

Applying Equitable Estoppel to ERISA Pension Benefit Claims

Adam S. McGonigle

Repository Citation

Adam S. McGonigle, *Applying Equitable Estoppel to ERISA Pension Benefit Claims*, 54 Wm. & Mary L. Rev. 627 (2012), <https://scholarship.law.wm.edu/wmlr/vol54/iss2/7>

APPLYING EQUITABLE ESTOPPEL TO ERISA PENSION
BENEFIT CLAIMS

TABLE OF CONTENTS

INTRODUCTION	628
I. BACKGROUND	631
A. <i>Pension Benefit Disputes Under American Common Law</i>	632
B. <i>Pension Benefit Disputes After the Taft-Hartley Act</i>	632
II. EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) OF 1974	634
A. <i>Build Up to ERISA</i>	634
B. <i>Overview of ERISA</i>	636
1. <i>ERISA’s Employee Pension Protections</i>	637
2. <i>Employee Remedies Under ERISA</i>	638
III. CRITIQUE OF PRE-CIGNA CIRCUIT COURT ERISA ESTOPPEL FORMULAS	640
A. <i>“Ambiguous” Provision Limitation</i>	641
B. <i>“Extraordinary Circumstances” Limitation</i>	641
1. <i>“Extraordinary Circumstances” Limitation Not Consistent with Traditional Notions of Equitable Estoppel</i>	643
2. <i>“Extraordinary Circumstances” Limitation Not Consistent with Congress’s Purpose in Enacting ERISA</i>	646
IV. CRITIQUE OF THE SIXTH CIRCUIT’S PRE-CIGNA ERISA EQUITABLE ESTOPPEL FORMULA	648
A. <i>Sixth Circuit’s “Reasonableness” Definition Is Not Reasonable</i>	648
B. <i>Sixth Circuit’s Formula Leaves “Gross Negligence” Undefined</i>	650
V. PROPOSED ERISA EQUITABLE ESTOPPEL FORMULA	651
CONCLUSION	653

“[H]e who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted.”¹

INTRODUCTION

Consider the following situation: A longtime employee at a nearby manufacturing plant receives a written pension benefit statement from his longtime employer.² The statement clearly provides that after his many years of loyal service to the company, the employee is eligible for early retirement when he turns sixty and, upon his early retirement, will receive a monthly pension benefit of \$3,000.

The employee, unable to verify the \$3,000 figure on his own due to the complexity of the benefits calculation,³ contacts his employer to confirm the figure. On multiple occasions over the course of several months, the employer confirms the \$3,000 figure to the employee in both written statements and in telephone conversations.

On his sixtieth birthday, the employee, tired after decades of work, anxious to enter a new phase of life, and confident that his pension will be sufficient to care for him and his wife in their remaining years, finally accepts early retirement. This scenario is common in the United States, where the pension has long been considered the final reward of the American Dream.⁴ But what happens next is a nightmare.

Just a few short months after the employee and his wife retire, the employee receives a letter in the mail from his former employer. The letter states that the employer miscalculated the employee's monthly pension benefit. Although the employee would have been

1. *Dickerson v. Colgrove*, 100 U.S. 578, 580 (1879).

2. For the purposes of this Note, the terms “pension benefit statement” and “summary plan description” are used interchangeably.

3. See *infra* text accompanying notes 129-32 (discussing the complicated nature of pension benefits calculations).

4. Victoria M. Cosentino, *The Illinois State Pension Crisis: Secure Retirement for Public Servants at Risk*, DUPAGE COUNTY BAR ASS'N BRIEF, Nov. 2006, at 18, 18 (“It was part of the American Dream, a pledge made by corporations to their workers: for your decades of toil, you will be assured of retirement benefits like a pension and health care.”).

eligible to receive a \$3,000 monthly benefit if he had retired at age sixty-five, because he retired at age sixty, his actual monthly benefit is a mere \$900 per month. The letter then informs the employee that he will no longer receive the \$3,000 check every month and demands that the employee repay the employer for the previous months' overpayments.⁵

The letter closes with a brief apology from the employer for "any inconvenience this may have caused" the employee, but the apology offers little consolation. The employee and his wife are out of work, and the \$900 monthly pension benefit is not nearly enough to cover the car payment, groceries, and utilities, let alone their medications. Even worse, neither can find a new job because no employer wants to hire a sixty-year-old disgruntled worker. Because the pension is not enough to live on, however, they have no choice but to look for new work.

One might think that the employee and his wife—a beneficiary to the pension—could bring suit in state court under any number of contract or tort causes of action, but the employee's remedies are actually much more limited. The employee's claims are governed by the Employee Retirement Income Security Act (ERISA),⁶ which preempts all state law causes of action, including all tort and contract claims,⁷ and severely limits the legal remedies available to the employee.⁸ The only way the employee can recover the \$3,000 monthly benefit is if he brings an estoppel claim against his employer to prevent the employer from asserting that the \$3,000 monthly benefit conflicts with the actual pension plan. Unfortunately, however, most federal courts permit ERISA estoppel claims only under the most narrow of circumstances and would not

5. An employer or pension administrator who overpays a pension benefit may recoup the amount overpaid from the pension recipient. *See* 29 C.F.R. § 4022.82 (2011) (discussing the proper methods of recoupment for overpayments of pension benefits).

6. Employee Retirement Income Security Act (ERISA) of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 5 U.S.C., 18 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C.).

7. 29 U.S.C. § 1144 (2006) ("[T]he provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws in so far as they may now or hereafter relate to any employee benefit plan.").

8. *See* 29 U.S.C. § 1132 (listing the exclusive set of remedies available to pension participants and beneficiaries under ERISA).

permit this employee's claim.⁹ Unless these narrow ERISA estoppel formulations change, the employee has no recourse.¹⁰

The specific facts of this scenario are loosely based on several cases in which the courts denied the plaintiff-employees' ERISA estoppel claims,¹¹ so it should be disconcerting that such a result could occur to the 114 million Americans covered by ERISA plans.¹² Because pension benefit calculation errors are relatively common,¹³ a legal mechanism is necessary to provide relief to employees who reasonably and justifiably rely on their employers' pension benefit statements when those statements later turn out to be inaccurate.

This Note will discuss how such pension benefit disputes were handled before ERISA, critique how federal courts have adjudicated these disputes since ERISA, and propose a new, fairer ERISA equitable estoppel formula to provide relief to employees in situations like that discussed above.¹⁴

Specifically, this Note will propose that federal courts should permit ERISA equitable estoppel claims in which: (1) a representation of fact has been made with fraudulent intent or gross negligence, (2) by a party who was aware or who should have been aware of the true facts, (3) who intended to induce another's reliance, (4) where the other party was unaware of the true facts, and (5) reasonably and justifiably relied on the representations to his detriment.¹⁵

9. See *infra* Part III (discussing ERISA equitable estoppel formulas in most circuit courts).

10. See *infra* note 122 (discussing why the other two available ERISA remedies do not apply).

11. See, e.g., *Livick v. Gillette Co.*, 524 F.3d 24, 26-27, 30-33 (1st Cir. 2008); *Mello v. Sara Lee Corp.*, 431 F.3d 440, 442, 445-46 (5th Cir. 2005).

12. Jane D. Bailey, *ERISA Preemption*, 74 DENV. U. L. REV. 473, 474 (1997) (citing U.S. GEN. ACCOUNTING OFFICE, *EMPLOYEE-BASED HEALTH PLANS: ISSUES, TRENDS, AND CHALLENGES POSED BY ERISA 2* (1995)).

13. According to an audit published by the U.S. Senate Special Committee on Aging, 13.7 percent of pension participants are being undercompensated based on the terms of their pension plans. See Marcy Gordon, *Pension Recipients Not Getting Full Benefits*, FREE LANCE-STAR, June 17, 1997, at B6; see also Press Release, Pension Benefit Guar. Corp., Pension Plans: Standard Termination Audit Findings (June 16, 1997), available at <http://www.pbpc.gov/news/press/releases/pr97-31a.html>.

14. See *supra* notes 2-10 and accompanying text.

15. This formula is loosely modeled after the Sixth Circuit's ERISA estoppel formula, as articulated in *Smiljanich v. Gen. Motors Corp.*, 302 F. App'x 443, 448 (6th Cir. 2008).

This Note will also propose a new formula for “gross negligence” in the ERISA estoppel context that would not require the employee to prove the employer’s intent to deceive the employee. The above formula would be satisfied when an employer or pension administrator issues a written benefit statement that grossly overstates an employee’s benefit and later reaffirms the employee’s overstated benefit in written and oral correspondences with the employee.¹⁶

Finally, this Note argues that, contrary to their current positions, courts should hold that it is not per se unreasonable for an employee to rely on his employer’s or pension administrator’s representations that—unknown to the employee—contradict the actual pension terms if those representations are made in a written pension benefit statement.¹⁷

I. BACKGROUND

Employee remedies in pension benefit disputes were not always as limited as they are today.¹⁸ Over the last century, Congress and the courts have steadily eroded employee remedies. Congress has done its part by enacting tough antiworker rights laws.¹⁹ The courts have done their part by interpreting workers’ recovery rights under these laws even more narrowly than Congress intended.²⁰

16. See *infra* Part V.

17. See *infra* Part V.

18. See Kimberly A. Kralowec, *Estoppel Claims Against ERISA Employee Benefit Plans*, 25 U.C. DAVIS L. REV. 487, 504-16 (1992) (discussing estoppel claims before ERISA).

19. See *infra* Part II.A (discussing the Taft-Hartley Act and ERISA).

20. See Kenneth G. Dau-Schmidt, *Union Security Agreements Under the National Labor Relations Act: The Statute, the Constitution, and the Court’s Opinion in Beck*, 27 HARV. J. ON LEGIS. 51, 53-54 (1990) (arguing that the Supreme Court’s interpretation of the Taft-Hartley provision that allows unions to collect dues from dissenting employees in *Communications Workers of America v. Beck* was inconsistent with congressional intent and amounts to “a significant drain on the resources of the American labor movement”); see also *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 222 (2004) (Ginsburg, J., concurring) (criticizing the Court’s interpretation of ERISA’s equitable relief provision as a “cramped construction”); Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35, 38-39 (1996) (arguing that the Supreme Court’s interpretation of ERISA’s preemption provision is contrary to congressional intent and has had “disastrous effects” on employee rights). *But see, e.g.*, Eric M. Jensen, *The NLRA’s “Guard Exclusion”: An Analysis of Section 9(b)(3)’s Legislative Intent and Modern Day Applicability*, 61 IND. L.J. 457, 472 n.94, 480-82 (1986) (arguing that courts have properly interpreted congressional intent by broadly applying the Taft-Hartley Act amendments’

A. Pension Benefit Disputes Under American Common Law

Before Congress and the courts began to limit employee remedies through legislation and judicial interpretation, courts readily provided relief to employees who detrimentally relied on their employers' pension benefit misrepresentations.²¹ The relief often came in the form of either promissory estoppel or equitable estoppel.²² For example, in *Sessions v. Southern California Edison Co.*, a California state court estopped an employer from denying that it owed a pension to the plaintiff-employee who retired at age fifty-four even though the actual pension plan terms required the employee to work until age sixty to be eligible for a pension.²³ The court applied the doctrine of promissory estoppel after finding that the employer incorrectly told the employee that it would disregard the age requirement.²⁴ Similarly, in *Sanders v. United Distributors, Inc.*, a Louisiana state court applied equitable estoppel to prevent an employer from claiming that it owed the plaintiff-employee only a \$119 monthly benefit under the actual plan terms, instead of the \$284 monthly benefit that the employer had told the employee he would receive upon early retirement.²⁵

These two cases illustrate how courts previously used estoppel to provide relief to employees in pension benefit disputes like the one discussed in the introduction to this Note.²⁶ As one author concluded, "Estoppel remained an important theory of recovery ... until Congress intervened."²⁷

B. Pension Benefit Disputes After the Taft-Hartley Act

In 1947, Congress slammed the brakes on employee rights in pension benefit disputes. The Labor Management Relations Act,

"guard exclusion").

21. Kralowec, *supra* note 18, at 492 ("[P]re-ERISA courts readily applied estoppel to enforce misrepresentations about benefits.").

22. *Id.* at 504-05.

23. 118 P.2d 935, 936-37, 939-40 (Cal. Dist. Ct. App. 1941); *see also* Kralowec, *supra* note 18, at 515-16 (summarizing the *Sessions* holding).

24. *Sessions*, 118 P.2d at 939-40.

25. 405 So. 2d 536, 538-39 (La. Ct. App. 1981).

26. *See supra* notes 2-10 and accompanying text.

27. Kralowec, *supra* note 18, at 516.

popularly known as the “Taft-Hartley Act,”²⁸ was enacted over President Harry Truman’s veto²⁹ and constituted Congress’s most significant attempt to regulate labor unions.³⁰ The highly controversial Act,³¹ which President Truman predicted would “adversely affect our national unity,”³² requires employers and labor unions to participate in collective bargaining to determine employee wages, hours, and retirement benefits.³³ The Act also requires the employer and labor union to put their agreement in writing “if requested by either party.”³⁴ It was this “writing” provision that courts first used to deny an employee’s estoppel claim against an employer who misrepresented the employee’s pension benefits.³⁵

In *Thurber v. Western Conference of Teamsters Pension Plan*, for example, the U.S. Court of Appeals for the Ninth Circuit rejected the plaintiff-employee’s estoppel claim against his pension administrator.³⁶ The court found that permitting the estoppel claim, and thereby allowing the employee to recover a pension not due under the provisions of the pension plan, would violate the Taft-Hartley Act’s requirement that pension payments be made according to the pension plan’s written provisions.³⁷ Similarly, in *Guthart v. White*,

28. Labor Management Relations Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 191-197 (2006)).

29. See Veto of the Taft-Hartley Labor Bill, 1947 PUB. PAPERS 288 (June 20, 1947), available at <http://www.presidency.ucsb.edu/ws/?pid=12675>; see also Jay Walz, *Labor Bill Is Held Sure of Passage over Truman Veto*, N.Y. TIMES, June 23, 1947, at A1.

30. See generally Steven E. Abraham, *The Impact of the Taft-Hartley Act on the Balance of Power in Industrial Relations*, 33 AM. BUS. L.J. 341, 341-43 (1995) (discussing the impact of the Taft-Hartley Act on employer-employee relationships).

31. William S. White, *Truman Plea Fails*, N.Y. TIMES, June 23, 1947, at A1 (noting the dispute between the President and Congress).

32. *Id.* at A3. In addition to President Truman’s veto, several political organizations labeled the Act a “slave labor law.” Leo Troy, *Taft-Hartley After 50 Years*, J. COM., Sept. 3, 1997, at 8A. In its statement on the Act, the National Executive Board of the Congress of Industrial Organizations (CIO) said, “[Congress] seek[s] to destroy labor unions, to degrade living standards ... and forever to prevent the great mass of the people ... from shaking off this yoke of want and repression.” Shannon Sheppard, *Pamphlets in the Fight Against Taft-Hartley 1947-1948*, HOLT LAB. LIBR., <http://www.holtlaborlibrary.org/tafthartley.html> (last visited Oct. 15, 2012).

33. 29 U.S.C. § 158 (2006).

34. *Id.* § 158(d).

35. Kralowec, *supra* note 18, at 518 (citing *Moglia v. Geoghegan*, 403 F.2d 110, 117 (2d Cir. 1968)).

36. 542 F.2d 1106, 1109 (9th Cir. 1976).

37. *Id.*

the Ninth Circuit denied an employee's estoppel claim seeking medical benefits that the pension administrator said he was eligible for but to which he was not actually entitled under the written provisions of the pension plan.³⁸ The court held that "it would be illegal for the fund to pay benefits" to the employee because doing so would violate the Taft-Hartley Act's writing requirement.³⁹

As devastating as the Taft-Hartley Act was to employee remedies in pension disputes, its reach was limited. The writing requirement, still in effect today, applies only to collectively bargained-for pensions.⁴⁰ Employees with pensions that were not collectively bargained-for could still seek relief via estoppel for a few more years.⁴¹

II. EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) OF 1974

A. *Build Up to ERISA*

Congress further limited employee rights in pension benefit disputes when it enacted ERISA in 1974.⁴² To fully appreciate just how adversely ERISA impacted employee rights in some instances, and just how contrary that impact was to Congress's intent when it enacted ERISA, one first needs to understand the context in which ERISA came to be.

In the late 1800s, employers first began implementing pension plans as part of employee compensation packages.⁴³ In their early years, pensions were legally considered "gifts" and therefore went

38. 263 F.3d 1099, 1102-03, 1105 (9th Cir. 2001).

39. *Id.* at 1103.

40. See 29 U.S.C. § 158(d) (2006); see also Steven L. Brown, *ERISA's Preemption of Estoppel Claims Relating to Benefit Plans*, 30 B.C. L. REV. 1391, 1397 (1989) (explaining that the Taft-Hartley Act "inadequately regulated employee benefit plans because it only applied to pension trusts established through collective bargaining"); Kralowec, *supra* note 18, at 519 (explaining that the Act governs only collectively bargained-for plans).

41. Kralowec, *supra* note 18, at 519 ("Meanwhile, pre-ERISA courts continued to decide estoppel claims against non-collectively-bargained plans.")

42. See ERISA, Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of 5 U.S.C., 18 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C.).

43. PATRICK PURCELL & JENNIFER STAMAN, CONG. RESEARCH SERV., RL 3443, SUMMARY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) 1 (2009), available at <http://aging.senate.gov/crs/pension7.pdf>. American Express was the first major company to establish an employee pension benefit plan. Brown, *supra* note 40, at 1396.

largely unregulated.⁴⁴ If an employer or union underfunded its pension fund or decided that the pension funds could be better used for another purpose, the employer or union could reduce or even terminate the pension plan with few legal consequences.⁴⁵ In short, “employees had no guarantee that employers would actually pay pension benefits”⁴⁶ if “the company became unprofitable or went out of business.”⁴⁷ Clearly, administration of pensions in these early years produced grossly unfair results for the employees who counted on the pensions for retirement income. It was not until World War II that pensions became an issue of national importance.⁴⁸

During World War II, Congress imposed limits on employee wages in order to keep manufacturing costs down.⁴⁹ In an effort to navigate around these limitations, employers ramped up the use of pensions as compensation for employees⁵⁰ because pensions were not subject to the wage controls.⁵¹ As a result, the number of pensions boomed and continued to boom through the 1950s and 1960s.⁵² Still, most pensions went largely unregulated because only a fraction of those pensions were collectively bargained-for and therefore subject to Taft-Hartley.⁵³ In 1963, things changed.

44. PURCELL & STAMAN, *supra* note 43, at 1 (“[P]ensions were regarded as gifts in recognition of long service rather than as a form of compensation protected by law.”); Kralowec, *supra* note 18, at 505 (“The earliest pre-ERISA courts would not enforce employers’ benefit plan promises as contracts because they considered them gifts.”).

45. PURCELL & STAMAN, *supra* note 43, at 1.

46. Brown, *supra* note 40, at 1392.

47. PURCELL & STAMAN, *supra* note 43, at 1.

48. *Id.* at 2.

49. *Id.* Congress had a vested interest in depressing manufacturing costs because it needed to efficiently manufacture the planes and weapons needed for a successful war effort. Richard E. Schumann, *Compensation from World War II Through the Great Society*, BUREAU OF LAB. STAT. (Jan. 30, 2003), <http://www.bls.gov/opub/cwc/cm20030124ar04p1.htm>.

50. Schumann, *supra* note 49; *see also* PURCELL & STAMAN, *supra* note 43, at 2.

51. PURCELL & STAMAN, *supra* note 43, at 2; Schumann, *supra* note 49.

52. PURCELL & STAMAN, *supra* note 43, at 2 (“Both of these developments led to more widespread adoption of employer-sponsored pensions during the 1950s and 1960s.”); Schumann, *supra* note 49.

53. James A. Wooten, “The Most Glorious Story of Failure in the Business”: *The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFF. L. REV. 683, 686 (2011) (“At the end of World War II about 20% of private-sector employees participated in a pension plan. Only a fraction participated in a collectively bargained plan.”).

In December 1963, the financially strained Studebaker-Packard Corporation, which employed thousands of people,⁵⁴ suddenly terminated its pension program.⁵⁵ Overnight, thousands of employees lost the pensions they were promised and had earned.⁵⁶ The story made headlines, outraging employees and labor unions across the country.⁵⁷ Reacting to the public outrage, Congress began exploring regulation of the rapidly growing and largely unregulated private pension system.⁵⁸ The result was ERISA. When Congress passed ERISA nearly a year after the Studebaker failure, the bill explicitly recognized that it was the rapid “growth in size, scope and numbers of employee benefit plans” and the “lack of ... adequate safeguards” that necessitated ERISA’s pension regulations.⁵⁹

B. Overview of ERISA

Although enacted to protect workers, in practice ERISA actually limits employee rights in some circumstances. To say that ERISA sharply limits employee rights *generally*, however, would be woefully simplistic and inaccurate. This Note makes a narrower assertion: that ERISA—as currently interpreted by federal courts—severely limits employee remedies in the event of a conflict between the employee and his or her employer regarding the employee’s pension.

54. PURCELL & STAMAN, *supra* note 43, at 2 (discussing the “several thousand workers and retirees” who lost their pensions due to the Studebaker collapse).

55. Wooten, *supra* note 53, at 683-84 (“When Studebaker-Packard closed the facility in December 1963 the pension plan for hourly workers did not have enough assets to meet its obligations.”).

56. *See id.*

57. *See id.* at 684 (discussing the Studebaker pension failure as a “[f]ocusing event”). The Studebaker pension failure was even referenced in Billy Joel’s chart-topping song “We Didn’t Start the Fire,” which rhythmically listed major political and cultural events from the 1940s through 1980s. *See* BILLY JOEL, *We Didn’t Start the Fire*, on STORM FRONT (Columbia Records 1989) (“Joe McCarthy, Richard Nixon, Studebaker, Television”).

58. PURCELL & STAMAN, *supra* note 43, at 2 (“After the Studebaker automobile company terminated its underfunded pension plan ... Congress began considering legislation to ensure the security of pension benefits in the private sector.”).

59. *See* ERISA, Pub. L. No. 93-406, 88 Stat. 829, 832 (1974) (codified at 29 U.S.C. § 1001 (2006)).

1. ERISA's Employee Pension Protections

ERISA does provide a host of protections and safeguards for employees and their pensions. Although an exhaustive review of those protections and safeguards is not necessary for the purposes of this Note, a brief overview is needed to illustrate the extraordinary lengths to which Congress went to protect employees. Congress's efforts, in turn, illustrate that it enacted ERISA to protect employees' pension benefit expectations and not to sharply limit employee remedies in pension disputes.⁶⁰

ERISA protects employees in three basic ways. First, it imposes on employers a variety of extensive reporting and disclosure requirements to ensure that employees and pension beneficiaries are fully informed about the plan and their benefits.⁶¹ To this end, ERISA requires employers to regularly issue to employees summary plan descriptions that detail in plain language the plan terms and benefits.⁶² If an employer wants to make any material modifications to the pension plan, ERISA requires the employer to notify affected employees in writing.⁶³

Second, ERISA regulates pension eligibility and benefit accrual.⁶⁴ If an employer wants to require an employee to work for the employer for a certain period of time before becoming eligible for pension benefits, the employer must do so in compliance with ERISA's strict limitations.⁶⁵ Similarly, ERISA regulates the rate at which employees earn benefits once they are actually eligible to participate in the pension plan.⁶⁶

60. See Lorraine A. Schmall, *Keeping Employer Promises When Relational Incentives No Longer Pertain: "Right Sizing" and Employee Benefits*, 68 GEO. WASH. L. REV. 276, 276 (2000) ("ERISA's ostensible and articulated purpose is to protect employees' expectations of receiving such benefits when they need them."); James A. Wooten, *A Legislative and Political History of ERISA, Preemption* (pt. 1), 14 J. PENSION BENEFITS 31, 32 (2006) ("In passing ERISA, Congress meant to make security of pension promises a basic goal of federal policy.").

61. See ERISA § 101(a).

62. See *id.* § 101(a)(1).

63. See *id.* § 102(a)(2).

64. See *id.* § 202(a)(1)(A) (regulating employer limits on pension eligibility); *id.* § 204 (regulating pension benefit accrual).

65. See *id.* § 202(a)(1)(A).

66. See *id.* § 204.

Finally, ERISA imposes strict pension funding requirements on employers to ensure that pension funds actually have enough money to pay out the benefits promised to employees.⁶⁷ Together, these regulations demonstrate that Congress intended ERISA to protect employees' pension benefit expectations and did not intend to preclude employees from seeking meaningful relief when wronged by their employers.

2. *Employee Remedies Under ERISA*

ERISA's pension regulations provide meaningful assurance to employees and beneficiaries that the benefits they have been promised will actually be there when they retire. It is the relatively rare instance when those benefits are denied that ERISA falls short.

Section 502(a) is ERISA's "civil enforcement" section, providing remedies for violations of ERISA's regulations.⁶⁸ There are three subsections under section 502(a) that govern virtually all ERISA claims.⁶⁹ Under section 502(a)(1)(A), pension participants and beneficiaries may sue pension administrators who fail to provide the required disclosures about their pension.⁷⁰ If the claim is successful, the pension administrator must provide the required information and may be subject to a \$100 per day fine.⁷¹ Under section 502(a)(1)(B), pension participants and beneficiaries may sue for benefits due under the pension plan terms, plus attorney's fees.⁷² Of course, this section does not provide relief to employees who detrimentally relied on their employer's inaccurate pension benefit statement.⁷³ Finally, and most importantly, under section 502(a)(3), employees and beneficiaries may "enjoin any act or practice which

67. *See id.* §§ 302-304.

68. *See id.* § 502(a).

69. *See id.*; *see also* Peter K. Stris, *ERISA Remedies, Welfare Benefits, and Bad Faith: Losing Sight of the Cathedral*, 26 HOFSTRA LAB. & EMP. L.J. 387, 393 (2009) ("[S]ubsections (1)-(3) ... constitute the three remedy provisions upon which virtually all claims by ERISA participants and beneficiaries are brought.").

70. ERISA § 502(a)(1)(A).

71. *Id.* § 502(c)(i).

72. *Id.* § 502(a)(1)(B)(g).

73. This is because summary plan descriptions are not the actual terms of the plan. *See Cigna v. Amara*, 131 S. Ct. 1866, 1877 (2011) (dismissing a 502(a)(1)(B) claim because the summary plan description was not the actual pension plan).

violates any [ERISA] provision ... or the terms of the [pension] plan, or ... obtain other appropriate equitable relief.”⁷⁴

The last section regarding “other appropriate equitable relief” is of paramount importance because ERISA preempts all state law causes of action, including all contract and tort causes of action, that “relate to” the pension benefit plan.⁷⁵ Likewise, unless an employee’s claims fall within the narrow confines of section 502(a)(1)(A), the employee’s claims are at the mercy of the courts’ interpretation of the phrase “other appropriate equitable relief.”⁷⁶ The meaning of this phrase is a subject of considerable debate.⁷⁷ One of the controversial issues is whether “other appropriate equitable relief” includes equitable estoppel.⁷⁸ Circuit courts were split on this issue.⁷⁹ In May 2011, the Supreme Court in *Cigna Corp. v. Amara* held that under ERISA section 502(a)(3)—the “other appropriate equitable relief” provision—courts could utilize equitable remedies, including reformation, prevention of unjust enrichment, and equitable estoppel to remedy a pension administrator’s ERISA violations.⁸⁰

74. ERISA § 502(a)(3).

75. *Id.* §§ 502(a), 514(a).

76. The employee may not seek relief under any other state or federal law because ERISA’s civil enforcement remedies are the exclusive remedies for claims that relate to ERISA benefit plans. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52 (1987) (stating that ERISA’s preemption provision expresses Congress’s intent that ERISA’s civil enforcement remedies be the exclusive remedies available for ERISA claims).

77. *See, e.g., Jayne Elizabeth Zanglein, Closing the Gap: Safeguarding Participants’ Rights by Expanding the Federal Common Law of ERISA*, 72 WASH. U. L.Q. 671 (1994) (arguing that the “other appropriate equitable relief” provision should be broadly interpreted to expand employee remedies). *But see, e.g., Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255-56 (1993) (holding that “other appropriate equitable relief” is limited, not to “whatever relief a court of equity is empowered to provide,” but to the “categories of relief that were typically available in equity”).

78. Some commentators and courts have suggested that equitable estoppel is consistent with ERISA’s “other equitable relief” provision. *See, e.g., Util. Workers, Local 369 v. NSTAR Electric & Gas Co.*, 317 F. Supp. 2d 69, 72 (D. Mass. 2004) (“An ERISA estoppel claim arises under the federal common law and is considered a form of ‘appropriate equitable relief’ that is available under Section 1132(a)(3).”). Other courts strongly disagree. *See, e.g., Nachwalter v. Christie*, 805 F.2d 956, 959 (11th Cir. 1986) (dismissing plaintiff’s ERISA equitable estoppel claim as inconsistent with ERISA’s writing requirement).

79. *Compare, e.g., Smiljanich v. Gen. Motors Corp.*, 302 F. App’x 443, 451 (6th Cir. 2008) (permitting an ERISA estoppel claim), *with Law v. Ernst & Young*, 956 F.2d 364, 367-68 (1st Cir. 1992) (denying that equitable estoppel is an actionable claim under ERISA).

80. 131 S. Ct. 1866, 1879-81 (2011).

The *Cigna* decision was a victory for employees, but it left many issues unaddressed. Although equitable estoppel is now a cause of action under ERISA, it is still not clear how to formulate an ERISA equitable estoppel claim or under what factual circumstances it might be permitted. The Supreme Court did not address these issues in *Cigna*,⁸¹ so it is up to the lower federal courts to develop a federal common law of ERISA estoppel.⁸² That task may prove to be divisive.

III. CRITIQUE OF PRE-*CIGNA* CIRCUIT COURT ERISA ESTOPPEL FORMULAS

When post-*Cigna* federal circuit courts of appeals begin to consider ERISA equitable estoppel cases, they will be charged with developing an ERISA estoppel formula that is consistent with the Supreme Court's holding in *Cigna*. Naturally, they will look for guidance from pre-*Cigna* circuit court decisions that permitted equitable estoppel. Post-*Cigna* courts should be wary of these decisions, however, because the ERISA estoppel formulas from these pre-*Cigna* decisions are too narrow and do not provide relief to employees in pension benefit disputes like the one described in the introduction to this Note.⁸³

Prior to *Cigna*, the circuit courts that permitted ERISA equitable estoppel claims used some variation of the following formula, permitting a claim only when (1) a representation of fact was made with fraudulent intent, (2) by a party aware of the true facts, (3) intending to induce the other party's reliance, (4) and the other party, unaware of the true facts, (5) reasonably or justifiably relied on the representation to his detriment.⁸⁴

81. *See id.*

82. Congress intended the courts to further develop a federal common law of equitable remedies. *Bins v. Exxon Co. U.S.A.*, 220 F.3d 1042, 1047 (9th Cir. 2000).

83. *See, e.g., Livick v. Gillette Co.*, 524 F.3d 24, 30-32 (1st Cir. 2008) (denying estoppel recovery to employee who detrimentally relied on his pension administrator's statements that conflicted with the unambiguous terms of the actual plan).

84. *See Smiljanich*, 302 F. App'x at 448; *see also* 43 AM. JUR. 3d *Proof of Facts* § 261(B)(8) (2011) (discussing the elements of federal common law equitable estoppel).

A. “Ambiguous” Provision Limitation

Circuit courts further narrowed this formula by limiting ERISA equitable estoppel to cases in which the pension plan itself was ambiguous.⁸⁵ In short, these courts held that a written pension benefit statement could not alter the terms of the actual plan but could bind the pension administrator through estoppel if the statement was an interpretation of an ambiguous provision in the actual plan.⁸⁶ In *Cigna*, the Supreme Court seemed to reject this limitation when it held that, although a pension administrator’s statements about an unambiguous provision of the plan cannot alter the pension plan itself, the statements can be used as the basis for estoppel should the pension participant seek to estop the administrator from claiming that it properly denied benefits under the pension plan.⁸⁷ For this reason, post-*Cigna* courts are unlikely to require ambiguity in the actual pension plan as a prerequisite for estoppel claims. Therefore, post-*Cigna* courts should adopt an equitable estoppel formula similar to that proposed below,⁸⁸ one that permits estoppel claims regardless of whether the pension plan was ambiguous.

B. “Extraordinary Circumstances” Limitation

The far bigger problem with these pre-*Cigna* circuit court formulations is another limitation they imposed on ERISA equitable estoppel claims. In addition to the formula above, every circuit that permitted ERISA estoppel before *Cigna* also added the element of “extraordinary circumstances.”⁸⁹ As one circuit court said, “[A] plain-

85. See 43 AM. JUR., *supra* note 84, § 261(B)(19) (“Under the prevailing rule, an estoppel claim cannot be successfully brought where the misrepresentation at issue conflicts with a clear and unambiguous term of the ... policy.”).

86. See *id.* § 261(B)(20) (“An employer or insurer can be estopped as a consequence of interpretations made of ambiguous provisions.... [But i]f the plain language is clear ... the oral representation will be ... unenforceable.”).

87. See *Cigna Corp. v. Amara*, 131 S. Ct. 1866, 1879-91 (2011).

88. See *infra* Part V.

89. See *Kerber v. Qwest Grp. Life Ins. Plan*, 647 F.3d 950, 957 (10th Cir. 2011); *Smiljanich*, 302 F. App’x at 448; *Mello v. Sara Lee Corp.*, 431 F.3d 440, 444 (5th Cir. 2005); *Coker v. Trans World Airlines*, 165 F.3d 579, 585-86 (7th Cir. 1999); *Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226, 235 (3d Cir. 1994); *Lee v. Burkhart*, 991 F.2d 1004, 1009 (2d Cir. 1993); *Tex. Oil & Gas Corp. v. Andrus*, 498 F. Supp. 668, 676 (D.C. Cir. 1980).

tiff must do more than merely make out the 'ordinary elements' of equitable estoppel to establish a claim for equitable estoppel under ERISA"; he or she must also prove the existence of "extraordinary circumstances."⁹⁰ Although circuit courts have never provided a single controlling definition,⁹¹ it is clear that "extraordinary circumstances" means that the plan administrators either engaged in fraud or intended to deceive the employee.⁹²

The courts' justification for limiting estoppel recovery to claims involving extraordinary circumstances was based on concern for the financial health of pension funds.⁹³ The basic argument was that if courts required pension funds to pay benefits to an employee who was not entitled to those benefits, the fund would not have enough money to pay benefits to employees who were actually entitled to benefits.⁹⁴ Thus, the solvency of the fund trumped an employee's claim for relief.⁹⁵

Admittedly, this justification makes some sense when the plaintiff employee is suing the pension fund. In that situation, the employee's recovery would be taken directly from the pension monies otherwise used to compensate his or her fellow employees. This justification makes little sense, however, when the plaintiff-employee sues his employer instead of the pension fund. In that case, the employee's recovery would be taken from the employer rather than the fund. If the plaintiff's recovery does not come

90. *Kurz v. Phila. Electric Co.*, 96 F.3d 1544, 1553 (3d Cir. 1996).

91. *Id.* ("We have never clearly defined 'extraordinary circumstances,' relying instead on case law to establish its parameters.").

92. *See Burstein v. Ret. Account Plan for Emps. of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 383 (3d Cir. 2003) ("[E]xtraordinary circumstances generally involve acts of bad faith on the part of the employer, attempts to actively conceal a significant change in the plan, or commission of fraud.").

93. *See Phillips v. Kennedy*, 542 F.2d 52, 55 n.8 (8th Cir. 1976) ("The 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.").

94. *See Haeberle v. Bd. of Trs. of Buffalo Carpenters Health-Care Funds*, 624 F.2d 1132, 1139 (2d Cir. 1980).

95. *See, e.g., Craig v. Bemis Co.*, 517 F.2d 677, 686 (5th Cir. 1975) (denying plaintiff-employees' ERISA estoppel claim in order to protect the pension fund's actuarial soundness, even though "[the court] sympathiz[ed] with plaintiffs' views that, after long years of faithful service with the Company which was concluded through no fault of their own, they ought to receive some pension benefits").

from the pension fund, it does not adversely impact the fund's actuarial soundness. Likewise, at least in cases in which the plaintiff-employee is suing his employer, there is no justification for requiring "extraordinary circumstances." Post-*Cigna* courts should therefore adopt an ERISA equitable estoppel formula similar to the one proposed below that abandons the "extraordinary circumstances" limitation.⁹⁶

The "extraordinary circumstances" limitation is flawed for two additional reasons. First, it is not consistent with traditional equitable estoppel formulas or the policies that underlie the doctrine of equitable estoppel. Second, the "extraordinary circumstances" limitation is not consistent with Congress's express purpose for enacting ERISA.

1. "Extraordinary Circumstances" Limitation Not Consistent with Traditional Notions of Equitable Estoppel

As discussed above, the "extraordinary circumstances" required for an ERISA equitable estoppel claim arose only when the employer or pension administrators engaged in fraud or intended to deceive the employee.⁹⁷ With only one exception,⁹⁸ no pre-*Cigna* circuit court permitted ERISA equitable estoppel claims based on an employer's gross negligence in administering a pension. Such a narrow formula is inconsistent with traditional formulas of equitable estoppel and also undermines the justifications for using equitable estoppel.

Outside the ERISA context, case law demonstrates that an equitable estoppel claim may be predicated upon a plaintiff's showing that the defendant either engaged in fraud, intended to deceive the plaintiff, or acted in such a grossly negligent manner toward the plaintiff that his or her actions constituted "constructive fraud." In *In re Maxwell*, for example, a federal district court in Illinois held that "[p]roof of fraudulent intent is not always necessary to invoke the estoppel doctrine."⁹⁹ Similarly, in *Albanese v. WCI*

96. See *infra* Part V.

97. See *Burstein*, 334 F.3d at 383.

98. See *Bloemker v. Laborers' Local 265 Pension Fund*, 605 F.3d 436, 444 (6th Cir. 2010).

99. 40 B.R. 231, 239 (Bankr. N.D. Ill. 1984).

Communities, Inc., a federal district court in Virginia held that “it is not necessary to show actual fraud” to establish equitable estoppel.¹⁰⁰ Indeed, even the Supreme Court has supported this view. In *Brant v. Virginia Coal & Iron Co.*, the Court held that “gross negligence ... [so] as to amount to constructive fraud” is sufficient to establish an equitable estoppel claim.¹⁰¹ Because gross negligence is so widely accepted as a basis for establishing equitable estoppel in other contexts, it is hard to understand why nearly every pre-*Cigna* circuit court required more than gross negligence.

A thorough review of case law from these circuit courts does not reveal a direct answer. The circuit courts simply required “fraud” or “intent to deceive” and made no reference at all to “gross negligence.”¹⁰² Although the justification may not have been expressly stated in these opinions, the crux of the justification was clear: the actuarial soundness of the pension fund is too important to permit estoppel claims that would drain the fund except in cases in which the employer or pension administrator acted in bad faith.¹⁰³ Of course, gross negligence does not require malice or bad faith.¹⁰⁴ Gross negligence is not premised on the mindset of the defendant but upon the reasonableness of the defendant’s actions.¹⁰⁵ An employer’s innocent actions, no matter how negligent, are not sufficiently “extraordinary” to justify jeopardizing the actuarial soundness of the pension fund.

A more compelling argument can be made that permitting equitable estoppel claims based on gross negligence will actually better protect the actuarial soundness of the pension fund. Permitting claims based upon gross negligence will incentivize the employer or pension administrator to take special care in dealing with pensions.¹⁰⁶ This, in turn, will ensure that employers and pension

100. 530 F. Supp. 2d 752, 766 (E.D. Va. 2007) (citing *Nargi v. CaMac Corp.*, 820 F. Supp. 253, 256 (W.D. Va. 1992)).

101. 93 U.S. 326, 335 (1876).

102. *See, e.g., supra* note 89 (listing circuit courts that permit ERISA equitable estoppel under “extraordinary circumstances”).

103. *See supra* notes 93-95 and accompanying text (discussing actuarial soundness of the pension fund as the reason courts required “extraordinary circumstances” in ERISA equitable estoppel cases).

104. JACOB A. STEIN, 1 STEIN ON PERSONAL INJURY DAMAGES TREATISE § 4:11 (3d ed. 2012).

105. *Id.*

106. This is because failure to do so could lead to liability via an ERISA estoppel claim.

administrators are not overpaying pensions, thereby protecting the pension fund's assets.¹⁰⁷ Moreover, if employers and pension administrators take better care to ensure that they are not overestimating an employee's potential monthly benefit in a pension benefit statement, fewer employees will likely choose early retirement based on faulty, overstated estimates. These employees will continue working and contributing to the pension fund, thereby increasing the fund's assets and reducing the number of years that the fund will pay out benefits once the employee retires. For these reasons, permitting equitable estoppel claims based on gross negligence could actually better protect the actuarial soundness of the pension fund. In contrast, artificially narrowing the cases in which an equitable estoppel claim may be brought is unlikely to bring the same benefit.

Requiring more than gross negligence to establish an equitable estoppel claim is more than just bad policy; it is also contrary to the very principles that support the doctrine of equitable estoppel in the first place. The founding principle of equitable estoppel is that "he who by his language *or conduct* leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted."¹⁰⁸ Without "gross negligence," the conduct of the offending party is irrelevant. The issue is simply whether the offending party acted in bad faith. Without a gross negligence standard, employee expectations will frequently be disappointed. Likewise, any ERISA equitable estoppel formula that does not encompass gross negligence undermines the foundational principles of equitable estoppel. Post-*Cigna* courts should therefore adopt an equitable estoppel formula like the one proposed below that permits claims when the employer or pension administrator acted in a grossly negligent manner.¹⁰⁹

107. If an employer or pension administrator overpays pension benefits, it is difficult to recoup those overpayments. See 8 WEST'S FEDERAL ADMINISTRATIVE PRACTICE § 10499 (3d ed. 2011) ("Overpayment of benefits is a relatively common problem with qualified plans. Recovering the overpayment may be difficult.").

108. *Dickerson v. Colgrove*, 100 U.S. 578, 580 (1879) (emphasis added).

109. See *infra* Part V.

2. “Extraordinary Circumstances” Limitation Not Consistent with Congress’s Purpose in Enacting ERISA

The “extraordinary circumstances” limitation on ERISA equitable estoppel claims is also inconsistent with congressional intent. Congress enacted ERISA in large part to protect employees’ expectations about future pension benefits.¹¹⁰ Requiring “extraordinary circumstances” undermines this intent in at least three ways.

First, if an employee reasonably expects to receive a certain benefit based on his employer’s pension benefit statement, it does not make sense that the employee’s chances of recovery depend upon the mindset of his employer or pension administrator when it issued the inaccurate statement. Although one could argue that permitting estoppel in a wider variety of cases would undermine the expectations of other employees whose pension benefits could be compromised if the fund went into the red, this would not necessarily be the result.¹¹¹ Regardless, undermining employees’ benefit expectations by artificially limiting estoppel to cases involving fraud and intentional deception is contrary to Congress’s goal of protecting those employees’ benefit expectations.

Second, requiring “extraordinary circumstances,” defined as “fraud” or “intent to deceive,” to establish an ERISA equitable estoppel claim undermines Congress’s stated goal of “providing ... ready access to the [] courts.”¹¹² Pleading “fraud” or “intent to deceive” is exceptionally difficult,¹¹³ even more so after the Supreme Court’s decisions in *Bell Atlantic Corp. v. Twombly*¹¹⁴ and *Ashcroft v. Iqbal*.¹¹⁵ In those cases, the Court held that a plaintiff must plead facts sufficient to state a plausible claim for relief.¹¹⁶ If the plaintiff fails to do so, the judge must dismiss the claim.¹¹⁷ This imposes a

110. See Schmall, *supra* note 60, at 276.

111. See *infra* Part V (discussing how permitting gross negligence claims could protect the actuarial soundness of the pension fund).

112. ERISA § 2(a), 29 U.S.C. § 1001(b) (2006).

113. See CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1300 (3d ed. 2004) (discussing the heightened pleading standard for fraud claims).

114. 550 U.S. 544 (2007).

115. 556 U.S. 662 (2008).

116. *Iqbal*, 556 U.S. at 677; *Twombly*, 550 U.S. at 556.

117. *Iqbal*, 556 U.S. at 677; *Twombly*, 550 U.S. at 556, 570.

heavy burden on plaintiffs alleging fraud or intent to deceive because proving the defendant's mindset is very challenging to do without discovery.¹¹⁸ Requiring an employee to plead fraud or intent to deceive can hardly be said to provide that employee with ready access to the courts. Permitting claims based on gross negligence, on the other hand, would further Congress's goal of providing ready access to the courts. Because gross negligence is concerned with the defendant's conduct, which may be evidenced by documents like pension benefit statements that are in the plaintiff's possession,¹¹⁹ the plaintiff could much more easily plead facts sufficient to proceed past a Rule 12(b)(6) motion to dismiss.¹²⁰

The third reason that the "extraordinary circumstances" limitation is contrary to Congress's intent is that it undermines Congress's desire to provide employees with "appropriate remedies" when the employer or pension administrator violates ERISA's regulatory provisions.¹²¹ By foreclosing estoppel claims premised on "gross negligence," courts essentially foreclose on those employees' only potential claims.¹²²

It is for these reasons that limiting ERISA equitable estoppel claims to cases involving "fraud" or "intent to deceive" is contrary to Congress's intent when it enacted ERISA.

118. Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 608 (2002) ("Facts supporting allegations of the state of mind of a defendant are often peculiarly in the hands of the defendant. Pleading with particularity is difficult, if not impossible, without discovery.").

119. A summary plan description, which is prepared by the employer or pension administrator, could evidence gross negligence if it contradicts the terms of the pension plan. *See supra* text accompanying note 62.

120. *See* FED. R. CIV. P. 8; *see also* 35A C.J.S. *Federal Civil Procedure* § 307 (2012).

121. ERISA § 2(a), 29 U.S.C. § 1001(b) (2006).

122. The other two civil enforcement remedies do not apply in this situation. ERISA section 502(a)(1)(A) does not apply because the employee would not be seeking disclosure of certain documents, and section 502(a)(1)(B) does not apply because the employee would not be seeking benefits due under the terms of the plan. *See supra* notes 70-73 and accompanying text.

IV. CRITIQUE OF THE SIXTH CIRCUIT'S PRE-*CIGNA* ERISA EQUITABLE ESTOPPEL FORMULA

As previously noted, the Sixth Circuit Court of Appeals was the only pre-*Cigna* circuit court that permitted ERISA equitable estoppel claims founded on an employer's or pension administrator's gross negligence.¹²³ For two reasons, however, the Sixth Circuit still denied pre-*Cigna* ERISA equitable estoppel claims with facts similar to those presented in the introduction.¹²⁴ If post-*Cigna* circuit courts are to provide remedies to employees who, to their detriment, reasonably relied on their employers' representations about pension benefits, these courts must reverse course.

A. Sixth Circuit's "Reasonableness" Definition Is Not Reasonable

The first problem with the Sixth Circuit's pre-*Cigna* ERISA equitable estoppel formula is its understanding of "reasonableness." Of course, an estoppel claim arises only if the plaintiff's reliance on the defendant's misrepresentations was "reasonable."¹²⁵ In the ERISA context, the Sixth Circuit held that it is almost per se unreasonable for an employee to rely on his or her employer's or pension administrator's statements in a pension benefit statement if those statements contradict the actual terms of the plan.¹²⁶ Courts that use this reasoning argue that a reasonable employee would have verified the accuracy of the pension benefit statement by calculating benefit eligibility on his or her own using the actual terms of the pension plan.¹²⁷ It would be unreasonable, these courts assert, for an

123. See, e.g., *Smiljanich v. Gen. Motors Corp.*, 302 F. App'x 443, 448 (6th Cir. 2008).

124. See, e.g., *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 404 (6th Cir. 1998) ("[E]stoppel can only be invoked in the context of ambiguous plan provisions.").

125. See 4 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 8:3 (4th ed. 2008).

126. See, e.g., *Sprague*, 133 F.3d at 404 ("[R]eliance can seldom, if ever, be reasonable or justifiable if it is inconsistent with the clear and unambiguous terms of plan documents available to or furnished to the party.").

127. See *Availability of Estoppel for ERISA Benefit Claims*, in RIA PENSION BENEFITS LIBRARY PENSION ANALYSIS 76,017.3 at 2 (2011).

employee to simply rely on his or her employer's statements about the plan.¹²⁸

The Sixth Circuit's understanding of "reasonableness" may have intellectual merit, but it fails in practice. It is not reasonable to expect employees to be able to accurately calculate their pension benefit eligibility on their own. The pension benefit calculation is often extraordinarily complex.¹²⁹ The plan itself can be up to one hundred pages long, and there are countless factors that can further complicate the calculation:¹³⁰ mergers, promotions, demotions, starting salary, ending salary, start date of employment, end date of employment, length of employment, breaks in employment, early retirement, late retirement; the list goes on and on.¹³¹ Further, when the employer issues one plan document whose terms govern the pensions of every employee, one cannot reasonably expect each individual employee to be able to navigate this complex calculation on his or her own.

It is far more reasonable for an employee to seek out the employer's or pension administrator's calculation. Pension administrators are experts in the pension system, and they have the ability and resources to calculate benefits more quickly and accurately. After all, it is what they get paid to do.¹³² Admittedly, a reasonable employee would not rely on a single pension benefit statement before making a decision about retirement. Employers and pension administrators are prone to human error, and a reasonable employee would verify the benefit statement before making a life-changing decision. A reasonable employee would ask his or her employer or pension administrator to verify the benefit statement and only upon verification would a reasonable employee make a decision in reliance on the employer's calculation.

128. *Id.*

129. *Id.*

130. "Following the Terms of the Plan": What Does It Mean? What if You Don't?, STROMATA, <http://stromata.tripod.com/id153.htm> (last visited Oct. 15, 2012).

131. See generally AM. ACAD. OF ACTUARIES, FUNDAMENTALS OF CURRENT PENSION FUNDING AND ACCOUNTING FOR PRIVATE SECTOR PENSION PLANS 3-4, 6 (2004), available at http://www.actuary.org/pdf/pension/fundamentals_0704.pdf.

132. See PA. MUN. RET. SYS., EVALUATING YOUR PENSION PLAN (2010), available at <http://www.pMrs.state.pa.us/pensions/PenPlanBroch.pdf>.

Given the complexity of the pension benefits calculation, it is baffling that courts have denied claims in which the employer verified its original benefits calculation, orally and in writing, and on multiple occasions, spanning a significant period of time.¹³³ If an employee's reliance in those circumstances is not reasonable, it is not clear how an employee could ever reasonably rely on his or her employer's statements about pension benefits. Therefore, when post-*Cigna* circuit courts address the issue of "reasonableness," they should recognize the complexity of the calculation from an employee's perspective and hold, as articulated in the proposal below, that an employee acts reasonably when he or she relies on a pension benefit statement that his or her employer verified on at least one separate occasion.¹³⁴

B. Sixth Circuit's Formula Leaves "Gross Negligence" Undefined

The second problem with the Sixth Circuit's pre-*Cigna* ERISA equitable estoppel formula is the Court's failure to provide a concrete definition for gross negligence. Outside of the ERISA context, courts have developed a variety of definitions. In some courts, gross negligence is a very high bar. For example, one court held that gross negligence is "an entire, utter, complete, or extreme lack of care."¹³⁵ Another court required a plaintiff to prove the defendant's gross negligence by establishing "intentional, conscious failure."¹³⁶ And yet another court held that gross negligence is not present "if the defendant exercised some degree of care."¹³⁷ Compare these definitions with those established by other courts that have developed a much lower bar for proving "gross negligence." For example, one court defined gross negligence as "[an] act or omission ... of an aggravated character."¹³⁸ Another court defined it as simply "a

133. See, e.g., *Livick v. Gillette Co.*, 524 F.3d 24, 32 (1st Cir. 2008) (discussing the employer's "repeated mistaken estimates").

134. See *infra* Part V.

135. *Mullins v. State Farm Fire & Cas. Co.*, 697 So. 2d 750, 754 (La. Ct. App. 1997) (internal quotation marks omitted).

136. *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 520 S.E.2d 142, 153 (S.C. 1999).

137. *Whitley v. Commonwealth*, 538 S.E.2d 296, 300 (Va. 2000).

138. *Curley v. AMR Corp.*, 153 F.3d 5, 13 (2d Cir. 1998).

greater lack of care than in the case of ‘ordinary negligence.’”¹³⁹ Leaving “gross negligence” undefined in the ERISA equitable estoppel context opens the door to any number of definitions and would lead to inconsistent outcomes.

How courts ultimately define “gross negligence” will have an important impact on ERISA equitable estoppel claims. If courts require proof of “intentional, conscious failure,” employees will have the same procedural difficulties proving gross negligence as they have proving fraud.¹⁴⁰ Similarly, if courts deny estoppel claims merely because the employer “exercised some degree of care,” employee claims are likely to fail. Employers could simply respond that they exercised “some” care just by preparing a pension benefit statement in the first place. If courts are to give “gross negligence” any meaning in the ERISA equitable estoppel context, they must define it in a manner that does not require a plaintiff to prove the employer’s intent or let the employer off simply by proving that it used some woefully inadequate degree of care.

V. PROPOSED ERISA EQUITABLE ESTOPPEL FORMULA

The analysis above demonstrates the flaws in pre-*Cigna* circuit courts’ approaches to ERISA equitable estoppel. With the Supreme Court’s decision in *Cigna*, however, circuit courts will have an opportunity to correct their flawed approaches. This Note proposes that these post-*Cigna* courts do so by adopting the following ERISA equitable estoppel formula:

ERISA equitable estoppel is permitted when (1) a representation of fact is made with fraudulent intent or gross negligence, (2) by a party who was aware, or who should have been aware, of the true facts, (3) who intended to induce another’s reliance, (4) where the other party was unaware of the true facts, and (5) reasonably and justifiably relied on the representations to his detriment.¹⁴¹

139. *Higgins v. N.Y.C. Hous. Auth.*, 702 N.Y.S.2d 502, 506 (N.Y. Civ. Ct. 1999).

140. *See supra* notes 112-20 and accompanying text.

141. This formula is loosely modeled after the Sixth Circuit’s ERISA estoppel formula, as articulated in *Smiljanich v. General Motors Corp.*, 302 F. App’x 443, 448 (6th Cir. 2008).

This Note also proposes that courts adopt a definition for gross negligence that does not require a plaintiff to prove the defendant's malicious intent to deceive the employee. Whatever precise definition the courts ultimately adopt, "gross negligence" should be found when an employer or pension administrator issues a written benefit statement that vastly overstates an employee's benefit and later reaffirms the employee's overstated benefit in correspondences with the employee.

Finally, this Note proposes that post-*Cigna* courts adopt a more realistic approach to the "reasonableness" requirement. Courts should find that it is not per se unreasonable for an employee to rely on his or her employer's or pension administrator's representations, provided those representations are made in a pension benefit statement and are later confirmed by the employer or pension administrator in subsequent communications with the employee.

By adopting these recommendations, which address the shortcomings of pre-*Cigna* formulas, courts would establish a new, fairer approach to ERISA equitable estoppel. This new approach would provide relief to employees who reasonably rely on their employers' or pension administrators' inaccurate statements about pension benefits. It may even protect the actuarial soundness of the pension plan for future employees. This new approach would also be more consistent with Congress's intent when it enacted ERISA because it protects employees' expectations about pension benefits¹⁴² and provides employees "ready access to the ... courts" when those expectations are disappointed.¹⁴³ Finally, this approach would work in practice. It does not impose unrealistic expectations on either the employee or the employer. It simply requires both parties to use reasonable care.

142. See *supra* note 60 and accompanying text.

143. ERISA § 2(a), 29 U.S.C. § 1001(b) (2006).

CONCLUSION

In 1879, the Supreme Court said: “[H]e who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted.”¹⁴⁴ Nearly a century and a half later, circuit courts must now decide whether that statement still has meaning in the employment benefits context. By adopting the proposed approach to ERISA equitable estoppel, circuit courts could restore meaning to that statement again. In doing so, courts would protect the legions of employees who have dedicated their lives to their work on the promise that they will one day reap the benefits of a retirement pension.

*Adam S. McGonigle**

144. *Dickerson v. Colgrove*, 100 U.S. 578, 580 (1879).

*J.D. Candidate 2013, William & Mary Law School; B.A. 2010, University of Kansas. Many thanks to my parents, Eric and Robin, for their love and support, and to the *Law Review* staff for their hard work.