(1)(B) because there are no benefits due her under the plan. . . . Allowing her to recover the benefit that she would have received absent the alleged breach of duty, but not consequential or other damages, would be entirely consistent with . . . the statute."); Martin v. Aetna Life Ins. Co., No. 4:13CV1108 JCH, 2014 WL 2009079, at *7 (E.D. Mo. May 16, 2014) ("[I]n a recent decision, the Supreme Court seemingly approved the use of estoppel to modify the terms of a plan." (citing *CIGNA*, 131 S. Ct. at 1880))); Jordan v. Aetna Life Ins. Co., No. 4:11 CV 635 DDN, 2012 WL 274693, at *3–6 (E.D. Mo. Jan. 31, 2012) (injunctive relief requiring plan to waive thirty-six month notice requirement although plaintiff had no claim for benefits under plan).

68. *CIGNA*, 131 S. Ct. at 1885.

69. 29 U.S.C. § 1102(a)(1) (2012); *see also* § 1102(b)(4) ("Every employee benefit plan shall . . . specify the basis on which payments are made to and from the plan.").

70. *Id.* § 1132(a)(1), (a)(3).

71. *Id.* § 1132(a)(3).

72. 516 U.S. 489 (1996).

73. *See* 29 U.S.C. § 502(a)(1)(B) (2012).

> could not proceed under the second subsection because that provision . . . does not provide a remedy for individual beneficiaries. . . . They must rely on the third subsection or they have no remedy at all. We are not aware of any ERISA-related purpose that denial of a remedy would serve. Rather, we believe that granting a remedy is consistent with the literal language of the statute, the Act's purposes, and pre-existing trust law.[74]

The Court stated that section 1132(a)(3) is a "catchall" provision that "acts as a safety net, offering appropriate equitable relief for injuries caused by violations that [section 1132] does not elsewhere adequately remedy."[75] Under this remedial framework, it is difficult to discern a congressional intent to prohibit equitable remedies when relief is unavailable under the terms of the plan. Rather, the intent seems to be the *exact opposite*. Moreover, this framework—permitting broad equitable relief when ordinary relief under the plan is unavailable or inadequate—is entirely consistent with traditional equitable remedies, providing relief "where . . . the Courts of Law cannot . . . clearly afford any relief, or adequate relief."[76]

Imposing a limitation on equitable relief contrary to this statutory framework and Supreme Court precedent requires a very strict construction of section 1132(a). Yet courts commonly hold that remedial statutes must be construed liberally to provide relief to protected groups.[77] Section 1132 is remedial in nature, and Congress intended that it protect participants and beneficiaries in employee benefit plans:

> It is hereby declared to be the policy of this chapter to protect interstate commerce *and the interests of participants in employee benefit plans and their beneficiaries*, by requiring the disclosure and report-

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74. *See Varity*, 516 U.S. at 515 (citation omitted).

75. *Id.* at 512.

76. SMITH, *supra* note 1.

77. *See, e.g.*, Jefferson Cty. Pharm. Ass'n v. Abbott Labs., 460 U.S. 150, 159 (1983) ("Because the Act is remedial, it is to be construed broadly to effectuate its purposes." (quoting Abbott Labs. v. Portland Retail Druggists Ass'n, Inc., 425 U.S. 1, 11–12 (1976))); Monell v. N.Y.C. Dep't of Soc. Servs., 436 U.S. 658, 684 (1978); Demutiis v. United States, 48 Fed. Cl. 81, 86 (2000) ("It has long been a 'familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes.' . . . This canon frequently has been applied in interpreting Federal statutes conferring benefits and rights on employees." (quoting Tcherepnin v. Knight, 389 U.S. 332, 336 (1967))); Bechtel Constr. Co. v. Sec'y of Labor, 50 F.3d 926, 932 (11th Cir. 1995) ("Even without *Chevron*, it is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws." (citations omitted)); Caro-Galvan v. Curtis Richardson, Inc., 993 F.2d 1500, 1505 (11th Cir. 1993) ("AWPA is a remedial statute and should be construed broadly to effect its humanitarian purpose."); West v. Bowen, 879 F.2d 1122, 1137 n.5 (3d Cir. 1989) ("There is also a line of cases which indicate that when benefits under a humanitarian (or remedial) statute are at issue, ambiguities in interpretation of the statute will be resolved in favor of the intended beneficiaries, despite the presence of a contrary agency interpretation." (citations omitted)); 3 N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 60.01 (5th ed. 1992)).

> ing to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and *by providing for appropriate remedies, sanctions, and ready access to the Federal courts*.[78]

Thus, Congress not only intended to protect employees by providing them statutory remedies, it also intended to create standards of conduct and obligations for fiduciaries. Fiduciaries' violations of these standards and obligations are expressly actionable under section 1132(a)(3).

It is unreasonable to construe ERISA to forbid equitable relief that contradicts unambiguous plan terms. Rather, it seems Congress specifically contemplated that section 1132(a) would afford participants injunctive and "other appropriate equitable relief"[79] for ERISA violations when adequate relief "under the terms of the plan"[80] is unavailable. Equitable relief, even when inconsistent with plan terms, is more consistent with ERISA's express purpose of protecting plan participants and beneficiaries.

C. Estoppel Can Arise from Oral Misrepresentations

Courts have relied on ERISA's writing requirement to preclude equitable estoppel claims based on oral misrepresentations of plan terms. For example, the Eleventh Circuit stated:

> [Section 1102(a)(1) of] ERISA expressly requires that employee benefit plans be "established and maintained pursuant to a written instrument." We agree with the district court that this requirement that ERISA plans be "maintained" in writing precludes oral modifications of the Plans; the common law doctrine of estoppel cannot be used to alter this result. . . . Reading the "written agreement" provision of subsection 1102(a)(1) in light of subsection 1102(b)(3)'s requirement of formal written amendments procedures necessitates our conclusion that section 1102(a)(1) of ERISA precludes oral modifications of employee benefit plans.[81]

This "estoppel as oral amendment" rationale is popular, but unpersuasive.[82] First, it is a legal fiction. It equates estoppel claims based on

78. 29 U.S.C. § 1001(b) (2012) (emphasis added); *see also* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983) ("ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans."). *But see* Mello v. Sara Lee Corp., 431 F.3d 440, 446 (5th Cir. 2005) (quoting Cefalu v. B.F. Goodrich Co. 871 F.2d 1290, 1296 (5th Cir. 1989)) ("The policy behind the 'written instrument' clause in ERISA is to prevent collusive or fraudulent side agreements between employers and employees.").

79. 29 U.S.C. § 1132(a)(3) (2012).

80. *Id.* § 1132(a)(1)(B) (2012).

81. Nachwalter v. Christie, 805 F.2d 956, 960 (11th Cir. 1986) (citation omitted).

82. *See, e.g.*, Livick v. Gillette Co., 524 F.3d 24, 31 (1st Cir. 2008) ("[A]n informal statement in conflict with [a written plan] is in effect purporting to *modify* the plan term, rendering any reliance on it inherently unreasonable."); Mello v. Sara Lee Corp., 431 F.3d 440, 446 (5th Cir. 2005) ("Employees who rely on a written benefit plan should

oral representations with plan amendments. However, estoppel does not amend plan terms and, unlike plan amendments, does not affect all participants and beneficiaries. Rather, estoppel only bars the plan fiduciary from enforcing a particular plan provision against a participant or beneficiary who was misled. Its scope and application are far more limited than a plan amendment. Thus, courts should not equate the two without recognizing their differences.

Second, the "estoppel as oral amendment" argument relies on the faulty premise that relief cannot contradict unambiguous plan terms.[83] As shown above, however, ERISA authorizes equitable relief even when relief is unavailable "under the terms of the plan." If the relief itself is not confined to the written plan terms, then it makes little sense to require the violations giving rise to such relief to occur in *writing*.

Third, under traditional trust law, which guides courts' interpretation of ERISA,[84] beneficiaries could sue trustees for breach of trust based on oral or written representations, because there was no requirement that breaches be in writing.[85] Similarly, no ERISA provision states that fiduciary duties apply only to fiduciaries' written conduct or that oral representations cannot breach a fiduciary's duty. Rather, ERISA describes fiduciary duties broadly, applying them to all forms of communication.[86] And if plan fiduciaries and trustees can *discharge* their duties by oral communication, surely they can *breach* their duties the same way.

In short, nothing in ERISA shows Congress intended to protect plan fiduciaries from liability for oral misrepresentations. Rather, Congress intended to provide plan participants and beneficiaries with remedies for breaches of fiduciary duties, regardless of the form of

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not have their benefits eroded by oral modifications to the benefit plan." (citing Cefalu v. B.F. Goodrich Co., 871 F.2d 1290,1297 (5th Cir. 1989))); Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1163–64 (3d Cir. 1990).

83. *See supra* Part III.B.

84. The Supreme Court said in *Varity Corp. v. Howe*:

> [T]he law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties. In some instances, trust law will offer only a starting point, after which courts must go on to ask whether, or to what extent, the language of the statute, its structure, or its purposes require departing from common-law trust requirements.

516 U.S. 489, 497 (1996).

85. *See* RESTATEMENT (SECOND) OF TRUSTS § 170 (AM. LAW INST. 1981) (listing the duties of a trustee: "(1) . . . duty to administer the trust solely in the interest of the beneficiary; (2) . . . duty to the beneficiary to deal fairly with him and to communicate to him all material facts in connection with the transaction which the trustee knows or should know."); *id.* § 174 ("duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property. . . ."); *id.* § 201 ("A breach of trust is a violation by the trustee of any duty which as trustee he owes to the beneficiary.").

86. *See* 29 U.S.C. § 1104 (2012).

fiduciary communication. It is inconsistent with ERISA's purpose to provide protection to participants deceived by written representations but not to those deceived by oral representations.

Nevertheless, the fact that a representation was oral can be relevant in proving estoppel. One of the quintessential elements of equitable estoppel is reasonable reliance.[87] In some circumstances, it may be unreasonable for plan participants or beneficiaries to rely on oral representations. For example, some participants who received, read, and understood unambiguous written plan documents that clearly contradicted oral representations may have difficulty showing reasonable reliance on the oral statement. However, in other circumstances, reliance may be entirely reasonable. ERISA requires plan fiduciaries to act "solely in the interest of the participants and beneficiaries . . . for the exclusive purpose of providing benefits . . . with . . . [reasonable] care, skill, prudence, and diligence . . . and in accordance with the documents and instruments governing the plan."[88] They also owe a duty of loyalty to plan participants.[89] Employees are *supposed* to be able to rely on fiduciaries; that is why the duties exist. If employees cannot reasonably rely on fiduciary oral communications—concerning, for example, how ERISA plans work, upcoming plan changes, the acceptance of premium payments as confirmation of plan enrollment, and the disclosure of material plan limitations or requirements—it is difficult to identify *any* person on whom employees could rely for such important information. Employees would be left helpless and on their own to understand their benefits.

Ultimately, it contradicts the purpose of ERISA's fiduciary duties to hold it is per se unreasonable for participants to rely on oral communication about important plan information. Instead, courts should consider oral representations as one factor when determining the reasonableness of participant reliance.

D. Estoppel Can Arise from Silence and Omissions

In addition to imposing fiduciary duties of loyalty, care, and prudence,[90] ERISA mandates certain plan disclosures.[91] Section 1132(a)(3) expressly grants plan participants and beneficiaries a cause of action to enforce or redress disclosure and fiduciary violations.[92] Thus, actionable violations can arise from silence or omissions, as that is how the nondisclosure occurs. Moreover, ERISA is expressly designed to protect employees by requiring plans to disclose important information to partici-

87. *See* Thomas v. Miller, 489 F.3d 293, 302 (6th Cir. 2007) (justifiable reliance).

88. 29 U.S.C. § 1104(a)(1); *see also* discussion *supra* note 5.

89. 29 U.S.C. § 1104 (2012).

90. *Id.*

91. *Id.* § 1024 (disclosure of Summary Plan Description, Summary of Material Modifications, among other plan documents).

92. *Id.* § 1132(a)(3).

pants, by creating fiduciary duties, and by providing for ready access to federal remedies.[93] Courts' prohibition of estoppel claims based on fiduciaries' failure to disclose important information undermines these objectives. Post-*CIGNA*, at least one court has refused to dismiss an estoppel claim based on a violation of mandatory disclosure requirements.[94]

In other contexts, courts have upheld estoppel claims based on a silence where there is a statutory duty to speak. Similar to ERISA, the Family and Medical Leave Act (FMLA)[95] authorizes "such equitable relief as may be appropriate, including employment, reinstatement, and promotion."[96] The FMLA also imposes civil penalties for employers that fail to provide employees with notices of their rights.[97] In *Kosakow v. New Rochelle Radiology Associates*,[98] the Second Circuit held that FMLA equitable estoppel claims may be based on employers' failure to provide statutorily required notices.[99] There is no good reason to treat ERISA differently. Courts that forbid plan participants and beneficiaries from using estoppel to enforce ERISA's most basic provisions—mandatory disclosures and fiduciary duties—often deprive participants and beneficiaries of a remedy altogether, substantially reducing incentives for fiduciaries to comply with ERISA. As the Supreme Court stated in *Varity*, there is no "ERISA-related purpose that denial of a remedy would serve. . . . [G]ranting a remedy is consistent with the literal language of the statute, the Act's

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93. *See supra* note 78 and accompanying text.

94. Martin v. Aetna Life Ins. Co., No. 4:13CV1108 JCH, 2014 WL 2009079, at *3–7 (E.D. Mo. May 16, 2014). *But see supra* note 25 and accompanying text.

95. 29 U.S.C. § 2601 (2012).

96. *Id.* § 2617(a)(1)(B) (2012).

97. *See id.* §§ 2619(a) ("Each employer shall post and keep posted, in conspicuous places . . . , a notice . . . setting forth excerpts from, or summaries of, the pertinent provisions of this title and information pertaining to the filing of a charge."); *id.* 2619(b) ("Any employer that willfully violates this section may be assessed a civil money penalty not to exceed $100 for each separate offense."); *cf. id.* § 1132(c) (ERISA penalties for failure to respond to participant written requests for plan documents).

98. 274 F.3d 706 (2d Cir. 2001).

99. *Id.* at 724, 727. The Second Circuit explained:

> [N]othing prevents a court from exercising its equitable powers to estop a party from raising a particular claim or defense. The doctrine of equitable estoppel is a judicial doctrine of equity which operates apart from any underlying statutory scheme. *If all the elements of equitable estoppel are met, an employer may be estopped from challenging an employee's eligibility as a result of the employer's misconduct in failing to post the required notice*.

Id. at 724 (emphasis added); *see also* Thomas v. Miller, 489 F.3d 293, 301–02 (6th Cir. 2007) (relying on *Kosakow*); Myers v. Tursso Co., No. C 07-3016-MWB, 2008 WL 474201, at *15 (N.D. Iowa Feb. 19, 2008) ("Tursso's contention that silence will not constitute a misrepresentation in the absence of a duty to speak also fails to carry the day here. . . ."); Myers v. Tursso Co., 496 F. Supp. 2d 986, 998 (N.D. Iowa 2007) (relying on *Kosakow*); Garcia v. Blueberry Sales, L.P., No. EP-05-CA-0289-FM, 2006 WL 506093, at *4–5 (W.D. Tex. Feb. 23, 2006) (following *Kosakow*, but also requiring that plaintiff prove defendant's "intent that the misrepresentation or concealment be acted upon").

purposes, and pre-existing trust law."[100] The statute and case law provide little support for courts to prohibit ERISA estoppel claims based on silence and omissions.

E. Extraordinary Circumstances Are Not Required for ERISA Estoppel Claims

The extraordinary circumstances requirement arose in the unique context of the LMRA and pension plans. There is little justification to require an ERISA welfare benefits plaintiff to prove extraordinary circumstances to obtain the remedy of estoppel. It is difficult to believe ERISA's requirement that plans be "established and maintained pursuant to a written instrument"[101] was designed to direct courts to create a vague and unwieldy extraordinary circumstances requirement. In contrast, the traditional remedy of estoppel has always been available to prevent parties from asserting written contract rights.[102] And limitations in the traditional remedy itself, such as the reasonable reliance requirement, are sufficient to address oral statements that directly contradict unambiguous plan language or to weed out frivolous claims.[103] There is no need for an extraordinary circumstances requirement.

Moreover, the Supreme Court in 2012 struck down a different court-created extraordinary circumstances requirement in ERISA. In *Fifth Third Bancorp v. Dudenhoeffer*,[104] a lower court had presumed it was prudent for employer stock ownership plans (ESOPs) to purchase or hold company-owned stock.[105] Plan participants and beneficiaries could rebut the presumption only by showing extraordinary circumstances or that the employer was "on the brink of collapse."[106] This presumption was "defense-friendly"[107] and imposed a significant burden on ERISA plaintiffs. The Supreme Court unanimously struck down the presumption:

> In our view, the law does not create a special presumption favoring ESOP fiduciaries. . . . This conclusion follows from the pertinent provisions of ERISA, which are set forth above. . . . *Section 1104(a)(2) makes no reference to a special "presumption" in favor of ESOP fiduciaries. It does not require plaintiffs to allege that the employer was on the "brink of collapse," under "extraordinary circumstances," or the like*.[108]

Similarly, here, the Court is unlikely to allow lower courts to impose the extraordinary circumstances requirement for ERISA estoppel

100. *See* Varity Corp. v. Howe, 516 U.S. 489, 515 (1996).
101. 29 U.S.C. § 1102(a)(1) (2012).
102. *See* discussion *supra* Part II.
103. *See supra* Part III.C.
104. 134 S. Ct. 2459 (U.S. 2014).
105. *Id.* at 2463.
106. *Id.* at 2463, 2466–67.
107. *Id.* at 2463, 2470.
108. *Id.* at 2467 (emphasis added).

claims, since section 1132(a) contains no such language or pro-fiduciary presumptions.[109]

Conclusion

The Supreme Court has recently admonished parties and lower courts for reading words into federal statutes.[110] That seems to be the case, here, as lower courts have imposed four non-statutory barriers to equitable estoppel claims of ERISA plaintiffs: (1) representations cannot contradict unambiguous written plan terms, (2) representations cannot be oral, (3) representations cannot be based on silence or omissions, and (4) there must be "extraordinary circumstances. These limitations are inconsistent with equity courts' traditional application of estoppel. If faced with the issue, the Supreme Court is likely to strike down these limitations. Such a holding would have two major implications.

First, because ERISA authorizes fiduciaries to obtain appropriate equitable relief against other fiduciaries or participants, participants *and* plan fiduciaries should find it much easier to estop *each other*. Plans would be able to use estoppel to bar employees from making certain legal or factual claims, permitting an entirely new realm of employee liability.

Second, without the protections of these limitations, fiduciaries would be subject to liability under equitable estoppel for written *or* oral misrepresentations concerning plan enrollment requirements, terms, coverage, and benefits. They might also be liable for breaching their statutorily mandated duty to disclose important plan information. Attorneys representing plan fiduciaries should advise clients how to adjust their behavior accordingly.

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109. There is, however, a potential justification for requiring extraordinary circumstances for estoppel claims involving self-funded pension benefits. If an employee's increased benefit—as a result of succeeding under an estoppel claim—necessarily reduces another employee's benefits, estoppel is not an appropriate remedy. In these cases, courts need to parse the facts to determine whether awarding equitable estoppel relief would adversely affect the pension fund or other employees' vested benefits.

110. *See, e.g.*, EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2033 (2015).

> Abercrombie urges this Court to adopt the Tenth Circuit's rule "allocat[ing] the burden of raising a religious conflict." . . . This would require the employer to have actual knowledge of a conflict between an applicant's religious practice and a work rule. *The problem with this approach is the one that inheres in most incorrect interpretations of statutes: It asks us to add words to the law to produce what is thought to be a desirable result. That is Congress's province. We construe Title VII's silence as exactly that: silence*.

Id. (alteration in original) (emphasis added).