

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

MYLA NAUMAN,
JANE ROLLER, and
MICHAEL LOUGHERY,

Plaintiffs,

v.

ABBOTT LABORATORIES
and HOSPIRA, INC.,

Defendants.

No. 04 C 7199

Judge Gettleman
Magistrate Judge Brown

PLAINTIFFS' POST-TRIAL BRIEF

Steven M. Sprenger
SPRENGER & LANG, PLLC
1400 Eye Street, N.W., Suite 500
Washington, DC 20005
(202) 772-1160

Michael M. Mulder
Jamie S. Franklin
MEITES, MULDER, MOLLICA & GLINK
20 S. Clark Street, Suite 1500
Chicago, IL 60603
(312) 263-0272

Attorneys for the plaintiffs and class

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I. INTRODUCTION

On April 30, 2004, Abbott Laboratories (“Abbott”) spun off the employees in its Hospital Products Division and related businesses (“HPD”) to create a new company called Hospira, Inc. (“Hospira”). The evidence presented at trial proved that Abbott, needing to reduce the cost of benefits companywide, developed a scheme to spin off a quarter of its employees to a freestanding entity. That alone might be justified in isolation on valid business grounds, but the combination of defendants’ decisions revealed a singular plan to dump pension and benefit liabilities: in deciding to spin HPD, Abbott and the future Hospira executives intentionally interfered with the benefits of the class members in order to maximize their savings. First, Abbott barred the spun employees from being rehired for two years, after which time they could return only as new hires, thereby cutting off their bridging rights under Abbott’s pension plan. Then the defendants provided the essential second step of the scheme by adopting a no-retiree policy under which Hospira refused to hire any retirement-eligible HPD employees who had chosen to retire from Abbott before the spin date (and, at trial, defendants exhibited a blatantly anti-retiree animus). Abbott thus solved its dilemma regarding how to stem the rising benefit costs for the company as a whole through the spin of HPD. Regardless of whether the spin added value for Abbott’s shareholders, it was conceived and executed to maximize benefit savings for the defendants by interfering with the benefits of the class members and discriminating against retirees, thus violating ERISA § 510, 29 U.S.C. § 1140.

The HPD spin depended from the very beginning on the premise that the new company would not offer a pension plan or retiree medical benefits, and that, in fact, it would not be financially capable of doing so because it would be in an entirely different benefits peer group than Abbott. (Tr. 1200; PX90 at A016800; PPF ¶¶ 277, 289.) However, to serve its own ends

of ensuring that the HPD workers went quietly to Hospira to provide it with a ready-made, trained workforce and to preserve its cost savings by avoiding mass retirements, Abbott concealed this crucial information and placated the employees by repeatedly telling them that Hospira would consider all the options and decide on its own retirement benefits plans after the spin date. Plaintiffs have proven at trial that Abbott breached its fiduciary duties to the class in violation of 29 U.S.C. § 1104 because it knew that decisions had been made to cut benefits, but it failed to inform the class members until long after the spin, and in so doing, it harmed the class.

ERISA § 510 (under which Counts I-III arise) and ERISA § 404 (under which Count IV arises) are both enforced by ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), which permits a civil action “to enjoin any act or practice” that violates any provision of Title I of ERISA or to obtain “other appropriate equitable relief” to redress such a violation. Remedies available to the class are set forth more fully in Section XIII of Plaintiffs’ Proposed Conclusions of Law (“PPCL”) and in Plaintiffs’ Response to Defendants’ Motion in Limine to Bar Plaintiffs’ Expert David Feinstein (Dkt. 394, filed April 13, 2009).

Below, plaintiffs summarize how they have proven their claims at trial, beginning with the omissions and misrepresentations that Abbott made to the class that constituted a breach of its fiduciary duties (Count IV). They then address Counts II and III, the two-sided policy adopted by Abbott and Hospira that barred employees from bridging back into the Abbott plans and barred retirees from going to Hospira. They conclude with Count I, the terminations under the spin itself. As the Court suggested (Tr. 1372-73), plaintiffs do not set forth a full statement of facts here; rather, they incorporate and refer to their concurrently-filed Plaintiffs’ Proposed Findings of Facts (“PPFF”) to supplement this brief.

II. COUNT IV – BREACH OF FIDUCIARY DUTY

Plaintiffs have proven at trial that Abbott omitted material information and made affirmative misrepresentations that harmed the class. On November 4, 2003, Abbott posted on its internal network a five-page newsletter titled “Information of Retirement Benefits for U.S. Employees Joining the New Company.” (PPFF ¶ 356; PX22.) The document began by acknowledging that the future of pension benefits at the new company was a “question [that] has been on the mind of many employees who will be joining the new company.” (*Id.* at MN00030.) It stated that through December 31, 2004, pension benefits earned to date would be provided by a plan set up by Abbott and the new company. However, as for future pension benefits, the newsletter stated “[r]etirement benefits (as well as other benefits) at the new company for 2005 and beyond will be determined by the new company and communicated at a later date.” *Id.* This statement was flatly untrue when Abbott made it: by November 2003, Abbott and the future Hospira executives had agreed to freeze additional pension accruals at the new company after December 31, 2004.

According to Abbott’s witnesses, one of the major goals of the spin’s structure was to keep the HPD workforce intact for Hospira. (PPFF ¶ 127; PX123 at A015002; PX22.) To achieve this end, Abbott simply lied about what the future held for employees weighing going to Hospira versus retiring from Abbott or seeking a job elsewhere. By the time this newsletter was distributed, Abbott and the new company’s future executives had determined that the pension plan would be spun to the new company and frozen, and the new company would not offer its own plan. Similarly, by the end of November 2003, a firm decision was made that retiree medical coverage would not be offered at the new company. This decision, too, was totally concealed from employees considering whether to retire, seek a new position, or go to Hospira.

If defendants had disclosed the truth – that Hospira would freeze pension accruals at the end of 2004 and would have no additional pension or retiree medical coverage – it would have been much harder to transfer an intact workforce to the new company.

The date of the November 2003 newsletter is crucial, because at that time, prospective Hospira employees had maximum leverage. The retirement-eligible employees had until December 31, 2003 to retire from Abbott and lock in the very advantageous retiree medical plan terms that were scheduled to change on January 1, 2004. (PX84; PPF ¶ 451.) And given the keen interest that Abbott knew the employees had in their future benefits, they would have had a variety of forums to express their displeasure if they had known the secret plan to end their benefits once they were at Hospira. Abbott knew that if the employees knew the truth, they could demand to be kept whole, just as Abbott’s executives Kearney and Amott used their insider knowledge about the new company’s plans to extract special, secret transition bonuses.¹ Abbott’s executives looked out for Abbott and themselves, rather than acting as fiduciaries are required to act – solely in the interest of the plan participants. As such, Abbott breached its fiduciary obligations of loyalty, candor and honesty to the class in violation of ERISA.

Congress intended ERISA’s fiduciary responsibility provisions (ERISA § 404(a), 29 U.S.C. § 1104) to codify the common law of trusts. *See Varsity Corp. v. Howe*, 516 U.S. 489, 496 (1996); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). The common law duty of loyalty precludes a fiduciary from making material misrepresentations to the beneficiary. *See Varsity*, 516 U.S. at 506; *Anweiler v. Am. Elec. Power Serv. Corp.*, 3 F.3d 986, 991 (7th Cir. 1993) (“[f]iduciaries breach duties of loyalty and care [under ERISA] if they mislead plan

¹At trial, ironically, Kearney described himself as “being sort of the financial conscience for the new company, the watchdog” – a watchdog, the evidence shows, for himself, but not for the rest of the employees. Tr. 1389.

participants”); *Peoria Union Stock Yards Co. Ret. Plan v. Penn Mut. Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983) (“[l]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in [29 U.S.C. § 1104]”). The Seventh Circuit has previously recognized that it is a breach of fiduciary duty for an employer to lie to employees “in order to induce them to surrender their benefits.” *Baker v. Kingsley*, 387 F.3d 649, 661 (7th Cir. 2005). And it is our Circuit’s longstanding position that fiduciary duties under ERISA are to be construed liberally: “The duty of care, diligence, and loyalty imposed by the fiduciary principle is far more exacting than the duty imposed by tort law not to mislead a stranger.” *Harzewski v. Guidant Corp.*, 489 F.3d 799, 805 (7th Cir. 2007).

As this Court has noted “[t]he Seventh Circuit has repeatedly described the elements of such a claim as (1) defendants are plan fiduciaries; (2) defendants breached their fiduciary duty; and (3) the breach caused harm to the plaintiff. *Kamler v. H/N Telecommunication Services*, 305 F.3d 672, 681 (7th Cir. 2002); *Brosted v. Unum Life Insurance Co. of America*, 421 F.3d 459, 465 (7th Cir. 2005).” *Nauman, et al. v. Abbott Laboratories and Hospira, Inc.*, No. 04 C 7199, 2007 WL 1052478, *2 (N.D. Ill. Apr. 3, 2007). At trial, the class established each element.

A. Abbott Acted as a Fiduciary

The facts established at trial clearly show that Abbott was acting as a fiduciary in counseling employees subject to the spin-off about both their benefits under its own plans and their future benefits if they went to work for the new company. This case in many ways mirrors the facts in *Varity*, 516 U.S. at 502-03, where the Court upheld the district court’s findings that the employer was a fiduciary. In *Varity*, when the employer conveyed information about the likely future of plan benefits, thereby permitting employees to make an informed choice about

continued participation, it was exercising a “power ‘appropriate’ to carrying out an important plan purpose.” *Id.* at 502-03.

The Seventh Circuit has recognized that “*Variety* shows that candid and complete information is required if two plans are in existence, and the sponsor tries to persuade employees to give up benefits under one in exchange for benefits under the other.” *Commonwealth Edison v. Beach*, 382 F.3d 656, 359 (7th Cir. 2004). Here, plaintiffs faced just that choice – whether to stay in Abbott’s plans or go with the new company’s yet-undisclosed plans. As the fiduciary of both Abbott’s pension and retiree medical plans and as negotiator with Hospira’s future executives, Abbott was in a unique position both to know the truth and to tell it. In fact, Abbott acknowledged on numerous occasions that it had obligations to its employees for candid communications about benefits with the new company.² (PX123 at A015002.) Without the truth, class members faced a blind choice among three options: going to Hospira, retiring from Abbott (if retirement-eligible), or leaving Abbott for another employer and remaining participants in Abbott’s pension plan. But they were denied the information they needed to make an informed decision, because Abbott concealed the crucial facts that early on in the spinoff process, everyone involved in the deal knew that the only way Hospira could afford the transitional plan was to freeze it on December 31, 2004 and not offer its own plan or retiree medical benefits. (PPFF ¶¶ 339-343.)

²For example, in the July 2003 document entitled “HR Guiding Principles,” its blueprint for the transaction, Abbott acknowledged that it knew that benefits would weigh heavily on the HPD employees’ minds and that the creation of a transitional period would “allow[] employees to focus primarily on the business instead of their pocketbooks.” Similarly, Hewitt advised Abbott that communications should be frequent, candid, and two-way with all stakeholders and that Abbott should communicate information, both good and bad news, as soon as it feasibly could. (PPFF ¶ 85; DX69; Tr. 1184.)

In *Varity*, the district court's finding that the company was acting as a fiduciary was upheld because the employer's "factual statements were made, combined with plan-related nature of the activity, [and] engaged in by those who had plan-related authority to do so." 516 U.S. at 503. All of those factors are true here: the HPD employees here had every reason to believe, reading the written communications about benefits from Abbott and attending the public discussions with Abbott's top executives and human resources representatives, that Abbott had apparent authority to communicate as a fiduciary with the plan beneficiaries. *Id.*

B. Abbott Omitted Material Information and Made Materially False Statements to the Class

1. Materiality.

As a fiduciary, Abbott had a high duty of care to "communicate material facts affecting the interests of the beneficiaries. This duty exists when a beneficiary asks fiduciaries for information, and even when he or she does not." *Anweiler*, 3 F.3d at 991. The evidence at trial showed that plan participants constantly questioned Abbott about what the future held. Abbott knew throughout the discussion of the spin – from August 2003 to May 2004 – that participants in the retirement plans were anxious to know how it would affect their retirement benefits. Abbott informed its board of directors prior to the public announcement of the spin that "beyond the viability of NewCo and job security, the employees will be most concerned about pay and benefits." (PX123 at A015002.) Abbott knew it needed to tread carefully – in fact, it set up an employee hotline to handle the crush of benefits-related questions. (PPFF ¶¶ 465-469.) Tellingly, though, the marching orders given to those answering the questions were to keep the answers purposely "vague." (PPFF ¶ 468.) In the face of these questions and reports to management by those receiving them (*see, e.g.*, PPFF ¶ 303), there can be no dispute that Abbott

