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ERISA Rights and Responsibilities

by John M. Vine, Esq.[*]

SUMMARY

Participants in employee benefit plans have both rights and responsibilities under ERISA. The Department of Labor and the federal courts often fail, however, to give as much attention to participants' ERISA responsibilities as they give to participants' ERISA rights.[1]

A DOL regulation, for example, requires the administrators of employee benefit plans to inform plan participants about their ERISA rights, but fails to require administrators to inform participants about their ERISA responsibilities. And when resolving disputes between plan participants and plan administrators, federal courts often fail to take participants' ERISA responsibilities into account. The DOL, the courts and plan sponsors are in positions to remedy these failings, and they should do so.

BACKGROUND

For over 35 years, ERISA has required benefit plan administrators to distribute summary plan descriptions — known in the ERISA world as ''SPDs'' — to plan participants. A 1977 DOL regulation requires SPDs to include an ''ERISA rights'' statement that summarizes a participant's rights under ERISA. The regulation includes a model statement (the ''Model'') that can be used to provide the required ''ERISA rights'' statement. The Model, reproduced in the Appendix to this article, focuses on a participant's right to obtain plan-related documents and the steps that a participant can take to enforce his or her rights under ERISA and the plan.

The Model is now obsolete. Contemporary employee benefit plans give participants many more options, and more significant options, than did the plans of the mid-1970s. If a participant fails to read the plan's SPD and other notices or fails to comply with the plan's procedures, the consequences to the participant can be severe. A participant's failure to read the plan's SPD and other notices or failure to comply with the plan's procedures may also impose substantial costs on the plan and other plan participants.

The Model did not anticipate the assignment of significant decision-making responsibility to individual plan participants. The Model does not refer to a participant's responsibilities under the terms of the plan

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and does not even mention a participant's responsibility to read the plan's SPDs and other notices.

While the Model has not kept up with the times, the law under ERISA has evolved. The federal courts of appeal are currently divided over an issue that is directly related to participants' ERISA responsibilities. The issue concerns the showing a participant must make in order to prevail on a claim for benefits based on an erroneous statement in an SPD. Some circuits allow the participant to recover SPD-based benefits *only if* the participant can prove that the participant detrimentally relied on (or was prejudiced by) the erroneous statement in the SPD. Other circuits allow the participant to recover SPD-based benefits *regardless of whether* the participant can show that the participant relied on (or was prejudiced by) the erroneous statement in the SPD.

The Second Circuit does not fall squarely in either of these two camps. The Second Circuit has ruled that if the participant shows that he or she is likely to have been harmed (or prejudiced) by the erroneous statement in the SPD, the participant is presumed to have been harmed by the erroneous statement, and can recover the SPD-based benefits, unless the employer rebuts the presumption. The U.S. Supreme Court recently agreed to review a Second Circuit decision in a case that could give the Supreme Court an opportunity to resolve the differences among the courts of appeal and, in so doing, to recognize the importance of participant responsibility under ERISA-governed plans.

No matter the outcome in the Supreme Court, sound employee benefit policy counsels that ERISA plan participants be informed of their responsibilities. A brief statement summarizing a participant's ERISA responsibilities, prominently displayed at or near the beginning of an SPD and emphasizing that each participant is responsible for making important decisions under the plan, will probably be more useful to most participants than most, if not all, of the information conveyed by the Model. An illustrative ERISA responsibilities statement appears below, following the ''ERISA Responsibilities Statement'' caption.

The importance of informing plan participants about their responsibilities under ERISA has increased as a result of the growing popularity of automatic enrollment features under §401(k) and other contributory plans. Automatic enrollment attracts participation by employees who otherwise would start contributing later or at lower rates or who otherwise would not contribute at all. These employees are among those most likely to benefit from ERISA responsibilities statements.

ERISA'S OBJECTIVES

Two of ERISA's central objectives are protecting the interests of plan participants and facilitating the efficient administration of employee benefit plans. Plan participants advance these objectives by reading the plan's SPDs, SMMs and other notices and by meeting their obligations under the terms of the plan.

Participants' Interests. ERISA states that its policy is to protect the interests of participants by requiring disclosure of plan information and by improving the equitable character of benefit plans.[2] ERISA's SPD and SMM provisions and its notice and election requirements implement this policy.

SPDs and SMMs are the basic tools that ERISA requires plan administrators to use to inform participants of their rights and obligations under employee benefit plans. ERISA requires each plan administrator to provide plan participants with an SPD that is sufficiently accurate, comprehensive and understandable to inform the average participant of his or her rights and obligations under the plan. An SPD must not mislead or misinform plan participants.[3]

ERISA's legislative history explains that the SPD provisions are designed ''so that the individual participant knows exactly where he stands with respect to the plan . . . .''[4] When there is a material change in the terms of the plan or a change in the information that must be included in the plan's SPD, the plan administrator is required to provide an updated SPD or an SMM that summarizes the change.[5] The plan administrator is also required to furnish a copy of the latest updated SPD to any participant who makes a written request for it.[6]

In addition, ERISA allows participants to elect to waive their rights under certain provisions of the statute, and to exercise their rights under others, after they have been notified of the consequences of waiving or exercising their rights. ERISA's notice and election provisions recognize that participants are more likely to make elections that protect their interests if the participants are informed before they make their elections.

For example, ERISA requires most individual account plans to allow an eligible participant to elect to diversify any portion of the participant's account that is invested in employer securities and imposes a related notice requirement on the plan administrator.[7] ERISA also allows a pension plan to permit a participant to elect to waive the plan's qualified joint and survivor annuity form of distribution and the plan's qualified preretirement survivor annuity only if the plan complies with specific notice and consent requirements.[8] Similarly, ERISA prescribes notice and election rules under which an eligible participant may elect to exercise health care continuation rights under COBRA.[9] Each of these provisions allows the participant to make an informed and voluntary election based on the participant's circumstances and preferences.

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Efficient Plan Administration. ERISA encourages employers to establish employee benefit plans voluntarily, but allows employers to decide whether to adopt employee benefit plans and what kinds of plans to adopt. ERISA encourages voluntary plan formation by providing rules that facilitate efficient, predictable and uniform plan administration.[10] For example, ERISA's notice and election requirements allow plan administrators to rely on participants' completed election forms, rather than investigate each election individually to determine whether the election is consistent with the participant's intentions and interests.[11]

The Supreme Court's 2009 decision in *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan* [12] illustrates the impact of ERISA's notice and election provisions on plan administration. *Kennedy* concerned the disposition of the balance in the §401(k) account of William Kennedy, a deceased DuPont employee who had participated in DuPont's §401(k) plan. The plan authorized each participant to designate a beneficiary and to replace or revoke a previous beneficiary designation. The plan required all designations to be made in the manner prescribed by the plan administrator, and the plan's SPD required designations to be made on forms approved by the administrator. William designated his wife (''Liv'') as his beneficiary on the appropriate beneficiary designation form.

When William and Liv later divorced, the divorce decree specified that Liv was divested of any interest in William's §401(k) account. However, William never changed his designation of Liv as his beneficiary under the §401(k) plan. After William's death, the administrator of DuPont's §401(k) plan relied on William's still-outstanding beneficiary designation and distributed William's §401(k) account balance to Liv. William's estate sued the plan administrator, claiming that the divorce decree superseded William's designation of Liv as the beneficiary of his §401(k) account.

The Supreme Court ruled that William's beneficiary designation form controlled the disposition of William's §401(k) account balance. Both the plan document and the SPD made clear that, after a participant's death, benefits would be distributed to the beneficiary whom the deceased participant had designated in accordance with the plan's requirements. The Court emphasized that ERISA was designed to allow plans to be administered on the basis of straight-forward, objective rules that allow benefits to be paid efficiently and promptly without the uncertainty, cost and delay that would be entailed by investigating each deceased participant's intent:

> [B]y giving a plan participant a clear set of instructions for making his own instructions clear, ERISA forecloses any justification for enquiries into nice expressions of intent, in favor of the virtues of adhering to an uncomplicated rule: *simple administration, avoid[ing] double liability, and ensur[ing] that beneficiaries get what's coming quickly,* without the folderol essential under less-certain rules.
>
> And the cost of less certain rules would be too plain. Plan administrators would be forced to examine a multitude of external documents that might purport to affect the dispensation of benefits, and be drawn into litigation like this over the meaning and enforceability of purported waivers.[13]

Subsequently, in *Conkright v. Frommert*, the Supreme Court again emphasized that ERISA promotes efficiency, predictability and uniformity in plan administration in order to encourage employers to adopt employee benefit plans voluntarily:

> Congress enacted ERISA to ensure that employees would receive the benefits they had earned, but Congress did not require employers to establish benefit plans in the first place. We have therefore recognized that *ERISA represents a careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans.* Congress sought to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place. ERISA induc[es] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred.[14]

PARTICIPANTS' RESPONSIBILITIES

Participants are responsible for the choices they make under ERISA-governed plans. If a participant fails to read the plan's SPDs, SMMs or other notices or fails to comply with the plan's procedures, the consequences to the participant can be severe. For example, a participant who is unaware of the plan's requirements may fail to exercise his or her rights under the plan, may unwittingly incur thousands of dollars of uninsured medical expenses, or may make improvident employment or retirement decisions.

ERISA's SPD provisions recognize that participants have obligations under the plan. Under ERISA, an SPD must be ''sufficiently accurate and comprehen-

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sive to reasonably apprise participants and beneficiaries of their rights *and obligations*'' under the plan.[15] According to ERISA's legislative history, SPDs are designed to allow each participant to determine ''what benefits he may be entitled to, what circumstances may preclude him from obtaining benefits, *what procedures he must follow to obtain benefits* . . . .''[16] The Supreme Court has recognized that SPDs are designed to assure that participants understand their rights *and obligations* under the plan.[17]

A participant's responsibilities to read SPDs, SMMs and other plan notices and to discharge his or her obligations under the terms of the plan are therefore core ERISA duties. A number of courts have expressly recognized that ERISA imposes a duty on participants to read the plan's SPD.[18]

Benefit Rights. A participant who fails to exercise his or her rights in accordance with the terms of the plan may lose valuable benefits under the plan. Consider the case of a married participant who wishes to designate his or her child as the participant's sole beneficiary under a §401(k) plan. The plan, the plan's SPD and the plan's beneficiary designation forms all say that in order for a married participant to designate a non-spouse beneficiary, the participant must submit to the plan administrator a completed and executed beneficiary designation form, together with the spouse's notarized written consent to the designation. However, instead of submitting the notarized spousal consent that the plan calls for, the participant submits a copy of a prenuptial agreement in which the participant and the participant's husband agreed, before their marriage, that each spouse will have no interest in the other spouse's §401(k) plan. Because the participant failed to submit the required spousal consent, he or she failed to make an effective designation of his or her child as the participant's sole beneficiary under the plan. If the participant dies while married and before correcting the mistake, the participant's sole beneficiary under the plan will be his or her spouse rather than his or her child.[19]

Another example is the case of Aldofo Tieri.[20] Tieri participated in a multiemployer pension plan and elected to receive his pension benefit under the plan's ''husband and wife option'' — a joint and survivor annuity under which, after Tieri's death, his surviving spouse would receive, for the remainder of her life, a monthly pension payment equal to 50% of the monthly pension payment made to Tieri before his death. Recognizing that the monthly payment made to him under the husband and wife option was less than it would have been if he had elected to receive his pension in the form of a single life annuity, for his life only, Tieri sought, after he retired, to change the form of payment. When the plan denied his request, Tieri sued the plan, complaining that the plan had failed to tell him that his election of the husband and wife option was irrevocable. In rejecting Tieri's complaint, the court emphasized Tieri's duty to inform himself about the plan:

> *[Plan participants have] a duty to inform themselves of the details provided in their plans.* Tieri asserts that the Fund is liable for failing to inform him that the husband and wife option was irrevocable. The husband and wife option reduces the plan participant's monthly payments during his lifetime and then pays 50% of the monthly payment amount to a surviving spouse after the participant's death. The Fund contends that it fulfilled its duty to inform by providing him with the SPD, which states on page 20 that the form of payment cannot be changed once payments begin, in response to his initial inquiry in July of 2005. Although Tieri agrees that there is no question that the SPD was provided to [him] over a year before he was asked to make his election, he argues that the authority of the SPD, and thus whether he should have relied on it, was undermined by an express disclaimer that it is only a guide and is non-binding, whereas the Plan documents, which are controlling, were never provided. This argument is unpersuasive — what matters is whether Tieri had notice of the irrevocability of the husband and wife option, not whether the SPD controlled. . . . *Tieri had a duty to inform himself of the information about the plan provisions contained in the SPD provided to him.* The Fund fulfilled its fiduciary duty to inform and the Court grants it summary judgment on the husband and wife option claim.[21]

Investment Rights. Participants in a participant-directed individual account plan are responsible for informing themselves about the plan's investment options. In a suit against the fiduciaries of the Unisys Savings Plan, the plaintiffs claimed that the Plan's fiduciaries had violated their fiduciary duties by failing to disclose information about the Plan's investments in guaranteed investment contracts issued by Executive Life Insurance Company.

The district court entered judgment for the defendants on a number of grounds. One of them was that the participants had all of the information they needed to make informed choices among the Plan's investment options. Under §409(a) of ERISA, if a fiduciary breaches a fiduciary duty to a plan, the fiduciary is liable for any losses that result from (or that are caused by) the breach.[22] The court concluded that Unisys' al-

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leged failure to provide the participants with information that the participants already possessed did not ''cause'' the alleged loss:

> ERISA requires that the plaintiffs prove not only that Unisys made 'material misrepresentations' about Executive Life, but that the misrepresentations caused each plaintiff either to invest in Executive Life and/or keep their money with the insurer, notwithstanding emerging information about the decline in Executive Life's portfolio. On this record, plaintiffs cannot meet their burden.
>
> In other words, the record reveals that plaintiffs had all the information they needed to make informed choices about their investments. Based on the record before me wherein the class representatives went so far as to warn other participants to move their money out of the [income funds], I find that *Unisys had no obligation to disclose to the participants that which they already knew. Moreover, the plaintiffs admitted they did not read the Plan documents to inform themselves when making their investment choices and also admitted that, no matter what Unisys might have then said, they would not transfer their money. The Third Circuit has recently held that ERISA plan participants have an affirmative obligation to read plan documents. . . . Unisys met its disclosure obligations and, further, any claimed non-disclosure could not possibly have caused the participants harm.*[23]

Uninsured Medical Expenses. A participant who fails to read a health plan's SPD can unwittingly incur thousands of dollars of uninsured medical expenses. Take the case of Susan Coker.[24] Susan's husband, Douglas, worked for TWA from 1986 until he was furloughed at the end of 1992. Under TWA's collective bargaining agreement with the IAM, Douglas, as a furloughed employee, and Susan, as his dependent, were entitled to receive health care coverage, at TWA's expense, for up to one year after the date of the furlough.

Due to a bureaucratic error, however, TWA continued to provide the Cokers with health care coverage after the first anniversary of Douglas's 1992 furlough and after the date in 1994 when the Cokers' eligibility to purchase an additional six months of coverage pursuant to COBRA expired. When TWA discovered the error in 1995, it refused to cover hospital expenses of nearly $45,000 that Susan had incurred.

Susan claimed, among other things, that she was entitled to continued health care coverage under a federal common law estoppel theory. The Seventh Circuit rejected the estoppel claim on a number of grounds, the principal one being that because Susan had easy access to accurate information about the duration of her medical coverage, she could not show that she had reasonably relied on a misrepresentation by TWA:

> The [estoppel] cause of action has four elements: (1) a knowing misrepresentation; (2) made in writing; (3) with reasonable reliance on that misrepresentation by the plaintiff; (4) to her detriment. A claim will *not* lie for every false statement reasonably and detrimentally relied upon by an unwitting plaintiff. . . .
>
> Even assuming for the sake of argument that Susan detrimentally relied on TWA's written mailings that led her to believe she continued to enjoy medical coverage, her estoppel claim fails for lack of reasonable reliance. Susan could not have reasonably relied on the mailings from TWA in light of her easy access to convenient ways of ascertaining the true facts about her medical coverage. Douglas had copies of the CBA, the SPD, and the memorandum TWA disseminated at the September 30 meeting. . . . Susan's deposition testimony was merely that she could not *recall* reading any notices about her rights — a far cry from saying that TWA failed to supply her with information that it should have by statute.[25]

Improvident Decisions. A participant who fails to read an SPD can make improvident employment or retirement decisions. Consider the case of Gary Mauser,[26] who was employed by Raytheon from 1966 to 1980. After Mauser's employment terminated, Raytheon amended its pension plan, effective January 1, 1981, to improve the plan's benefit formula. The amended formula did not apply to Mauser because he was not employed by Raytheon when the amendment became effective in 1981. In 1988 Mauser returned to employment with Raytheon — prompted, Mauser claimed, by his belief that by returning to employment with Raytheon, he would become entitled to credit for his pre-1981 service under the Raytheon pension plan's revised benefit formula.

Mauser's belief was mistaken, however, and when his claim for pension benefits based on his pre-1981 service was denied, Mauser sued Raytheon. Mauser claimed that the plan's SPD required Raytheon to credit his pre-1981 years of service under the plan's revised benefit formula. The First Circuit ruled, however, that Mauser's SPD claim could not succeed because there was no evidence that Mauser had relied on the SPD. In fact, Mauser stipulated that he did not remember reading the SPD at the time Raytheon rehired him.[27]

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EFFECT ON OTHER PARTICIPANTS

Plans are funded on the basis of reasonable assumptions about the payments that the plan will make in the future. If a plan incurs costs that were not anticipated when the plan was funded, the plan assets that are used to pay the unanticipated costs will no longer be available to the plan and its participants, and the unanticipated costs can therefore harm the plan and its participants.

If a defined benefit plan is required to use plan assets to pay unanticipated costs, the plan's expenditures reduce the security that the plan's assets provide to all plan participants. Alternatively, if a defined contribution plan's general assets are used to pay unanticipated costs, the plan's expenditures reduce the account balances of all participants. If unanticipated costs are paid for with employer and/or participant contributions, (1) the employer and/or the participants will be required to make larger contributions to the plan, (2) a larger portion of their future contributions will be used to pay plan expenses rather than to fund plan benefits, and/or (3) the employer will be discouraged from continuing to sponsor the plan — contrary to the interests of plan participants and contrary to Congress's intent.[28]

If a plan's SPD incorrectly describes benefits that the plan provides, plan participants might claim the right to receive benefits in accordance with the erroneous description in the SPD. In general, the courts appear to agree that if a participant proves that he or she is entitled to prevail on the claim for SPD-based benefits, the participant can recover the benefits directly from the plan, rather than from the plan administrator.[29]

The courts' imposition of liability on the plan, rather than on the plan administrator, in these circumstances is surprising for a number of reasons. If a plan is required to provide benefits that are erroneously described in the plan's SPD, the payments that the plan is required to make could deplete the plan's assets and harm the interests of the plan and other plan participants.[30] Moreover, the plan administrator would appear to be the party responsible for the erroneous statement in the SPD. Under ERISA, the plan administrator is responsible for preparing and distributing the SPD.[31] When a plan administrator communicates with plan participants about the plan, the plan administrator acts as a fiduciary and can be held responsible under ERISA if it breaches its fiduciary responsibility.[32]

The plan, by contrast, would not appear to be responsible for benefits erroneously described in the plan's SPD. Under ERISA, a plan's obligation to pay benefits is generally determined by the terms of the plan, not by the terms of the SPD.[33] Although the terms of a plan can be amended, ERISA does not authorize the plan administrator to amend the plan.[34]

The courts' inclination to provide a remedy against the plan might stem from the courts' concern that it can be difficult for a participant to establish that an erroneous statement in an SPD was caused by a plan administrator's breach of fiduciary duty or to establish that the participant is entitled to a remedy under ERISA for the alleged breach. Every error by a fiduciary is not a breach of fiduciary duty, and in some cases, it can be difficult for a participant to establish either that the error was caused by a plan administrator's breach of fiduciary duty or that the participant is entitled to a remedy for the breach under ERISA §502(a)(3). By contrast, under ERISA §502(a)(1), a participant can recover benefits due under the terms of the plan without regard to any showing that there has been a breach of fiduciary duty.[35]

The common law of agency also might help to explain the courts' inclination to hold the plan responsible for benefits erroneously described in the plan's SPD. When a plan administrator issues an SPD, the administrator might be regarded as the plan's agent pursuant to a congressional directive[36] to provide participants with an accurate plan summary on which plan participants are encouraged to rely.[37] Under traditional agency law principles, if a plan participant reasonably believes that the administrator is authorized to act on behalf of the plan and the participant's reasonable belief is traceable to the plan's conduct, namely the plan's appointment of the administrator, the plan administrator, as the plan's agent, has the power to affect the plan's legal obligations to the participant.[38]

In order to establish that an agent acted with apparent authority, it is not necessary for the plaintiff to show that he or she detrimentally relied on an action taken or statement made by the principal or the agent. However, in order to establish the plaintiff's underlying cause of action against the principal, it might be necessary for the plaintiff to show detrimental reliance:

> To establish that an agent acted with apparent authority, it is not necessary for the plaintiff to establish that the principal's manifestation induced the plaintiff to make a detrimental change in position, in contrast to the showing required by the estoppel doctrines . . . . Many cases stating that apparent authority requires 'reliance' on the part of the plaintiff do not articulate what specifically must be shown. Successful assertions of apparent authority by third parties as the basis on which to bind a principal follow action or forbearance on the part of a third party as a result of the agent's action and the principal's manifestation. Establishing that a plaintiff took an action as a

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> result of the principal's manifestation may also help to establish that the person to whom the manifestation was made believed it to be true. *Moreover, the underlying substantive cause of action on which the third party sues the principal may require proof that the plaintiff took a specific type of action. For example, if the underlying cause of action is fraud, it is necessary for the plaintiff to establish that the defendant's misrepresentation led to a detrimental change in position.*[39]

Because the income and employment tax consequences of plan-provided benefits can be more favorable to plan participants than the income and employment tax consequences of payments that the employer makes in lieu of such plan-provided benefits, plan participants might be better off, on an after-tax basis, with a remedy against the plan than with a remedy against the plan administrator.[40] As a result, if a court rules that a plan is responsible for providing benefits erroneously described in the plan's SPD, it might well be necessary, or at least advisable, under both ERISA and the Internal Revenue Code, for the plan sponsor to amend the plan to authorize payment of the benefits.[41]

Entirely apart from SPD-based benefit claims, participants who fail to fulfill their responsibilities under the plan can increase plan administration costs and deplete plan assets. When plan participants make designations and elections that do not comply with the plan's rules,[42] and when plan participants make meritless claims, such as a claim that they have been misled by an SPD that they have not read,[43] plan costs are increased, plan solvency can be compromised, and plan formation can be discouraged — contrary to the interests of other plan participants and contrary to Congress's objectives in enacting ERISA.[44]

In its recent decision in *Conkright v. Frommert*, the Supreme Court recognized that plan administrators have a fiduciary duty to plan participants ''to preserve limited plan assets'' and ''prevent . . . windfalls for particular employees.''[45] For example, when Leo Chiles and other former Control Data employees claimed that the SPD for Control Data's long-term disability plan provided them with vested rights to continued health benefits, the Tenth Circuit ruled that in order to prevail, the plaintiffs must show significant reliance on, or prejudice flowing from, the SPD. The Tenth Circuit recognized that, if granted, the plaintiffs' claims could divert resources that might otherwise be available to provide benefits to other plan participants:

> 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 participant] must show some significant reliance upon, or possible prejudice flowing from, the faulty plan description. This requirement makes sense because 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. Only where employees rely on an ambiguous or faulty SPD, or otherwise show prejudice from the inconsistency between the SPD and the master plan document, is relief appropriate. *Any other rule would allow a windfall for some employees and unfairly increase costs for employers and their insurers, who rely on the terms of the plan in providing benefits and coverage. This in turn could jeopardize the solvency of the plan with respect to the remaining employees.*[46]

A governing instrument of an individual account plan might provide that if an identifiable group of participants unnecessarily causes the plan to incur unanticipated costs, the unanticipated costs will be allocated to the accounts of those participants.[47] This approach has limited practical value, however. Unanticipated costs (and the participants who caused the plan to incur them) can be very difficult to identify and quantify; and even when they can be identified and quantified, the costs can dwarf the aggregate account balances of the participants who caused the plan to incur the costs. Moreover, the cost allocation approach is not easily applied outside the context of an individual account plan.[48] It is generally more effective to reduce the potential for unanticipated costs by establishing sensible, straightforward administrative rules that participants can easily understand; to communicate the rules clearly to participants; and to apply the rules consistently. As the Supreme Court recognized in *Kennedy*, ERISA favors adherence to uncomplicated rules.[49]

JUDICIAL RECOGNITION OF PARTICIPANTS' RESPONSIBILITIES

The federal courts of appeal are currently divided on an issue that implicates participants' responsibilities under employee benefit plans. The issue concerns the showing a participant must make in order to prevail on a claim for benefits based on an erroneous statement in an SPD.[50]

Reliance or Prejudice. Five circuits allow a participant to recover SPD-based benefits only if the partici-

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pant can prove that he or she detrimentally relied on, or was prejudiced by, the erroneous statement in the SPD. Three of the five circuits (the First, Fourth and Tenth) allow a participant to recover SPD-based benefits if the participant can prove detrimental reliance on, or prejudice caused by, an erroneous SPD, while the remaining two circuits (the Seventh and the Eleventh) allow a plaintiff to recover SPD-based benefits only upon a showing of detrimental reliance.[51]

The courts of appeal for these five circuits have concluded that because Congress imposed the SPD requirement in order to give participants a way to ascertain the benefits their plan provides, a participant should not be penalized for relying on the SPD as Congress intended.[52] These circuits have recognized that summaries are necessarily imprecise and incomplete,[53] and have required a showing of detrimental reliance or prejudice to order to avoid conferring ''windfall'' benefits on plan participants and to avoid discouraging employers from maintaining plans.[54]

It is not clear whether the ''detrimental reliance'' standard differs from the ''detrimental reliance or prejudice'' standard. The Second Circuit — which has adopted a variant of the prejudice standard — has characterized the prejudice standard as ''amorphous.''[55] Leading ''detrimental reliance'' decisions in the Seventh and Eleventh Circuits rely on ''detrimental reliance or prejudice'' decisions, without suggesting that there is a difference between the two standards.[56] Recent decisions in the First Circuit — where the ''detrimental reliance or prejudice'' standard was first applied in this context — ''suggest[] that the First Circuit has collapsed the reliance and prejudice prongs, treating them as one and the same or at least requiring very similar showings of harm.''[57]

The detrimental reliance standard is consistent with the view that ERISA imposes a duty on plan participants to read the plan's SPD and other notices and that a participant who fails to discharge that duty has no right to any additional benefits that the SPD or other notices erroneously describe. Given the lengths to which ERISA goes to assure that plan administrators notify plan participants regarding their rights and obligations under ERISA-governed plans,[58] it would be illogical for a plan to reward a participant who fails to read a plan notice or who fails to comply with a requirement accurately described by the notice.

Some of the courts adopting the prejudice standard have asserted that a detrimental reliance standard is inconsistent with ERISA's objective of protecting employees and that a detrimental reliance standard imposes an excessive burden on the plaintiff, especially when the participant is deceased.[59] These courts have not taken into account the other ERISA objective that the Supreme Court emphasized in *Conkright*: to encourage employers to adopt employee benefit plans voluntarily.

Strict Liability. Three circuits (the Third, Fifth and Sixth) hold that a plan is bound by an erroneous statement in the plan's SPD, regardless of whether a participant can show that he or she relied on (or was prejudiced by) the erroneous statement.[60] These circuits effectively impose strict liability on the plan for any erroneous statement in the plan's SPD. Under the strict liability approach, a plan administrator must implement an erroneous statement in an SPD as if the SPD were one of the plan's governing instruments, and participants who have not relied on (or been prejudiced by) the erroneous statement become entitled to windfall benefits at the expense of the plan, other participants and the sponsoring employer.[61]

The Third Circuit's recent opinion in *In re Lucent Death Benefits ERISA Litigation* suggests that the strict liability approach might be based on the view that an SPD is equivalent to a governing plan instrument:

> ERISA's framework ensures that employee benefit plans be governed by written documents and summary plan descriptions, which are the statutorily established means of informing participants and beneficiaries of the terms of their plan and its benefits. We therefore look to the plan documents to interpret plan obligations. Extra-ERISA commitments (such as vested welfare benefits) must be found in the plan documents and stated in clear and express language.[62]

The view that an SPD is, or is equivalent to, a governing plan instrument is mistaken, however. The governing instruments of most plans — especially pension plans, which must comply with a bewildering array of complex ERISA, Internal Revenue Code and other requirements — are typically lengthy, technical and dense. An SPD, by contrast, is required to be understandable by the average plan participant [63] and to provide, as the term ''summary plan description'' suggests, an abbreviated description of the plan, not to set forth the plan's terms.[64]

The distinction between an SPD and the plan's governing instruments is reflected in ERISA's text. ERISA §104(b)(2), for example, requires a plan administrator to make available for inspection by plan participants ''copies of the latest updated summary plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.''[65]

Similarly, ERISA §104(b)(4) requires a plan administrator, upon receiving a written request, to furnish to a participant ''a copy of the latest updated summary plan description, and the latest annual report, any ter-

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minal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.''[66]

In both provisions, the phrase ''or other instruments under which the plan is established or operated'' appears at the end of a list of documents that does not include the SPD: ''the bargaining agreement, trust agreement, contract'' in §104(b)(2) and ''the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract'' in §104(b)(4). There is a strong argument that the documents appearing earlier in each list are also ''instruments under which the plan is established or operated.'' However, because both §104(b)(2) and §104(b)(4) refer to the SPD, but *exclude* the SPD from the list that includes ''other instruments under which the plan is established or operated,'' §104(b)(2) and §104(b)(4) indicate that ERISA does *not* require the SPD to be considered as one of the ''instruments under which the plan is established or operated.'' Consistent with §104(b)(2) and §104(b)(4), ERISA §404(a)(1)(D) requires a plan fiduciary to act in accordance with the documents and instruments governing the plan and does not mention the plan's SPD.

If Congress had intended to require an SPD to be a governing plan instrument, Congress likely would have said so expressly or called it something other than a ''summary plan description'' or would have referred to the SPD in ERISA §404(a)(1)(D) or included the SPD in the lists in §104(b)(2) and §104(b)(4). The fact that Congress did none of these things strongly indicates that Congress did not intend to require an SPD to be a governing plan instrument.

Other Views — The Eighth Circuit. The Eighth Circuit applies three different standards, depending on the document in which the erroneous statement appears. If the erroneous statement appears in an SPD, the SPD prevails over the plan without any need to show detrimental reliance or prejudice.[67] If the erroneous statement appears in a ''faulty'' SPD — an SPD that does not meet ERISA's requirements — the participant must prove reliance on, or possible prejudice flowing from, the summary in order to recover benefits from the plan on the basis of the error.[68] If the erroneous statement appears in a document that is not even a faulty SPD (a ''hopelessly inadequate'' SPD) — for example, a brochure describing only the plan's eligibility requirements — the terms of the plan are controlling.[69]

There is no support in the text of ERISA for an approach based on the differences among SPDs, ''faulty'' SPDs, and ''hopelessly inadequate'' SPDs. Moreover, the Eighth Circuit's approach has perverse consequences. Under Eighth Circuit law, if a statement in an SPD is inconsistent with the terms of the plan, the plan is better off if the SPD is faulty or hopelessly inadequate than it would be if the plan's SPD (apart from the alleged error) met all of ERISA's SPD requirements.[70] There is no reason to believe that this is what Congress intended.

Other Views — The Second Circuit. In *Burke v. Kodak Retirement Income Plan*,[71] the Second Circuit adopted a ''likely harm'' standard. The Second Circuit ruled that if a participant shows that he or she was likely to have been harmed by an erroneous statement in an SPD, the participant is presumed to have been harmed by the erroneous statement, but that the employer has the opportunity to rebut the presumption by showing that the erroneous statement in the SPD was harmless.[72] The Second Circuit explained that the ''likely harm'' standard was designed to avoid what the court called ''harsh common law principles'' that would defeat participants' claims.[73]

Burke involved a dispute over a surviving spouse's right to a survivor income benefit (''SIB'') following her husband's death. The SIB was available to a domestic partner of a deceased Kodak employee only if the domestic partners filed a joint affidavit of domestic partnership. Although 16 sections of the SPD mentioned the joint affidavit requirement, the section dealing with the SIB did not. The Second Circuit stated that requiring a showing of detrimental reliance would impose ''an insurmountable hardship'' on many plaintiffs:

> [A] prejudice standard is more consistent with ERISA's objective to protect the employee against inadequate SPDs. A rule requiring . . . detrimental reliance . . . imposes an insurmountable hardship on many plaintiffs, especially on the estate of a deceased participant, and such a rule hardly advances the Congressional purpose of protecting the beneficiaries of ERISA plans by insuring that employees are fully and accurately apprised of their rights under the plan. . . .
>
> The consequences of an inaccurate SPD must be placed on the employer. The individual employee is powerless to affect the drafting and less equipped to absorb the financial hardship of the employer's errors. The employer, however, receives a substantial benefit in return: a defense against certain state law claims.[74]

In contrast to the Supreme Court's subsequent opinions in *Kennedy* and *Conkright*, the Second Circuit's opinion in *Burke* focused on Congress's effort in ERISA to protect plan participants and largely overlooked Congress's effort to strike a balance between the objective of protecting participants and the objective of promoting efficient plan administration — an effort that was central to the Supreme Court's subse-

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quent decisions in *Conkright* and *Kennedy*.[75] The Second Circuit also mistakenly regarded the dispute in *Burke* as a clash solely between the interests of participants and the interests of the employer and did not take into account the clash between the plaintiffs' interests and the interests of other plan participants.[76]

In *Amara v. Cigna Corp.*,[77] the Second Circuit affirmed a district court's application of the ''likely harm'' standard that the Second Circuit had applied in *Burke*.[78] At the Supreme Court's invitation,[79] and joined by the DOL, the Solicitor General filed a brief amicus curiae supporting the ''likely harm'' standard [80] and recommending that the Court not review the Second Circuit's decision.[81] On June 28, the Supreme Court announced that it would review the decision in *Amara*, [82] giving the Court a potential opportunity to resolve the current circuit split.

THE GOVERNMENT'S POSITION

The Government's amicus brief in *Amara* presented the following arguments in support of the ''likely harm'' standard:

(1) A participant should not be entitled to benefits based on an erroneous statement in an SPD unless the participant was prejudiced by the erroneous statement. If the participant was not prejudiced by the erroneous statement, the error was harmless, and the participant should not be entitled to an award of additional benefits on the basis of the erroneous statement. In the absence of a ''harmless error'' rule, some participants would be awarded windfall benefits at the expense of the plan and other participants and, contrary to ERISA's objectives, employers would be discouraged from establishing plans.[83]

(2) The SPD is one of the documents and instruments governing the plan.[84]

(3) The ''likely harm'' standard appropriately places the burden on employers to draft accurate SPDs and appropriately takes into account how difficult it would be for participants to prove how they were harmed by an inaccurate statement in an SPD.[85]

(4) Requiring participants to prove that they individually relied on the erroneous terms of an SPD would not be consistent with the statutory scheme, would likely preclude class action treatment of benefit claims, and would undermine ERISA's goals of ensuring efficiency, predictability and uniformity in plan administration.[86]

Avoidance of Windfalls. The Government's first argument — that a participant should not collect benefits based on an erroneous statement in an SPD unless the participant was prejudiced by the erroneous statement — is consistent with ERISA's objectives and the Supreme Court's decision in *Conkright*. The ''likely harm'' standard is so open-ended, however, that it is at least as likely to produce windfalls as it is to avoid windfalls. The Second Circuit's opinion in *Burke* makes it evident that the ''likely harm'' standard invites lawsuits based on conjecture:

> Cognizant of ERISA's distribution of benefits, we require, for a showing of prejudice, that a plan participant or beneficiary was *likely* to have been harmed as a result of a deficient SPD. Where a participant makes this initial showing, however, the employer may rebut it through evidence that the deficient SPD was in effect a harmless error.
>
> The facts of *Maginaro v. Welfare Fund of Local 771, I.A.T.S.E.*, 21 F. Supp. 2d 284 (S.D.N.Y. 1998), provide a useful illustration. In that case, the plan itself imposed a two-year statute of limitations on legal actions against an employee welfare fund. The SPD, however, omitted any mention of the statute of limitations. The normal statute of limitations under New York law would have been six years. *Id.* at 293.
>
> The district court ruled, in accordance with Second Circuit precedent, that because the plan and the SPD were in conflict, the SPD controlled. Noting a division in the circuits over whether reliance or prejudice was required for recovery, the court adopted a ''possible prejudice'' approach. Applying that standard revealed that ''plaintiffs were likely prejudiced by the SPD's failure to disclose the limitation on actions contained in the Plan'' because New York's statute of limitations allowed an additional four years to sue. *Id.* at 296. The court then concluded that ''had the Fund adequately disclosed the two-year limitation . . . via the SPD, it is likely that [the plaintiff] would have learned of this limitation from his employer, his co-workers, or the union, even if he never read the SPD himself.'' *Id.* at 297.[87]

Governing Plan Instruments. The Government's second argument — that the SPD is one of the instruments governing the plan — is inconsistent with the Government's first argument. If a plan's SPD were one of the instruments governing the plan, the Government would have no basis for asserting that, in order to be entitled to benefits erroneously described by

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an SPD, participants must show that they have been prejudiced by the erroneous SPD. ERISA requires a plan's fiduciaries to discharge their duties in accordance with the terms of the plan's governing instruments,[88] regardless of whether the plan's participants have read, relied on or been prejudiced by those provisions.[89]

To support its argument that the SPD is one of the instruments governing the plan, the Government cited the Supreme Court's opinion in *Kennedy* and four circuit court opinions: *Chiles v. Ceridian Corp.*, *Bergt v. Retirement Plan for Pilots Employed by MarkAir, Inc.*, *Alday v. Container Corp. of America*, and *Jensen v. SIPCO, Inc.*[90] However, none of these opinions support the Government's position. Although there are passages in some of these opinions that might be misinterpreted to support the Government's position,[91] none of the cases involved a statement in an SPD that was more favorable to the participant than the applicable provision of a governing plan document. In two of the cases (*Kennedy* and *Chiles*), there was *no inconsistency* between the plan document and the SPD; in one case (*Bergt*), the governing plan document was *more favorable* to the participant than was the SPD; in another case (*Alday*), the governing plan document and the SPD were *the same document*; and in the last case (*Jensen*), the SPDs did not address the subject of the dispute.

Kennedy. The Government relied on the following passage in the Supreme Court's opinion in *Kennedy*:

> It is no answer, as the Estate argues, that William's beneficiary-designation form should not control because it is not one of the ''documents and instruments governing the plan'' under §1104(a)(1)(D) and was not treated as a plan document by the plan administrator. That is beside the point. *It is uncontested that the SIP and the summary plan description are ''documents and instruments governing the plan.''* See [*Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 84, 115 S. Ct. 1223, 1231 (1995)] (explaining that 29 U.S.C. §§1024(b)(2) and (b)(4) require a plan administrator to make available the ''governing plan documents''). Those documents provide that the plan administrator will pay benefits to a participant's designated beneficiary, with designations and changes to be made in a particular way. William's designation of Liv as his beneficiary was made in the way required; Liv's waiver was not.[92]

There was no inconsistency between the plan document and the SPD in *Kennedy*, and the issue whether the SPD was a governing plan instrument was not litigated in that case. The Court's statement — that the question was ''uncontested'' — confirms this. The Supreme Court's point was that because both the plan document and the SPD required participants' beneficiary designations to be made or changed in a particular way and because William had designated his beneficiary in the required way, it was irrelevant that the beneficiary designation form itself was not a governing plan instrument.

Chiles. In *Chiles*, disabled employees claimed that when they qualified for long-term disability benefits, they acquired a vested right to company-paid health benefits under the employer's disability plan. The Tenth Circuit found that the pertinent provisions of the plan and the pertinent provisions of the SPD were consistent and that, as a result, there was no need to decide whether a statement in the SPD superseded conflicting terms in a governing plan instrument:

> [I]t is clear that Control Data retained the right to change the benefits of all LTD plan participants — including those who had already qualified for long-term disability.
>
> As noted above, the LTD plan's reservation of rights clause contains a proviso. Described in the plan's SPD, it states: ''If the group Long-Term Disability Plan terminates, and if on the date of such termination you are totally disabled, your Long-Term Disability benefits and your claim for such benefits will continue as long as you remain totally disabled as defined by the plan.'' Here, the LTD plan specifically contemplates a situation in which Control Data's discretion to change the plan is circumscribed. We find that the interpretive maxim of *expressio unius est exclusio alterius* — the expression of one thing is the exclusion of another — properly applies to this case. By explicitly listing a qualification to Control Data's ability to change the LTD plan, it is proper to infer that the right to make other changes to disabled participants' benefits was reserved.[93]

Bergt. The issue in *Bergt* was whether participant-favorable provisions in the plan document prevailed over conflicting statements in the SPD. The Ninth Circuit concluded, unsurprisingly, that in these circumstances the plan document prevailed:

> [W]hen the plan master document is more favorable to the employee than the SPD, and unambiguously allows for eligibility of an employee, it controls, despite contrary unambiguous provisions in the SPD. The plan master document is the main document that speci-

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> fies the terms of the plan, and employees should be entitled to rely on its unambiguous provisions. The SPD, on the other hand, should simply summarize the relevant portions of the plan master document.[94]

Alday. In *Alday*, a single document served as both the plan's SPD and the plan document. It is not surprising that the Eleventh Circuit concluded that this dual-purpose document — the plan's *only* governing instrument — was controlling:

> [T]here was an SPD which clearly functioned as the plan document required by ERISA. Moreover, the SPD unambiguously set out the rights of the parties, including [the employer's] right to terminate or modify the plan. Accordingly, there is no need to refer to other communications between the parties to determine the parties' intent.[95]

Jensen. In *Jensen*, the question was whether retiree medical benefits vested when salaried employees retired. The Eighth Circuit found that the plan document was ambiguous, and that the relevant SPDs were *silent*, on the vesting question. Far from allowing the SPDs to determine the outcome of the suit, the Eighth Circuit emphasized that it used the SPDs only as a tool to assist it interpreting the plan document:

> This does not mean that the silence of SIPCO's pre-1989 SPDs on the question of vesting is irrelevant in construing the Plans. As our prior discussion makes clear, those SPDs were a significant factor in discerning SIPCO's intent regarding the issue of vesting. However, the SPDs are simply part of that interpretive landscape. We do not affirm the district court's material misrepresentation and breach of fiduciary duty holdings.
>
> . . . SIPCO's pre-1989 SPDs may not be the basis for an estoppel — they were merely silent with regard to SIPCO's reservation of the right to modify or terminate benefits, and they expressly notified interested participants and beneficiaries that they could obtain and examine all Plan documents as required by the Department's regulations.[96]

Other Cases. Although the Government's amicus brief did not make this point, some circuit court opinions refer to SPDs as ''summary plan *documents*'' rather than as ''summary plan *descriptions*.''[97] However, these opinions appear to repeat errors that the parties have made, to reflect confusion over nomenclature, or both. The references to ''summary plan documents'' do not appear to reflect considered judgments that SPDs are governing plan instruments.

Burden on Plaintiffs. In its amicus brief, the Government also argued that plaintiffs need the ''likely harm'' standard to make their case because many plaintiffs will not be able to prove how they were actually harmed by erroneous statements in SPDs and will, in consequence, be unable to bring their suits as class actions. In making this argument, the Government was skating on very thin ice.

Rule 23 of the Federal Rules of Civil Procedure, which governs class actions in federal court, ''must be interpreted in keeping . . . with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right,' 28 U.S.C. §2072(b).''[98] The Government's argument — that, in order to allow plan participants to bring class actions under Rule 23, courts should relieve participants of the need to show that they suffered actual harm — disregards the Rules Enabling Act's requirement that rules of procedure not modify substantive rights.[99]

Further, there is nothing in ERISA to suggest that ERISA should be interpreted to facilitate litigation brought by people who have no evidence that they have been harmed or to suggest that ERISA should be interpreted to facilitate class actions.[100] To the contrary, as the Supreme Court has recognized in *Conkright*, *Kennedy* and *Varity*, ERISA was designed to *avoid* creating a system plagued by litigation and under which ''administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place.''[101]

Workplace Chit-Chat. The Government also argued that the Second Circuit's ''likely harm'' standard meets the needs of participants who rely on workplace chit-chat, rather than on SPDs and other formal plan notices, as sources of information about their benefit plans:

> [M]any participants rely on oral representations and discussions with friends, coworkers, and colleagues for information about the plan. As a result, misstatements in SPDs can be propagated throughout the workplace and influence even employees who do not read them. Similarly, even if just a minority of participants would have read, communicated, or objected to the terms of the plan as described in an accurate SMM, the failure to correctly describe the amendment can have a widespread impact on participants; for example, by depriving them of the opportunity to protest and thereby secure the reversal of adverse changes to the plan — as the district court concluded occurred here.[102]

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If accepted by the courts, this argument would subvert ERISA's informational [103] and governance [104] regimes. It would reward participants who do not discharge their obligation to read the SPDs and other notices that the plan administrator provides to them,[105] and it would give participants a role in plan design — a ''settlor'' function — that ERISA does not assign to them.[106]

Consistent with Statutory Scheme. Finally, the Government argued that requiring proof of actual reliance is inconsistent with the statutory scheme. If the SPD were a governing plan instrument, this argument might have merit. However, as explained earlier, the SPD is not a governing plan instrument.

If the SPD were a governing plan instrument, the Government could have argued forcefully that requiring proof of actual reliance was inconsistent with the statute. This is so because ERISA requires plan fiduciaries to discharge their duties in accordance with the provisions of the plan's governing instruments, regardless of whether the plan's participants have read, relied on or been prejudiced by the plan's governing plan instruments.[107]

However, because an SPD is *not* a governing plan instrument, a reliance requirement *is* consistent with the statutory scheme. A reliance requirement protects those participants who reasonably and detrimentally rely on the availability of the benefits that the SPD erroneously describes. A reliance requirement also protects the plan and other participants from being compelled to finance windfall benefits for participants who do not reasonably and detrimentally rely on the availability of benefits erroneously described in the SPD.[108]

Many SPDs include a ''disclaimer'' that states that if there is a conflict between the SPD and the plan's governing instruments, the plan's governing instruments will prevail over the SPD. The disclaimer recognizes the possibility that there might be a discrepancy between the SPD and the plan's governing instruments and informs the reader that, in the event of such a discrepancy, the plan's governing instruments will trump any conflicting description in the SPD. A disclaimer of this kind raises the question whether a participant's belief in the accuracy of the SPD is reasonable.

The courts, however, generally do not give effect to disclaimers in SPDs — primarily because giving effect to such disclaimers would defeat Congress's objective in requiring the distribution of SPDs in the first place.[109] As Congress intended that plan participants reasonably rely on the plan's SPD, the courts are not likely to conclude that the presence of a disclaimer in an SPD is, by itself, sufficient to cause a participant's reliance on the SPD to be considered unreasonable.

ERISA RIGHTS STATEMENT

ERISA §104(c) provides that ''The Secretary [of Labor] may by regulation require that the administrator of any employee benefit plan furnish to each participant and to each beneficiary receiving benefits under the plan a statement of the rights of participants and beneficiaries under this title.''[110]

Technically, Congress did not need to enact a provision specifically authorizing the Secretary to require the distribution of an ERISA rights statement. Other ERISA provisions gave the Secretary ample authority to require plan administrators to distribute such a statement.[111]

Section 104(c), however, reflected Congress's expectation that the Secretary would require the distribution of an ERISA rights statement, and when the DOL issued a regulation in 1977 specifying the information that an SPD must present, the regulation identified an ERISA rights statement as a required item. The regulation included the Model and stated that an SPD would be deemed to comply with the ERISA rights requirement if the SPD included the relevant portions of the Model.[112]

Both §104(c) and the DOL regulation under §104(c) focus on participants' rights under ERISA.[113] Section 104(c) does not even mention participants' responsibilities and, apart from a brief passage on participants' cost-sharing responsibilities under group health plans, the DOL regulation treats participants' responsibilities as an after-thought. The passage on participants' cost-sharing responsibilities was not added until 2000 and relates only to group health plans:

> For employee welfare benefit plans that are group health plans . . ., the summary plan description shall include a description of any cost-sharing provisions, including premiums, deductibles, coinsurance, and copayment amounts for which the participant or beneficiary will be responsible; any annual or lifetime caps or other limits on benefits under the plan; the extent to which preventive services are covered under the plan; whether, and under what circumstances, existing and new drugs are covered under the plan . . . .[114]

Otherwise the regulation does little more than pay lip service to participants' responsibilities under ERISA-governed plans:

> If you have any questions about your plan, you should contact the plan administrator. If you have any questions about this statement or about your rights under ERISA, or if you need assistance in obtaining documents from

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the plan administrator, you should contact the nearest office of the Employee Benefits Security Administration, U.S. Department of Labor, listed in your telephone directory or the Division of Technical Assistance and Inquiries, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, D.C. 20210. *You may also obtain certain publications about your rights and responsibilities under ERISA by calling the publications hotline of the Employee Benefits Security Administration.*[115]

ERISA RESPONSIBILITIES STATEMENT

The failure of the 1977 regulation to emphasize participants' responsibilities is likely attributable to the environment of the mid-1970s, when the regulation was drafted and when plans offered participants many fewer choices, and less significant choices, than they do currently.[116] Contemporary §401(k) plans and cafeteria plans allow eligible employees to decide whether, and to what extent, to participate; many individual account retirement plans allow participants to make investment elections; health and life insurance plans typically allow participants to elect among a variety of types and levels of coverage; pension and life insurance plans generally allow participants to designate beneficiaries and distribution schedules; and many pension plans allow participants to choose among distribution options with different values.[117] Although the DOL has not revised the 1977 SPD regulation to reflect appropriately the increased importance of personal responsibility under employee benefit plans, other DOL publications recognize the importance of personal responsibility under contemporary benefit plans.[118]

A brief ERISA responsibilities statement, prominently displayed at or near the beginning of an SPD and emphasizing that each employee is responsible for making important personal decisions under the plan, will probably be more useful to most participants than most, if not all, of the information in the Model. An ERISA responsibilities statement might read along the following lines:

> You are responsible for decisions affecting your participation in the plan. No one else can make these decisions for you. You can't be sure you are receiving all of the plan benefits for which you are eligible unless you know what those benefits are and you follow the plan's rules for obtaining those benefits. This handbook summarizes the plan's benefits and rules as in effect on [date]. We strongly encourage you to study this handbook and any modifications to the handbook and other plan notices that you receive, and to keep handy a paper or electronic copy of each of them. If you fail to learn about the benefits offered by the plan, or if you fail to follow the plan's rules for obtaining benefits, you could
>
> - Miss out on benefits that could be of great value to you and your family,
> - Have substantial health care expenses that are not covered by the plan,
> - Make employment or retirement decisions based on an erroneous understanding about your benefit rights, and
> - Take action that harms other plan participants and beneficiaries.
>
> If you have any questions about the plan, please feel free to raise them with the Company's human resources office.

The current DOL regulation does not bar an SPD from including an ERISA responsibilities statement,[119] and some SPDs now include such statements. The DOL would do both plan participants and plan administrators a great service, however, if it encouraged or required plan administrators to include ERISA responsibilities statements in their SPDs. Calling attention to participants' decision-making responsibilities will encourage participants to read their SPDs, SMMs and other plan notices, to comply with the plan's rules, and to make appropriate choices, and will help to reduce plan costs and to fulfill plan administrators' responsibilities to all plan participants.

AUTOMATIC ENROLLMENT

The growing use of automatic enrollment and automatic escalation features in §401(k) and other contributory plans increases the importance of ERISA responsibilities statements. Under a plan with an automatic enrollment feature, an eligible employee is enrolled in the plan automatically unless the employee affirmatively elects not to enroll. If the plan has an automatic escalation feature, a participant's contribution amount or contribution rate automatically increases over time unless the participant affirmatively elects otherwise.[120]

Automatic enrollment and automatic escalation features are designed to increase participation by employees who are among those most likely to benefit from ERISA responsibilities statements: employees

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who otherwise would start contributing later or at lower rates or who otherwise would not contribute at all.[121]

THE PUBLIC HEALTH SERVICE ACT

The recently enacted Patient Protection and Affordable Care Act amended the Public Health Service Act (the ''PHSA'') to direct the Department of Health and Human Services (''HHS'') to promulgate standards for providing explanations of benefits and coverage to enrollees in health plans that are subject to the PHSA.[122] HHS should consider encouraging plans subject to its jurisdiction to provide an ''enrollee responsibility'' notice even if these plans are not subject to ERISA.

APPENDIX

§2520.102-3 Contents of summary plan description.

Section 102 of the Act specifies information that must be included in the summary plan description. The summary plan description must accurately reflect the contents of the plans as of the date not earlier than 120 days prior to the date such summary plan description is disclosed. The following information shall be included in the summary plan description of both employee welfare benefit plans and employee pension benefit plans, except as stated otherwise in paragraphs (j) through (n):

* * *

(t)(1) The statement of ERISA rights described in section 104(c) of the Act, containing the items of information applicable to the plan included in the model statement of paragraph (t)(2) of this section. Items which are not applicable to the plan are not required to be included. The statement may contain explanatory and descriptive provisions in addition to those prescribed in paragraph (t)(2) of this section. However, the style and format of the statement shall not have the effect of misleading, misinforming or failing to inform participants and beneficiaries of a plan. All such information shall be written in a manner calculated to be understood by the average plan participant, taking into account factors such as the level of comprehension and education of typical participants in the plan and the complexity of the items required under this subparagraph to be included in the statement. Inaccurate, incomprehensible or misleading explanatory material will fail to meet the requirements of this section. The statement of ERISA rights (the model statement or a statement prepared by the plan), must appear as one consolidated statement. If a plan finds it desirable to make additional mention of certain rights elsewhere in the summary plan description, it may do so. The summary plan description may state that the statement of ERISA rights is required by Federal law and regulation.

(2) A summary plan description will be deemed to comply with the requirements of paragraph (t)(1) of this section if it includes the following statement; items of information which are not applicable to a particular plan should be deleted:

As a participant in (name of plan) you are entitled to certain rights and protections under the Employee Retirement Income Security Act of 1974 (ERISA). ERISA provides that all plan participants shall be entitled to:

Receive Information About Your Plan and Benefits

Examine, without charge, at the plan administrator's office and at other specified locations, such as worksites and union halls, all documents governing the plan, including insurance contracts and collective bargaining agreements, and a copy of the latest annual report (Form 5500 Series) filed by the plan with the U.S. Department of Labor and available at the Public Disclosure Room of the Employee Benefits Security Administration.

Obtain, upon written request to the plan administrator, copies of documents governing the operation of the plan, including insurance contracts and collective bargaining agreements, and copies of the latest annual report (Form 5500 Series) and updated summary plan description. The administrator may make a reasonable charge for the copies.

Receive a summary of the plan's annual financial report. The plan administrator is required by law to furnish each participant with a copy of this summary annual report.

Obtain a statement telling you whether you have a right to receive a pension at normal retirement age (age * * *) and if so, what your benefits would be at normal retirement age if you stop working under the plan now. If you do not have a right to a pension, the statement will tell you how many more years you have to work to get a right to a pension. This statement must be requested in writing and is not required to be given more than once every twelve (12) months. The plan must provide the statement free of charge.

Continue Group Health Plan Coverage

Continue health care coverage for yourself, spouse or dependents if there is a loss of coverage under the plan as a result of a qualifying event. You or your dependents may have to pay for such coverage. Review this summary plan description and the documents governing the plan on the rules governing your COBRA continuation coverage rights.

Reduction or elimination of exclusionary periods of coverage for preexisting conditions under your group

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health plan, if you have creditable coverage from another plan. You should be provided a certificate of creditable coverage, free of charge, from your group health plan or health insurance issuer when you lose coverage under the plan, when you become entitled to elect COBRA continuation coverage, when your COBRA continuation coverage ceases, if you request it before losing coverage, or if you request it up to 24 months after losing coverage. Without evidence of creditable coverage, you may be subject to a preexisting condition exclusion for 12 months (18 months for late enrollees) after your enrollment date in your coverage.

Prudent Actions by Plan Fiduciaries

In addition to creating rights for plan participants ERISA imposes duties upon the people who are responsible for the operation of the employee benefit plan. The people who operate your plan, called ''fiduciaries'' of the plan, have a duty to do so prudently and in the interest of you and other plan participants and beneficiaries. No one, including your employer, your union, or any other person, may fire you or otherwise discriminate against you in any way to prevent you from obtaining a (pension, welfare) benefit or exercising your rights under ERISA.

Enforce Your Rights

If your claim for a (pension, welfare) benefit is denied or ignored, in whole or in part, you have a right to know why this was done, to obtain copies of documents relating to the decision without charge, and to appeal any denial, all within certain time schedules.

Under ERISA, there are steps you can take to enforce the above rights. For instance, if you request a copy of plan documents or the latest annual report from the plan and do not receive them within 30 days, you may file suit in a Federal court. In such a case, the court may require the plan administrator to provide the materials and pay you up to $110 a day until you receive the materials, unless the materials were not sent because of reasons beyond the control of the administrator. If you have a claim for benefits which is denied or ignored, in whole or in part, you may file suit in a state or Federal court. In addition, if you disagree with the plan's decision or lack thereof concerning the qualified status of a domestic relations order or a medical child support order, you may file suit in Federal court. If it should happen that plan fiduciaries misuse the plan's money, or if you are discriminated against for asserting your rights, you may seek assistance from the U.S. Department of Labor, or you may file suit in a Federal court. The court will decide who should pay court costs and legal fees. If you are successful the court may order the person you have sued to pay these costs and fees. If you lose, the court may order you to pay these costs and fees, for example, if it finds your claim is frivolous.

Assistance with Your Questions

If you have any questions about your plan, you should contact the plan administrator. If you have any questions about this statement or about your rights under ERISA, or if you need assistance in obtaining documents from the plan administrator, you should contact the nearest office of the Employee Benefits Security Administration, U.S. Department of Labor, listed in your telephone directory or the Division of Technical Assistance and Inquiries, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, D.C. 20210. You may also obtain certain publications about your rights and responsibilities under ERISA by calling the publications hotline of the Employee Benefits Security Administration.

NOTES

[1] The following acronyms and short-hand terms are used in this article: ''COBRA'' (for the Consolidated Omnibus Budget Reconciliation Act of 1986, as amended); ''Code'' (for the Internal Revenue Code of 1986, as amended, 26 USC §§1 *et seq.*); ''DOL'' (for the U.S. Department of Labor); ''EBSA'' (for the Employee Benefits Security Administration of the DOL); ''ERISA'' (for the Employee Retirement Income Security Act of 1974, as amended, 29 USC §§1001 *et seq.*); ''IAM'' (for the International Association of Machinists and Aerospace Workers, AFL-CIO); ''Model'' (for the model statement of ERISA rights set forth in 29 CFR §2520.102-3(t)(2)); ''SMM'' (for Summary of Material Modifications); ''SPD'' (for Summary Plan Description); and ''TWA'' (for Trans World Airlines). In addition, the term ''participant'' is used to refer to both participants and beneficiaries.

[2] *See* ERISA §2(b)–(c), 29 USC §1001(b)–(c).

[3] *See* ERISA §§101(a), 102, 104(b), 29 USC §§1021(a), 1022, 1024(b); 29 CFR §2520.102-2(b).

[4] H.R. Rep. No. 533, 93d Cong., 1st Sess. 11 (1973).

[5] *See* ERISA §§102, 104(b), 29 USC §§1022, 1024(b) (SPD and SMM); 29 CFR §§2520.102-2(a)–(b), 2520.104b-3 (same).

[6] ERISA §§104(b)(4), 502(c), 29 USC §§1024(b)(4), 1132(c).

[7] *See* ERISA §101(m), 29 USC §1021(m) (notification of right to elect to diversify out of employer stock); ERISA §204(j), 29 USC §1054(j) (right to elect to diversify out of employer stock); *see also* 29 CFR §2550.404c-1 (disclosure standards that a participant-directed individual account plan must meet in order to qualify for the ''safe harbor'' offered by ERISA §404(c), 29 USC §1104(c)).

[8] *See* ERISA §205(c), 29 USC §1055(c) (notification and right to opt out of qualified joint and survivor annuity or qualified preretirement survivor annuity).

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[9] *See* ERISA §§601–07, 29 USC §§1161–67.

[10] *Conkright v. Frommert*, 130 S. Ct. 1640, 1648–49 (2010) (''Congress enacted ERISA to ensure that employees would receive the benefits they had earned, but Congress did not require employers to establish benefit plans in the first place. We have therefore recognized that ERISA represents a careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans. Congress sought to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place. ERISA induc[es] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred'' (citations and internal quotation marks omitted).); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002) (''ERISA's policy of inducing employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred''); *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) (''Nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan.''); H.R. Rep. No. 779, 93d Cong., 2d Sess. 8–9 (1974) (''A fundamental aspect of present law, which the committee bill continues, is reliance on voluntary action by employers . . . for the establishment of qualified retirement plans. The committee bill also continues the approach in present law of encouraging the establishment of retirement plans which contain socially desirable provisions through the granting of tax inducements. . . . [U]nder the new legislation as under the present law, no one is compelled to establish a retirement plan.''); *id.* at 14–15 (''[T]he committee is aware that under our voluntary pension system, the cost of financing pension plans is an important factor in determining whether any particular retirement plan will be adopted and in determining the benefit levels if a plan is adopted, and that unduly large increases in costs could impede the growth and improvement of the private retirement system. For this reason, . . . the committee has sought to adopt provisions which strike a balance between providing meaningful reform and keeping costs within reasonable limits. . . . [S]ince these plans are voluntary on the part of the employer and both the institution of new pension plans and increases in benefits depend upon employer willingness to establish or expand a plan, it is necessary to take into account additional costs from the standpoint of the employer. If employers respond to more comprehensive coverage, vesting and funding rules by decreasing benefits under existing plans or slowing the rate of formation of new plans, little if anything would be gained from the standpoint of securing broader use of employee pensions and related plans.'').

[11] *See Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 875–76 (2009) (''[B]y giving a plan participant a clear set of instructions for making his own instructions clear, ERISA forecloses any justification for enquiries into nice expressions of intent, in favor of the virtues of adhering to an uncomplicated rule: simple administration, avoid[ing] double liability, and ensur[ing] that beneficiaries get what's coming quickly, without the folderol essential under less-certain rules'' (citations and internal quotation marks omitted).); *Egelhoff v. Egelhoff*, 532 U.S. 141, 149–50 (2001) (ERISA's requirement that plans be administered in accordance with plan documents promotes ''the congressional goal of minimiz[ing] the administrative and financial burden[s] on plan administrators'' and promoting efficient plan administration (citation and internal quotation marks omitted).); *Ft. Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987) (''An employer that makes a commitment systematically to pay certain benefits undertakes a host of obligations, such as determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records in order to comply with applicable reporting requirements. The most efficient way to meet these responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits.''); *McGowan v. NJR Serv. Corp.*, 423 F.3d 241, 247 (3d Cir. 2005) (Van Antwerpen, J.) (reduced ''risk of litigation and administrative burdens''); *Altobelli v. Est. Int'l Bus. Machs. Corp.*, 77 F.3d 78, 82–83 (4th Cir. 1996) (Wilkinson, C.J., dissenting) (''Because the majority ignores the beneficiary designation on file with the IBM plans, its approach compromises the principles underlying §1104(a)(1)(D). Forcing plan trustees to examine a multitude of external documents that might purport to affect the dispensation of benefits frustrates the statutory goals of efficiency in administration and certainty in expectations. The costs associated with these inefficiencies might well lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them. And uncertainties over the interpretation of external documents will produce conflicts among parties asserting rights to plan benefits, miring plan assets in expensive litigation'' (citations and internal quotation marks omitted).); *McMillan v. Parrott*, 913 F.2d 310, 312 (6th Cir. 1990) (''avoiding expensive litigation'').

[12] *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865 (2009).

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[13] *Id.* at 875–76 (2009) (citations and internal quotation marks omitted) (emphasis added).

[14] *Conkright v. Frommert*, 130 S. Ct. 1640, 1648–49 (2010) (citations and internal quotation marks omitted) (emphasis added); *see also Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003) (''In contrast to the obligatory, nationwide Social Security program, [n]othing in ERISA requires employers to establish employee benefit plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan. Rather, employers have large leeway to design disability and other welfare plans as they see fit. In determining entitlement to Social Security benefits, the adjudicator measures the claimant's condition against a uniform of federal criteria. [T]he validity of a claim to benefits under an ERISA plan, on the other hand, is likely to turn, in large part, on the interpretation of terms in the plan at issue. It is the Secretary of Labor's view that ERISA is best served by preserv[ing] the greatest flexibility possible for . . . operating claims processing systems consistent with the prudent administration of a plan'' (citations and internal quotation marks omitted).).

[15] ERISA §102(a), 29 USC §1022(a) (emphasis added).

[16] H.R. Rep. No. 533, 93d Cong., 1st Sess. 11 (1973) (emphasis added); *see also id.* at 18–19.

[17] *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83–84 (1995).

[18] *See, e.g., Jordan v. Federal Express Corp.*, 116 F.3d 1005, 1016 (3d Cir. 1997) (''We recognize that participants have a duty to inform themselves of the details provided in their plans, and that the irrevocability restriction was contained in Jordan's plans. But it is uncontested that Jordan did not receive copies of the plans or their Summary Plan Descriptions before his election'' (citations and internal quotation marks omitted).); *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1579 (11th Cir. 1992) (''Of course, when 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, whether it is accurate or not, the beneficiary also prevents full apprisal 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.''); *Genter v. Acme Scale & Supply Co.*, 776 F.2d 1180, 1185–86 (3d Cir. 1985) (''The defendants are correct to the extent that there are certain responsibilities an employee has in familiarizing himself with the details of the Plan and the information provided, and executing those provisions requiring the employee's participation that are in clear and plain terms. The difficulty here, though, is that the plan documents only advise an employee, in clear and plain terms, of his right to an anniversary date increase in his insurance level. There was never any information provided as to a midstream increase . . . .''); *Sollon v. Ohio Cas. Ins. Co.*, 396 F. Supp. 2d 560, 574 (W.D. Pa. 2005) (''Participants have a duty to inform themselves of the details provided in their plans, and when a plan participant possesses a written document notifying him of the conditional nature of benefits, reliance on employer representations regarding benefits may never be reasonable'' (citations and internal quotation marks omitted).); *Action Indus., Inc. v. Litton*, 1998 U.S. Dist. LEXIS 12644 at *6 (N.D. Miss. 10/23/98) (''The complete explanation of those rights is contained in the SPD, and Litton's signature on the Receipt did not relieve him of his duty to read the SPD and to abide by its terms and conditions'' (internal quotation marks omitted).); *In re Unisys Sav. Plan Litig.*, 1997 U.S. Dist. LEXIS 19198 at *85–*86 (11/24/97) (''[T]he record reveals that plaintiffs had all the information they needed to make informed choices about their investments.''), *aff'd*, 173 F.3d 145, 159 (3d Cir. 1999) (''We need not address the question of whether the alleged nondisclosures were material, however, because it is clear that Meinhardt did not prove that any alleged failures to disclose caused the participants to suffer damages. The District Court found that Meinhardt and the other class plaintiffs (1) already had actual knowledge of much of the information it is claimed that Unisys failed to disclose, (2) did not read the Plan documents, and (3) testified that they would not have withdrawn or transferred their money from the Fund even if they had known about Executive Life's problems. Moreover, Meinhardt's expert, Tsetsekos, offered testimony on losses suffered as a result of the alleged failures to disclose, but referred only to those losses incurred *by the Fund* and not to any losses incurred by individual participants named as plaintiffs. Meinhardt also failed to prove individual damages suffered by each participant as ERISA requires. We hold that these factual findings of the District Court are not clearly erroneous and that they support the conclusion reached by the District Court that Meinhardt failed to prove his claim that Unisys breached its duty of disclosure'' (citations omitted).); *but see Bock v. Computer Assoc. Int'l, Inc.*, 257 F.3d 700, 709 (7th Cir. 2001) (''Bock was under no duty to read the summary, although the fact that [the employer's general counsel] invited employees' attention to it may be relevant . . . .'').

[19] *See, e.g., Robins v. Geisel*, 666 F. Supp. 2d 463, 467 (D.N.J. 2009) (''Courts have consistently held that prenuptial agreements are not valid spousal waivers . . .'' (citing cases).).

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[20] *Tieri v. Board of Trustees of the Heavy & Gen'l Laborers' Local Union 472 & Local Union 172 of NJ Pension Fund*, 2008 U.S. Dist. LEXIS 49722 (D.N.J. 6/30/08).

[21] *Id.* at *14–*15 (citations and internal quotation marks omitted) (emphasis added).

[22] *See Graden v. Conexant Sys., Inc.*, 574 F. Supp. 2d 456, 465 (D.N.J. 2008) (''[T]o the extent Plaintiff's non-disclosure claim is premised on the theory that participants investing in Conexant stock would not have sustained the losses they did had earlier disclosures about Conexant's poorer-than-expected performance been made, the claim fails because, under the efficient capital markets hypothesis, such a disclosure would have resulted in a swift market adjustment. In other words, this Court cannot grant any relief to Plaintiff for the alleged non-disclosure and/or misrepresentation because, due to the almost immediate market internalization of any announcement by Conexant, no loss to Plaintiff could be linked to the alleged wrongdoing'' (citation and internal quotation marks omitted).).

[23] *In re Unisys Savings Plan Litig.*, 1997 U.S. Dist. LEXIS 19198, at *85–*86 (E.D. Pa. 11/24/97) (emphasis added and paragraph numbers omitted), *aff'd*, 173 F.3d 145, 159 (3d Cir. 1999).

[24] *Coker v. Trans World Airlines, Inc.*, 165 F.3d 579 (7th Cir. 1999).

[25] *Id.* at 585–86.

[26] *Mauser v. Raytheon Co. Pension Plan for Salaried Employees*, 239 F.3d 51 (1st Cir. 2001).

[27] *Id. at* 55.

[28] *Cf. Conkright v. Frommert*, 130 S. Ct. 1640, 1649 (2010) (''ERISA represents a careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans. Congress sought to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place. ERISA induc[es] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred'' (citations and internal quotation marks omitted).); *Shields v. Local 705, Int'l Bhd. of Teamsters Pension Plan*, 188 F.3d 895, 905 (7th Cir. 1999) (Posner, C.J., concurring) (citing cases) (''[Actuarial] considerations are decisive against allowing the invocation of promissory estoppel in any case involving a defined-benefit plan. I thus would not either require the defendant to prove, or permit the plaintiff to disprove, that honoring the promise would actually impair the actuarial soundness of the plan.''); *Singer v. Black & Decker Corp.*, 964 F.2d 1449, 1453–54 (4th Cir. 1992) (Wilkinson, J., concurring) (''Modifications to a written plan that do not conform to the formal amendment procedures threaten the actuarial soundness of the plan and thereby undercut the ability of plan participants to rely on their expected stream of benefits. Strict adherence to a written plan also prevents a collusive agreement between an employer and a favored employee that could operate to the detriment of all other plan participants' rights. In addition, if employer obligations could be casually created outside the written plan, a substantial disincentive to offering such plans would arise since employers would be potentially exposed to massive future liabilities for which they could not confidently plan. This would undercut the public interest in encouraging employers to offer these plans'' (citations omitted).); *Black v. TIC Inv. Corp.*, 900 F.2d 112, 115 (7th Cir. 1990) (''The reason ordinarily cited for this reluctance (and for earlier refusals to allow estoppel at all) is a concern for the actuarial soundness of the ERISA plan. . . .'' (citation omitted).); *Skinner v. Northrop Grumman Retirement Plan B*, 2010 U.S. Dist. LEXIS 6591, at *26–*28 (C.D. Cal. 1/26/10) (''[J]udgments that 'create an actuarial and funding nightmare' by providing 'an unintended . . . windfall' to participants 'cannot be the result envisioned by Congress' under ERISA. . . . [R]equiring reasonable reliance before a participant can recover greater benefits than the plan sponsor intended based on a defective SPD fosters the balance Congress sought to achieve between protecting participants and maintaining incentives for employers to offer benefit plans'' (citations omitted).); *but see Goldiner v. Datex-Ohmeda Cash Balance Plan*, 2010 U.S. Dist. LEXIS 38644, at *17–*29 (W.D. Wash. 3/31/10) (disagreeing with *Skinner* and citing cases).

[29] *Compare Ponsetti v. GE Pension Plan*, 2010 U.S. App. LEXIS 15780 at *39 (7th Cir. 7/30/10) (''Crucially, under the logic of *Wilkins* . . ., a procedural misstep by a plan administrator can only lead to money damages when the plaintiff victim of said misstep has an indisputable entitlement to *some* benefits.''), *with Wilkins v. Mason Tenders District Council Pension Fund*, 445 F.3d 572, 583 (2d Cir. 2006) (''That [plaintiff] has also characterized the Fund's alleged failure to produce a valid SPD as a breach of its duties as a fiduciary in no way forecloses his access to relief under §502(a)(1)(B). And, as decisions of this court have made clear, if a summary plan is inadequate to inform an employee of his rights under the plan, ERISA empowers plan participants and beneficiaries to bring civil actions against plan fiduciaries for any damages that result from the failure to disclose under 29 U.S.C. §1132(a)(1)(B). *Layaou*, 238 F.3d [205,] 212 (quoting *Howard v. Gleason Corp.*, 901 F.2d 1154, 1159 (2d Cir. 1990)); *see also Burke*, 336 F.3d [103,] 114 (holding that, where the plaintiff

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was likely prejudiced by a defective SPD, she was entitled to recover under §502(a)(1)(B) the benefits she was due under the plan as construed in light of the SPD)'' (internal quotation marks omitted).). Some courts have reasoned that because Congress intended plan participants to rely on the plan's SPD, Congress's intent is best effectuated by providing a remedy to the participant when the SPD erroneously describes the plan's benefits. *See* footnote 109, below. However, Congress's intent could be effectuated by providing a remedy against the plan administrator rather than against the plan.

[30] *See* 29 CFR §2509.75-8, D-2 (certain functions are not fiduciary functions); *Shields v. Local 705, Int'l Bhd. of Teamsters Pension Plan*, 188 F.3d 895, 905 (7th Cir. 1999) (Posner, C.J., concurring) (citing cases) (''[Actuarial] considerations are decisive against allowing the invocation of promissory estoppel in any case involving a defined-benefit plan.''); *Singer v. Black & Decker Corp.*, 964 F.2d 1449, 1453–54 (4th Cir. 1992) (Wilkinson, J., concurring) (''Modifications to a written plan that do not conform to the formal amendment procedures threaten the actuarial soundness of the plan and thereby undercut the ability of plan participants to rely on their expected stream of benefits. Strict adherence to a written plan also prevents a collusive agreement between an employer and a favored employee that could operate to the detriment of all other plan participants' rights. In addition, if employer obligations could be casually created outside the written plan, a substantial disincentive to offering such plans would arise since employers would be potentially exposed to massive future liabilities for which they could not confidently plan. This would undercut the public interest in encouraging employers to offer these plans'' (citations omitted).); *Black v. TIC Inv. Corp.*, 900 F.2d 112, 115 (7th Cir. 1990) (''The reason ordinarily cited for this reluctance (and for earlier refusals to allow estoppel at all) is a concern for the actuarial soundness of the ERISA plan. . . .'' (citation omitted).); *Skinner v. Northrop Grumman Ret. Plan B*, 2010 U.S. Dist. LEXIS 6591, at *26–*28 (C.D. Cal. 1/26/10) (''[J]udgments that 'create an actuarial and funding nightmare' by providing 'an unintended . . . windfall' to participants 'cannot be the result envisioned by Congress' under ERISA. . . . Therefore, requiring reasonable reliance before a participant can recover greater benefits than the plan sponsor intended based on a defective SPD fosters the balance Congress sought to achieve between protecting participants and maintaining incentives for employers to offer benefit plans.'').

[31] *See* ERISA §§101, 102(a), 104, 29 USC §§1021, 1022(a), 1024.

[32] *See Varity Corp. v. Howe*, 516 U.S. 489, 505 (1996) (''[P]lan administrators often have, and commonly exercise, discretionary authority to communicate with beneficiaries about the future of plan benefits.'').

[33] *See* ERISA §§402(b)(4), 404(a)(1)(D), 29 USC §§1102(b)(4), 1104(a)(1)(D).

[34] *See* ERISA §402(b)(3), 29 USC §1102(b)(3).

[35] *See, e.g., Kenseth v. Dean Health Plan, Inc.*, 2010 U.S. App. LEXIS 13153, at *44–*45 (7th Cir. 6/28/10) (''Section 1104(a)(1) is not a guarantee of accuracy in all communications with the insured. . . . [N]otwithstanding the fiduciary's duty to provide complete and accurate information to the insured, mistakes in the advice given to an insured which are attributable to the negligence of the individual supplying the advice are not actionable as a breach of fiduciary duty.''); *id.* at *81–*82 (''Kenseth has filed suit to recover for the injuries that Dean has caused to her rather than to the plan as a whole. She therefore must be suing under the statute's catch-all provision, section 1132(a)(3). That provision authorizes a civil suit by a plan participant or beneficiary (and also a fiduciary) '(A) to enjoin any act or practice which violates any provision or this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]' As its terms suggest, section 1132(a)(3) does permit a plan participant to seek redress in her own behalf for a breach of fiduciary duty. However, the language of this section also imposes an important limitation on the type of relief that is available: it allows only injunctive and 'other appropriate equitable relief'; compensatory damages and other forms of legal relief are beyond the scope of the relief authorized'' (citation omitted).).

[36] *See* ERISA §3(16)(A), 29 USC §1002(16)(A) (Administrator is the person so designated by the plan and, if an administrator is not so designated, the plan sponsor.); ERISA §§101(a), 104(b), 29 USC §§1021(a), 1024(b) (Administrator is required to furnish SPDs.); *cf. Varity Corp. v. Howe*, 516 U.S. 489, 504 (1996) (''There is more to plan (or trust) administration than simply complying with the specific duties imposed by the plan document or statutory regime . . . .'').

[37] *See Helfrich v. Carle Clinic Ass'n*, 328 F.3d 915, 916–17 (7th Cir. 2003) (''Plans can control the contents of summary plan descriptions, which they prepare (with, one hopes, a degree of care appropriate to the reliance they engender and the legal consequences they carry). . . . Because ERISA requires plans to prepare summary plan descriptions, and because their content is within the plan's control, it makes sense to give these documents legal effect when relied on. . . . Claims based on the plan (or the summary plan description) must be enforced against the plan. . . .'');

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Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574, 588 (7th Cir. 2000) (''Our colleagues in other circuits have held that estoppel is permissible where the ERISA plan has supplied ambiguous documentation and the participant is further misled by the statements of the Plan's agents'') (citing cases).); *Taylor v. Peoples Natural Gas Co.*, 49 F.3d 982, 989 (3d Cir. 1995) (''Bergunder was acting within his authority as an agent of the plan administrator . . . in counseling participants regarding possible changes in the plan. Our conclusion also accords with established principles of apparent authority. It is well settled that apparent authority (1) results from a manifestation by a person that another is his agent and (2) exists only to the extent that it is reasonable for a person dealing with the agent to believe that the agent is authorized'' (internal quotation marks omitted).); *Dermady Est.*, 136 F.2d 181, 188 (W.D.N.Y. 2001) (''[A]lthough defendants attempt to distinguish between Drexel's authority to make representations or give advice concerning Mr. Dermady's disability leave, and her authority (or lack thereof) to make representations about his benefits or retirement, that again leads to factual issues that are not resolvable on a motion for summary judgment. When a principal refers others to an agent . . . for information, such person becomes the spokesman for the principal to them, with apparent authority to make statements upon the subject matter as to which reference is made, and the principal is bound by such apparently authorized statements or promises'' (citations and internal quotation marks deleted).); *Candlewood Obstetric-Gynecologic Assocs., P.C. Ret. Trust v. Ret. & Benefit Analysts, Inc.*, 1994 U.S. App. LEXIS 4501 at *19 (4th Cir. 3/14/94) (''Apparent authority results from certain acts or manifestations by the alleged principal to a third entity leading the other party to believe that an agent has authority to act.''); EBSA, *Amendments to Summary Plan Description Regulations (Final Rule)*, 65 Fed. Reg. 70226, 70228 (11/21/00) (''Under ERISA, the SPD is the primary vehicle for informing participants and beneficiaries about their rights and benefits under the employee benefit plans in which they participate.''); EBSA, *Interim Rule Amending Summary Plan Description Regulations*, 63 Fed. Reg. 48372, 48373 (9/9/98) (''These amendments, upon adoption, will clarify the information required to be disclosed by group health plans and update other information required to be set forth in employee benefit plan SPDs.''); EBSA, *Reporting and Disclosure Guide for Employee Benefit Plans* 2 (rev. Oct. 2008) (''Basic Disclosure Requirements for Pension and Welfare Benefit Plans . . . . [A] plan has 120 days after becoming subject to ERISA to distribute the SPD.''); EBSA, *What You Should Know About Your Retirement Plan*, Ch. 3 (''If you have a question about your retirement plan, you can start by looking for information that the plan provides. You can request this information from your plan administrator, the person who is in charge of running the plan.''), *available at* http://www.dol.gov/ebsa/publications/wyskapr.html; *cf. Kamler v. H/N Telecomm. Servs., Inc.*, 305 F.3d 672, 681 (7th Cir. 2002) (''In *Bowerman*, we permitted oral misrepresentations to be a basis for ERISA estoppel only if: (1) the ERISA plan was ambiguous and (2) an agent of the plan, or someone with apparent authority to interpret the plan, made the oral misrepresentations. Here, the PAL Plan documents were not ambiguous . . . . Further, it was unreasonable for Kamler to believe that Lamplota had apparent authority to modify the PAL Plan by excusing enrollment since the enrollment form clearly indicates that enrollment was mandatory . . .'' (citation omitted).); *Jacobs v. Xerox Corp. Long Term Disability Income Plan*; 520 F. Supp. 2d 1022, 1039 (N.D. Ill. 2007) (''At times Plaintiff appears to suggest that the ERISA plan or plan administrator created an apparent agency relationship vis-á-vis the human resources department at Xerox, such that agency principles would warrant the imposition of liability against the Defendant ERISA Plan. This contention is unpersuasive. The supposed factual predicate for this idea is that the SPD misled Mr. Faraci, Plaintiff's former counsel, into believing that the human resources department at Xerox was the agent of the plan or administrator. However, Mr. Faraci repeatedly and plainly acknowledged that he had not seen the SPD during the relevant time periods, and thus was not misled by it. Plaintiff offers no further evidence in support of his apparent agency claim vis-á-vis the named Defendant, the ERISA Plan, or the Plan Administrator, the party potentially accountable under Section 1132(c). In this regard, it is well-settled that a showing of apparent agency must be grounded in the words and actions of the putative principal, not those of the putative agent. Because the Plan, the named Defendant, did not create an apparent agency, nor did the Administrator, the apparent agency theory fails on the record assembled'' (citations omitted).).

[38] *See* Restatement (Third) of Agency §1.01 (''Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.''); *id.* §2.03 (''Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has the authority to act on behalf of the principal and that belief is traceable to the principal's manifestations.''); *id.* §3.03 (''Apparent authority . . . is created by a person's manifestation that another has authority to act

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with legal consequences for the person who makes the manifestation, when a third party reasonably believes the actor to be authorized and the belief is traceable to the manifestation.''); *cf. Varity Corp. v. Howe*, 516 U.S. 489, 502–03 (1996) (relying on agency law principles).

[39] Restatement (Third) of Agency §2.03 cmt. e (emphasis added); *see id.* §2.03 (''Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has the authority to act on behalf of the principal and that belief is traceable to the principal's manifestations.''); *Richards v. Gen. Motors Corp.*, 991 F.2d 1227, 1232 (6th Cir. 1993) (''For guidance on general agency principles, we turn to the Restatement (Second) of Agency (1983). Section 27 provides that 'apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.' Plaintiff points to several actions by defendants that could lead him reasonably to believe Kraeger had authority to bind defendants as to the disputed transactions. As the commentary to §27 points out, 'apparent authority can be created by appointing a person to a position . . . which carries with it generally recognized duties; to those who know of the appointment there is apparent authority to do the things ordinarily entrusted to one occupying such a position.' *Id.* at cmt. a. The savings plan provides that the transfers were effective as of the date 'received' by the Administrator, the Corporation. Defendants appointed Kraeger local Plan Administrator to 'receive' the transfers on their behalf. Plaintiff asserted in his complaint that he had never worked as a pension benefits administrator, and that he depended on Kraeger to explain and interpret the savings plan as to the manner in which his investment elections should be prepared for processing. Construing these facts with all inferences drawn in favor of the non-moving party, it seems reasonable that plaintiff would follow the administrative instructions of the person defendants appointed to administer the plan.'').

[40] *See, e.g.,* Code §402(c) (rollover of distributions from tax-qualified plan), §3121(a)(5) (FICA wage exemption for distributions from tax-qualified plan); *LTV Steel Co. v. U.S.*, 215 F.3d 1275, 1280 (Fed. Cir. 2000) (''[A] payment that is specifically made subject to taxation is not rendered exempt from tax simply because it is made in settlement of an obligation which, had it been paid, would not have been taxed.''); Rev. Rul. 85-44, 1985-1 C.B. 22 (payments in lieu of insurance coverage includible in gross income); Rev. Rul. 61-146, 1961-2 C.B. 25 (payments reimbursing employee for health insurance premiums excludable from gross income).

[41] *See* ERISA §402(b), 29 USC §1102(b) (plan must specify basis on which payments are made to and from the plan); ERISA §404(a)(1)(D), 29 USC §1104(a)(1)(D) (fiduciary must discharge duties in accordance with the documents and instruments governing the plan); ERISA §502(a)(3), 29 USC §1132(a)(3) (authorizing a civil action for equitable relief to enforce Title I of ERISA or the terms of the plan); *Varity Corp. v. Howe*, 516 U.S. 489, 507–15 (1996) (§502(a)(3) authorizes a civil action for appropriate equitable relief on behalf of individual participants.).

[42] *See, e.g., Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 875–76 (2009) (''The point is that by giving a plan participant a clear set of instructions for making his own instructions clear, ERISA forecloses any justification for enquiries into nice expressions of intent, in favor of the virtues of adhering to an uncomplicated rule: simple administration, avoid[ing] double liability, and ensur[ing] that beneficiaries get what's coming quickly, without the folderol essential under less-certain rules'' (citations and internal quotation marks omitted).); *Altobelli Est. v. Int'l Bus. Machs. Corp.*, 77 F.3d 78, 82–83 (4th Cir. 1996) (Wilkinson, C.J., dissenting) (''Forcing plan trustees to examine a multitude of external documents that might purport to affect the dispensation of benefits frustrates the statutory goals of efficiency in administration and certainty in expectations. The costs associated with these inefficiencies might well lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them. And uncertainties over the interpretation of external documents will produce conflicts among parties asserting rights to plan benefits, miring plan assets in expensive litigation'' (citations and internal quotation marks omitted).).

[43] *See, e.g., Skinner v. Northrop Grumman Retirement Plan B*, 2010 U.S. Dist. LEXIS 6591, at *26–*28 (C.D. Cal. 1/26/10) (''[J]udgments that 'create an actuarial and funding nightmare' by providing 'an unintended . . . windfall' to participants 'cannot be the result envisioned by Congress' under ERISA. *Bance v. Alaska Carpenters Retirement Plan*, 829 F.2d 820, 825 (9th Cir. 1987); *see also Harms v. Cavenham Forest Indus.*, 984 F.2d 686, 693 (5th Cir. 1993) (holding that windfalls based on alleged technical errors are 'a result abhorred by ERISA'); *Mathews v. Sears Pen. Plan*, 144 F.3d 461, 469 (7th Cir. 1998) ('we cannot see how ERISA beneficiaries or anyone else within the protective sweep of the statute would be benefitted by the adoption of principles of contractual interpretation so rigid . . . as to permit the class to reap' windfalls). In addition, this Court's conclusion regarding the reasonable reliance requirement is consistent

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with other courts in this Circuit that have repeatedly warned against imposing strict liability for defective SPDs. . . . As one court recently explained, the most likely outcome if errors in SPDs are strictly enforced against employers will be that those employers will be deterred from offering plans at all. *Young v. Verizon's Bell Atlantic Cash Balance Plan*, [667 F. Supp. 2d 850, 900 (N.D. Ill. 2009)] ('Congress did not desire to create a system that would result in high administrative and litigation costs that could potentially discourage employers from offering plans . . . . If errors in plan drafting are to be strictly enforced so as to create a windfall to participants at the unanticipated expense of the plan, it could presumably act as a deterrent to employers from establishing such plans.') (citing *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996)); *see also Sprague v. GMC*, 133 F.3d 388, 403 (6th Cir. 1998) ('creat[ing] disincentives for employers to offer benefits . . . is not in the interests of employees generally, and it is certainly not compatible with the goals of ERISA.'). Therefore, requiring reasonable reliance before a participant can recover greater benefits than the plan sponsor intended based on a defective SPD fosters the balance Congress sought to achieve between protecting participants and maintaining incentives for employers to offer benefit plans.'').

[44] *See Egelhoff v. Egelhoff*, 532 U.S. 141, 149–50 (2001) (ERISA's requirement that plans be administered in accordance with plan documents promotes ''the congressional goal of minimiz[ing] the administrative and financial burden[s] on plan administrators — burdens ultimately borne by the beneficiaries'' (internal quotation marks omitted).).

[45] *Conkright v. Frommert*, 130 S. Ct. 1640, 1650 (2010) (citation omitted).

[46] *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th Cir. 1996) (citations, internal quotation marks, and footnotes omitted) (emphasis added).

[47] *See* EBSA, Field Assistance Bulletin 2003-3 (5/19/03) (''Except for the few instances in which ERISA specifically addresses the imposition of expenses on individual participants, the statute places few constraints on how expenses are allocated among plan participants.'').

[48] *See, e.g.,* ERISA §206(d)(2), 29 USC §1056(d)(2) (prohibition on assigning benefits applies to arrangements for defraying plan administration costs); Treas. Regs. §1.401(a)-13 (same).

[49] *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 875–76 (2009). About 10 years ago, the fiduciaries of a number of participant-directed individual account plans discovered that a relatively small number of plan participants were engaging in market-timing transactions that were reducing the plans' investment performance, to the detriment of most plan participants. The courts and the DOL recognized that the fiduciaries' efforts to restrict market-timing trading were an appropriate exercise of the fiduciaries' duties to all plan participants. *See, e.g., Borneman v. Principal Life Ins. Co.*, 291 F. Supp. 2d 935, 945–48 (S.D. Iowa 2003) (upholding restriction on market-timing trading); *Straus v. Prudential Employee Sav. Plan*, 253 F. Supp. 2d 438, 453–54 (E.D.N.Y. 2003) (dismissing motion for preliminary injunction to enjoin market-timing policies); DOL, Statement of Ann L. Combs, Assist. Sec., EBSA, ''Duties of Fiduciaries in Light of Recent Mutual Fund Investigations'' (2/17/04) (''The guiding principle for fiduciaries should be to ensure that appropriate efforts are being made to act reasonably, prudently and solely in the interests of participants and beneficiaries.''), *available at* http://www.dol.gov/ebsa/pdf/sp021704.pdf).

[50] *Washington v. Murphy Oil USA, Inc.*, 497 F.3d 453, 458 n.1 (5th Cir. 2007) (citing cases).

[51] *See, e.g., Mauser v. Raytheon Co. Pension Plan for Salaried Employees*, 239 F.3d 51, 55 (1st Cir. 2001) (''[R]elief is only appropriate if the participant demonstrates significant or reasonable reliance on the Plan Summary. It is not enough to show a 'mere expectation' that certain benefits will materialize; action must have been taken in reliance on reasonable expectations formed after reading the Plan Summary'' (citation omitted).); *Govoni v. Bricklayers, Masons & Plasterers Int'l Union of Am., Local No. 5 Pension Fund*,732 F.2d 250, 252 (1st Cir. 1984) (''Case law suggests, however, that to secure relief, Govoni must show some significant reliance upon, or possible prejudice flowing from, the faulty plan description. And we can find no such reliance or prejudice here'' (citations omitted).); *Stiltner v. Beretta U.S.A. Corp.*, 74 F.3d 1473, 1478 (4th Cir. 1996) (''[T]o secure relief under ERISA based on representations in a summary plan description that are inconsistent with provisions of the other official plan documents, an ERISA claimant must demonstrate that he either relied upon or was prejudiced by those representations.''); *Health Cost Controls of Ill., Inc. v. Washington*, 187 F.3d 703, 711 (7th Cir. 1999) (''When . . . the plan and the summary plan description conflict, the former governs, being more complete — the original, as it were, which the summary plan description excerpts and translates into language that may be imprecise because it is designed to be intelligible to lay persons — unless the plan participant or beneficiary has reasonably relied on the summary plan description to his detriment.''); *Andersen v. Chrysler Corp.*, 99 F.3d 846, 859 (7th Cir. 1996) (''We have repeatedly held that technical violations of ERISA's notification requirements, without a showing of bad faith, active concealment or detrimental reliance, do not state a cause of action'' (footnotes omitted).); *Chiles v. Ceridian Corp.*, 95 F.3d 1505,

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1511 (10th Cir. 1996) (''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'' (citations and internal quotation marks omitted).); *Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1340 (11th Cir. 2006) (''[I]n order 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'' (internal quotation marks omitted).); *see also Skinner v. Northrop Grumman Retirement Plan B*, 2010 U.S. Dist. LEXIS 6591, at *20–*25 (C.D. Cal. 1/26/10) (''Although the Ninth Circuit has not directly decided whether reasonable reliance on a defective SPD is required in order to recover under its terms, three district courts in this Circuit — including one decision affirmed by the Ninth Circuit — have held that reasonable reliance is required in order to recover for a claim based on a defective SPD . . . [and] this Court concludes . . . that Plaintiffs must demonstrate reasonable reliance'' (citation, internal quotation marks, and footnote omitted).); *cf. Grant v. Sprint Nextel Corp.*, 2010 U.S. Dist. LEXIS 66508 (W.D. Va. 7/2/10) (''When a claimant shows a conflict between an SPD and a plan, the language of the SPD shall be enforced if the claimant can show some significant reliance upon, *or* possible prejudice flowing from, the faulty plan description. In order to show prejudice, a plaintiff must demonstrate that she was likely to have been harmed because of the discrepancy [between the SPD and the full plan]'' (citations and internal quotation marks omitted).).

[52] *See, e.g., Senkier v. Hartford Life & Accident Ins. Co.*, 948 F.2d 1050, 1051 (7th Cir. 1991) (''The statute requires that the summary plan document [*sic*] be sufficiently accurate and comprehensive to reasonably apprise the plan participants of their rights under the plan. This requirement entitles the participant to rely on the summary plan document [*sic*], and if he does the plan is estopped to deny coverage. But only if there is a contradiction between the summary plan document [*sic*] and the policy'' (citation and internal quotation marks omitted).).

[53] *See Mers v. Marriott Int'l Group Accidental Death & Dismemberment Plan*, 144 F.3d 1014, 1024 (7th Cir. 1998) (''If silence in the SPD were enough to trump the underlying plan, then SPDs would mushroom in size and complexity until they mirrored the plans. Larding the summary with minutiae would defeat that document's function: to provide a capsule guide in simple language for employees. . . . [A]s long as an SPD satisfies ERISA's requirement that it is accurate and sufficiently comprehensive to reasonably apprise plan participants of their rights and obligations, a participant or beneficiary may rely on an SPD and estop a plan administrator from denying coverage for terms found in the underlying policy only if there is a direct conflict between an SPD and the underlying policy'') (citations and internal quotation marks omitted).); *Health Cost Controls of Ill., Inc. v. Washington*, 187 F.3d 703, 711 (7th Cir. 1999) (''When . . . the plan and the summary plan description conflict, the former governs, being more complete — the original, as it were, which the summary plan description excerpts and translates into language that may be imprecise because it is designed to be intelligible to lay persons — unless the plan participant or beneficiary has reasonably relied on the summary plan description to his detriment.''); *Stiltner v. Beretta U.S.A. Corp.*, 74 F.3d 1473, 1478 (4th Cir. 1996) (''[T]o secure relief under ERISA based on representations in a summary plan description that are inconsistent with provisions of the other official plan documents, an ERISA claimant must demonstrate that he either relied upon or was prejudiced by those representations.''); *Govoni v. Bricklayers, Masons & Plasterers Int'l Union of Am., Local No. 5 Pension Fund*, 732 F.2d 250, 252 (1st Cir. 1984) (''Case law suggests, however, that to secure relief, Govoni must show some significant reliance upon, or possible prejudice flowing from, the faulty plan description. And we can find no such reliance or prejudice here'' (citations omitted).).

[54] *See, e.g., Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th Cir. 1996) (''Any other rule would allow a windfall for some employees and unfairly increase costs for employers and their insurers, who rely on the terms of the plan in providing benefits and coverage. This in turn could jeopardize the solvency of the plan with respect to the remaining employees.''); *Skinner v. Northrop Grumman Retirement Plan B*, 2010 U.S. Dist. LEXIS 6591, at *26–*28 (C.D. Cal. 1/26/10) (''[J]udgments that 'create an actuarial and funding nightmare' by providing 'an unintended . . . windfall' to participants 'cannot be the result envisioned by Congress' under ERISA. . . . In addition, this Court's conclusion regarding the reasonable reliance requirement is consistent with other courts in this Circuit that have repeatedly warned against imposing strict liability for defective SPDS. . . . [T]he most likely outcome if errors in SPDs are strictly enforced against employers will be that those employers will be deterred from offering plans at all. *Young v. Verizon's Bell Atlantic Cash Balance Plan*, [667 F. Supp. 2d 850, 900 (N.D. Ill. 2009)] ('Congress did not desire to create a system that would result in high administrative and litigation costs that could potentially discourage employers from offering plans . . . . If errors in plan drafting are to be strictly enforced so as to create a windfall to participants at the unanticipated expense of the plan, it could presumably act as a deterrent to employers from establishing such plans.') . . . . Therefore, requir-

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ing reasonable reliance before a participant can recover greater benefits than the plan sponsor intended based on a defective SPD fosters the balance Congress sought to achieve between protecting participants and maintaining incentives for employers to offer benefit plans.'').

[55] *See Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 113–14 (2d Cir. 2003) (''We recognize that courts apply the amorphous prejudice standard with varying degrees of stringency. *Compare, e.g.,* [*Palmisano v. Allina Health Sys., Inc.*, 190 F.3d 881, 887–88 (8th Cir. 1999)] (affirming the district court's finding of no reliance and implicitly viewing reliance and prejudice as synonymous), *with* [*Aiken v. Policy Management Sys. Corp.*, 13 F.3d 138, 142 (4th Cir. 1993)] (remanding for alternative findings on reliance and prejudice as two distinct standards).'').

[56] *See, e.g., Health Cost Controls of Ill., Inc. v. Washington*, 187 F.3d 703, 711 (7th Cir. 1999) (relying on Fourth and Tenth Circuit decisions); *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1578–79 (11th Cir. 1992) (relying on First Circuit decisions).

[57] *See Joyce v. John Hancock Fin. Servs. Inc. Severance Pay Plan*, 462 F. Supp. 2d 192, 209 (D. Mass. 2006) (referring to *Mauser v. Raytheon Co. Pension Plan*, 239 F.2d 51, 55 (1st Cir. 2001), *Fenton v. John Hancock Mut. Life Ins. Co.*, 400 F.3d 83, 88 (1st Cir. 2005), and *Burstein v. Ret. Account Plan for Employees of Alleghany Health*, *Educ. & Research Found.*, 334 F.3d 365, 380 (3d Cir. 2003)); *but cf. Grant v. Sprint Nextel Corp.*, 2010 U.S. Dist. LEXIS 66508 (W.D. Va. 7/2/10) (''When a claimant shows a conflict between an SPD and a plan, the language of the SPD shall be enforced if the claimant can show some significant reliance upon, *or* possible prejudice flowing from, the faulty plan description. In order to show prejudice, a plaintiff must demonstrate that she was likely to have been harmed because of the discrepancy [between the SPD and the full plan]'' (citations and internal quotation marks omitted).).

[58] *See* ERISA §§101, 102(a), 104, 502(c), 29 USC §§1021, 1022(a), 1024, 1132(c).

[59] *See Frommert v. Conkright*, 433 F.3d 254, 267 (2d Cir. 2005) (''[T]he fact that the plaintiffs remained in Xerox's employ does not demonstrate that they suffered no prejudice through the purported adoption of the phantom account offset. Imposing a requirement that plan participants must show actual prejudice from a challenged plan amendment by terminating their employment imposes an unduly harsh burden on dissatisfied plan participants. This Court has rejected such a standard in the context of plan participants challenging deficient SPDs. *Burke*, 336 F.3d at 112. Rather than showing actual prejudice, we held that plan participants must demonstrate that they were 'likely to have been harmed' by the faulty SPD. *Id.* at 113. In this case, we find that the plaintiffs have met this standard. The prolonged absence of any mention of the phantom account from Plan documents, most notably SPDs, likely, and quite reasonably, led plan participants to believe that it was not a component of the Plan. Rather, rehired employees likely believed that their past distributions would only be factored into their benefits calculations by taking into account the amounts they had actually received.''), *rev'd on other grounds*, 130 S. Ct. 1640, 1650 (2010); *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 112–13 (2d Cir. 2003) (''At the outset, we agree that a prejudice standard is more consistent with ERISA's objective to protect the employee against inadequate SPDs. 'A rule requiring . . . detrimental reliance . . . imposes an insurmountable hardship on many plaintiffs,' especially on the estate of a deceased participant, and 'such a rule hardly advances the Congressional purpose of protecting the beneficiaries of ERISA plans by insuring that employees are fully and accurately apprised of their rights under the plan.' [*Ritzer Est. v. Nat'l Org. of Ind. Trade Unions Ins. Trust Fund*, 822 F. Supp. 951, 955–56 (E.D.N.Y. 1993)]; *see also Springs Valley Bank & Trust Co. v. Carpenter*, 885 F. Supp. 1131, 1139 (S.D. Ind. 1993) (application of the traditional detrimental reliance test would thwart the substantive objective of ERISA's SPD requirement); *cf.* [*Edwards v. State Farm Mut. Auto Ins. Co.*, 851 F.2d 134, 137 (6th Cir. 1988)] ('Congress has promulgated clear directives prohibiting misleading [SPDs] . . . . This court elects not to undermine the legislative command by imposing technical requirements upon the employee.').''); *Amara v. CIGNA Corp.*, 534 F. Supp. 2d 288, 351–54 (D. Conn. 2008), *aff'd per curiam*, 2009 U.S. App. LEXIS 21941 (2d Cir. 10/6/09); *Maginaro v. Welfare Fund of Local 771, I.A.T.S.E.*, 21 F. Supp. 2d 284 (S.D.N.Y. 1998).

[60] *See, e.g., Burstein v. Ret. Account Plan for Employees of Alleghany Health*, *Educ. & Research Found.*, 334 F.3d 365, 381 (3d Cir. 2003) (''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. And, just as a court's enforcement of a contract generally does not require proof that the parties to the contract actually read, and therefore relied upon, the particular terms of the contract, we are persuaded that enforcement of an SPD's terms under a claim for plan benefits *does not* require a showing of reliance.''); *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 137 (6th Cir. 1988) (''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.''). *See also Washington v. Murphy Oil USA,*

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Inc., 497 F.3d 453, 458–59 (5th Cir. 2007) (''[W]e hold that when the terms of an SPD and an ERISA plan conflict and the terms of the conflicting SPD unequivocally grant the employee with a vested right to benefits, the employee need not show reliance or prejudice. We find that this approach is most consistent with ERISA, which is designed to protect employees . . .'' (footnote omitted).).

[61] *See Conkright v. Frommert*, 130 S. Ct. 1640, 1650 (2010) (''Deference to plan administrators, who have a duty to all beneficiaries to preserve limited plan assets, helps prevent . . . windfalls for particular employees.''); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th Cir. 1996) (''Only where employees rely on an ambiguous or faulty SPD, or otherwise show prejudice from the inconsistency between the SPD and the master plan document, is relief appropriate. Any other rule would allow a windfall for some employees and unfairly increase costs for employers and their insurers, who rely on the terms of the plan in providing benefits and coverage. This in turn could jeopardize the solvency of the plan with respect to the remaining employees.'').

[62] *In re Lucent Death Benefits ERISA Litig.*, 541 F.3d 250, 254–55 (3d Cir. 2008) (citations and internal quotation marks omitted).

[63] *See* ERISA §102(a), 29 USC §1022(a) (''written in a manner calculated to be understood by the average plan participant''); 29 CFR §2520.102-2(a) (same).

[64] *See* ERISA §102(b), 29 USC §1022(b) (''shall contain the following information''); 29 CFR §2520.102-3(j) (''describe the plan's provisions''); *Araujo v. Kraft Foods Global, Inc.*, No. 09-3329, slip op. at 12 (3d Cir. 7/23/10) (''[T]he SPD is meant to summarize and not parrot the terms of the Plan as parroting would defeat the purpose of the SPD.''); *McCarthy v. Dunn & Bradstreet Corp.*, 482 F.3d 184, 194 (2d Cir. 2007) (''The Labor Department's regulations expressly allow a Summary Plan Description to summarize, rather than describe in every detail, the benefits available under an employee pension benefit plan.''); *Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1341 (11th Cir. 2006) (''In short, the SPD does not necessarily contain all of the information about a plan, and the plan is governed by documents other than the SPD. As the term 'summary plan description' suggests, the SPD is a document that describes, in summary fashion, the relevant features of an employee benefit plan.''); *Health Cost Controls of Ill., Inc. v. Washington*, 187 F.3d 703, 711 (7th Cir. 1999) (''When . . . the plan and the summary plan description conflict, the former governs, being more complete — the original, as it were, which the summary plan description excerpts and translates into language that may be imprecise because it is designed to be intelligible to lay persons — unless the plan participant or beneficiary has reasonably relied on the summary plan description to his detriment.'').

[65] ERISA §104(b)(2), 29 USC §1024(b)(2).

[66] ERISA §104(b)(4), 29 USC §1024(b)(4).

[67] *See, e.g., Marolt v. Alliant Techsystems, Inc.*, 146 F.3d 617, 621 (8th Cir. 1998) (''A plan document required by law to be plainspoken for the benefit of average plan participants, and furnished to participants, says one thing, and an obscure passage in a transactional document only lawyers will read and understand says something else. The accessible provisions govern because adequate disclosure to employees is one of ERISA's major purposes. Alliant contends Marolt must prove she relied on the SPD to her detriment. We disagree. We have indeed held that to 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, but Marolt does not contend Alliant Tech's SPD is faulty. A faulty summary plan description is one that fails to meet the requirements of ERISA and its attendant regulations. Marolt says in her brief the SPD meets the requirements of ERISA'' (citations and internal quotation marks omitted).).

[68] *See, e.g., Greeley v. Fairview Health Servs.*, 479 F.3d 612, 614 (8th Cir. 2007) (''In order for an employee to recover from his employer for a faulty SPD, this court requires the employee to show he relied on its terms to his detriment'' (footnote omitted).); *Washington v. Murphy Oil USA, Inc.*, 497 F.3d 453, 458 n.1 (5th Cir. 2007) (''[T]he Eighth Circuit requires a showing of reliance or prejudice, but only if the SPD is 'faulty.' '').

[69] *See, e.g., Antolik v. Saks, Inc.*, 463 F.3d 796, 800–01 (8th Cir. 2006) (''The district court correctly noted that, [b]ecause of the importance of disclosure to the statutory regime, an SPD provision prevails if it conflicts with a provision of a plan. This rule applies even if the SPD is faulty — that is, does not contain all the information required by the statute and regulations — provided the plan claimant proves reliance on or prejudice from the faulty SPD. However, the rule does not apply if the conflicting document on which the claimant relies was so thoroughly lacking in the required detail that it cannot be deemed even a faulty SPD. The reason that a hopelessly inadequate SPD does not trump a conflicting plan provision is rooted in the fundamental principle that ERISA precludes oral or informal amendments to a plan, by estoppel or otherwise. If a document is so hopelessly inadequate that it cannot even be considered a faulty SPD, the plaintiff may not recover because an ERISA plan cannot be changed by informal amendments, even if employees relied on those amendments. We require that a document substantially comply with ERISA's for-

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mal requirements because there should be no accidental or inadvertent SPDs. If a document is to be afforded the legal effects of an SPD, such as conferring benefits when it is at variance with the plan itself, that document should be sufficient to constitute an SPD for filing and qualification purposes'') (citations and internal quotation marks omitted).).

[70] *See Marolt v. Alliant Techsystems, Inc.*, 146 F.3d 617, 621–22 (8th Cir. 1998) (''Marolt says in her brief the SPD meets the requirements of ERISA. Relying on *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1520 (8th Cir. 1988), however, Alliant argues that by claiming the SPD and the formal plan conflict, Marolt necessarily contends the SPD is faulty. . . . *Anderson* does not so hold.. . . *Anderson* stands for the unremarkable proposition that an ERISA plaintiff who claims a summary plan description violates 29 U.S.C. §1022 necessarily contends the summary description is faulty. Marolt makes no such claim.'') (citations and internal quotation marks omitted).

[71] *See Burke v. Kodak Ret. Income Plant*, 336 F.3d 103 (2d Cir. 2003).

[72] *Cf. McCarthy v. Dunn & Bradstreet Corp.*, 482 F.3d 184, 198 (2d Cir. 2007) (''Plaintiffs-appellants also rely on *Burke v. Kodak Retirement Income Plan*, 336 F.3d 103 (2d Cir. 2003). They argue that pursuant to the holding in *Burke*, an employer may not enforce a plan requirement where that requirement was not clearly set forth in the section of the summary plan description that dealt with the benefits at issue. However, *Burke* is distinguishable because it involved a conflict between the employer's summary plan description and the retirement plan. *See id.* at 110–11. In *Burke*, a plaintiff sued for survivor income benefits under a retirement plan that conditioned eligibility for receipt of such benefits on the filing of an affidavit. *Id.* at 106. The 'Survivor Income Benefits' section of the summary plan description omitted any reference to the affidavit requirement, to which the summary plan description made reference in sixteen other sections. *Id.* Accordingly, we held that the summary plan description violated ERISA, applying the well-established principle that '[w]here the terms of a plan and the [summary plan description] conflict, the [summary plan description] controls.' *Id.* at 110. Plaintiffs-appellants are not alleging a conflict between Dun & Bradstreet's Summary Plan Description and the Master Retirement Plan.''); *Grant v. Sprint Nextel Corp.*, 2010 U.S. Dist. LEXIS 66508 (W.D. Va. 7/2/10) (''When a claimant shows a conflict between an SPD and a plan, the language of the SPD shall be enforced if the claimant can show some significant reliance upon, *or* possible prejudice flowing from, the faulty plan description. In order to show prejudice, a plaintiff must demonstrate that she was likely to have been harmed because of the discrepancy [between the SPD and the full plan]'' (citations and internal quotation marks omitted).).

[73] *See Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 113–14 (2d Cir. 2003) (''This 'likely prejudice' standard avoids the use of harsh common law principles to defeat employees' claims based on a federal law designed for their protection. The result is a presumption of prejudice in favor of the plan participant after an initial showing that he was likely to have been harmed.'').

[74] *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 112–13 (2d Cir. 2003) (citations and internal quotation marks omitted).

[75] *See Conkright v. Frommert*, 130 S. Ct. 1640, 1648–49 (2010) (''Congress enacted ERISA to ensure that employees would receive the benefits they had earned, but Congress did not require employers to establish benefit plans in the first place. We have therefore recognized that ERISA represents a careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans. Congress sought to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place. ERISA induc[es] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred'') (citations and internal quotation marks omitted).); *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 877 (2009) (Plan documents rule advances ''the congressional goal of minimiz[ing] the administrative and financial burden[s] on plan administrators'' (citations and internal quotation marks omitted).).

[76] *See Conkright v. Frommert*, 130 S. Ct. 1640, 1650 (2010) (''Deference to plan administrators, who have a duty to all beneficiaries to preserve limited plan assets, helps prevent . . . windfalls for particular employees.''); *see also Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th Cir. 1996) (''Only where employees rely on an ambiguous or faulty SPD, or otherwise show prejudice from the inconsistency between the SPD and the master plan document, is relief appropriate. Any other rule would allow a windfall for some employees and unfairly increase costs for employers and their insurers, who rely on the terms of the plan in providing benefits and coverage. This in turn could jeopardize the solvency of the plan with respect to the remaining employees.'').

[77] *See Amara v. CIGNA Corp.*, 2009 U.S. App. LEXIS 21941 (2d Cir. 10/6/09).

[78] *SeeAmara v. CIGNA Corp.*, 534 F. Supp. 2d 288, 351-54 (D. Conn. 2008).

[79] *See CIGNA Corp. v. Amara*, 130 S. Ct. 1754 (3/8/10) (inviting the Solicitor General to file a brief

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expressing the views of the United States); *Amara v. CIGNA Corp.*, 130 S. Ct. 1754 (3/8/10) (same).

[80] Brief for the United States as Amicus Curiae at 11, *Amara v. CIGNA Corp.* (May 2010).

[81] The Government's brief recognized the existence of the circuit split and acknowledged that the Supreme Court should resolve the split at some point, but urged the Court not to review *Amara* on the ground that (a) the case arises in an unusual factual setting that is unlikely to recur; (b) ERISA has been amended to provide a remedy in cases like this one, involving a defective notice of a plan amendment that reduces the rate of benefit accrual in the future; (c) because CIGNA failed to take advantage of opportunities it had to determine whether individual class members were actually prejudiced by the defects in the SPD, it is unclear whether the ''likely harmed'' standard altered the outcome of the case; and (d) because CIGNA violated ERISA §204(h) and the district court could have reinstated the plan's pre-amendment benefit formula, the ''likely harmed'' issue may be irrelevant to the outcome of the case. Brief for the United States as Amicus Curiae at 11, *Amara v. CIGNA Corp.* (May 2010).

[82] *CIGNA Corp. v. Amara*, No. 09-804, 130 S. Ct. ___ (6/28/10).

[83] Brief for the United States as Amicus Curiae at 12, *Amara v. CIGNA Corp.* (May 2010).

[84] *Id.* at 11–12.

[85] *Id.* at 13–14.

[86] *Id.* at 14–15.

[87] *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 113 (2d Cir. 2003); *see also Amara v. CIGNA Corp.*, 534 F. Supp. 2d 288, 352 (D. Conn. 2008); *cf. Drutis v. Rand-McNally & Co.*, 499 F.3d 608, 611 (6th Cir. 2007) (Injury was ''entirely speculative'' and ''any harm to [plaintiffs was] hypothetical at best.'').

[88] *See* ERISA §§402(a)(1), 404(a)(1)(D), 29 USC §§1102(a)(1), 1104(a)(1)(D).

[89] *See, e.g., Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 875–76 (2009) (''[B]y giving a plan participant a clear set of instructions for making his own instructions clear, ERISA forecloses any justification for enquiries into nice expressions of intent, in favor of the virtues of adhering to an uncomplicated rule: simple administration, avoid[ing] double liability, and ensur[ing] that beneficiaries get what's coming quickly, without the folderol essential under less-certain rules'' (citations and internal quotation marks omitted).); *Health Cost Controls of Ill., Inc. v. Washington*, 187 F.3d 703, 711 (7th Cir. 1999) (''When . . . the plan and the summary plan description conflict, the former governs, being more complete — the original, as it were, which the summary plan description excerpts and translates into language that may be imprecise because it is designed to be intelligible to lay persons — unless the plan participant or beneficiary has reasonably relied on the summary plan description to his detriment.''); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th Cir. 1996) (''On remand, plaintiffs may attempt to demonstrate that the LTD Plan did in fact include health benefit premiums as part of disability benefits. Alternatively, if plaintiffs' evidence only shows that the LTD Plan SPD could lead an employee to reasonably believe that the Plan intended health benefits to vest, each individual plaintiff must demonstrate some reasonable reliance on the SPD provision or prejudice flowing from the inconsistency between the SPD and the Plan master document. The issue of detrimental reliance on the plan document is not appropriate for class action determination. *Of course, if plaintiffs prove that the LTD Plan in fact intended to vest a continuing health care premium waiver, no reliance need be shown*'' (citation and footnotes omitted and emphasis added).).

[90] *Bergt v. Retirement Plan for Pilots Employed by MarkAir, Inc.*, 293 F.3d 1139 (9th Cir. 2002); *Chiles v. Ceridian Corp.*, 95 F.3d 1505 (10th Cir. 1996); *Jensen v. SIPCO, Inc.*, 38 F.3d 945 (8th Cir. 1994); *Alday v. Container Corp. of Am.*, 906 F.2d 660 (11th Cir. 1990).

[91] *See, e.g., Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1511 (10th Cir. 1996) (''SPDs are considered part of the ERISA plan documents.'').

[92] 129 S. Ct. 865, 877 (2009) (emphasis added).

[93] *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1512 (10th Cir. 1996). In a separate section of its opinion in *Chiles*, addressing the plaintiffs' claim that, even if their right to health benefits did not vest when they qualified for disability benefits, their right to health benefits vested upon the sale of the business to a third party (effecting a termination of the plan), the Tenth Circuit stated that ''[b]ecause the SPD best reflects the expectations of the parties to the plan, the terms of the SPD control the terms of the plan itself,'' *id.* at 1515, but did not resolve the issue:

> Based on the evidence in the record it is unclear what benefits plaintiffs were entitled [to] upon plan termination. Whether we conclude that the ambiguous SPD renders the LTD Plan documents faulty, or that it is unclear from the plan documents what benefits the plan confers, summary judgment is inappropriate.
>
> 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.' *Id.* at 1519 (internal quotation marks omitted).

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[94] *Bergt v. Retirement Plan for Pilots Employed by MarkAir, Inc.*, 293 F.3d 1139, 1145 (9th Cir. 2002).

[95] *Alday v. Container Corp. of Am.*, 906 F.2d 660, 666 (11th Cir. 1990); *see also Health Cost Controls of Ill., Inc. v. Washington*, 187 F.3d 703, 712 (7th Cir. 1999) (''What we (and Health Cost) have called 'the plan' is a document entitled 'Subscriber's Service Agreement,' which is in the record but which states that it (like the summary plan description) is only a 'summary' and that the 'Group Service Agreement,' which is not in the record, is the real plan document. This kind of confusion is all too common in ERISA land; often the terms of an ERISA plan must be inferred from a series of documents none clearly labeled as 'the plan.' ''); *Admin. Comm. of the Wal-Mart Stores, Inc. Associates' Health & Welfare Plan v. Gamboa*, 479 F.3d 538, 544 (8th Cir. 2007) (''Where no other source of benefits exists, the summary plan description *is* the formal plan document, regardless of its label.''); *Feifer v. Prudential Ins. Co. of Am.*, 306 F.3d 1202, 1208 (2d Cir. 2002) (''[T]he Program Summary is the only document in the record that existed between January and September 30, 1993, and that described employee benefits. We do not think that an employer can avoid the written instrument requirement by treating this written document describing employee benefits as merely a summary of a plan that is nowhere else in writing.'').

[96] *Jensen v. SIPCO, Inc.*, 38 F.3d 945, 952–53 (8th Cir. 1994).

[97] *See, e.g., Robinson v. New Orleans Employers ILA AFL-CIO Pension, Welfare, Vacation & Holiday Funds*, 2008 U.S. App. LEXIS 5523, at **9 n.2 (5th Cir. 3/13/08) (''Marian has failed to establish any connection between the Pension Fund's alleged failure to distribute a *summary plan document* and the reasonableness of her reliance on an oral representation, and we can conceive of none'' (emphasis added).); *Crosby v. Rohm & Haas Co.*, 480 F.3d 423, 428 (6th Cir. 2007) (''[S]tatements in a *summary plan [document]* are binding[,] and if such statements conflict with those in the plan itself, the summary shall govern'' (emphasis added and citations and internal quotation marks omitted).); *Bland v. Fiatallis N. Am., Inc.*, 401 F.3d 779, 784 (7th Cir. 2005) (''In addition, the same principles apply to a vesting analysis whether the retiree benefits are provided under a collective bargaining agreement or under *summary plan documents*, since 'the same underlying considerations are present irrespective of the particular type of document at issue' '' (emphasis added).); *Flacche v. Sun Life Assurance Co. of Can.*, 958 F.2d 730, 736 (6th Cir. 1992) (holding that even 'formal statements made to beneficiaries concerning the plan or benefits, which are relied upon by the beneficiaries,' are not enforceable if not part of *a summary plan document*) . . .'') (emphasis added).); *Senkier v. Hartford Life & Acc. Ins. Co.*, 948 F.2d 1050, 1051 (7th Cir. 1991) (''Nothing in ERISA requires that the insurance policy summarized in the *summary plan document* be given the insured. The insured is protected by the fact that, in the event of a discrepancy between the coverage promised in the *summary plan document* and that actually provided in the policy, he is entitled to claim the former. . . . The statute requires that the *summary plan document* be 'sufficiently accurate and comprehensive to reasonably apprise' the plan participants of their rights under the plan. . . . This requirement entitles the participant to rely on the *summary plan document*, and if he does the plan is estopped to deny coverage'' (emphases added).); *cf. Bergt v. Ret. Plan for Pilots Employed by MarkAir, Inc.*, 293 F.3d 1139, 1141, 1144 (9th Cir. 2002) (''The Company also issued a summary of the retirement plan, called a *Summary Plan Document* ('SPD') . . .'' (emphasis added).)

[98] *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999).

[99] *See* Rules Enabling Act, 28 USC §2072(b); *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442 (2010) (''The test is not whether the rule affects a litigant's substantive rights; most procedural rules do. What matters is what the rule itself *regulates*. If it governs only the manner and means by which litigants' rights are enforced, it is valid; if it alters the rules of decision by which [the] court will adjudicates [those] rights, it is not'' (citations and internal quotation marks omitted).); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (''[N]o reading of the Rule can ignore the Act's mandate that rules of procedure shall not abridge, enlarge or modify any substantive right'' (internal quotation marks omitted).); *Seijas v. Republic of Argentina*, 2010 U.S. App. LEXIS 10807 at *12 (2d Cir. 5/27/10) (''Estimating gross damages for each of the classes as a whole, without using appropriate procedures to ensure that the damage awards roughly reflect the aggregate amount owed to class members, enlarges plaintiffs' rights by allowing them to encumber property to which they have no colorable claim.'').

[100] *See, e.g., Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1345 (11th Cir. 2006) (''Certification under Rule 23(b)(2) is proper when the relief sought necessarily affects all class members. Success by the class representative in this case, however, will not result in relief to other class members. That is because, in order to be entitled to the relief that the class seeks, each plaintiff must prove reliance on the SPD . . . .''); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th Cir. 1996) (''The issue of detrimental reliance on the plan document is not appropriate for class action determination.''); *Jensen v. SIPCO,*

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Inc., 38 F.3d 945, 953 (8th Cir. 1994) (''[I]f estoppel is an available doctrine, it must be applied with factual precision and is therefore not a suitable basis for class-wide relief.''); *see also Dobson v. Hartford Fin. Services Group, Inc.*, 2009 U.S. App. LEXIS 18517 (2d Cir. 8/18/09) (insufficient commonality of facts to justify class certification).

[101] *Conkright v. Frommert*, 130 S. Ct. 1640, 1649 (2010) (citation and internal quotation marks omitted) (emphasis added); *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan*, 129 S. Ct. 865, 876 (2009) (''[B]y giving a plan participant a clear set of instructions for making his own instructions clear, ERISA forecloses any justification for enquiries into nice expressions of intent, in favor of the virtues of adhering to an uncomplicated rule: *simple administration, avoid[ing] double liability, and ensur[ing] that beneficiaries get what's coming quickly*, without the folderol essential under less-certain rules. And the cost of less certain rules would be too plain. Plan administrators would be forced to examine a multitude of external documents that might purport to affect the dispensation of benefits, and be drawn into litigation like this over the meaning and enforceability of purported waivers.''); *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (''Congress' desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place'').

[102] Brief for the United States as Amicus Curiae at 14, *Amara v. CIGNA Corp.* (May 2010).

[103] *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 877 (2009) (''The plan provided an easy way for William to change the designation, but for whatever reason he did not. The plan provided a way to disclaim an interest in the SIP account, but Liv did not purport to follow it. The plan administrator therefore did exactly what §1104(a)(1)(D) required . . . .''); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 85 (1995) (''This may not be a foolproof informational scheme, although it is quite thorough. Either way, it is the scheme that Congress devised.'').

[104] *See* ERISA §402(b)(3), 29 USC §1102(b)(3).

[105] *See* footnote 18, above.

[106] Decisions concerning the design of an employee benefit plan are ''settlor functions'' that are not subject to ERISA's standards of fiduciary responsibility. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999) (''The . . . act of amending [a plan] . . . does not constitute the action of a fiduciary . . . .'').

[107] *See* ERISA §404(a)(1)(D), 29 USC §1104(a)(1)(D).

[108] *See Young v. Verizon's Bell Atlantic Cash Balance Plan*, 667 F. Supp. 2d 850, 899 (N.D. Ill. 2009) (''[C]ourts do not look favorably on attempts to obtain windfall recoveries from ERISA plans. *See Harms v. Cavenham Forest Indus., Inc.*, 984 F.2d 686, 693 (5th Cir. 1993) (windfall recoveries are 'abhorred by ERISA'); *Henry v. Champlain Enterprises, Inc.*, 445 F.3d 610, 624 (2d Cir. 2006) (Sotomayor, J.) (the aim of ERISA is 'to make the plaintiffs whole, but not to give them a windfall'). Clearly, the goals of ERISA to protect the rights of plan beneficiaries were not intended to extend to benefits that participants never expected.''); *cf.* ERISA §409(a), 29 USC §1109(a); *Silverman v. Mut. Benefit Life Ins. Co.*, 138 F.3d 98, 104 (2d Cir. 1998) (Plaintiff must ''show some causal link between the alleged breach of [the fiduciary's] duties and the loss plaintiff seeks to recover.''); *Kuper v. Iovenko*, 66 F.3d 1447, 1459–60 (6th Cir. 1995) (''[T]o show that an investment decision breached a fiduciary's duty to act reasonably in an effort to hold the fiduciary liable for a loss attributable to this investment decision, a plaintiff must show a causal link between the [breach] and the harm suffered by the plan.''); *Graden v. Conexant Sys., Inc.*, 574 F. Supp. 2d 456, 465 (D.N.J. 2008) (''[T]o the extent Plaintiff's nondisclosure claim is premised on the theory that participants investing in Conexant stock would not have sustained the losses they did had earlier disclosures about Conexant's poorer-than-expected performance been made, the claim fails because, under the efficient capital markets hypothesis, such a disclosure would have resulted in a swift market adjustment. In other words, this Court cannot grant any relief to Plaintiff for the alleged non-disclosure and/or misrepresentation because, due to the almost immediate market internalization of any announcement by Conexant, no loss to Plaintiff could be linked to the alleged wrongdoing (citation and internal quotation marks omitted).); *In re Unisys Savings Plan Litig.*, 1997 U.S. Dist. LEXIS 19198, at *85–*86 (E.D. Pa. 11/24/97) (''Before liability for fiduciary breach may attach, a plaintiff must show that the fiduciaries' actions caused a loss. . . .''), *aff'd*, 173 F.3d 145, 159 (3d Cir. 1999); *see also Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996) (['']These 'catchall' provisions act as a safety net, offering appropriate equitable relief for injuries *caused by* violations that §502 does not elsewhere adequately remedy'' (emphasis added).).

[109] *See, e.g., Washington v. Murphy Oil USA, Inc.*, 497 F.3d 453, 458 (5th Cir. 2007) (''[D]rafters of a summary plan description may not disclaim its *binding* nature'' (citation and internal quotation marks omitted).); *Burstein v. Retirement Account Plan*, 334 F.3d 365, 379 (3d Cir. 2003) (''The SPD is the document to which the lay employee is likely to refer in obtaining information about the plan and in making

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decisions affected by the terms of the plan. Indeed, the SPD in this case suggests that the Plan Document is *not* provided to employees as a matter of course, but must be either inspected on [the employer's] designated premises or requested in writing. The front page of the SPD, after explaining that the '[P]lan [D]ocument always governs' if there is a difference between the SPD 'booklet' and the 'official [P]lan [D]ocument,' describes how and where a participant may read the official Plan Document . . . . The relative inaccessibility of [the employer's] Plan Document serves to highlight that, as Congress intended, the SPD is the primary document on which plan participants must rely.''); *id.* at 378 (''In addition to the Eleventh and Second Circuits, the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have all adopted similar views (though somewhat varying in scope, precise context, and extent) that if the SPD language differs from or conflicts with the plan language, it is the SPD language that will control. . . . Today, we join with the other Courts of Appeals that have considered this issue, and hold that, where a summary plan description conflicts with the plan language, it is the summary plan description that will control. We are satisfied that this holding, as we have stated it, is faithful to Congressional intent. The ERISA provision governing summary plan descriptions expresses Congress's desire that the SPD be transparent, accurate, and comprehensive . . . .''); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1518 (10th Cir. 1996) (''Because the SPD is such an important vehicle in ERISA's attempt to fairly regulate employment benefits, courts have held that the terms of the master plan cannot control an SPD's provision that is ambiguous or in conflict with the master plan document. . . . The duty of clarity falls upon the plan sponsor. . . . Allowing the plan's master documents to trump the SPD would both undermine Congress's intent for the SPD to convey accurately plan information to employees upon which they could rely, and would tempt plan sponsors to engage in drafting legerdemain in order to conceal or omit the less attractive aspects of their plan, thereby creating for ERISA a Daliesque world of legal surrealism'' (citations omitted).); *Pierce v. Security Trust Life Ins. Co.*, 979 F.2d 23, 27 (4th Cir. 1992) (''[T]his Court holds that the summary plan description is binding, and that 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'' (footnote omitted).); *Senkier v. Hartford Life & Accident Ins. Co.*, 948 F.2d 1050, 1051 (7th Cir. 1991) (''The insured is protected by the fact that, in the event of a discrepancy between the coverage promised in the summary plan document and that actually provided in the policy, he is entitled to claim the former. The statute requires that the summary plan document [*sic*] be sufficiently accurate and comprehensive to reasonably apprise the plan participants of their rights under the plan. This requirement entitles the participant to rely on the summary plan document [*sic*], and if he does the plan is estopped to deny coverage.'' (citations omitted).); *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 982 (5th Cir. 1991) (''[T]his Court holds that the summary plan description is binding, and that 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.''); *Heidgerd v. Olin Corp.*, 906 F.2d 903, 907–08 (2d Cir. 1990) (''[O]nly the Booklet, not the Plan itself, was distributed to employees. The Booklet purported to summarize the Plan. ERISA and the regulations promulgated under it require that employees be given such summaries. Thus, the statute contemplates that the summary will be an employee's primary source of information regarding employment benefits, and employees are entitled to rely on the descriptions contained in the summary. To allow the Plan to contain different terms that supersede the terms of the Booklet would defeat the purpose of providing the employees with summaries.''); *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 136 (6th Cir. 1988) (''This Circuit has decided that statements in a summary plan are binding and if such statements conflict with those in the plan itself, the summary shall govern.''); *McKnight v. Southern Life & Health Ins. Co.*, 758 F.2d 1566, 1570 (11th Cir. 1985) (''It is of no effect to publish and distribute a plan summary booklet designed to simplify and explain a voluminous and complex document and then proclaim that any inconsistencies will be governed by the plan. Unfairness will flow to the employee for reasonably relying on the summary booklet.'').

[110] 29 USC §1024(c).

[111] ERISA §§104–09, 505; 29 USC §§1024–29, 1135.

[112] 29 CFR §2520.102-3(t)(2); *Watts v. BellSouth Telecomms., Inc.*, 316 F.3d 1203, 1205 (11th Cir. 2003) (''The Secretary, implementing this statutory authority, has issued a regulation mandating that summary plan descriptions include a statement of the plan participants' legal rights under ERISA, and the regulation includes a model statement of rights which is recommended for use. The pertinent language of the model statement provides that 'if you have a claim for benefits which is denied or ignored, in whole or in part, you may file suit in a state or Federal court.' The

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summary plan description BellSouth provided to Watts and other participants contained a statement under the heading 'Your Rights Under ERISA,' which repeated verbatim the language of the model statement recommended by the Secretary in the regulation'' (citations omitted).).

[113] Participants have had very little success making the argument that an SPD's use of the Model had the effect of granting them rights over and above the statutory rights that the Model summarizes. *See, e.g., Cruthis v. Metro. Life Ins. Co.*, 356 F.3d 816, 819 (7th Cir. 2004) (''[W]e join the several courts that have addressed this issue by holding that the phrase, 'you may file suit in a state or federal court' is a statutorily required disclosure of an employee's ERISA rights rather than a forum selection clause. *See, e.g., Clorox Co. v. U.S. Dist. Court for the Northern Dist. of California*, 779 F.2d 517, 521 (9th Cir. 1985); *Fanney v. Trigon Ins. Co.*, 11 F. Supp. 2d 829, 831 (E.D. Va. 1998); *Yurcik v. Sheet Metal Workers' Int'l Ass'n*, 889 F. Supp. 706, 707 (S.D.N.Y. 1995); *Satterfield v. Fortis Benefits Ins. Co.*, 225 F. Supp. 2d 1319, 1321–22 (M.D. Ala. 2002).''); *Prescott v. Little Six, Inc.*, 387 F.3d 753, 756–58 (8th Cir. 2004) (reversing on other grounds a district court ruling that an SPD's use of the Model waived an Indian tribal government entity's sovereign immunity defense.); *Watts v. BellSouth Telecom., Inc.*, 316 F.3d 1203, 1209–10 (11th Cir. 2003) (''If a plan claimant reasonably interprets the relevant statements in the summary plan description as permitting her to file a lawsuit without exhausting her administrative remedies, and as a result she fails to exhaust those remedies, she is not barred by the court-made exhaustion requirement from pursuing her claim in court.''); *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 658 (4th Cir. 1996) (''The SPD language relied upon by the Appellants here tracks, almost verbatim, the model statement of ERISA rights set forth in the regulation. Thus, the language relied on by the Appellants is included in the SPD in an attempt to comply with the regulation. The language does not create additional disclosure obligations beyond the disclosure obligations imposed by ERISA'' (footnote omitted).); *Galvanek v. AT&T, Inc.*, 2007 U.S. Dist. LEXIS 81764, at *13–*14 (D.N.J. 11/5/07) (following *Cruthis*).

[114] 29 CFR §2520.102-3(j)(3) (added to the regulation in 2000 in response to the recommendations of the President's Advisory Commission on Consumer Protection and Quality in the Health Care Industry, as set forth in its report, ''Consumer Bill of Rights and Responsibilities'' (11/20/96) (the ''Report''); *see* 65 Fed. Reg. 70225, 70226, 70241 (11/21/00); *see* Chapter 8 of the Report, ''Consumer Responsibilities'' (''In a health care system that protects consumers' rights, it is reasonable to expect and encourage consumers to assume reasonable responsibilities. Greater individual involvement by consumers in their care increases the likelihood of achieving the best outcomes and helps support a quality improvement, cost-conscious environment.'').

[115] 29 CFR §2520.102-3(t)(2) (emphasis added).

[116] *See* Michael S. Melbinger, *Flex Plan Handbook* ¶100 (2008) (''Since flex plans emerged in the early 1980s, they have been one of the fastest growing ways of providing benefits to employees.'') and *id.* ¶101 (''The compensation-and-benefits environment of the 1980s was ideal for the growth of flex plans.''); *see also Schelberg Est. v. Comr.*, 612 F.2d 25, 27 (2d Cir. 1979) (employee had no right to designate beneficiary under employer-sponsored death benefit plan).

[117] *See LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 (2008) (''Defined contribution plans dominate the retirement plan scene today. In contrast, when ERISA was enacted . . ., 'the [defined benefit] plan was the norm of American pension practice.' J. Langbein, S. Stabile, & B. Wolk, Pension and Employee Benefit Law 58 (4th ed. 2006); see also Zelinsky, The Defined Contribution Paradigm, 114 *Yale L.J.* 451, 471 (2004) (discussing the 'significant reversal of historic patterns under which the traditional defined benefit plan was the dominant paradigm for the provision of retirement income')'' (footnote omitted).); Dale L. Gifford & Christine A. Seltz, eds., *Fundamentals of Flexible Compensation* at 3 (1988) (''Not long ago, the concept of flexible compensation was viewed as innovative, leading-edge approach to delivering benefits and compensation. . . . Today all of that has changed. . . . [O]ver 800 organizations, representing most industries and all employer sizes, have implemented flexible compensation programs, with most of the activity occurring in recent years. More significant, evidence is mounting that choice making will replace fixed approaches as the 'norm' for delivering employee benefits and compensation in the future.''); Employee Benefit Research Institute, EBRI Databook on Employee Benefits, Ch. 48 & Chart 48.1) (impact of legislation and regulations on flexible benefits plans); ERISA §2006 (freeze of status quo for salary reduction and cafeteria plans); H.R. Rep. (Conf.) No. 1280, 93d Cong., 2d Sess. 355–56 (1974) (same).

[118] *See, e.g.,* EBSA, *What You Should Know About Your Retirement Plan* 1 (11/06) (''It is important to understand how your plan works and what benefits you will receive.''), *available at* http://www.dol.gov/ebsa/Publications/wyskapr.html; EBSA, *Top 10 Ways to Prepare for Retirement* 2 (9/07) (''Financial security doesn't just happen. It takes planning and commitment and, yes, money.''), *available at* http://www.dol.gov/ebsa/publications/

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10_ways_to_prepare.html; EBSA, *Work Changes Require Health Choices* 2 (9/05) (''Starting your very first job? Consider enrolling in your employer's health care plan. If your employer offers more than one option — an HMO plan, a preferred provider option, and a fee-for-service plan, for example — compare each to your needs and preferences before making a decision. Ask for a copy of the summary plan description (SPD) to get details about covered benefits. Ask what type of plan you have, how it works, and what eligibility requirements you may have to meet. Know whether you will be expected to pay a portion of your premium, how much it will be, and who to talk to if you have questions.''), *available at* http://www.dol.gov/ebsa/pdf/WorkChanges.pdf. Similarly, DOL notices regarding other employment-related statutes emphasize employee responsibilities as well as employee rights. *See* DOL, Employment Standards Admin., Wage & Hour Div., *Employee Rights and Responsibilities under the Family and Medical Leave Act* (1/09) (''employee responsibilities''), *available at* http://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf; DOL, Office of Assistant Secretary for Policy, Office of Compliance Assistance Policy, *elaws — USERRA Advisor* (''rights and responsibilities''), *available at* http://www.dol.gov/elaws/vets/userra/mainmenu.asp. The DOL ERISA Advisory Council does not appear to have focused on the importance of participant responsibility under ERISA. *See* Advisory Council Report on Promoting Literacy and Security by Streamlining Disclosures to Participants and Beneficiaries (2009), *available at* http://www.dol.gov./ebsa/publications/2009ACreport2.html; Report of the Working Group On Communications to Retirement Plan Participants (2005), *available at* http://www.dol.gov./ebsa/publications/AC_1105b_report.html.

[119] *Cf.* 29 CFR §2520.102-3(t)(1) (''If a plan finds it desirable to make additional mention of certain rights elsewhere in the summary plan description, it may do so.'').

[120] *See* Rev. Rul. 2009-30, 2009-39 I.R.B. 391 (9/5/09); Notice 2009-65, 2009-39 I.R.B. 413 (9/5/09); Jack VanDerhei, ''The Impact of Automatic Enrollment in 401k) Plans on Future Retirement Accumulations: A Simulation Study Based on Plan Design Modifications of Large Plan Sponsors,'' *EBRI Issue Brief*, no. 341 (April 2010); AARP, Automatic 401(k) Plans: Employer Views on Enrolling New and Existing Employees at 1, 33–35 (June 2010); Towers Watson, 2010 Defined Contribution Survey at 3 (June 2010) (''Auto-enrollment is now dominant practice among large companies''); *id.* at 6 (''Nearly a third of sponsors are putting greater focus in their communication on retirement income adequacy'').

[121] *See* U.S. Government Accountability Office, Retirement Savings: Automatic Enrollment Shows Promise for Some Workers , but Proposals to Broaden Retirement Savings for Other Workers Could Face Challenges, GAO-10-31, at 9–14 (Oct. 2009).

[122] *See* Patient Protection and Affordable Care Act, P.L. 111-148, §1001(5) (enacted 3/23/10), adding §2715 to the Public Health Service Act (''Not later than 12 months after the date of enactment of the Patient Protection and Affordable Care Act, the Secretary shall develop standards for use by a group health plan and a health insurance issuer offering group or individual health insurance coverage, in compiling and providing to enrollees a summary of benefits and coverage explanation that accurately describes the benefits and coverage under the applicable plan or coverage.'').

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