LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
FRIDAY, SEPTEMBER 22, 2017

Truth or consequences (180 million of them)

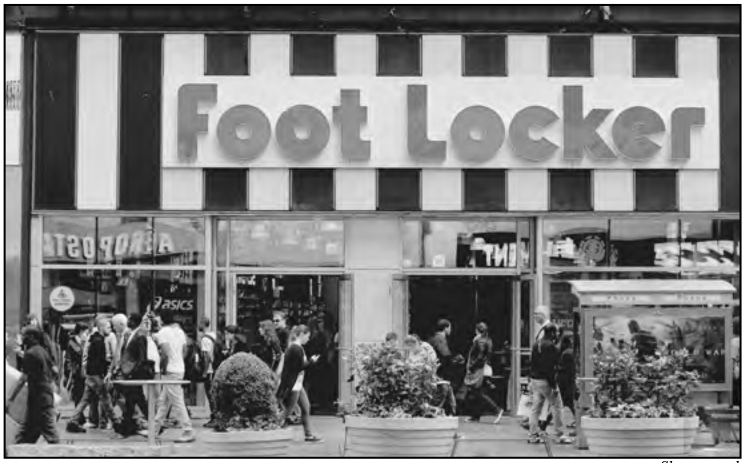
By Bob Blum

Tell the truth or face the consequences. For Foot Locker Retail Inc., the consequences are to pay employees $180 million. *Osberg v. Foot Locker*, 862 F. 3d 198 (2d. Cir, July 6, 2017). That's a heck of a big cost for learning that when the news is bad, say it. Don't hide it.

In the mid-1990s, Foot Locker was in trouble. Its share price had plummeted from about $30 to about $11; its revenue was following suit. So it had to cut costs. A standard play for employers in trouble is to cut pensions, and Foot Locker decided to do this. But Foot Locker was squeamish. Cutting pensions was a "morale killer," so Foot Locker decided to "obscure" what was really happening.

It's not hard to obscure pensions. Few understand them and there's a lot of behind-the-curtain actuarial stuff that makes them work. Foot Locker changed its pensions to be less generous. More to the point, Foot Locker used actuarial maneuvers to *freeze benefits for four to five years* for thousands of employees. They would work for four to five years after the change *without earning any* new pension benefits. No doubt, employees would not be happy with this news.

Foot Locker decided on disguise: Instead of telling employees what was happening, it sent out "good news." One key letter said that, "after listening to what associates have told us they would like to see," it had, "decided to update its pension plan to give associates a more competitive retirement benefits package." Foot Locker knew that the news was not good so at the least this statement was misleading. Foot Locker also said that the employees would be able to see their pension accounts "grow each year." The truth was quite different. Nothing grows in a freeze.



Shutterstock

The strategy was successful — in the short run. Apparently very few understood what had happened to their pensions. But by 2007, plaintiffs figured out the truth. When that happened they sued.

It took three district court decisions and one decision by the 2nd U.S. Circuit Court of Appeals to get to trial. By that time, the U.S. Supreme Court in *CIGNA vs. Amara*, 563 U.S. 443 (2011), had changed the law in plaintiff's favor, though not entirely. In *Foot Locker*, there were a number of legal issues including the limitations period, the standard required to obtain a remedy, and the remedy itself. But the case turned on the facts.

Trial testimony was awful for Foot Locker. The vice president of human resources said that she knew the information given was wrong. In fact she had made an "affirmative decision" to leave out the bad news. One of the pension design team said that they "made sure" that employees were not told anything that would contradict the idea that their pensions would grow. The former chief financial officer of a major division testified that he did not understand that his pension would be frozen. Even employees whose job was to calculate pensions did not understand the freeze. It probably did not help Foot Locker that it had destroyed 141 boxes of documents that could have been relevant to plaintiffs' case, though the court said that this did not affect the decision. Nor could it have helped that the former chief executive officer of a major division was clearly annoyed that he had to testify, to such an extent that this was called out in the court's opinion.

The district court found that the communications to employees were intentionally false and misleading, that Foot Locker obscured the facts, and that Foot Locker knew that employees would "mistakenly perceive" the new plan. The district court held foursquare for the employees. The deciding factor was that Foot Locker intentionally did not tell the truth even though as plan administrator it had a fiduciary responsibility under the Employee Retirement Income Security Act of 1974 to act for the benefit of the employees.

The district court decided that the plaintiffs should get what they reasonably believed that they were told they would get — the pension plan was to be reformed to undo the freeze. The court even gave additional benefits (a windfall?) to over 200 employees who had no pension loss with the change. What was remarkable is that the same judge previously had granted Foot Locker's motion to dismiss because she found no damages. After all, even if Foot Locker had told the truth, what could plaintiffs have done about it?

The 2nd Circuit reversed and remanded for the district court to determine if equitable remedies were appropriate. The trial testimony on remand clearly turned around the judge's opinion and this time the 2nd Circuit affirmed.

You have to ask why this case did not settle. Well before trial, Foot Locker surely knew the facts were not favorable, and the plaintiffs also must have been concerned about serious legal issues. There were several possible avenues for the parties to explore. There were legitimate limitations period issues. Compromise on technical actuarial factors (interest rates and mortality tables) might have been reasonable. The plaintiffs might have yielded on the windfall issue. Maybe they also would have considered a haircut for quick payment because some class members may not live long enough to otherwise collect. It may be difficult to find employment records back to 1996 and both sides might have wanted to find a way to resolve this issue. But perhaps "principle" took over. Major amicus briefs decrying the terrible effects on pension plans (for defendant) and on all employees (for plaintiff) were filed with the 2nd Circuit.

This loss will cost Foot Locker a bundle. Too bad. If Foot Locker had told the truth — even though the news was not good — there would have been no case and no liability.


BLUM

Bob Blum *is a mediator in the Bay Area. Reach him at* ***BobBlumMediation. com.***