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Defining the Parameters: When an ERISA Summary Plan Description Trumps the Corresponding Plan Document

*Megan Rose Bosau*

"Annual notices to employees are required for some laws, but a lot of other important information about health care rights is buried in what are called summary plan descriptions of benefits packages, mounds of legalese about as readable as the package inserts in a Tylenol box."

I. INTRODUCTION

Roughly 78.6 million people in the United States work for companies that offer an employer-sponsored retirement plan.\(^2\) Seventy-nine percent of these workers participate in the sponsored plans.\(^3\) Approximately $4.9 trillion in aggregate assets are held in trust by qualified private retirement savings plans.\(^4\) Nearly 74% of Americans are also covered by an employer- or union-sponsored group health care plan.\(^5\)

The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law which regulates employer-provided pension and health and welfare benefit plans in the United States.\(^6\) The terms under which an employer's health and welfare plans are administered are set

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3. Id.
4. Peter J. Wiedenbeck, ERISA in the Courts 3 (Federal Judicial Center 2008). "That extraordinary figure excludes $1.3 trillion in private pension plan assets held by life insurance companies and more than $3.7 trillion held by deferred compensation plans covering government workers [which are not governed by ERISA]." Id.
5. Id.
forth in a comprehensive manuscript known as a plan document. Plan documents detail the benefits available to a plan participant. Pursuant to ERISA, employers must furnish plan participants and beneficiaries with a summary plan description (SPD). The SPD must be "written in a manner calculated to be understood by the average plan participant [which is] . . . sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." By definition, an SPD contains different language than the much longer and comprehensive corresponding plan document. However, problems arise when the SPD terms conflict with the plan document provisions. The circuit courts are split regarding what elements an ERISA claimant must establish to prevail on a claim for benefits which the SPD seemingly allows but the plan document prohibits.

This Article explores an area of law which is currently subject to a five-way circuit split—whether an ERISA claimant must establish reliance and/or prejudice when the terms of an SPD conflict with the more detailed terms of a plan document—and argues the Supreme Court should settle the confusion and unpredictability caused by the differing standards.

Section II of this Article describes the background of ERISA, discusses SPD requirements and policy concerns, analyzes ways an SPD can conflict with the underlying plan document, and summarizes the remedies available to a claimant under ERISA. Section III explains the five-way circuit split. Section IV analyzes the circuit split, arguing the Supreme Court should adopt the Seventh and Eleventh.

7. ERISA § 3(3); 29 U.S.C. § 1002(3) defines "employee benefit plan" or "plan" to mean "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan."

8. Consistent with ERISA § 3(7); 29 U.S.C. § 1002(7), this Article uses "participant" to mean "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit" (emphasis added). An "employee" is not necessarily a plan "participant" because ERISA defines "employee" as simply "any individual employed by an employer." ERISA § 3(6); 29 U.S.C. § 1002(6).

9. Consistent with ERISA § 3(8); 29 U.S.C. § 1002(8), this Article uses the term "beneficiary" to mean "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder."

10. ERISA § 102(a); 29 U.S.C. § 1022(a) (emphasis added).


12. See infra Section II. A-D.

13. See infra Section III. A-E.

Circuits' standard that a beneficiary must prove reliance on an SPD before they may benefit from advantageous SPD terms which conflict with the corresponding plan document.\footnote{Branch v. G. Bernd Co., 955 F.2d 1574, 1579 (11th Cir. 1992) (requiring showing of reliance).}

II. BACKGROUND

A. The Employee Retirement Income Security Act of 1974

Prior to the enactment of ERISA, employee benefit plans were governed by a patchwork of federal and state laws; however, this system—or lack thereof—ineffectively protected employees.\footnote{See infra Section IV. A-C.} ERISA was adopted in 1974 "in response to highly publicized instances of fraud and mismanagement in employee pension funds, which had resulted in thousands of workers losing retirement benefits accumulated over a lifetime of work."\footnote{See Sarah D. Burt, Pension Protection? A Comparative Analysis of Pension Reform in the United States and the United Kingdom, 18 IND. INT'L & COMP. L. REV. 189, 191-201 (2008) for a brief history on employee benefits in the United States. See also Mark A. Rothstein et al., Employment Law 383 (3d ed. 2005) stating that "much of [ERISA's] legislative history dealt with abuses in the administration and investment of private pension plans..." \"Not only did ERISA 'solve' the pre-ERISA procedural difficulties in employee benefits litigation, but ERISA also added some new law—new procedural requirements, and opportunities...\" Frank Cummins, ERISA Litigation: An Overview of Major Claims, Defenses, and Remedies, SP024 A.L.I.-A.B.A. 943 (2008).}

Although ERISA was primarily intended to regulate pensions, it also "applies to employee welfare benefit plans, and thus covers employer provided health insurance, the dominant vehicle for private finance of health care in the United States."\footnote{BARRY R. FURROW ET AL., HEALTH LAW § 8-1, at 419 (2d ed. 2000).}

ERISA was designed to serve several interrelated goals including: promoting equity for employees, increasing transparency and accountability in the operation of benefit plans, and improving the financial security of retirees and their families.\footnote{Id.} The statute established guidelines for the proper administration of employer pension and welfare plans to ensure active employees and retirees received promised benefits by securing plan assets.\footnote{Justin Cummins & Meg Luger Nikolai, ERISA Reform in a Post-Enron World, 39 J. MARSHALL L. REV. 563, 574 (2006).} ERISA is important because once it applies, the statute contains broad preemption language which allows the provisions to supersede most state laws.\footnote{Boggs v. Boggs, 520 U.S. 833, 839 (1997).} Although ERISA does

\begin{itemize}
  \item \footnote{See ERISA § 514; 29 U.S.C. § 1144(a), providing that ERISA \textquoteleft\textquoteleft shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title \textquoteleft\textquoteleft [29 U.S.C. § 1003(a)] and not exempt under section 1003(b) of this} states that
\end{itemize}
not require employers to establish or maintain employee welfare or pension benefit plans, employers who do must comply with specific statutory requirements.23

ERISA works in tandem with the Internal Revenue Code (IRC)24 to encourage employers to develop employee benefit plans by providing preferential tax treatment for plans meeting ERISA requirements.25 IRC provisions incentivize employers to voluntarily adopt these plans—and thereby facilitate saving for workers’ retirement—because it makes no economic sense to operate a plan that forfeits the tax advantages.26

The Department of Labor and the IRS administer ERISA. As part and parcel of the supervision of plan administrators’ compliance with the law, ERISA requires several disclosures. These disclosures include: (1) an SPD; (2) a summary annual report (SAR); (3) a summary of material modifications (SMM); and (4) an annual report (Form 5500).27 Of the foregoing disclosures, the SPD is the requirement most frequently discussed in employment litigation.28

B. SPD Requirements and Policy Concerns: The Competing Goals of Clarity and Completeness

Pursuant to ERISA, the SPD must “be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan.”29 The document must describe the plan benefits and inform title [29 U.S.C. § 1003(b)].” “The term ‘State law’ includes all laws, decisions, rules, regulations, or other State action having the effect of law . . .” ERISA § 514(c)(1); 29 U.S.C. § 1144(c)(1). Consistent with ERISA § 514(c)(2); 29 U.S.C. § 1144(c)(2), “[t]he term ‘State’ includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.” ERISA § 514(c)(2); 29 U.S.C. § 1144(c)(2). “ERISA contains a preemption provision of ‘unparalleled breadth.’ It bars state regulation of benefit plans even as to matters on which ERISA is silent.” ROTHSTEIN, supra note 17, at 414.

24. IRC §§ 1-9833.
26. “Pension tax preferences are structured to strike a balance between providing incentives for employers to start and maintain voluntary, tax-qualified pension plans and ensuring participants receive an equitable share of the tax-favored benefits.” Id.
28. BALES, supra note 27, at 201.
29. ERISA § 102(a); 29 U.S.C. § 1022(a).
participants of, among other things, eligibility requirements, procedures for claiming plan benefits, the names and addresses of plan fiduciaries, and obligations due under the plan. \(^{30}\) Employers must provide employees with the SPD within ninety days of joining the plan. \(^{31}\)

Unlike the comprehensive plan document it summarizes, the SPD is intended to be the primary means by which plan participants are informed about their benefits. \(^{32}\) Written to be understood by an average plan participant, an SPD cannot be comprehensive while also \textit{summarizing} and making the complex plan documents "intelligible (and therefore useful) to the intended audience." \(^{33}\) As one scholar has put it:

\begin{quote}
30. ERISA § 102(b); 29 U.S.C. § 1022(b). Specifically, the statute provides:

The summary plan description shall contain the following information: The name and type of administration of the plan; in the case of a group health plan (as defined in section 1191b(a)(1) of this title), whether a health insurance issuer (as defined in section 1191b(b)(2) of this title) is responsible for the financing or administration (including payment of claims) of the plan and (if so) the name and address of such issuer; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan including the office at the Department of Labor through which participants and beneficiaries may seek assistance or information regarding their rights under this chapter and the Health Insurance Portability and Accountability Act of 1996 with respect to health benefits that are offered through a group health plan (as defined in section 1191b(a)(1) of this title) and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

\textit{Id.}

31. 29 U.S.C. § 1024(b)(1)(A). Beneficiaries must receive a copy of the SPD "within ninety days after he first receives benefits." \textit{Id.} There are little monetary sanctions for noncompliance with the ERISA SPD requirements. If a sponsor ignores the SPD requirement, a participant or beneficiary may make a written request for an SPD. If a sponsor fails to respond within thirty days to the written request, the plan sponsor is penalized up to $110 per day until it complies. \textsc{Wiedenbeck, supra} note 4, at 105, n.336.

32. \textit{See} Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. & Research Found., 334 F.3d 365, 379 (3d Cir. 2003), stating that Congress intended the SPD to be "the primary document on which plan participants must rely." "The SPD is intended to give participants accessible, reliable information concerning the plan, and to serve as their primary source of information about the plan's terms." \textsc{Wiedenbeck, supra} note 4, at 82.

33. \textit{See} \textsc{Wiedenbeck, supra} note 4, at 82, stating that because the SPD is "written to be understood by the average participant [it] cannot be \textit{completely} accurate and comprehensive; it need be only \textit{reasonably} so, in recognition of the fact that generalizations and simplifications are necessary to make the SPD intelligible (and therefore useful) to the intended audience."
Benefit plan documents are complex legal instruments, often running over thirty pages in length, the precise meaning of which can only be determined by giving scrupulous attention to a set of defined terms, and following up a large number of internal cross-references. To be useful to its intended audience of participants and beneficiaries, the SPD must summarize by simplifying and omitting detail. Accordingly, several courts have been quick to point out the two competing goals in drafting an SPD: clarity and completeness.

C. Situations in Which a Participant May Claim the SPD and Plan Document Conflict

An SPD necessarily contains different language than the (much longer) comprehensive corresponding plan document. However, there are at least three categories of SPDs where this different language may lead to disputes: (1) inaccurate SPDs (in which SPD and plan document provisions conflict); (2) self-contradictory SPDs; and (3) incomplete SPDs.

The majority of courts agree that when the SPD is more favorable to a participant than the plan term with which it directly conflicts, the favorable SPD provision controls. This result generally makes sense because ERISA contemplates that "employees will depend on the SPD, and if the Plan Documents are allowed to supersede, then the SPD is useless." However, courts and scholars debate what specifically ERISA claimants must establish to achieve this favorable result.

If the SPD is self-contradictory, courts generally hold that a person’s reliance on the defective SPD is unjustified. Although ERISA

34. Id. at 96.
35. See Mers v. Marriott Int’l Group Accidental Death & Dismemberment Plan, 144 F.3d 1014, 1024 (7th Cir. 1998) ("Clarity and completeness are competing goods."); Lorenzen v. Employees Ret. Plan of Sperry & Hutchinson Co., 896 F.2d 228, 236 (7th Cir. 1990) ("[T]he plan summary is not required to anticipate every possible idiosyncratic contingency that might affect a particular participant’s or beneficiary’s status. . . . If it were, the summaries would be choked with detail and hopelessly confusing. Clarity and completeness are competing goods."); Mattias v. Computer Sciences Corp., 34 F. Supp. 2d 120, 125 (D.R.I. 1999) ("The problem is that clarity and completeness are competing goals.").
36. WIEDENBECK, supra note 4, at 82-83. “There is nearly unanimous agreement in the case law that the purposes of disclosure demand that the SPD have controlling legal effect in the event it conflicts with the terms of the plan, notwithstanding a disclaimer clause.” Id. See also Burstein, 334 F.3d at 376-79.
37. Mattias, 34 F. Supp. 2d at 125. It has also been recognized that “[t]he SPD is the document to which the lay employee is likely to refer in obtaining information about the plan and in making decisions affected by the terms of the plan.” Burstein, 334 F.3d at 379.
38. WIEDENBECK, supra note 4, at 88. “If a reasonable participant’s careful reading of the SPD alone reveals an inconsistency, further investigation would seem to be the prudent response.” Id.
does not provide clear guidance on the issue of an incomplete SPD—for example, when the SPD is silent on an issue addressed in the plan document, or when the SPD uses a term only defined in the plan document—most courts addressing the issue have held the plan document controls because "an inference based on the SPD's silence cannot override more specific provisions in the underlying instruments."\(^{39}\)

Although the aforementioned patterns reflect the majority approach, circuit court holdings greatly differ, as demonstrated below.\(^ {40}\)

D. Remedies Available Under ERISA

To understand the importance of the five-way circuit split regarding the appropriate standard of reliance a claimant must establish to prevail on a claim when an SPD conflicts with the terms of the underlying plan document, it is necessary to understand how the distinctions—some combination of reliance, prejudice, or nothing at all—affect the available remedies. Plan participants may turn to three principal places for relief in civil actions under ERISA: Section 502(a)(1)(B), Section 502(a)(2), and Section 502(a)(3).\(^ {41}\)

ERISA § 502(a)(1)(B) provides that a participant or beneficiary may sue "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."\(^ {42}\) However, "[i]f the misleading SPD merely describes but does not itself comprise 'the plan,' then a suit for benefits... will fail, for the terms of the plan as set forth in the plan documents have not been breached. Consequently, instead of enforcing the plan, recovery is limited to 'appropriate equitable relief'..."\(^ {43}\)

39. Id. at 94.
40. See infra Section III. A-E.
43. Wiedenbeck, supra note 4, at 86 (emphasis added). If a claimant need not establish reliance on the SPD, then, like a contract, the SPD is enforced because it sets forth the principal terms of the plan itself. If, however, a claimant must establish reliance, then the SPD may govern as a matter of estoppel. Id.
ERISA § 502(a)(2) allows the Secretary of Labor, plan participants, beneficiaries, and fiduciaries to bring an action for “appropriate relief under [ERISA § 409]” on behalf of the plan.44 Section 409 provides the following:

Any person who is a fiduciary with respect to a plan who breaches [his or her fiduciary duty] shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary . . . 45

The Supreme Court has interpreted congressional intent and severely limited the relief available under ERISA § 502(a)(2). *Massachusetts Mutual Life Insurance Co. v. Russell* held that ERISA § 502(a)(2) does not create a private right of action for a single plan participant to seek recovery for damages payable directly to him or her; such relief is limited to the benefit of the plan only.46 Accordingly, Section 502(a)(2) does not provide a remedy for individual injuries that are distinct from plan injuries.47

ERISA § 502(a)(3) allows plan participants, beneficiaries, and fiduciaries to “enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or . . . to obtain other appropriate equitable relief . . .”48 Interpreting congressional intent, the Supreme Court has also severely limited the relief available under Section 502(a)(3). *Mertens v. Hewitt Associates* held that “appropriate equitable relief” under ERISA § 502(a)(3) only authorizes courts to give plan participants, beneficiaries, and fiduciaries relief typically available in equity, not compensatory damages.49

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44. ERISA § 502(a)(2); 29 U.S.C. § 1132(a)(2) provides that a civil action may be brought by “the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USCS § 1109].”

45. ERISA § 409(a); 29 USC § 1109(a) (emphasis added).

46. Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 148 (1985). “Petitioner contends, however, that recovery for a violation of § 409 inures to the benefit of the plan as a whole. We find this contention supported by the text of § 409, by the statutory provisions defining the duties of a fiduciary, and by the provisions defining the rights of a beneficiary.” Id. at 140. “[T]he relevant text of ERISA, the structure of the entire statute, and its legislative history all support the conclusion that in § 409(a) Congress did not provide, and did not intend the judiciary to imply, a cause of action for extra-contractual damages caused by improper or untimely processing of benefit claims.” Id. at 148.

47. Cf. LaRue v. DeWolff, Boberg & Assocs., Inc., 128 S. Ct. 1020, 1026 (2008) (holding that “although § 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant’s individual account”).


49. See Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993) stating that remedies traditionally viewed as equitable include injunctive relief and restitution. The compensatory damages which petitioners sought, however, is the classic form of legal relief. Equitable relief has previously...
In *Great-West Life & Annuity Insurance Co. v. Knudson*, the Supreme Court further limited the recovery available under ERISA § 502(a)(3) by refusing to permit an insurance company's subrogation claim. In *Great-West*, petitioners brought a claim seeking to recover money due under the terms of a contract. The petitioners attempted to characterize the relief sought as equitable, alternatively arguing that they were seeking injunctive relief (to enforce the terms of the contract) or restitution. In considering the matter, the Supreme Court reiterated its statement in *Mertens*:

‘Equitable’ relief must mean *something* less than *all* relief . . . Thus, in *Mertens* we rejected a reading of the statute that would extend the relief obtainable under § 502(a)(3) to whatever relief a court of equity is empowered to provide in the particular case at issue (which could include legal remedies that would otherwise be beyond the scope of the equity court's authority).

Accordingly, the Court refused to grant the legal relief petitioners sought, reaffirming its strict adherence to the plain language of ERISA, a statute the Court described as "comprehensive and reticulated."

As the foregoing cases make clear, little relief is available for individual ERISA claimants. Thus, the five-way circuit split must be considered with a seemingly principal policy goal in mind—containing employee benefit plan costs so employers continue to develop and maintain these plans for the benefit of participating workers.

### III. THE FIVE-WAY CIRCUIT SPLIT

We certainly do not write on a clean slate. Indeed, there appears to be a five-way circuit split regarding whether an ERISA claimant needs to establish reliance and/or prejudice based on the conflicting terms of an SPD.

When courts are faced with the decision whether to enforce the terms of an SPD which conflict with the terms of a plan document, the

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51. *Id.*
52. *Id.* at 210-12. Additionally, "the United States, as petitioners *amicus*, argues that the common law of trusts provides petitioners with equitable remedies that allow them to bring this action under § 502(a)(3). Analogizing respondents to beneficiaries of a trust, the United States argues that a trustee could bring a suit to enforce an agreement by a beneficiary to pay money into a trust or to repay an advance made from the trust. . . . These trust remedies are simply inapposite." *Id.* at 219.
53. *Id.* at 209-10.
55. *Washington v. Murphy Oil USA, Inc.*, 497 F.3d 453, 458, n.1 (5th Cir. 2007).
favorable SPD provisions generally control. However, courts differ regarding what specifically a claimant must show for the favorable SPD provisions to control. The Fifth Circuit Court of Appeals recently noted the split over this issue can be broken down five ways between courts which: (1) do not require a showing of reliance; (2) do not require a showing of reliance but require a showing of a likelihood of prejudice (which can be rebutted by evidence showing the error was harmless); (3) require a showing of either reliance or prejudice; (4) require a showing of reliance or prejudice, but only if the SPD is "faulty;" or (5) simply require a showing of reliance. Each of these standards is discussed below.

A. No Showing of Reliance is Necessary: Fifth, Third, and Sixth Circuits' Approach

In Washington v. Murphy Oil USA, Inc., a terminated employee seeking disability pension benefits under ERISA brought an action against his employer. The employee, who had eight years of service at the company, sought disability benefits under the employer's pension plan, which required ten years of service for the disability pension to vest. However, the SPD stated the benefits vested after the completion of only five years of service.

The Fifth Circuit affirmed summary judgment in the employee's favor and held that when the terms of an SPD and plan document conflict, "the terms of the conflicting SPD unequivocally grant the employee with a vested right to benefits, the employee need not show reliance or prejudice."

In addressing whether the plaintiff needed to establish reliance on the SPD or prejudice based on the conflicting SPD and plan terms, the

56. Id.
60. Palmisano v. Allina Health Sys., 190 F.3d 881, 887-88 (8th Cir. 1999); Marolt v. Alliant Techsystems, 146 F.3d 617, 621-22 (8th Cir. 1998).
63. Id. at 455.
64. Id.
65. Id. at 459 (emphasis added).
court primarily relied on its prior decision in *Hansen v. Continental Insurance Co.*,66 and the Third Circuit's decision in *Burstein v. Retirement Account Plan for Employees of Allegheny Health Education & Research Foundation*, discussed further below.67

In *Hansen*, the court analogized ERISA SPDs to insurance contract law and held:

> [T]he summary plan description is *binding*, . . . if there is a conflict between the summary plan description and the terms of the policy, the summary plan description shall *govern*. Any other rule would be, as the Congress recognized, grossly unfair to employees and would undermine ERISA's requirement of an accurate and comprehensive summary. . . . the ambiguity in the summary plan description must be resolved in favor of the employee and made *binding* against the drafter.68

The Fifth Circuit found its approach to reliance consistent with ERISA, which the court stated was "designed to protect employees," and with its own opinion in *Hansen*, which the court stated "refused to place the burden of conflicting SPDs on plan beneficiaries."69

In *Burstein*, five former employees of the bankrupt Allegheny Health Education and Research Foundation, sought benefits they believed had accrued through the corporation's Retirement Account Plan prior to the bankruptcy filing.70 The retirement plan document provided that rights to benefits accrued as of the date of the plan's total or partial termination became nonforfeitable "*to the extent funded* as of such date."71 However, the SPD stated that if the plan was terminated, participants "*automatically become vested*" in their account, regardless of their years of service.72

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68. *Hansen*, 940 F.2d at 982.
69. *Murphy Oil USA, Inc.*, 497 F.3d at 459.
70. *Burstein*, 334 F.3d at 368. The corporation was not required by ERISA to fund accounts for participants who had not yet met the five-year service requirement. *Id.* at 375. The plan in question was a defined benefit, cash balance pension plan under ERISA. *Id.* at 370. "Under a cash balance plan . . . if the plan terminates, 'it is possible that the plan will be underfunded as to some or all of the participants.' . . . ERISA does not require that the cash-balance plan sponsor fund the plan fully for all participants; rather, it only requires that these plans be funded for those participants whose benefits had vested prior to the plan's (partial) termination. Burstein has not claimed that AHERF failed to fund the Plan in accordance with these minimum standards." *Id.* at 370-71. See 29 U.S.C. § 1082 for ERISA's minimum funding standards. See also 26 U.S.C. § 412 for the IRC's minimum funding standards for a plan's qualification for preferential tax treatment.
71. *Burstein*, 334 F.3d at 380.
72. *Id.*
The Third Circuit held that the participants need not plead or prove reliance or prejudice when the SPD terms conflict with the plan document itself and thus the employees had stated a claim against the Retirement Account Plan.\(^{73}\) Analogizing a claim for plan benefits under ERISA § 502(a)(1)(B) to contract law, the court reasoned that enforcement of contracts does not require the contracting parties to even read, and therefore rely upon, the particular contract’s terms.\(^{74}\) The court found this should be true for SPDs as well.

The Third Circuit recently limited the *Burstein* holding in *Hooven v. Exxon Mobil Corp.* In *Hooven*, former Mobil employees were terminated following the Exxon-Mobil merger.\(^{75}\) After the merger was announced, Mobil distributed an initial SPD to its employees. The district court found that, unlike Mobil’s formal Change-in-Control Retention/Severance Plan (CIC Plan), the corresponding initial SPD ‘failed to advise Plaintiffs that they would be ineligible for severance in the event of a divestiture’\(^{76}\)—even though Mobil had already distributed a second SPD clearing up the mistake.\(^{77}\) Relying on *Burstein*, the district court determined that since the terms of the SPD and the CIC Plan differed, the terms of the SPD should control.\(^{78}\) The court ordered Exxon to provide the employees with severance benefits due under the terms of the SPD.\(^{79}\)

On appeal, the Third Circuit distinguished *Burstein* as a situation where, “[b]ased on the terms of the SPD, all of the conditions precedent to [the employees’] receipt of such benefits had been satisfied.”\(^{80}\) Unlike *Burstein*, where the SPD purporting to vest the plaintiffs’ benefits was in effect when the plaintiffs’ benefits actually vested, the severance benefits in *Hooven* did not arise when the initial SPD was still in effect.\(^{81}\) Accordingly, the Third Circuit reversed stating:

> [T]he starting point for Plaintiffs’ claim is ERISA, not the common law of contracts. Under this framework, Plaintiffs’ rights to benefits under the Initial SPD never became due. . . . [t]he plan documents

\(^{73}\) Id. at 380-82. “If an SPD conflicts with a plan document, then a court should read the terms of the ‘contract’ to include the terms of a plan document, as superseded and modified by conflicting language in the SPD.” Id. at 381.

\(^{74}\) Id.

\(^{75}\) *Hooven v. Exxon Mobil Corp.*, 465 F.3d 566, 569 (3d Cir. 2006).

\(^{76}\) Id. at 570.

\(^{77}\) Id. at 578.

\(^{78}\) Id. at 572.

\(^{79}\) Id.

\(^{80}\) *Hooven*, 465 F.3d at 577.

\(^{81}\) Id.
that were in effect when Plaintiffs' claim to benefits would have accrued clearly establish that they are ineligible for severance.\textsuperscript{82}

In \textit{Edwards v. State Farm Mutual Automobile Insurance Co.}, the Sixth Circuit considered a former employee's claim to disability benefits.\textsuperscript{83} The retirement plan granted benefits to those who satisfied the following prerequisite: "The sum of the member's attained age and the length of his credited service must be at least 55 years prior to his date of disablement."\textsuperscript{84}

The employer provided its employees with a summary instead of the entire plan document.\textsuperscript{85} This summary stated that time while on sick leave counts as service for plan membership, vesting, and retirement income.\textsuperscript{86} The plaintiff-appellee was a forty-year-old, long-time employee of State Farm who became permanently disabled following a surgical procedure to remove a brain tumor.\textsuperscript{87} Unable to return to work, the employee received a letter three months into his sick leave informing him that he had already qualified or would qualify for disability income based on the summary provision previously provided to the plaintiff.\textsuperscript{88}

Two hundred days into his sick leave—having accumulated what he believed was a sufficient amount of time to enable him to qualify for disability benefits under the plan—the employee filed a claim for disability benefits. Only if the 200 sick leave days were credited to his length of service would the plaintiff-appellee satisfy the disability benefits requirement.\textsuperscript{89} However, a provision in the plan document defined the date of disablement as the first workday an employee did not report to work because of total disability.\textsuperscript{90} Accordingly, the plan administrator denied the plaintiff's claim because the employee had not met the necessary length of service to receive disability benefits.\textsuperscript{91}
Although the participant had reasonably relied on the summary, the Sixth Circuit found "existing precedent does not dictate that a claimant who has been misled by summary descriptions must prove detrimental reliance. Congress has promulgated clear directives prohibiting misleading summary descriptions. This court elects not to undermine the legislative command by imposing technical requirements upon the employee." Accordingly, the statements in the summary were binding notwithstanding the participant's reliance. The dissent noted the case was a "classic example of the maxim that hard cases make bad law."

B. No Showing of Reliance is Necessary, but Must Show a Likelihood of Prejudice: Second Circuit's Approach

In Burke v. Kodak Retirement Income Plan, the Second Circuit for the first time proclaimed the court's standard on whether detrimental reliance or prejudice is required to recover in cases of faulty SPDs. The court held that requiring plan participants or beneficiaries to show detrimental reliance to recover for a deficient SPD contravened ERISA's objective of promoting distribution of accurate SPDs to employees.

Plaintiff brought a claim against the Retirement Income Plan Administrators of her deceased husband's employer, the Eastman Kodak Company (Kodak), for denying her survivor income benefits (SIB). Plaintiff and her husband were married for less than six months when he passed away. However, prior to their marriage, plaintiff and the decedent lived together for eight years as domestic partners. The employee handbook and sixteen separate sections of the SPD explicitly required domestic partners to file joint affidavits if they wished to be eligible for various types of benefits, but the SIB section failed to mention this requirement. In the two to three years prior to the decedent's death, Kodak had advertised the benefits available to domestic partners in an Employee Benefits Newsletter and a Benefits

92. Id. at 137.
93. Edwards, 851 F.2d at 136 (citing Rhoton v. Cent. States, Se. & Sw., 717 F.2d 988, 989-91 (6th Cir. 1983)).
94. Id. at 137.
96. Id. at 106.
97. Id. at 105.
98. Id. at 106.
99. Id.
100. Kodak Ret. Income Plan, 336 F.3d at 106.
Update. The record demonstrated the plaintiff and her husband had consciously decided for eight years not to apply for domestic partnership status for Kodak's health care benefits because of concerns that the plaintiff would not be covered due to a pre-existing illness. The Second Circuit held that the decedent and his beneficiary, despite not having read the SPD, were likely prejudiced as a result of it because the specific SIB section failed to mention the affidavit requirement noted in sixteen other sections of the SPD. Furthermore, Kodak failed to demonstrate that this error would have been harmless. Thus, the case was remanded with instructions to enter judgment in favor of the plaintiff.

C. Must Show Reliance or Prejudice: First, Fourth, and Tenth Circuits' Approach

The First, Fourth, and Tenth Circuits employ a disjunctive test, requiring claimants to show they either relied on, or were prejudiced by, the SPD. In Govoni v. Bricklayers, Masons & Plasterers International Union, Local No. 5 Pension Fund, the appellant claimed he was entitled to a larger pension by arguing that his break in service from the company between March of 1962 and October of 1966 fell outside the "break in service" definition found in the pension plan. The First Circuit stated that to secure relief, the appellant "must show some significant reliance upon, or possible prejudice flowing from, the faulty plan description." The court held that although the SPD available to the appellant failed to inform him that plan participants with pre-1976 breaks would be treated harsher than those with breaks after 1976, the petitioner did not detrimentally rely on this. The court reasoned that the only conceivable prejudice was the petitioner's decision to retire early, which the court dismissed by noting that early retirement was a revocable decision. Furthermore, the appellant was informed about the

101. Id.
102. Id. at 114.
103. Id.
104. Id. at 113.
108. Id. at 253.
109. Id.
break in service rule two days prior to his retirement and could have changed his retirement decision upon receiving this notification.\textsuperscript{110}

In \textit{Aiken v. Policy Management Systems Corp.}, the Fourth Circuit reversed the district court decision and held the plan document terms controlled over the SPD.\textsuperscript{111} Quoting earlier precedent, the court reiterated that the SPD is the ‘employee’s primary source of information regarding employment benefits.’\textsuperscript{112} Accordingly, ‘if there was a conflict between the complexities of the plan’s language and the simple language of the SPD, the latter would control.’\textsuperscript{113}

In \textit{Aiken}, the plaintiff resigned from his company following sexual harassment allegations.\textsuperscript{114} He claimed he was entitled to a lump-sum distribution of his vested pension benefits pursuant to a provision in the SPD, which facially entitled the plaintiff to the requested distribution.\textsuperscript{115} However, the plan document stated he was not eligible for the specific benefits until he turned sixty.\textsuperscript{116}

Quoting \textit{Govoni}, the Fourth Circuit stated that ‘[t]o secure relief, [the claimant] must show some significant reliance upon, or possible prejudice flowing from, the faulty plan description.’\textsuperscript{117} The Fourth Circuit specifically adopted the disjunctive test from \textit{Govoni}: a plaintiff must prove reliance on the SPD or prejudice in order to recover.\textsuperscript{118} The case was remanded for further proceedings.\textsuperscript{119}

\begin{itemize}
\item \textsuperscript{110} \textit{Id.} at 252.
\item \textsuperscript{111} \textit{Aiken v. Policy Mgmt. Sys. Corp.}, 13 F.3d 138, 139 (4th Cir. 1993).
\item \textsuperscript{112} \textit{Id.} at 140 (quoting \textit{Pierce v. Security Trust Life Ins. Co.}, 979 F.2d 23 (4th Cir. 1992)).
\item \textsuperscript{113} \textit{Id.}
\item \textsuperscript{114} \textit{Id.} at 139.
\item \textsuperscript{115} \textit{Id.} Specifically, the provision stated, “[a] participant may take early retirement after age 60 and the completion of 20 years of service or upon completion of 25 years of service without regard to participant’s age. If a participant terminates employment after completing 20 years of service but before attaining age 60, the participant is entitled to distribution of the vested interest in the Plan. The participant may elect to defer the distribution until normal retirement age.” \textit{Aiken}, 13 F.3d at 140 (emphasis added).
\item \textsuperscript{116} \textit{Id.} “[T]he official Plan document provided that distribution of vested benefits under the applicable provision only occurred ‘upon satisfaction of said age requirement.’” \textit{Id.}
\item \textsuperscript{117} \textit{Id.} at 141 (quoting \textit{Govoni v. Bricklayers, Masons & Plasterers Int’l Union, Local No. 5 Pension Fund}, 732 F.2d 250, 252 (1st Cir. 1984)).
\item \textsuperscript{118} \textit{Id.} The district court had applied \textit{Govoni}; however, it interpreted \textit{Govoni} as requiring an ERISA claimant to prove reliance on the SPD and resulting prejudice in order to recover (a conjunctive construction of the reliance or prejudice test as opposed to the proper disjunctive test of reliance or prejudice). \textit{Aiken}, 13 F.3d at 141.
\item \textsuperscript{119} \textit{Id.} at 142. “The district court found that Aiken had failed to demonstrate reliance and prejudice because under its construction of Aiken’s reading of the SPD, he would have been entitled to benefits regardless of whether he resigned or was fired.” \textit{Id.} at 141. However, the case was remanded because the district court’s finding of prejudice and reliance were bound up together. \textit{Id.} at 142.
\end{itemize}
In *Chiles v. Ceridian Corp.*, the plaintiffs were former employees of a division of Control Data which was sold to another company.\(^{120}\) Prior to the sale, each plaintiff was receiving long-term disability benefits under the Control Data Long Term Disability Plan (LTD Plan).\(^{121}\) The SPD to the plan provided that while the participants remained on long-term disability status, "the company will pay the premiums for all the company-sponsored benefits (medical, life, and dental) for which you and your dependents were enrolled before your disability began . . . until you and your dependents are no longer eligible for the plans."\(^{122}\) However, the SPD allowed for the plan to be amended as the company deemed it 'advisable.'\(^{123}\) The SPD also noted the company reserved the right to terminate the plan 'at any time.'\(^{124}\)

When the company informed the employees receiving long-term disability benefits that the plan was going to be amended (to require the plaintiffs to pay the same premiums as the active employees),\(^{125}\) the plaintiffs brought suit, claiming the SPD for the LTD Plan constituted an enforceable promise to pay the disabled employees' health care premiums as long as they remained disabled.\(^{126}\)

On appeal, the Tenth Circuit stated the mere demonstration that an SPD is inconsistent with the LTD Plan did not inherently entitle the plaintiffs to any sort of recovery.\(^{127}\) The court remanded so each individual plaintiff could have the opportunity to show some sort of reasonable reliance on the SPD or prejudice flowing from the inconsistency.\(^{128}\) In reaching its conclusion, the Tenth Circuit quoted *Govoni* and *Aiken*, stating:

The mere demonstration that the SPD is inconsistent with the terms outlined in the LTD Plan itself does not entitle plaintiffs to the benefits they believe vested upon termination. Where the SPD incorrectly described benefits in the plan, 'to secure relief, [the claimant] must show some significant reliance upon, or possible prejudice flowing from, the faulty plan description.'\(^{129}\)

\(^{120}\) *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1508 (10th Cir. 1996).

\(^{121}\) *Id.*

\(^{122}\) *Id.*

\(^{123}\) *Id.* at 1509.

\(^{124}\) *Id.*

\(^{125}\) *Chiles*, 95 F.3d at 1509.

\(^{126}\) *Id.*

\(^{127}\) *Id.* at 1519.

\(^{128}\) *Id.*

\(^{129}\) *Id.*
The court reasoned that the reliance or prejudice requirement made sense in light of the purpose of the SPD. Holding otherwise would allow a windfall for some employees while unjustly increasing employers' and insurers' costs, which would ultimately jeopardize a plan's solvency to the detriment of all employees.

D. Must Show Reliance or Prejudice, but only if the SPD is "Faulty:" Eighth Circuit's Approach

In Marolt v. Alliant Techsystems, Inc., the Eighth Circuit considered whether a plaintiff could "bridge" her service to a company for purposes of dating her employment—and thereby increase her retirement benefits—according to a provision in the company's SPD. This provision allowed participants to back-date their employment to an earlier, pre-break date under certain circumstances.

The claimant in Marolt worked for the employer's parent company prior to the employer's spinoff. Before she accepted her new position with the spinoff company, the claimant was informed she could "bridge" her break in service—which would increase her retirement benefits. It was unclear whether the claimant ever read the SPD; she relied on her supervisor and the Location Benefits Administrator's assurances that her break in service would be bridged.

Addressing the company's claim that the claimant must prove she detrimentally relied on the SPD, the Eighth Circuit reiterated the following rule:

[T]o secure relief on the basis of a faulty summary plan description, the claimant must show some significant reliance on, or possible prejudice flowing from the summary. A faulty summary plan description is one that fails to meet 'the requirements of ERISA and its attendant regulations.'

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130. *Chiles*, 95 F.3d at 1519. The court stated the purpose of the SPD is "to give employees an understanding of the plan upon which they are entitled to rely; the master plan document, however, is also relevant to determine what the terms of the plan actually are." *Id.*

131. *Id.*

132. *Id.*


134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Marolt*, 146 F.3d at 621 (citing *Maxa v. John Alden Life Ins. Co.*, 972 F.2d 980, 984 (8th Cir. 1992)).

139. *Id.* Accordingly, "faulty" does not mean simply that the plan document and the SPD conflict.
Here, however, the SPD in question met ERISA’s requirements—so it was not “faulty”—and the claimant never argued the SPD was faulty.\textsuperscript{140} Thus a different rule applied; when the SPD terms conflict with the plan terms, the provisions in the SPD govern as a matter of law.\textsuperscript{141}

The Eighth Circuit reasoned the rule was designed to prevent ERISA claimants from being “sandbagged” by after-the-fact interpretations of the plan provisions, which might be done for purposes of litigation.\textsuperscript{142} However, if the SPD was faulty, then the claimant would have had to show “some significant reliance on, or possible prejudice flowing from the summary” in order to secure relief.\textsuperscript{143}

In \textit{Palmisano v. Allina Health Systems}, another Eighth Circuit decision, the defendant corporation fired the claimant for failing to adequately respond to fraudulent billing allegations.\textsuperscript{144} The corporation’s predecessor company had provided the claimant with a copy of its “Plan Book,” which described the company’s employee benefit plans, including the severance benefit at issue.\textsuperscript{145} The Plan Book stated executives would receive severance “[i]n the event of involuntary termination without cause.”\textsuperscript{146} However, the company’s formal severance plans defined eligible employees as those “terminated by the Employer because his or her position has been eliminated.”\textsuperscript{147}

Relying on \textit{Marolt}, the participant in \textit{Palmisano} claimed the SPD plan terms prevailed as a matter of law.\textsuperscript{148} However, the participant also contended the SPD was “faulty.”\textsuperscript{149} The Eighth Circuit defines a “faulty” SPD as one which does not meet the requirements of ERISA, as laid out in 29 U.S.C. § 1022(a), (b).\textsuperscript{150} Here, however, the SPD could not even be deemed “faulty”—it contained only a mistaken description of the plan’s eligibility requirements and none of the other information required by ERISA.\textsuperscript{151} Therefore, the reliance or possible

\begin{footnotes}
\item 140. Id.
\item 141. Id.
\item 142. Id. at 620.
\item 143. \textit{Marolt}, 146 F.3d at 621 (quoting \textit{Maxa}, 972 F.2d at 984).
\item 144. \textit{Palmisano v. Allina Health Sys.}, 190 F.3d 881, 889 (8th Cir. 1999).
\item 145. Id. at 886.
\item 146. Id.
\item 147. Id. at 887.
\item 148. Id.
\item 149. \textit{Palmisano}, 190 F.3d at 889.
\item 150. Id. at 888-89.
\item 151. Id. at 888. The SPD did not contain “the name and type of the plan; the name and address of the agent for service of process; the name and address of the plan administrator; the plan’s eligibility requirements; circumstances which may result in denial or loss of benefits; the source of the plan’s financing; the plan year; and claim procedures and remedies available for redress of denied claims.” \textit{Id.}
\end{footnotes}
prejudice flowing from a faulty SPD test did not even apply. Regardless of whether the participant relied upon the conflicting Plan Book definition of eligibility, the terms of the formal severance plans controlled. The company violated ERISA by failing to provide an SPD describing its benefit plans, but the claimant failed to assert a claim for a disclosure violation.

In *Greeley v. Fairview Health Services*, the Eighth Circuit again stated that to obtain relief when a faulty SPD conflicts with the plan document, a participant must show he "relied on its terms to his detriment." Detrimental reliance involves showing the following:

> [T]he plaintiff took action, resulting in some detriment, that he would not have taken had he known that the terms of the plan were otherwise or that he failed, to his detriment, to take action that he would have taken had he known that the terms of the plans were otherwise.

A single typographical error in a memo attached to an SPD indicated the long-term disability benefits expired at age sixty-seven. The SPD did not contradict this statement, but the plan document provided the benefits expired at age sixty-five. The Eighth Circuit reversed the district court holding that a participant "was likely to have been harmed by a deficient SPD." The plaintiff had not offered any evidence suggesting prejudice—that "he changed his course of action or otherwise relied on the faulty SPD." Accordingly, the participant could not recover for the faulty SPD.

E. Must Show Reliance: Seventh and Eleventh Circuits’ Approach

In the Seventh Circuit, the existence of an SPD does not eviscerate the underlying policy of a plan. If a discrepancy exists between an SPD and the underlying policy, the terms of the SPD do not always control. Seventh Circuit courts follow this rule under the following two circumstances: (1) the underlying policy clarifies, rather than con-

152. *Id.*
153. *Palmisano*, 190 F.3d at 888-89.
155. *Id.* (quoting *Maxa* v. *John Alden Life Ins. Co.*, 972 F.2d 980, 984 (8th Cir. 1992)).
156. *Id.* at 613.
157. *Id.*
158. *Id.* at 614 (quoting *Greeley* v. *Fairview Health Servs.*, 2006 WL 1851132, 3-4N (2006)).
161. *Id.* at 1022.
tradicts, the summary; and (2) the SPD is silent on an issue that is
described in the underlying policy.162

In *Health Cost Controls, Inc. v. Washington*, the Seventh Circuit
considered a suit brought by Health Cost Controls seeking reimburse-
ment of certain benefits the plan paid defendant, a participant in an
employer-sponsored welfare plan.163 The plan paid defendant’s med-
cal expenses after she was injured in a car accident with an uninsured
motorist.164 However, the defendant also obtained $60,000 ($10,580.15
of which was for medical expenses) from an insurance policy provid-
ing uninsured motorist benefits.165

The plan document stated that the plan covered the expense of
“medical services for injury caused by a third party . . . However, [the
plan] has the right to be reimbursed for the value of services it has
provided when a beneficiary receives payment from a third party.”166
The SPD clumsily paraphrased this language, stating that the plan
“will provide medical services and treatment for injuries caused by a
third party. You must, however, assign to the [plan] all rights to ob-
taining reimbursement from the third party for medical services pro-
vided by or through the [plan].”167

The provision was intended to prevent double payment and avoid a
windfall to the plan participant. Read literally, however, the SPD im-
plied the plan could only seek reimbursement from a third party caus-
ing the injury. In *Health Cost Controls*, the third party causing the
injury was an uninsured motorist, not the insurance company paying
the defendant’s uninsured-motorist benefits.168

The Seventh Circuit reiterated the principle that when a plan docu-
ment and SPD conflict, the former governs because it is more com-
plete and the SPD is excerpting and translating language designed to
be intelligible to a lay person “unless the plan participant or benefici-
ary has reasonably relied on the summary plan description to his
detriment.”169

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162. Id. at 1023.
164. Id.
165. Id.
166. Id. at 711.
167. Id.
169. Id. (citing Mers v. Marriott Int’l Group Accidental Death & Dismemberment Plan, 144
F.3d 1014, 1022-24 (7th Cir. 1998); Senkier v. Hartford Life & Accident Ins. Co., 948 F.2d 1050,
1051 (7th Cir. 1991); Chiles v. Ceridian Corp., 95 F.3d 1505, 1518-19 (10th Cir. 1996); Aiken v.
Here, however, the Seventh Circuit found there was no conflict. 170 The defendant’s interpretation of the summary plan description was senseless and the provision’s purpose was clear. 171 “The quoted language is merely a clumsy paraphrase of the clear language of the plan itself. Senseless interpretations of ERISA summary plan descriptions as of other contractual documents should be rejected.” 172

In Senkier v. Hartford Life & Accident Insurance Co., another Seventh Circuit decision, the administrator of a decedent’s estate filed for recovery on the decedent’s life insurance policy. 173 The decedent’s life insurance policy stated that her beneficiaries could only recover if the decedent died accidentally. 174 The decedent died in the hospital while being treated for Crohn’s disease; her death was caused by a loose feeding tube which moved and punctured her heart. 175 The insurance carrier denied recovery on the life insurance policy because the decedent’s death was not an accident, rather it stemmed from her illness. 176 The SPD referred to the insurance policy for details, and the policy expressly excluded ‘sickness or disease’ and ‘medical or surgical treatment of a sickness or disease.’ 177

The Seventh Circuit upheld the district court decision that death resulting from medical malpractice is not “accidental” within the accepted meaning of the word. 178 According to the Seventh Circuit, it made no difference that the decedent never received the policy (only the SPD) because receiving the policy is not an ERISA requirement. 179 ERISA 29 U.S.C. § 1022(a)(1) entitles participants to rely on SPDs, and if the participant does so, the plan is estopped from denying coverage. 180 However, that is only the case when the SPD and plan document conflict; here, there was no contradiction between the SPD and the policy—the policy simply clarified the SPD. 181

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170. Id. at 712.
171. Id.
172. Id. (citing Grun v. Pneumo Abex Corp., 163 F.3d 411, 420 (7th Cir. 1998); Delgrosso v. Spang & Co., 769 F.2d 928, 936 (3d Cir. 1985)).
174. Id.
175. Id.
176. Id. at 1050.
177. Id. at 1051.
178. Senkier, 948 F.2d at 1054.
179. Id. at 1051. Under ERISA § 104(B)(4), participants and beneficiaries may always request, at any time, the controlling plan documents. Plan administrators must furnish such documents.
180. Id.
181. Id.
Eleventh Circuit decisions are consistent with this approach. In *Branch v. G. Bernd Co.*, the administrator of a decedent’s estate brought suit to recover health insurance benefits from a life insurance company the decedent received as an employee of the G. Bernd Company. The decedent resigned his employment after the company implemented a new drug testing policy. Advised of his COBRA right, the decedent signed an election form. Instead of accepting or declining continued coverage for himself, the decedent, who was without dependents, checked a box indicating an election to decline continued coverage for dependents.

Days later, the decedent was admitted to the hospital after being shot several times. He died, leaving the hospital with unpaid medical bills approaching $100,000 and an incomplete COBRA election form. Consistent with the minimum requirements of COBRA, G. Bernd Company’s Employee Welfare Benefit Plan (the Plan) expressly provided for a sixty day election period. However, the SPD stated the election period was only thirty-one days.

Given that ERISA contemplates the SPD is an employee’s primary source of information regarding benefits and employees are entitled to rely on them, the Eleventh Circuit stated the following:

> [W]hen an employer provides an inaccurate plan summary, the beneficiaries who rely on that summary are not accurately apprised of their rights. But when a beneficiary fails to read or rely on the summary, . . . the beneficiary also prevents full appraisal of the rights under the plan. Beneficiaries must do their part if Congress’ objective is to be met. We thus hold that, to prevent an employer from enforcing the terms of a plan that are inconsistent with those of the plan summary, a beneficiary must prove reliance on the summary.

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183. *Id.* Among other things, the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), 29 U.S.C. §§ 1161-1168, requires companies to offer their employees the option of continuing their health insurance coverage after leaving employment. Here, as required by COBRA, the G. Bernd company plan offered employees the option to continue their health insurance coverage at their own expense for eighteen months following the termination of their employment. *Branch*, 955 F.2d at 1576.
184. *Id.*
185. *Id.*
186. *Id.* at 1577.
187. *Id.* at 1577-78.
188. *Branch*, 955 F.2d at 1578 (citing Heidgerd v. Olin Corp., 906 F.2d 903, 907-08 (2d Cir. 1990)).
189. *Id.* at 1579.
In Branch, the court found no reliance because there was no evidence the decedent ever read or relied on the summary.\textsuperscript{190}

IV. ANALYSIS OF THE CIRCUIT COURT APPROACHES

In Murphy Oil USA, Inc., the Fifth Circuit stated that on three previous occasions it had declined to address whether an ERISA claimant needed to show reliance on the conflicting terms of an SPD to prevail on a claim for benefits.\textsuperscript{191} The court’s avoidance of this difficult issue is hardly surprising in light of the confused body of case law and lack of Supreme Court guidance on the issue.\textsuperscript{192}

To facilitate analysis, this Article has attempted to group the existing body of case law into the five distinct levels of proof described by Murphy Oil USA, Inc. However, as shown in the previous section, the courts’ incredibly varied approaches to the law create a large number of possible outcomes—from strict liability for an incorrect SPD to a required demonstration of detrimental reliance.

The legislative history of ERISA reveals that Congress empowered the federal courts to create federal common law to govern issues in ERISA not covered by the act itself.\textsuperscript{193} Indeed, the United States Supreme Court has stated “[t]he expectations that a federal common law of rights and obligations under ERISA-regulated plans would develop . . . would make little sense if the remedies available to ERISA participants and beneficiaries under § 502(a) could be supplemented or supplanted by varying state laws.”\textsuperscript{194} Although the law regarding conflicts between plans and SPDs is governed by federal law, the patchwork of varying circuit laws has created the effect Congress wanted to avoid—the unpredictability and inconsistency that accompanies different rules for different jurisdictions, particularly for employers that operate in multiple geographic regions but deliver employee benefits through a single plan.

\textsuperscript{190} Id. at 1580.

\textsuperscript{191} Washington v. Murphy Oil USA, Inc., 497 F.3d 453, 457 (5th Cir. 2007).

\textsuperscript{192} Id. at 548, n.1.

\textsuperscript{193} Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1988) (citing 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits) (“a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans”)). The United States Supreme Court and several appellate courts have recognized this authority as validating the use of federal common law. See Jamail, Inc. v. Carpenters Dist. Council of Houston Pension & Welfare Trusts, 954 F.2d 299, 303 (5th Cir. 1992) (“Both the legislative history and the case law pursuant to ERISA validate our application of federal common law to ERISA.”); Kane v. Aetna Life Ins., 893 F.2d 1283, 1285 (11th Cir. 1990) (“Federal courts possess the authority, however, to develop a body of federal common law to govern issues in ERISA actions not covered by the act itself.”).

\textsuperscript{194} Pilot Life Ins. Co., 481 U.S. at 56.
Congress designed ERISA to serve a number of interrelated goals including: equity for employees, transparency and accountability in the operation of benefit plans, and increased financial security for retirees and their families.\(^{195}\) The five-way circuit split interferes with each of these goals because it further complicates the byzantine world of pension and welfare benefits and produces unequal results, with outcomes depending on the jurisdiction of a company’s incorporation. Neither plan documents nor SPDs are models of simplicity,\(^{196}\) and their sometimes impenetrable nature is further compounded by the lack of common standards for handling the seemingly inevitable need to resolve conflicts between them.\(^{197}\)

The Supreme Court’s intervention to decide the appropriate standard of reliance and/or prejudice which ERISA claimants must demonstrate in order to benefit from favorable SPD terms would settle the debate among the circuits and provide much-needed guidance for attorneys. Perhaps no standard is flawless, but the approach of the Seventh and Eleventh Circuits—requiring a beneficiary to prove reliance on an SPD before he may benefit from advantageous terms in an SPD—yields fair results and is in line with ERISA’s statutory scheme. As such, this Article proposes the Supreme Court adopt this reliance standard.

A. No Reliance: A Strict Liability Standard

The Fifth, Third, and Sixth Circuits do not require a showing of reliance.\(^{198}\) The principal justification for this standard is that it conforms to the remedial goals of ERISA and protects the interests of the injured employee(s).

ERISA does not come into play until a private employer voluntarily decides to establish an ERISA plan. Congress had multiple goals in enacting ERISA, one of which was to encourage employers to provide benefit plans for employees and to enhance the benefits provided

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195. See generally Cummins & Nikolai, supra note 20.
196. “[T]he effect of drafting plan documents explicitly to grant interpretive discretion to decision makers has come to be a complex amalgam of shield and sword.” Dana M. Muir, Fiduciary Status as an Employer’s Shield: The Perversity of ERISA Fiduciary Law, 2 U. PA. J. LAB. & EMP. L. 391, 412 (2000).
197. “[A] document written to be understood by the average participant cannot be completely accurate and comprehensive; it need be only reasonably so, in recognition of the fact that generalizations and simplifications are necessary to make the SPD intelligible (and therefore useful) to the intended audience.” Wiedenbeck, supra note 4, at 82.
under those plans. Employers will not provide these benefits if the costs become prohibitive due to unfavorable court rulings. Furthermore, courts should be concerned with the solvency of plans and avoid giving windfalls to undeserving beneficiaries.

Thus, the strict liability approach suggested by the Fifth Circuit in *Murphy Oil USA, Inc.* could actually hinder ERISA's goal of increased financial security for retirees and their families because employers may decide against organizing and maintaining benefit plans if the legal risk becomes too great. This approach also does not serve the equity goal, as windfalls to employees who have not even read their company's SPD can drain limited company reserves, leading to increased costs for employers and insurers, which then jeopardizes the solvency of the plan for all employees.

Additionally, the Fifth Circuit approach is overbroad. When the SPD terms conflict with the Plan, the SPD terms control and bind the company. This approach does not limit the scope of what constitutes a contradiction. Thus, a specific contradiction, a self-contradiction within an SPD, or an incomplete SPD can all potentially give rise to liability. This, in turn, could discourage companies from providing benefit plans in the first place.

The Third Circuit, in *Burstein*, utilized common law contract principles as the basis for its no-reliance standard. However, this approach overlooks the fact that ERISA benefit plans are fundamentally different than common law contracts. Contracts require an offer, an acceptance, and some sort of bargained-for consideration. No bargaining is involved when one signs up for an employer-provided benefit plan. Employees cannot bargain with plan administrators to receive better benefits than other plan participants. Furthermore, a contract generally represents terms to which parties have agreed. An SPD is simply designed to inform employees of their rights under a plan—the creation of which has been incentivized by the federal government through beneficial tax treatment. Finally, violating a contract will never result in criminal liability. However, criminal penalties are available under ERISA for any person who willfully violates any provision of Part 1 of Title I. In sum, this approach ignores important policy differences between contract law and ERISA.

199. Alternatively, one could also argue that an employee automatically agrees to the terms of the Plan Document when he or she signs their offer of employment; therefore, employees have already agreed to the terms of the contract, the Plan Document, prior to litigation.

The Sixth Circuit’s decision in Edwards is, as the dissenting opinion noted, a “classic example of the maxim that hard cases make bad law.”\textsuperscript{201} The case involved a forty-year-old long time employee who underwent a procedure to remove a brain tumor and was specifically informed he would qualify for disability income. The plaintiff in the case was undeniably misled by the SPD. He detrimentally relied upon the summary’s language, a reassuring letter, and a report of his accrued employment service. However, the Sixth Circuit stated that precedent did not dictate that a claimant who has been misled by summary descriptions must prove detrimental reliance.\textsuperscript{202}

This holding went too far. The facts of Edwards did not require such a broad decision. Contrary to the Sixth Circuit’s argument, existing precedent did not dictate that a claimant must prove detrimental reliance because the United States Supreme Court has not addressed the matter and the circuits are split on the issue.

Under the proposed reliance standard, the approach of the Seventh and Eleventh Circuits, a plaintiff like Edwards—who detrimentally relied on the summaries provided to him—is exactly the type of claimant who would recover. Thus, unfairness to employees will not result under the proposed rule because those who detrimentally rely will have a cause of action. Those not detrimentally relying on summary plans should not be allowed to drain limited company reserves, which they did not reasonably believe themselves entitled to in the first place. There is no need for the Sixth Circuit’s standard and, indeed, the court has begun to back away from the no-reliance standard.\textsuperscript{203}

B. Vague Middle Ground Standards

On the spectrum of approaches courts have taken, the likelihood of prejudice standard, the reliance or prejudice standard, and the reliance or prejudice but only if the SPD is “faulty” standard, all seem to be vague middle grounds. Each is discussed below.

\textsuperscript{201} Edwards, 851 F.2d at 137.
\textsuperscript{202} Id.
\textsuperscript{203} Recently, the Sixth Circuit decided Zirnhelt v. Mich. Consol. Gas Co., 526 F.3d 282 (6th Cir. 2008). In Zirnhelt, a former plan participant did not receive a copy of the SPD until after she filed her complaint seeking pension benefits. Id. at 285. In dicta, the Sixth Circuit noted that if there is a conflict between the SPD and plan, the plan controls unless the participant can show he or she reasonably relied on the SPD. Id. at 287-88. However, as noted above, previous Sixth Circuit authority explicitly and specifically endorses the idea that showing reliance is not necessary. See Edwards, 851 F.2d at 137. As of the time this Article was written, it remains to be seen what, if any, effect Zirnhelt will have on the Sixth Circuit.
1. The Likelihood of Prejudice Standard

The Second Circuit does not require a showing of reliance but requires a claimant to demonstrate a likelihood of prejudice from a contradiction, which can be rebutted by evidence showing the error was harmless.\textsuperscript{204} The Second Circuit’s approach, as applied in \textit{Burke v. Kodak Retirement Income Plan} seems unworkable. First, it is unclear from the court’s decision what constitutes a contradiction. In \textit{Burke} (unlike \textit{Murphy Oil USA, Inc.}), there was not an explicit contradiction. Instead, a requirement—which was present in sixteen other sections of the summary and communicated to employees via other corporate literature—was omitted in one particular section.

ERISA was not designed to protect employees who failed to fully inform themselves of their rights and benefits. ERISA merely provides the structure to which employee benefit plans should adhere. By definition, a summary plan description contains less information than a plan document because it is just that—a summary. It cannot, and should not, contain all of the same information that is in the plan document, only enough important information to reasonably apprise plan participants of their rights and benefits.

Second, the \textit{Burke} court leaves district courts grappling with the hazy concept of what constitutes a showing of a likelihood of prejudice. The plaintiffs in \textit{Burke} were likely put on notice that, as domestic partners for eight years, they should have filed a joint affidavit; this was communicated in sixteen separate summary sections and through other corporate literature. While corporate literature may not cure a deficient SPD, it is certainly not readily apparent that there was a likelihood of prejudice in this case.

Finally, if employees are allowed to ignore an SPD and company literature, and later take advantage of a company’s auspicious mistake, the SPD’s function as the primary means by which employees are apprised of their benefits is not served. This also would not encourage employers to develop ERISA benefits plans. Courts should not reward decisions such as those made by the plaintiff in \textit{Burke}—conscious decisions to not apply for domestic partnership for eight years, ignoring the SPD completely, and only then attempting to seek survivor income benefits on the fortuitous ground that there was an inconsistency between the SPD and SIB. A claimant like this (who chooses to bury their head in the sand) would not recover under the Seventh and Eleventh Circuits’ reliance approach.

\textsuperscript{204} Burke v. Kodak Ret. Income Plan, 336 F.3d 103, 112-13 (2d Cir. 2003).
2. The Reliance or Prejudice Standard

The First, Fourth, and Tenth Circuits have recognized the inherent unfairness of a per se rule that resolves ambiguities and inconsistencies in favor of the employee in every situation. The problem with the First, Fourth, and Tenth Circuit approaches is that their standards allow for either reliance or prejudice. These courts' holdings are seemingly inconsistent with their reasoning. They reason for a reliance standard (which assumes prejudice like the Seventh and Eleventh Circuits), citing concerns of windfalls, fairness, notice, and very little detriment, but then conclude by allowing a showing of reliance or prejudice.

Prejudice is defined as damage or detriment to a claimant's legal rights or claims. Requiring reliance and prejudice is redundant; why would a person bring a lawsuit if his rights were not damaged? Simply bringing a claim to point out an inconsistency between an SPD and a Plan Document makes little sense unless a person is actually seeking relief for a perceived harm.

This holding is confusing, redundant, and leaves the door open for meritless claims of an inconsistency between an SPD and a Plan Document. The approach of the Seventh and Eleventh Circuits, requiring detrimental reliance, is superior to the aforementioned reliance or prejudice standard.

3. The Reliance or Prejudice but only if the SPD is "Faulty" Standard

The Eighth Circuit requires a showing of reliance or prejudice, but only if the SPD is "faulty." The Eighth Circuit's decision is confusing. Although the court purportedly takes the approach to avoid sandbagging ERISA claimants, ERISA claimants may not even know if the SPDs they receive are "faulty." Many, if not most, claimants do not know until the time of litigation whether the SPD they received meets the formal requirements of ERISA.

A "faulty" SPD requires a showing of reliance or prejudice whereas a non-faulty SPD does not. Thus, the approach shoulders an ERISA claimant with an even more difficult burden because it requires a claimant provided with a confusing and inadequate SPD to prove even more—reliance or prejudice—than a claimant provided with an

205. BLACK'S LAW DICTIONARY (8th ed. 2004).
206. Palmisano v. Allina Health Sys., 190 F.3d 881, 887-88 (8th Cir. 1999); Marolt v. Alliant Techsystems, 146 F.3d 617, 621 (8th Cir. 1998) (quoting Maxa v. John Alden Life Ins. Co., 972 F.2d 980, 984 (8th Cir. 1992)).
SPD meeting all ERISA requirements. In effect, this standard is more lenient to employers who write faulty SPDs than it is to employers who comply with ERISA's formal SPD requirements.

The application of Marolt in Palmisano particularly demonstrates the peculiarity of the Eighth Circuit's approach. The refusal to "sandbag"207 ERISA claimants is grounded in the theory that SPDs are an essential component of ERISA's reporting and disclosure requirements and when SPD provisions conflict with formal plan provisions, then the SPD provisions should prevail as a matter of law.208 The Eighth Circuit's approach allows a claimant like the plaintiff in Marolt (who did not read the SPD) to rely on it as a matter of law. However, to obtain relief when a faulty SPD conflicts with the plan document, a participant must show reliance.

Thus, the Eighth Circuit's approach places additional burdens on claimants who have placed their faith in a faulty SPD: they must also prove reliance on, or prejudice from, the summary and that the plan summary was in fact a faulty SPD, not just a grossly inaccurate or misleading document provided by an employer. The claimant in Palmisano could not recover because the plan's summary was too inadequate to be considered an SPD.

However, it remains unclear whether failing to include specific ERISA requirements or a certain number of ERISA requirements can turn a non-faulty SPD into a faulty one. In its attempt to avoid benefit plan interpretations concocted for purposes of litigation, the Eighth Circuit seems to have saddled claimants with inadequate and unequal protection. These anomalous results do not serve the purpose of ERISA as this approach does not encourage employees to take action to inform themselves of their rights and benefits.

C. Reliance Required: A Fair Standard to Plan Participants and Employers

Approaching ERISA as a statute designed solely to protect employees at the expense of employers is narrow-minded given Congress's multiple objectives in developing ERISA. The statute's preemption of state law claims,209 removal to federal court,210 and the aforementioned

207. Marolt, 146 F.3d at 620.
208. Palmisano, 190 F.3d at 887.
210. Removal to federal court is important because the trier of fact is now a U.S. District Judge, as opposed to a state court jury (which commentators have suggested would be more favorable to a claimant). Additionally, more restrictive federal common law will be applied as opposed to the more expansive state common law.
tioned limited remedies available under ERISA reveal the drafters' intent—and the Supreme Court's interpretation of congressional intent—to create a statute which is not so unfavorable to employers as to prevent them from developing ERISA benefit plans for their employees. Benefit plans are just that—benefits for employees—and thus a primary goal is to encourage employers to develop these plans.

By not requiring proof of reliance on a favorable SPD term, the SPD term is in effect converted into a "plan term," which is enforceable as a claim for benefits under ERISA § 502(a)(1)(B).211 As ERISA § 502(a)(1)(B) is one of the three main avenues for relief, changing a faulty SPD term into a "plan term" (which is enforceable as a claim for benefits under § 502(a)(1)(B) of ERISA) gives claimants an easier avenue for relief not found in the legislative history of ERISA. This approach is incongruent with the Supreme Court's interpretation of congressional intent.212 Since ERISA benefit plans are not a statutory requirement,213 employers may shirk this practice if losing every ERISA employee benefit plan lawsuit became the norm. Moreover, the plan fiduciary has a legal duty, subject to personal liability should there be a breach, to follow the terms of the "documents and instruments governing the plan," the plan document.214 There is no legal obligation under ERISA, the regulations, or any Supreme Court case to follow the SPD's terms.

The Seventh215 and Eleventh216 Circuits' approach, which requires a showing of reliance, is the most logical and faithful way to meet the goals of ERISA. The rule of these circuits is that when a plan document and SPD conflict, the former governs because it is more complete and the SPD has excerpted and translated the former into language designed to be intelligible to lay persons. This is true unless a plan participant or beneficiary has reasonably relied on the SPD to his detriment.

211. Wilkins v. Mason Tenders Dist. Council Pension Fund, 445 F.3d 572, 582-83, 585-86 (2d Cir. 2006) (holding a deficient SPD can give rise to claim for benefits under ERISA § 502(a)(1)(B)).

212. See Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146-47 (1985), emphasizing the Court's unwillingness to infer causes of action in the ERISA context because the statute's carefully designed and detailed enforcement scheme provided "strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." Id. at 146.


The Seventh Circuit further distinguishes SPDs which clarify, rather than contradict, the plan from SPDs which are silent on issues.\textsuperscript{217} This approach is logical as SPDs would no longer be a summary if the \textit{summary plan description} restated every part of the plan document. Moreover, clarification of a benefit in an SPD is directly in line with ERISA and the federal government's goal in requiring an SPD in the first place. As the primary source by which an employee is apprised of his benefits, the document should be comprehensible to the employees who will be reading it. It follows that employees are certainly entitled to rely on the SPD, but when they have not relied, they should not be entitled to cry foul. Any other approach does not serve ERISA's purpose for providing employees with an SPD and does not further ERISA's goals.

Employers and insurers rely on benefit plans, not the SPD, to provide benefits and coverage. Failing to require reliance on an SPD allows a windfall for employees lucky enough to find a pertinent inconsistency between the SPD and the plan document and unjustly increases the cost of administering benefit plans for employers and insurers. This ultimately jeopardizes the solvency of the plan which affects all employees. For this reason, while employees may rely on SPDs, they should not be allowed to recover based on a conflicting or faulty term in an SPD without first proving that they relied on the provision.

\textbf{V. Conclusion}

The spectrum of circuit court case law is broad on the question of what the appropriate standard of reliance should be for a plan participant to successfully bring suit when an SPD conflicts with the terms of the underlying plan document. The amorphous requirements established by the circuit courts underscore the need for a higher authority—the Supreme Court or Congress—to step in and settle the debate.

This Article advocates for a standard which requires beneficiaries to prove reliance on an SPD before benefiting from SPD terms that con-

\textsuperscript{217} \textit{Mers}, 144 F.3d at 1023. "[Prior precedent] suggests that the terms of an SPD control over the terms of the underlying document if any discrepancy exists between them. . . . The \textit{Williams} court found that a discrepancy exists when a definition provided only in the plan of a term used in the SPD is inconsistent with the common meaning of the term. . . . This interpretation of our precedent is not entirely accurate. We allow a participant or beneficiary to rely on the SPD and estop the plan administrator from denying coverage because of terms not included in the SPD only if there is a direct conflict between the SPD and the underlying policy." \textit{Id.} (emphasis added) (citing \textit{Williams} v. Midwest Operating Eng'rs Welfare Fund, 125 F.3d 1138, 1140-41 (7th Cir. 1997); \textit{Senkier} v. Hartford Life & Accident Ins. Co., 948 F.2d 1050, 1051 (7th Cir. 1991); \textit{Fuller} v. CBT Corp., 905 F.2d 1055, 1060 (7th Cir. 1990)).
Conflict with the corresponding plan document. Congress's goals in requiring the SPD—transparency and accountability in the operation of benefit plans—are not furthered by allowing employees who did not detrimentally rely on the SPD to benefit from the SPD. Balancing the relative hardships, it is fairer to require plan participants to actually read and rely on the SPD before benefiting from it than it is to require employers to be strictly liable for every contradiction or omission in the SPD. Utilizing a form of strict liability when SPD terms differ from plan terms may discourage employers from forming benefit plans for fear of massive liability or even jeopardize the solvency of the plan to the detriment of all of the plan participants. Due to the millions of workers and the trillions of dollars in assets potentially involved, it is paramount for the Supreme Court or Congress to restore order and bring predictability to this otherwise ambiguous body of case law.